

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 June 2017

Case No.: 2016-SOX-00019

In the Matter of:

JAY MORGAN,
Complainant,

v.

FORD MOTOR COMPANY,
One American Road
Dearborn , Michigan 48126-2798

ZIAD OJAKLI
c/o Ford Motor Company
One American Road
Dearborn, Michigan 48126-2798

JAMES T. YOUNG
c/o Ford Motor Company
One American Road
Dearborn, Michigan 48126-2798

and

MARY CULLER,
c/o Ford Motor Company
One American Road
Dearborn, Michigan 48126-2798
Respondents.

DECISION AND ORDER DISMISSING COMPLAINT

This action arises under the employee protection provisions of § 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (CCFA), Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A. The above-captioned claim is currently pending before the undersigned, but it has not been scheduled for a hearing. The Procedures for handling discrimination complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(b)(2)(A), are governed under the rules and procedure set forth in Section 42121(b) of

Title 49, U.S.C. The reference in the statute is to Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (AIR 21). Regulations for the handling of discrimination complaints under Sarbanes-Oxley are found at 29 C.F.R. Part 1980.

A. Background

Complainant filed a complaint with OSHA in July 2013 (4-1510-13-043) claiming Respondent terminated him in violation of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(b)(2)(A) for engaging in protected activity. Thereafter, the parties entered into a settlement agreement resolving the claim. OSHA approved the agreement on August 29, 2013. Over two years later on November 10, 2015, Complainant requested to reopen the original claim. Complainant alleges that Respondent misrepresented its possession of witness statements that would have provided a legitimate non-retaliatory reason for Complainant's termination. Complainant states that he learned in a subsequent state action that the statements did not exist, and therefore, Respondent fraudulently induced Complainant to enter into the settlement agreement. On January 4, 2016, OSHA issued its findings dismissing the Complaint for lack of jurisdiction under the new case number 4-1221-16-001. Complainant thereafter appealed to the Office of Administrative Law Judges.

I issued a Motion to Show Cause on July 6, 2016, ordering Complainant to illustrate why this claim should not be dismissed for lack of jurisdiction or in the alternative for untimeliness. Complainant filed a response on August 8, 2016, and Respondent filed a response on August 22, 2016. I have reviewed the arguments and facts presented by both parties and have determined that this matter should be dismissed.

B. The Office Of Administrative Law Judges Does Not Have Jurisdiction To Vacate the Settlement Agreement.

Complainant seeks to invalidate the parties' 2013 settlement agreement. Complainant alleges that fraud and misrepresentation on the part of Respondents induced him to enter into the settlement agreement. Therefore, Complainant filed a Motion to Reopen on November 10, 2015, to reopen his original 2013 claim.

The regulations provide that jurisdiction lies with the U.S. District Court for the enforcement of whistleblower cases.¹ 29 C.F.R. § 1980.11(e) provides "any settlement approved by OSHA, the ALJ, or the ARB, will constitute the final order of the Secretary and may be enforced in United States district court pursuant to §1980.113." The regulations at 29 C.F.R. § 1980.113 provide:

Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under the Act, the Secretary may file a civil action seeking enforcement of

¹ See *Williams v. Metzler*, No. 97-3127, 1997 WL 793315 (3rd Cir. Dec. 30, 1997) (case below, ARB No. 96-160, ALJ No. 94-ERA-2); *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-34 (ARB Mar. 30, 2001).

the order in the United States district court for the district in which the violation was found to have occurred. Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under the Act, a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the appropriate United States district court.

While Complainant is correct that the Secretary is to ensure a settlement agreement is fair and reasonable, the regulations provide only for the evaluation of the settlement agreement prior to its approval. Once the agreement is final and the action is dismissed, this agency no longer retains jurisdiction over the matter. Jurisdiction over the validity of the parties' finalized settlement agreement lies with the U.S. District Court.² Furthermore, this agency has no jurisdiction over any additional contract claims related to the settlement agreement.

C. Complainant's Motion to Reopen and New Complaint Are Untimely.

An action under SOX, 18 U.S.C. § 1514A, must be brought "not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation."³ Therefore, even if this agency retained jurisdiction over Complainant's settlement agreement, Complainant's Motion to Reopen is untimely, as are all new claims asserted in the 2015 Complaint/Motion to Reopen. Complainant filed his most recent complaint and Motion to Reopen outside the 180 day time period provided in the Act.

OSHA approved the parties' settlement agreement on August 29, 2013. Complainant did not file the Motion to Reopen until over two years later on November 10, 2015. In Complainant's response to the Order to Show Cause, Complainant asserts that he did not learn about Respondent's misrepresentations until the filing of a state defamation action against the witnesses Respondent claimed to have statements from during the settlement negotiations. He does not state when he actually learned about the potential fraud and misrepresentation. The only evidence Complainant presents in an attempt to assert timeliness is the statement that he "proceeded within a reasonable time after receiving evidence of the material representations" and, that "within 180 days of filing of his Application to Reopen Complainant received a sworn statement from the Mayor of Louisville which formed the basis of his Motion to Reopen." (Response p. 3, fn 1).

Complainant, however, ignores that he attached an affidavit from Kevin Cosby dated February 24, 2014, to the Motion to Reopen. The affidavit helps to form the basis of Complainant's misrepresentation allegations and clearly shows that Complainant had knowledge of the potential misrepresentation as early as February 24, 2014, if not before. As Complainant did not file his Motion to Reopen until November 10, 2015, the Motion and any new potential claims included in the Motion are untimely.

² *Id.*

³ 18 U.S.C. § 1514A(b)(2)(D).

D. ORDER

Accordingly, the Office of Administrative Law Judges does not have jurisdiction to review the parties' settlement agreement and, even if jurisdiction were retained, Complainant's Motion to Reopen and all new claims are untimely. Therefore, Complainant's Complaint is hereby **DISMISSED**.

JOSEPH E. KANE
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).