



Issue Date: 04 December 2015

OALJ No.: 2015-SOX-00028
OSHA No.: 2-4173-15-146

In the Matter of:

OMAR TELLEZ
Complainant,

v.

OTG INTERACTIVE, LLC
Respondent.

DECISION AND DISMISSAL ORDER

The above-captioned matter comes before the Office of Administrative Law Judges (“OALJ”) 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 (“SOX”) enacted on July 30, 2002.

Omar Tellez (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) against OTG Interactive (“Respondent”) on April 2, 2015 alleging that Respondent terminated his employment in retaliation for his protected activity under SOX. By letter dated August 5, 2015, the complaint was dismissed by the Secretary.

By letter dated August 31, 2015 and received by fax on that date, Complainant timely filed his objections to the Secretary’s dismissal and requested a hearing before the OALJ. The matter was then referred to this office and assigned to me.

I issued an Initial PreHearing Order And Notice Of Hearing on September 11, 2015, scheduling the matter for hearing on March 10, and March 11, 2016 and for prehearing conference on February 19, 2016.

By letter dated October 8, 2015, Complainant, through his counsel, requested that this complaint be withdrawn so that he could file an action in federal court.

SOX, in part, provides:

A person who alleges discharge or other discrimination 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 corresponding regulation is found at 29 C.F.R. § 1980.114. The regulation requires that “[w]ithin seven days after filing a complaint in federal court, a complainant must file with ...the ALJ ... a copy of the file stamped complaint” and the complainant must also serve a copy of the complaint on certain other officials. 29 C.F.R. § 1980.114(c).

Enclosed in a letter dated November 17, 2015 from Complainant’s counsel is a copy of the summons and complaint filed by Complainant against Respondent in Federal District Court, Southern District of New York, on November 16, 2015, alleging violation of SOX’s employee protection provisions. In that November 17, 2015 letter, Complainant requests that his complaint be withdrawn so that he can proceed with his federal civil action.

Complainant filed his complaint with OSHA on April 2, 2015. No decision has been issued within 180 days of the filing of the complaint, and the delay was not been shown to have been caused by bad faith of the Complainant. Accordingly, Complainant 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 matter. *See Stone v. Duke Energy Corp.*, 432 F.3d 320 (4th Cir. 2005) (case below 2003-SOX-12).

In this matter, Complainant has commenced such an action and so OALJ now lacks any jurisdiction. Accordingly, the complaint must be dismissed.

ORDER

The complaint filed by Complainant under SOX is DISMISSED for lack of jurisdiction. The hearing and prehearing conference scheduled in this matter are therefore canceled.

SO ORDERED.

LYSTRA A. HARRIS
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 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).