



Issue Date: 31 May 2012

Case No.: 2012-SOX-00022

In the Matter of

VICTOR J. COSCIA,
Complainant,

v.

ECOLAB, INC., ET AL¹,
Respondent.

PRE-HEARING ORDER #4 - ORDER GRANTING RESPONDENTS' MOTION FOR
SUMMARY DECISION AND DISMISSING CASE

This matter arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U. S. C. § 1514A ("Sarbanes-Oxley" or "SOX").

By motion dated April 30, 2012, Counsel for Respondents filed a motion for Summary Decision seeking dismissal of this complaint as being untimely filed. On May 22, 2012, pro-se Complainant filed two affidavits in response².

Findings of Fact

1. Complainant began his employment with Respondent, Ecolab, Inc., in November 1981. He rose to the level of Vice-President. By 2008, Complainant began making a series of complaints which he claims constitute protected activity. (Resp EXH #2).

¹ Michael Meyer, James Rollwagen, Lawrence Bell, Douglas Baker and Steven Fritz.

² The Presiding Judge will also consider other documents in the file in making a determination with regard to whether Complainant filed an untimely complaint.

2. On March 9, 2010, Ecolab informed Complainant that his position had been eliminated. (Resp. EXH #9).
3. By letter dated May 28, 2010, Ecolab informed Complainant that his employment would be terminated effective June 4, 2010. (Resp. EXH #10).
4. Complainant was terminated on June 4, 2010.
5. Subsequent to the termination Ecolab and Complainant attempted to work out a mutually agreeable severance package for Complainant.
6. On June 30, 2010, Complainant refused to sign an agreement with regard to the severance package.
7. On July 13, 2010, Ecolab filed a legal action in State Court seeking to enforce what it believed to be an oral agreement with regard to the severance package.
8. Complainant filed a SOX complaint on September 27, 2010 with OSHA. Complainant alleged that the complaint was timely filed within the 90 day period because the law suit constituted a retaliatory adverse action.

Discussion

In Complainant's complaint filed on September 27, 2010, Complainant, who was represented at the time, does not even refer to the day his was unequivocally terminated (June 4, 2010) as the date of the adverse action. Rather, Complainant refers to July 13, 2010, the day the state law suit was filed. The Presiding Judge infers that Complainant's then attorney realized that the 90 day filing deadline had already expired with regard to the termination date. I conclude that June 4, 2010 was the day he suffered the adverse workplace action. It was then that Complainant received final, definitive and unequivocal notice of his discharge.

I do not find that the later law suit filed on July 13, 2010 against Complainant by Respondent with regard to the severance package constituted an adverse retaliatory action under SOX. Complainant was no longer an employee by July 13, 2010, the date the law suit was filed. Moreover, Respondent was merely seeking to enforce what it considered to be an oral agreement between the parties to provide a severance package that would benefit Complainant. Due to his own refusal to accept the offered severance package, Complainant has still not received anything with regard to severance pay.

Complainant has not alleged that he was entitled to equitable tolling of the 90 day filing period. Moreover, I find nothing in the record to suggest that Complainant was somehow misled by Respondent with regard to his employment being terminated on June 4, 2010.

Finally, the fact that subsequent to his alleged protected activity and adverse action, the Dodd-Frank Wall Street Reform Act (effective July 22, 2010) extended the time to file SOX claims to 180 days, does not extend the filing date to this complaint. The alleged protected

activity and adverse action all took place prior to the enactment of Dodd-Frank. Moreover, the statute was not made retro-active by Congress.

Consequently, I conclude that the Respondent's summary decision motion should be GRANTED. IT IS ORDERED that the complaint IS DISMISSED.

SO ORDERED.

A

DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR./ccb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).