

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 February 2015

Case No.: 2014-SOX-00036

In the Matter of

JOSIE CLINE

Complainant

v.

**SPONGETECH DELIVERY SYSTEM,
BARRY KOLEVZON, MICHAEL METTER
and STEVEN MOSKOWITZ**

Respondents

DECISION AND ORDER OF DISMISSAL

This proceeding arises from a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107- 204, 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 (the Act) enacted on July 30, 2002. Complainant alleged that Respondents Sponge Tech Delivery System, Barry Kolevzon, Michael Metter and Steven Moskowitz discriminated against her by terminating her employment with Respondents.

In a letter dated June 9, 2014, the Occupational Safety and Health Administration (OSHA) issued its findings that there was reasonable cause to believe that the Respondents violated the Act. OSHA ordered Respondents to pay Complainant \$30,288.54 in back wages at the rate of \$2,403.85 biweekly for the period from January 11, 2010 until July 9, 2010. Respondent Barry Kolevzon filed a timely request for hearing. No other Respondent requested a hearing.

The case was initially assigned to Administrative Law Judge Daniel Solomon and set for hearing in Orlando, Florida. Respondent Kolevzon moved for a change of venue to New York, New York. Judge Solomon granted the request for change of venue and the matter was reassigned to the undersigned. On August 4, 2014, I issued an Order to Show Cause to Complainant granting her additional time to respond to the motion for change of venue. I received no response from Complainant or from any of the other named Respondents. On September 23, 2014, I granted Respondent's Request for Change of Venue. On September 24, 2014, I issued a Notice of Hearing and Pre-Hearing Order scheduling the hearing for January 26, 2015. In my Pre-Hearing Order, I scheduled two telephonic prehearing conferences; an initial conference for October 27, 2014 and a final conference for January 20, 2015. Only Respondent

Kolevzon appeared at the scheduled prehearing conferences. Only Respondent Kolevzon complied with the filing requirements of my Pre-Hearing Order by filing his pre-hearing statement. All mail to Complainant has been returned as undeliverable and my office has been unable to discover a valid mailing address for Complainant. No attorney has entered an appearance for Complainant.

At the final pre-hearing teleconference, counsel for Respondent Kolevzon requested that the hearing scheduled for January 26, 2015 be canceled as it appeared that none of the other parties would be appearing. Counsel also advised that he would be filing a Motion to Dismiss the findings against Respondent Kolevzon. On January 26, 2015, I issued an Order Cancelling the Hearing. On that same day, I received Respondent Kolevzon's Motion to Dismiss. Respondent Kolevzon attached an Affidavit of Barry Kolevzon setting forth what he would have testified to, had the hearing been held, and a Declaration by attorney Chaim Book, who previously represented Respondent Kolevzon, setting forth his proposed testimony.

In his Affidavit, Respondent Kolevzon avers that he was not a control person or director of Respondent Sponge Tech Delivery Systems. Further, Complainant did not report to him and he played no role in the decision to terminate Complainant. Attorney Book's Declaration sets forth that he did file an opposition to the discrimination charge on behalf of his then client, Respondent Kolevzon, when the matter was still under investigation by OSHA.

I find the un rebutted facts establish that Respondent Kolevzon has at all times disputed the claim that he discriminated against Complainant under the Act, that he is not a director or control person of Respondent Sponge Tech, that he did not directly supervise Complainant and that he did not participate in the decision to terminate her. I further find that Respondent Kolevzon has actively participated in the matter before me and has complied with all requirements set forth in the Notice of Hearing and Pre-Hearing Order, despite no other party appearing or responding to any Orders.

Therefore, the OSHA findings of a violation of the Act against Respondent Kolevzon, as set forth in the Administrator's letter of June 9, 2014, are hereby DISMISSED.

I note, however, that the other Respondents, Sponge Tech Delivery System, Michael Metter and Steven Moskowitz, did not appeal the OSHA findings of violation and Order directing that Respondents pay Complainant back wages of \$30,288.54 for the period from January 11, 2010 until July 9, 2010. That Order is final and unreviewable.

ORDER

It is ORDERED that the OSHA findings against Respondent Kolevzon are hereby dismissed.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

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 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. 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(a). Your Petition must specifically identify the findings, 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).

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1980.110(a).

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(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).