



Issue Date: 04 November 2014

CASE NO.: 2015-SOX-00003

In the Matter of:

**SUSAN M. HINDS aka JANE DOE,¹
Complainant,**

v.

**TOYOTA MOTOR ENGINEERING & MANUFACTURING.,
Respondent.**

ORDER OF DISMISSAL

The instant case, which arises under the employee protection provisions of 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 (“SOX”) (with pertinent regulations appearing at Parts 18 and 1980 of Title 29 of the Code of Federal Regulations), has been assigned to the undersigned administrative law judge for disposition, including the conduct of a hearing. 18 U.S.C. § 1514A(b)(1)(B). *See also* 29 C.F.R. § 1980.114(a). The record provided by OSHA is incomplete and Complainant’s own submissions are confusing. However, as Complainant has indicated that she wishes to withdraw this matter and possibly proceed with a private cause of action, this case is being dismissed without prejudice to its reinstatement if Complainant fails to file an action in federal district court.

Procedural Background

On September 10, 2014, the Occupational Safety & Health Administration dismissed Complainant Susan M. Hinds’ complaint against Toyota Motor Engineer & Manufacturing for failure to provide requested information. In the denial letter, OSHA referenced a complaint filed on June 18, 2014.

¹ Complainant filed her complaint under the name of Jane Doe but she referenced the denial letter from OSHA of September 10, 2014 and the claim number 4-1760-14-074 relating to Susan M. Hinds. Although Complainant has indicated that she wishes to keep her identity secret from the Respondent, OSHA denied that request and provided a copy of the denial letter to the General Counsel for Toyota Motor Engineering & Manufacturing, so the Respondent already knows her identity. In any event, it would be virtually impossible to conduct a case under the employee protection provisions of SOX anonymously as an employer could not respond to allegations that it retaliated against an employee without knowing the employee’s identity.

Complainant, using the name Jane Doe, appealed the denial of her claim by letters of October 13, 2014 and October 14, 2014 (with attachments), filed on October 17, 2014 and October 20, 2014, respectively. In the October 13, 2014 letter, she indicated that the filing date of her complaint was April 11, 2014. In that regard, she stated that she first contacted OSHA on April 11, 2014 based upon what she perceived to be an imminent danger and that she made followup allegations on June 18, 2014. She further indicated that in August 2014, she had asked OSHA to close its investigation and “forward files to proper governmental agency,” citing the provision in the regulations relating to withdrawal of complaints, 29 C.F.R. § 1980.111(a). Later she indicated that she asked OSHA to strike its findings as prejudicial to interested parties. It is unclear exactly what she wanted OSHA to do. However, in the final paragraph of that letter, she stated that she “also requested a letter from OSHA to proceed in a private suit,” if she chose to do so. In the October 14, 2014 letter, she indicated that she had filed her complaint on April 11, 2014, by telephone, and she argued that was an acceptable complaint option to file a safety and health complaint. She again indicated that she had also “requested a letter from OSHA to proceed in a private suit” based upon continuing retaliation.²

Discussion

Based upon Complainant’s submissions, she apparently either (1) does not wish to proceed with her whistleblower action as an individual employee protection action at this time or (2) wishes to pursue her action in another forum. In either event, dismissal is appropriate.

In her two appeal letters, Complainant references 29 C.F.R. § 1980.111(a). That section allows a party to withdraw a complaint:

(a) At any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order, a complainant may withdraw his or her complaint by notifying the Assistant Secretary, orally or in writing, of his or her withdrawal. The Assistant Secretary then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. The Assistant Secretary will notify the parties (and each party's legal counsel if the party is represented by counsel) of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

She also references subsection (b), which provides for withdrawal of findings by the Assistant Secretary.

² She stated in the final paragraph of the October 14, 2014 letter: “I also requested a letter from OSHA to proceed in a private suit, if I so choose, please refer as ‘continuing actions’ of perceived retaliatory amicus [sic] of unnamed Respondents, in a matter currently under investigation, ‘inverse bounty’, and one of ‘imminent danger’ to a Whistleblower and zone of interests. I did not feel safer as a WB [whistleblower]. . . .”

Although not cited by Complainant, section 806(b)(1) of the Sarbanes-Oxley Act, relating to enforcement, provides:

(1) IN GENERAL- A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by--

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary 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, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

18 U.S.C. § 1514A(b)(1). The regulatory counterpart to the statutory provision appears at 29 C.F.R. § 1980.114(a) and specifies that the pertinent inquiry is whether a final decision has been issued by the Administrative Review Board, to which the Secretary's authority has been delegated under Secretary's Order 1-2002, issued on September 24, 2002, 67 Fed. Reg. 64272-64273 (Oct. 17, 2002). The regulations also require a complainant to file a notice with the administrative law judge or the Administrative Review Board, as appropriate, of his or her intention to file a complaint in federal court, fifteen days in advance of filing such an action. 29 C.F.R. § 1980.114(b).

On the one hand, Complainant appears to be suggesting that she has not yet filed an individual whistleblower complaint under SOX and wishes to have findings related to that case withdraw. If that is indeed what she is arguing, this case should be dismissed.

On the other hand, if Complainant is instead arguing that she wishes to pursue this matter in another forum, dismissal is also appropriate. In the event that she decides not to file in federal district court, she may ask that this case be reinstated.

Here, no decision has been issued within the specified 180 days as measured from the April 11, 2014 telephone complaint and, inasmuch as the process is rarely completed within that time frame, the delay was not caused by bad faith of the Complainant. Complainant therefore has a right to file a complaint in federal district court. 18 U.S.C. § 1514A(b)(1); 29 C.F.R. § 1980.114(a). If the Complainant commences an action in federal district court, the Secretary of Labor will no longer have jurisdiction over this action. *See Stone v. Duke Energy Corp.*, 432 F.3d 320 (4th Cir. 2005) (case below 2003-SOX-12). Some administrative law judges have required that the complainant submit a copy of the complaint filed with the appropriate U.S. District Court before dismissing the action; others have not. *Compare, e.g., Evans v. Liberty Medical Supply, Inc.*, 2007-SOX-22 (ALJ, July 2, 2007) *with Miley v. Emerachem, LLC*, 2007-SOX-31 (ALJ, June 15, 2007). Others have simply closed the file subject to reopening. *E.g., Roberts v. Weatherford International, Ltd.*, 2008-SOX-69 (ALJ Sept. 25, 2008). My practice has been to dismiss the case without prejudice. In the event that the Complainant fails to file an action in federal district court, any party may move to set aside this Order of Dismissal and reopen these proceedings.

ORDER

IT IS HEREBY ORDERED that the complaint filed by Complainant Susan M. Hinds, also known as Jane Doe, under the Sarbanes-Oxley Act is **DISMISSED WITHOUT PREJUDICE** to its reinstatement if an action is not filed in federal district court.

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.