

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 January 2019

OALJ No. 2012-SOX-00035
OSHA No. 9-3290-12-023

In the Matter of:

PAMELA EVANS,
Complainant,

v.

AFFILIATED COMPUTER SERVICES, LLC,
Respondent.

Appearances: Pamela Evans
Culver City, California
*Pro Se*¹

Samuel Zurik III
Rachel E. Linzy
The Kullman Firm, PLC
New Orleans, Louisiana
For Respondent

ORDER GRANTING
RESPONDENT'S MOTION TO DISMISS

This case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act of 2002 ("SOX"), as amended, 18 U.S.C. § 1514A, and the implementing regulations at 29 C.F.R. Part 1980. The issue currently before this tribunal is whether the SOX claim is subject to dismissal based on res judicata.

¹ Ms. Evans was initially represented by a non-attorney representative. Ms. Evans, however, elected to proceed pro se. (See Complainant's Reply to Order Regarding Non-attorney Representation (Feb. 13, 2013)). Complainant later retained an attorney. That attorney's request to withdraw was granted on April 24, 2014, and Complainant thereafter has been self-represented in this matter.

BACKGROUND

Complainant alleged in a January 30, 2012 complaint filed with the Occupational Safety and Health Administration (“OSHA”) that she had been terminated by Respondent on July 28, 2011 in retaliation for reporting accounting irregularities and other incidents of non-compliance. After Complainant filed objections to the Secretary’s July 12, 2012 Findings dismissing the complaint and requested a hearing with the U.S. Department of Labor, Office of Administrative Law Judges (“OALJ”), the matter was assigned to Administrative Law Judge William Dorsey from OALJ’s San Francisco District Office. Judge Dorsey stayed the proceedings pending mandatory arbitration in another matter with common issues of fact ordered by the U.S. District Court for the Central District of California in *Evans v. Affiliated Computer Services, Inc.*, No. 2:13-cv-07407. The parties were directed to file periodic status reports to Judge Dorsey.

While this matter was stayed, Judge Dorsey retired and the case was transferred to OALJ’s National office and subsequently reassigned to me. 29 C.F.R. §§ 18.12, 18.15. On September 7, 2017, Respondent filed a status report asking that the stay be lifted and that the complaint be dismissed based on res judicata on the ground that “Complainant’s other discrimination and retaliation actions against Respondent have been fully and finally adjudicated and dismissed with prejudice” in an employment retaliation action in the U.S. District Court—i.e., *Evans v. Affiliated Computer Services, Inc.*, No. 2:13-cv-07407—and two retaliation actions in state court in California—*Evans v. East West Bank, et al*, No. BC558513 and *Evans v. East West Bank, et al*, No. YC070155. (“Motion to Dismiss”). On November 22, 2017, having not received a response from Complainant, I issued an *Order Lifting Stay and Order to Show Cause* (“Order to Show Cause”). In the Order to Show Cause, I lifted the stay and instructed Complainant to show cause, within 30 days, why judgment should not be granted for Respondent based upon claim or issue preclusion. Respondent was given 30 days after receipt of Complainant’s brief to file a reply.

Complainant filed a response to the Order received on December 28, 2017 (“Compl. Response”). Respondent filed a reply received on April 25, 2018 (“Reply”).²

² The cover letter to Complainant’s response was dated December 23, 2017, but was sent via FedEx Express two-day service for delivery on December 28, 2017. In the cover letter, Complainant stated that the filing was a “summary” of her opposition to the motion to dismiss and that she would be filing a more formal pleading by December 26, 2017. The cover letter also provided explanations for why the filing was tardy. OALJ did not receive any additional statement from Complainant. Respondent’s reply was also tardy, apparently because Complainant had not served it on Respondent. In order to conduct a meaningful assessment of the Motion to Dismiss, I have considered all arguments made in the filings of both parties. Complainant is directed in the future to include a certificate of service with all filings with OALJ that shows that she served Respondent’s attorney. See 29 C.F.R. § 18.30(a)(3).

POSITIONS OF THE PARTIES

Respondent

Respondent contends that res judicata effect should be afforded to the dismissal of Complainant's federal lawsuit, *Evans*, No. 2:13-cv-07407, because it involves the same factual allegations as those charged in her OSHA complaint. Respondent states:

It becomes clear on review of Complainant's complaint in the Federal Proceeding and her charge in the instant DOL Proceeding that both actions involve exactly the same factual allegations. In Complainant's OSHA charge, she alleges, inter alia, that she was harassed and retaliated against based on her disclosure to management and third parties of certain auditing and accounting inconsistencies. Complainant makes exactly the same allegations in her complaint in the Federal Proceeding, namely that Respondent subjected her to ridicule, harassment, discrimination and retaliation based on her notifying external parties of Respondent's alleged noncompliance with accounting requirements.

(Respondent's Motion to Dismiss at 6-7 (citations omitted)). Respondent also argues that Complainant complains of exactly the same action by Respondent in both proceedings, namely not being permitted to work from home, not being assigned key tools to perform tasks, being micromanaged, lack of accommodation of disability, being followed both in the office and elsewhere, and accessing of personal belongings without permission. *Id.* at 7.

Complainant

Complainant did not address the elements of res judicata and claim preclusion, but rather contends that Respondents' arguments

should be disallowed due to the fact that the defendants in the case sabotaged Evans ability to continue to pursue the cases through acts of fraud, deceit, personal injury and other acts (kidnapping her young daughter). Additionally, the judges were purposefully selected to prevent Evans from receiving due process before the court as guaranteed under the Fourth . . . Amendment of the U.S. Constitution. At most times, it appeared that the judges and judicial staff and attorneys were just running through the motions and did not afford her the right to be heard. Accordingly, she still has grievances to sue for and/or against the defendants related to the same claims stated in each case.

(Compl. Response at 5.). Complainant further contends that

the Judge in the cases which involved Respondents Affiliated Computer Services, Inc./Xerox Corporation, were in conflict with each case due to the fact that they conspired with certain individuals to become the presiding judge to assist the Respondents [to] retaliate against Evans.

Id. Complainant attached documentation which purportedly shows, or raises an appearance, of a connection between certain judges who were assigned to adjudicate her complaint and persons possibly affiliated with Respondent.

DISCUSSION

Summary Decision Standard

Respondent is asserting that no facts remain to be adjudicated because res judicata, or claim preclusion, applies. Therefore, Respondent's Motion is properly evaluated according to the standard for summary decision. The parties were notified of the summary decision standard in my Order to Show Cause. To reiterate, the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges provide that an Administrative Law Judge "shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law." 29 CFR § 18.72(a). A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists when the nonmoving party produces sufficient evidence of a material fact that a factfinder is required to resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence. *Id.* at 249, citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-290 (1968). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The party moving for summary decision has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp v. Zenith Radio Corp.*, 477 U.S. 317, 325. The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). In reviewing the request for summary decision, all of the evidence must be viewed in a light most favorable to the non-moving party. *See, e.g., Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001). A genuine issue of material fact exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. *Anderson*, 477 U.S. at 242.

Res Judicata/Claim Preclusion Standard

In *Abbs v. Con-Way Freight, Inc.*, ARB No. 08-017, ALJ No. 2007-STA-037 (ARB July 27, 2010), the Administrative Review Board ("ARB") considered a respondent's request to dismiss a Surface Transportation Assistance Act ("STAA") whistleblower complaint based on res judicata or collateral estoppel. In regard to the res judicata ground for dismissal, the ARB stated that

Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Res judicata, or claim preclusion, has four elements: (1) a final decision on the merits in the first action by a court of competent jurisdiction; (2) the second action involves the same parties or their privies, as the first action; (3) the second action raises an issue actually litigated or which should have been litigated in the first action; and (4) the cases involve the same cause of action.

Abbs, ARB No. 08-017 at 7.

1. Final decision on the merits and court of competent jurisdiction

In the instant case, the first element of the res judicata test poses two questions.

The first question is whether the district court’s judgment holding Ms. Evans in contempt and dismissing her action for failure to comply with court-ordered arbitration,³ affirmed by the Ninth Circuit Court of Appeals,⁴ was a final decision on the merits for purposes of res judicata. I find that it was.

In *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001), the appellants challenged the district court’s conclusion that the dismissal of their prior action was “an adjudication on the merits.” The court noted that the prior action was dismissed with prejudice based upon plaintiffs’ failure to prosecute, and stated that “[u]nless otherwise specified, such a dismissal ‘operates as an adjudication upon the merits.’ Fed. R. Civ. P. 41(b). Thus, ‘involuntary dismissal generally acts as a judgment on the merits for the purposes of res judicata ...’ *United States v. Schimmels* ..., 127 F.3d 875, 884 (9th Cir. 1997); *see also Johnson v. United States Dep’t of Treasury*, 939 F.2d 820, 825 (9th Cir. 1991) (noting that dismissal for failure to prosecute is ‘treated as an adjudication on the “merits” for purposes of preclusion’).”

Federal Rule of Civil Procedure 41(b) states:

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

Thus, pursuant to the rules governing federal district courts, the district court’s dismissal of Complainant’s claims in *Evans v. Affiliated Computer Services, Inc.*, No. 2:13-cv-07407 for

³ *Evans v. Affiliated Computer Serv.*, No. 2:13-cv-07407 (C.D. Cal. Jan. 9, 2015), *recon. denied* (C.D. Cal. Feb. 20, 2015).

⁴ *Evans v. Affiliated Computer Serv.*, 682 Fed. Appx. 608 (9th Cir. 2017).

contempt for failure to comply with court-ordered arbitration was an adjudication on the merits for res judicata purposes.

The second question is whether the district court in *Evans v. Affiliated Computer Services, Inc.*, No. 2:13-cv-07407, was a court of competent jurisdiction.

In *Abbs*, the ARB determined that res judicata/claim preclusion was not warranted on the ground that the district court did not have subject-matter jurisdiction over a STAA whistleblower claim and therefore was not a “court of competent jurisdiction” under the res judicata test. At the time, the STAA did not include a “kick-out” provision permitting a complainant to file an original STAA whistleblower claim in federal district court.⁵

The instant complaint, however, was filed under the SOX whistleblower provision. SOX claims may be filed in federal district court if the Secretary of Labor “has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant.” 18 U.S.C. § 1514A(b)(1)(B). Thus, *Abbs* is distinguishable. Federal district courts do have subject-matter jurisdiction over SOX whistleblower claims once the 180 day waiting period has expired. See *Thanedar v. Time Warner, Inc.*, No. 08-20734 (5th Cir. Nov. 3, 2009) (unpublished)⁶, cert. denied (U.S. Apr. 26, 2010) (district court presiding over Title VII lawsuit was competent to adjudicate claim under 18 U.S.C. § 1514A). Here, because more than 180 days past the filing of the SOX complaint had transpired, and there is no evidence that the delay was due to the bad faith of Complainant, the district court could have considered the SOX complaint in *Evans v. Affiliated Computer Services, Inc.*, No. 2:13-cv-07407.⁷ The district court, therefore, was a court of competent jurisdiction for purposes of applying the res judicata test.

2. Privity

The parties in this SOX action and *Evans v. Affiliated Computer Services, Inc.*, No. 2:13-cv-07407 are the same.

⁵ Abbs filed his STAA complaint in 2004. The STAA was amended in accordance with the Implementing Recommendations of the 9/11 Commission Act of 2007, effective August 3, 2007, see Pub. L. No. 110-53, § 1536, 121 Stat. 266, 464-67. It was this 2007 amendment that first provided a “kick-out” provision providing district court jurisdiction over STAA complaints. The new jurisdictional provision was not retroactive in effect. See *Elbert v. True Value Co.*, 550 F.3d 690, 693 (8th Cir. 2008).

⁶ Federal Rule of Appellate Procedure 32.1 permits citation to federal courts of appeals unpublished opinions issued in 2007 or later.

⁷ In contrast, Respondent cannot rely on the state court actions for res judicata effect given that that state courts do not have subject matter jurisdiction over a SOX complaint.

3. *Second action raises an issue actually litigated or which should have been litigated in the first action*

The record indicates that Complainant's SOX complaint was not actually litigated in the federal court action. The remaining question is whether it should have been litigated in the federal court action.

As noted above, in *Thanedar*, the court rejected the plaintiff-appellant's argument that the district court presiding over his Title VII lawsuit lacked jurisdiction to hear his SOX claim, finding that once the 180-day waiting period expired, "Thanedar could have filed suit under Sarbanes-Oxley and moved to consolidate the claim with his Title VII lawsuit...." The court went on to say:

However, Thanedar waited until June 26, 2006 to file his Sarbanes-Oxley claim. This type of piecemeal litigation undercuts the finality of judgments, which is precisely what claim preclusion seeks to ensure. *See Nevada v. United States*, 463 U.S. 110, 129–30 (1983). We conclude that the district court presiding over Thanedar's Title VII lawsuit was competent to adjudicate his claim under 18 U.S.C. § 1514A and there was no impediment to consolidation of the claims. *Thanedar therefore should have filed a motion to consolidate his Sarbanes-Oxley claim with his claims under Title VII.*

Thanedar, supra, slip op. at 10 (emphasis added).

Here, Complainant filed her SOX complaint with OSHA on July 3, 2012. She filed a state court action under the same set of operative facts, albeit alleging violations of state law, on June 24, 2013. (Motion to Dismiss, Attachment 1 page 1). I take administrative notice that the state court action was transferred to federal district court on October 7, 2013. Thus, because more than 180 days had elapsed from the date of the filing of the OSHA SOX complaint, there was no impediment to Complainant filing a SOX claim in federal district court and moving to have it consolidated with the transferred state court action. The *Thanedar* decision indicates, moreover, that a plaintiff *should* do so in order to avoid the type of piecemeal litigation claim preclusion seeks to prevent.

The procedural circumstances of *Thanedar* and the instant SOX complaint are remarkably similar, and I find that Complainant's SOX claim should have been litigated in the federal district court action.

4. *Same cause of action*

In *Thanedar*, the plaintiff-appellant had filed a Title VII lawsuit in federal district court prior to filing a SOX complaint with OSHA. The Title VII lawsuit was dismissed with prejudice. The plaintiff-appellant then brought a SOX lawsuit in federal district court, together with two state law claims. The district court held that all three of Thanedar's claims were barred by the doctrine of res judicata, as the claims should have been litigated in his Title VII lawsuit.

On appeal, Thanedar argued that Title VII claim was not identical to his SOX claim. The court was not persuaded. It wrote:

To determine whether the claims are in fact identical, we apply the transactional test, which considers whether the two claims rest on “the same nucleus of operative facts.” *Id.* (quoting *Bank of Lafayette v. Baudoin (In re Baudoin)*, 981 F.2d 736, 743 (5th Cir. 1993)). Under this approach, the operative facts define the claims, not the relief requested, legal theories, or rights asserted. *Agrilectric Power Partners, Ltd. v. Gen. Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994). If the operative facts are the same, the prior judgment’s preclusive effect “extends to all rights the original plaintiff had ‘with respect to all or any part of the transaction, or series of connected transactions, out of which the [original] action arose.’” *Petro-Hunt v. United States*, 365 F.3d 385, 395–96 (5th Cir. 2004) (alteration in original) (quoting Restatement (Second) of Judgments § 24(1) (1992)).

We agree with the district court that all three of Thanedar’s claims arise from the same core set of facts. Thanedar asserts three different claims of relief, all of which arise from the fact that he suffered an adverse employment action and that his employer ultimately terminated his employment out of illegal and retaliatory motives. *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 962 (9th Cir. 2006) (holding that plaintiff’s Sarbanes-Oxley claim and Title VII retaliation claims involved the same nucleus of operative facts, including the time, cause, and circumstances of plaintiff’s termination); *see also Nelson v. AMX Corp.*, No. 3:04-cv-1350-H, 2005 WL 2495343, at *6 (N.D. Tex. Sept. 22, 2005) (holding that the same nucleus of operative fact existed between an employee’s claim under her employment contract and subsequent discrimination claim). The fact that the retaliatory motive asserted in the Title VII suit was not identical to that of the Sarbanes-Oxley claim does not bar a finding of res judicata. We have previously held that claims asserting different grounds for wrongful termination may nevertheless be subject to claim preclusion. *See, e.g., Miller v. U.S. Postal Serv.*, 825 F.2d 62, 64 (5th Cir. 1987) (sex and disability discrimination); *Fleming v. Travenol Labs., Inc.*, 707 F.2d 829, 830 (5th Cir. 1983) (race and sex discrimination). As the district court aptly noted, both of Thanedar’s lawsuits focus “on one critical issue: whether Thanedar’s employer had a legitimate and lawful reason for taking the adverse employment action of which he complains.” This is sufficient to establish a “same nucleus of operative fact.” *In re Southmark*, 163 F.3d at 934.

Thanedar, supra, slip op. at 9-10.

Here, Complainant’s complaint in *Evans v. Affiliated Computer Services, Inc.*, No. 2:13-cv-07407 was based in part on the following allegation:

13. On July 28, 2012, within months of filing EEOC complaints and Workers Compensation Complaints, defendant’s [sic] terminated Plaintiff’s employment stating that her cooperation was not acceptable concerning her claim that

Compliance Management was deterring employees from providing clients and other governmental parties with correct financial and operational information/data. Plaintiff believes that the Defendants retaliated against her for filing complaints with the EEOC, Workers Compensation Board, and Division of Labor Standards, and notifying external parties of Defendants non-compliance with financial and operation disclosures.

Plaintiff's Complaint for Damages at Paragraph 13.⁸ Complainant did not raise a SOX claim, but rather based her complaint on State of California laws. As noted, in *Thanedar*, however, under the transactional test, the operative facts define the claims, not the relief requested, nor the legal theories or rights asserted.

In the complaint filed with OSHA, Ms. Evans alleged in the Form OSHA-7:

My employer ACS, a Xerox company retaliated against me for reporting non-compliance by operations management with internal policies and procedures, client third party guidelines, government disclosures, federal credit reporting laws, accounting of funds to be returned to the State, and cover up from employees of its true financial status and other issues. ACS micromanaged me with pay, discriminated against me with pay and other benefits, did not allow me to return to work and fired me.

In an attached Labor Commissioner, State of California Form DLSE 205, she stated:

ACS terminated me after I notified government agency, clients and EEOC of financial coverups, inaccurate credit reporting and discrimination toward myself and other personnel

In an attached four-page typed narrative, Complainant stated that

I worked as a Sr. Compliance Auditor for Affiliated Computer Services, Inc., beginning on October 17, 2007 and was terminated... on July 28, 2011 soon after I notified senior management of several actions taken by Operations Management and Compliance Management that were not in accordance with client policy and federal laws.

Complainant's four page narrative included a description of her actions in reporting her concern that the loan department was withholding information from the compliance office. The narrative detailed the actions occurring thereafter that she alleged constituted harassment and micromanagement. The narrative noted that Complainant had emailed the Federal Trade Commission notifying of inaccurate reporting of information to the credit bureau, and that she had also informed a client of her belief that ACS Compliance management allowed persons to cover up information from third parties including external auditors. The narrative also detailed her perceptions that ACS's investigation into her allegations had actually been preparatory to

⁸ The "Plaintiff's Complaint for Damages" was attached as Exhibit 1 to Respondent's Motion to Dismiss.

firing her. She stated that she was terminated via email from a Senior Vice President for not complying with the investigation.

Based on a comparison of the complaint transferred to the federal district court and the complaint filed with OSHA, it is indisputable that the state law claims and the SOX claim involved the same nucleus of operative facts, including the time, cause, and circumstances of Complainant's termination. Thus, under the transactional test for determining whether claims are identical for purposes of application of res judicata, I find that the retaliation claims were operationally identical, despite the fact that the emphasis in the federal court action was on state law causes of action.⁹

Due Process

When considering a motion for summary decision, pro se filings are to be read liberally and interpreted to raise the strongest arguments suggested therein. However, a pro se litigant cannot shift the burden of litigating the case to the court, nor avoid the risks attendant to foregoing expert assistance. Moreover, a nonmoving party must produce specific evidence to rebut a well pleaded motion for summary decision and not rely solely on speculation. *See Coates v. Southeast Milk, Inc.*, ARB No. 05-050, ALJ No. 2004-STA-60 (ARB July 31, 2007).

Here, Complainant's reply to my Order to Show Cause is grounded in speculative allegations that Respondent sabotaged her ability to pursue her case and that she had been denied due process by the courts. More directly, Complainant alleges that associates of Respondent interfered with her ability to timely respond to my Order to Show Cause by a physical assault.

Initially, I note that the Ninth Circuit, in affirming the district court's dismissal of Evan's complaint, rejected "as unsupported by the record Evans' contentions that the district court violated her right to due process." I have carefully reviewed Complainant's allegations of sabotage by Respondents and of alleged association between the judges who decided her cases and Respondent, including the attachments to her response to my Order to Show Cause. The federal judge who decided Case No. 2:13-cv-07407 is not mentioned in any of these associations. Rather, the purported documentation of such associations appears to be solely related to the state court judges. As noted above, I am not basing my decision on res judicata on the state court actions, as they did not have subject matter jurisdiction to determine a SOX whistleblower complaint. Thus, whether there was some sort of denial of due process in the state court proceedings is not material to whether res judicata effect should be afforded the federal court action in Case No. 2:13-cv-07407.

⁹ I note that Respondent filed a motion in the federal action to consolidate the SOX complaint. Complainant filed an opposition to the motion to consolidate. Thus, it cannot be said that Complainant was blindsided by Respondent's position that the two actions were related. The district court denied the motion to consolidate, but only for the reason that it was moot because he had stayed the federal action and ordered arbitration as required by Complainant's employment contract with Respondent. The stay was ordered by the district court to avoid conflicting rulings on common issues of law and fact. Respondent also filed a motion asking Judge Dorsey to transfer the SOX matter to the federal court, which he did not rule on. *See Evans v. Affiliated Computer Services, LLC*, 2012-SOX-00035 (ALJ July 9, 2014) (description of motion to consolidate in Judge Dorsey's Stay Order).

Complainant's allegations of sabotage by Respondents, such as surveillance and interference in a child custody matter, are implausible, speculative and unsupported by any credible evidence. In short, there is no documentation in Complainant's response to my Order to Show Cause sufficient to raise a material fact in genuine dispute to support Complainant's contention that she was denied due process in the federal courts, either by the court itself or the actions of Respondent.

Complainant's allegation that her response to my Order to Show Cause was delayed due to a physical assault by persons associated with Respondents is vague, speculative, and not supported by any credible evidence. Moreover, even assuming the allegation is true, I have fully considered Complainant's untimely response to the Order to Show Cause. There is no evidence that Complainant was actually prevented from responding to the Order to Show Cause.

Summary

The material facts of this case as related to the standard for application of res judicata are not in genuine dispute. It is indisputable that the district court issued a final decision in *Evans v. Affiliated Computer Services, Inc.*, No. 2:13-cv-07407 which under FRCP 41(b) is considered an adjudication on the merits. It is indisputable that a federal district court has subject matter jurisdiction over a SOX complaint once the 180 day window for a final DOL decision ends. It is indisputable that the same parties are involved in the instant SOX proceeding and the federal action in Case No. 2:13-cv-07407. It is indisputable that Fifth Circuit caselaw provides that a plaintiff who files a retaliation complaint in federal district court *should* move to consolidate an SOX whistleblower complaint once the 180 day window expires. It is indisputable that the complaint that formed the basis for the federal district court action in Case No. 2:13-cv-07407 alleged the same nucleus of operative facts that were alleged in the SOX complaint filed with OSHA. Complainant's allegations of misconduct in Case No. 2:13-cv-07407 by the federal courts and Respondent are entirely speculative and not supported by any concrete or credible evidence. Complainant's allegation that her response to my Order to Show Cause was delayed by a physical assault perpetrated by associates of the Respondent is wholly speculative and not supported by any evidence; moreover I fully considered Complainant's untimely response.

Based on consideration of the record taken as a whole, I find that it could not lead a rational trier of fact to find that a genuine issue of material fact exists about whether res judicata and claim preclusion applies to this matter. I find that Respondent has established that res judicata applies and supports dismissal of this matter.¹⁰

¹⁰ Because res judicata/claim preclusion, applies, I have not reached the question of equitable estoppel/issue preclusion.

ORDER

IT IS ORDERED that the above-captioned matter is hereby **DISMISSED** with prejudice.

STEPHEN R. HENLEY

Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When 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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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(e) and 1980.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).