



Issue Date: 03 September 2014

Case Number: 2014-SOX-00037

In the Matter of:

CRYSTAL DERRICK,

Complainant,

v.

ROCHE DIAGNOSTICS CORPORATION,

Respondent.

ORDER OF DISMISSAL

This proceeding arises from a claim under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (“the Act”), Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A (“SOX”).

On June 18, 2014, Crystal Derrick (“Complainant” or “Derrick”) filed a letter with the U.S. Department of Labor, Office of Administrative Law Judges (“Office” or “OALJ”) seeking a hearing before an administrative law judge under SOX with regard to the termination of her employment by Respondent on or about December 10, 2013. This case was docketed on June 27, 2014, and I issued a Notice of Docketing and Order to Show Cause on July 7, 2014.

In my Order to Show Cause, in light of OSHA’s finding that Respondent was not a covered entity within the meaning of 18 U.S.C. §1514A because Respondent did not have a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §781) and was not required to file reports under Section 15(d) of that Act, I directed Complainant and Respondent to explain why this matter should proceed to hearing or, alternatively, why it should not be dismissed.

On July 29, 2014, Respondent’s counsel filed a Notices of Appearance and submitted a brief in support of dismissal of Derrick’s complaint. Respondent argued therein that Complainant had failed to “make even a *prima facie* showing of each element of her claim, including subject matter jurisdiction over Roche.” On August 11, 2014, Respondent also filed a draft Order to Show Cause and an Affirmation of Antonio J. Perez-Marques, counsel for Respondent. According to the Affirmation, counsel notes that Complainant has failed to respond to my July 9, 2014 Order to Show Cause and suggests that dismissal of her complaint is appropriate for that reason alone.

On August 12, 2014, I issued a Second Order to Show Cause in which I again ordered Complainant to explain why her complaint should not be dismissed, giving Complainant until the close of business on Tuesday, August 26, 2014 to do so. To date, no response has been received from Complainant.

In light of the foregoing, there are two bases for dismissing Complainant's SOX complaint, *i.e.*, her failure to comply with my Order to Show Cause and her failure to state a claim upon which relief may be granted.

The OALJ's regulations provide at 29 C.F.R. § 18.6(d)(2)(v) that:

If a party or an officer or agent of a party fails to comply . . . with an order, . . . the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may . . . [r]ule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

As noted above, Complainant has failed to respond to both my July 9, 2014 Order to Show Cause and my Second Order to Show Cause dated August 12, 2014. That alone justifies dismissal of her complaint pursuant to § 18.6(d)(2)(v).

In *Sylvester v. Parexel Int'l LLC*, ARB No.07-123, ALJ No. 2007-SOX-00039 (ARB May 25, 2011), the Administrative Review Board noted that motions to dismiss whistleblower complaints under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted are highly disfavored. According to the Board, "SOX claims are rarely suited for Rule 12 dismissals" inasmuch as they "involve inherently factual issues such as 'reasonable belief' and issues of 'motive.'" *Id.*, slip op. at 13. However, the Board clearly recognized that "ALJs are entitled to manage their caseloads and decide whether a particular case is so meritless on its face that it should be dismissed in the interests of justice," *ibid.*, leaving open the application of Fed. R. Civ. P. 12(b)(6) as a vehicle for dismissing complaints.

In her original request for a hearing, Complainant claimed that "Roche is a publicly traded US company with operations in all 50 states." She further stated that she "believe[s] the defendant Roche Inc. was negligent in terminating [her] employment based on [her] uncovering a large financial error."

In its Response, Respondent confirms that it "does not register a class of securities under Section 12, is not required to file reports under Section 15(d), and is not a subsidiary or affiliate whose financial information is included in the consolidated financial statements of a company with a class of securities registered under Section 12 or that is required to file reports under Section 15(d)" of the Securities Exchange Act of 1934 (15 U.S.C. §781) as required by SOX. There is, therefore, simply no evidence of record which demonstrate that Respondent is an employer within the meaning of 18 U.S.C. §1514A. Derrick's complaint therefore fails to state a

claim upon which relief can be granted and is subject to dismissal under Fed. R. Civ. P. 12(b)(6) as well.

Based on the foregoing, IT IS HEREBY ORDERED that the SOX whistleblower complaint of Crystal Derrick filed under 18 U.S.C. § 1514A is DISMISSED pursuant to 29 C.F.R. § 18.6(d)(2)(v) for failure to comply with my orders of July 9 and August 12, 2014, as well as Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

SO ORDERED.

STEPHEN L. PURCELL
Chief Administrative Law Judge