



Issue Date: 08 June 2016

CASE NO.: 2016-SOX-00018

In the Matter of:

DEREK KUYKENDALL,
Complainant

v.

PNC BANK,
Respondent

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION

This matter arises from Complainant’s November 25, 2014 complaint with the Occupational Safety & Health Administration (“OSHA”), alleging retaliatory discharge in violation of the Sarbanes-Oxley Act of 2002 (“SOX”), 18 U.S.C. § 1514A, and the implementing regulations at 29 C.F.R. Parts 18 and 1980. A hearing in this matter is scheduled for Monday, September 26, 2016, in Pittsburgh, Pennsylvania. On May 9, 2016, Respondent filed a Motion for Summary Decision. In support of its motion, Respondent submitted a Memorandum of Law as well as a number of accompanying exhibits. Complainant did not file a timely response with this Court.

Summary Judgment

Any party may move for summary decision on all or any part of a proceeding. 29 C.F.R. § 18.72(a). The Administrative Law Judge may enter summary judgment for the movant if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show “that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” *Id.*¹

The Administrative Review Board (“the Board”) has offered specific guidance on the issue of summary decision. In *Reddy*, the Board announced the following procedure for adjudicating such motions:²

¹ In *Reddy v. Medquist, Inc.*, No. 04-123 (September 30, 2005), the Board elaborated on the meaning of “genuine issue of material fact.” It stated, “[a] ‘material fact’ is one whose existence affects the outcome of the case. A ‘genuine issue’ exists when the nonmoving party produces sufficient evidence of a material fact so that a fact-finder is required to resolve the parties’ differing versions at trial. Sufficient evidence is any probative evidence.” *Id.* at 4.

² The Board noted that, because it reviews issues of law *de novo*, its procedure for reviewing a grant of summary decision is the same as the Administrative Law Judge would follow in ruling on the motion.

Once the moving party has demonstrated an absence of evidence supporting the nonmoving party's position, the burden shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation. **The nonmoving party may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof.** If the nonmoving party fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Id. at 4-5 (emphasis added). The Board further emphasized that, in a summary decision ruling, the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* at 5. Additionally, the summary decision ruling shall not include a weighing of the evidence or determination of the truth of the matters asserted. *Id.*

Therefore, the Board has put forth a two-step burden-shifting process, whereby summary decision may only be granted if, given the parameters stated above, the moving party meets its burden *and* the nonmoving party fails to meet its own. Conversely, if *either* the moving party fails to meet its burden *or* the nonmoving party succeeds in meeting its burden, summary decision must be denied.

Discussion

In this case, Respondent has stated that Complainant cannot establish that hhe engaged in any activity protected by the Act.³ Resp't Mot. Summ. J. at 13. Further, even if Complainant's conduct *did* constitute a protected activity, Respondent argues that "there is no evidence that the activity played any role in [the employer's] decision to terminate his employment." *Id.* Establishment of protected activity, as well as a causal link between the protected activity and

³ 29 C.F.R. § 1980.102(b) defines protected activity as any lawful act done by the employee:

- (1) To provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of 18 U.S.C. [§§] 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-
 - (i) A Federal regulatory or law enforcement agency;
 - (ii) Any Member of Congress or any committee of Congress; or
 - (iii) A person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
- (2) To file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to alleged violations of 18 U.S.C. [§§] 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

the unfavorable action, are both essential elements in any claim under the Act. The four requisite elements of the *prima facie* case a complainant must establish are:

- (1) The employee engaged in protected activity or conduct;
- (2) The respondent knew or suspected that the employee engaged in the protected activity;
- (3) The employee suffered an adverse action, and;
- (4) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

29 C.F.R. § 1980.104(e)(2). Therefore, Complainant's failure to establish either element would indeed render all other facts immaterial as a claim that fails to establish this element cannot succeed. Additionally:

[n]otwithstanding a finding that a complainant has made a *prima facie* showing, as required by this section, further investigation of the complaint will not be conducted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.

29 C.F.R. § 1980.104(e)(4). Respondent argues that it has "easily demonstrated, by undisputed clear and convincing evidence," that it would have terminated Complainant's employment even in the absence of any protected behavior or conduct.

Respondent's principal argument that summary decision should be granted is that there "is (and can be) no genuine dispute concerning the following dispositive fact: [the employer] terminated the employment of Complainant on August 27, 2014 for serious violations of company policy." Resp't Mot. Summ. J. at 1. As noted, *supra*, Respondent also argues that Complainant fails to establish a *prima facie* case. However, assuming *arguendo* that Complainant has made such a showing, the complaint must still be dismissed if Respondent is able to meet its burden of proof under Section 1980.104(e)(4). Therefore, it is necessary to evaluate this argument in the context of the burden-shifting process announced in *Reddy*.

Respondent acknowledges that Complainant submitted a complaint with the SEC on June 4, 2014. Resp't Mot. Summ. J. at 1. However, it is alleged that Complainant's employment was terminated for unrelated acts of misconduct including "theft of [company] property, dishonesty about that theft, threats to his supervisor, and refusal to participate in [the employer's] investigation." *Id.* at 18. Surveillance video shows, and Complainant does not dispute that, on Saturday, May 31, 2014, he went to his office with a carrier bag before travelling to New York to pursue his complaint with the SEC. Respondent's Exhibit ("RX")-7. On June 5, 2015, Respondent became aware of the fact that the hard drive was missing from Complainant's work computer. RX-5. Respondent interviewed Complainant on June 6 and June 9, 2014 regarding the missing hard drive. RX-7; 8. Complainant was then placed on administrated leave pending the results of the investigation because Respondent's bonding requirements mandate that any employee suspected of theft must be suspended. RX-7. After repeatedly denying that he took the hard drive, Complainant sent an e-mail to Respondent on June 10, 2014, stating that he

“found” the hard drive in his carrier bag in his hotel room. RX-M. Complainant then accused his supervisor of stealing the hard drive and breaking into his home to plant the drive in the carrier bag. RX-E; M.

Complainant proceeded to send text messages to his supervisor stating: “Good thing I have nothing to do tomorrow. I know someone’s house I’ll be visiting...You better not come in my home again.” RX-E. The threat was reported to the local police department. RX-5.

As part of its investigation into the theft of the hard drive, Respondent requested that Complainant appear on August 19, 2014, for an interview. RX-7. Complainant responded by saying he was not in Pittsburgh and would, therefore, not be able to attend. RX-P. Respondent scheduled a second meeting for August 26, 2014, but Complainant again refused to attend. *Id.* Respondent replied to Complainant with an e-mail noting that a “decision to not cooperate with an investigation will lead to termination of [his] employment,” and stated that Complainant had until 4:00 PM on August 27, 2014 to call and schedule a meeting. *Id.* Respondent reiterated that if Complainant failed to schedule a meeting, his employment would be terminated. *Id.* Complainant refused to cooperate any further with the investigation and Respondent terminated his employment on August 27, 2014. RX-T.

Although Complainant did not file a response to Respondent’s Motion for Summary Decision, he did previously file a rebuttal to Respondent’s Position Statement which discussed the same facts. RX-3. Complainant did not dispute any of the facts contained, *supra*, except to deny that he sent the text messages that were received from his cell phone and to deny that he stole the hard drive that was found in his carrier bag. Whether Complainant actually committed these offenses is irrelevant to the present case. The proper inquiry is whether Respondent *believed* he committed the offenses and whether it is the underlying reason for Complainant’s dismissal. *Motto v. Wal-Mart Stores east, LP*, 563 F.App’x 160 (3d Cir. 2014).

Complainant has not identified any “issue of fact that could affect the outcome of the litigation.” *See Reddy, supra*. In his prior rebuttal he stated that Respondent “never provide[d] any type of proof” that he stole the hard drive. RX-3. Setting aside the fact that the hard drive was ultimately found in Complainant’s own bag, Respondent does not need to prove that Complainant was guilty of the alleged offenses, only that it *believed* he was. “The only question is whether [the employer’s] stated reason for firing [the employee] was pretext.” *Motto*, 563 F.App’x at 164. It is noted that, in his final e-mail prior to being terminated, Complainant stated that he was “done pretending there is a hard drive investigation when [Respondent’s] real task is persecution and surveillance.” RX-P. However, at no point did he offer any evidence in support of this allegation. In response to a motion for summary decision, “[t]he nonmoving party may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof.” *Reddy, supra*.

Prior to terminating his employment, Respondent gave Complainant numerous warnings that his conduct *entirely unrelated to* any potentially protected activity would warrant dismissal. Only then did Complainant suffer any adverse action. Accordingly, even when the facts are

viewed in the light most favorable to Complainant, there is no genuine dispute as to whether Respondent would have terminated his employment in the absence of any protected activity.

CONCLUSION

Therefore, Respondent's arguments in support of its Motion for Summary Dismissal support a grant of summary dismissal. Specifically, there is no genuine dispute as to whether Respondent has proven by clear and convincing evidence that it would have terminated Complainant's employment in the absence of any purportedly protected activity.

ORDER

IT IS HEREBY ORDERED that the Respondent's Motion for Summary Dismissal is GRANTED. It is further ORDERED that the hearing set to commence on September 26, 2016 in Pittsburgh, Pennsylvania is CANCELLED.

DREW A. SWANK
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).