



Issue Date: 17 June 2019

CASE NO.: 2018-SOX-00046

In the Matter of:

MICHAEL BROOKS,
Complainant,

vs.

AGATE HEALTH CARE,
Respondent.

ORDER GRANTING SUMMARY DECISION

This is a claim under the employee-protection provisions of the Corporate and Criminal Fraud Accountability Act of 2002 (the “Sarbanes-Oxley” or “SOX”), 18 U.S.C. section 1514A, and regulations at 29 C.F.R. Part 1980; and under the Affordable Care Act (“ACA”), 29 U.S.C. section 218c. It has not yet been set for hearing.

On October 26, 2018, Respondent, identifying itself as “Agate Resources, Inc.,” moved for summary decision in its favor, contending the claims asserted in this case under SOX “are untimely to the extent they are based on alleged violations occurring before January 4, 2018” (Motion, p. 1). Complainant opposed the Motion, filing thirty pages of argument and twelve exhibits. Respondent filed a Reply in support of the Motion.

On January 8, 2019, I issued an Interim Order and Order to Show Cause on Motion for Summary Decision. In that Order, I stated six material facts which I concluded were undisputed. These six facts support the conclusion that the complaints asserted in this case are untimely. But because the Complainant is not an attorney, and represents himself in this matter, I gave him a second opportunity, under 29 C.F.R. section 18.72, subsection (e), to address Respondent’s assertion of those facts “properly” – that is, by citing to materials in the record, or to affidavits or declarations, or by showing an inability to present facts essential to justify his opposition (*see* 29 C.F.R. section 18.72, subsections (c) and (d)). I also invited Com-

plainant to submit supporting evidence to show any allegedly-retaliatory acts occurring on or after January 4, 2018. I set a deadline of February 22, 2019, for filing such materials. I further observed,

I have repeatedly advised Complainant to obtain the services of counsel in this case. I do so again now. It is obvious to me Complainant sincerely believes he has been wronged. It is equally obvious to me Complainant does not understand the limits of my jurisdiction, or the proper role of the Department of Labor in an administrative hearing such as this one. The Complainant needs competent legal counsel.

(Interim Order and Order to Show Cause, pp. 6-7).

On January 4, 2019, Complainant filed a motion seeking a stay of the proceedings on the grounds he was about to undergo surgery and anticipated he would require twelve weeks to recover from it. On January 15, 2019, I issued an Order imposing a stay until June 1, 2019, and extending the Complainant's time to file additional papers under my Interim Order to June 5, 2019.

Still representing himself without counsel,¹ Complainant has now filed his supplemental opposition to the Motion, entitled "Answer, Interim Order to Show Cause on Motion for Summary Judgment" ("Answer"). It includes forty additional pages of argument and thirty-one additional exhibits.

On June 12, 2019, Respondent filed a motion for leave to file a Sur-Reply to Complainant's Answer. Complainant opposes the Motion. I conclude further briefing by either party would not help clarify the issues before me, and deny leave for filing further papers.

Having carefully considered the arguments of the parties, I find:

Undisputed Facts

These facts are undisputed:

1. Respondent employed Complainant from November 7, 2005, until September 27, 2013.

¹ "A number of brilliant people, untrained specifically in the law, feel they can better protect their own interests if they appear personally and fight their own battles. . . . [I]n cases where counsel appear for the litigants, the limits which circumscribe the actions of a court, such as jurisdiction, decision only on matters which appear in the record of a particular case and the effect of the pleadings, pre-trial conferences, admissions and argument, are understood by all concerned. In a matter where a litigant appears in her own person and without counsel, *erroneous notions as to the effect of these factors may lead her to believe the proceeding is unfairly handled*" (emphasis added). *Barnes v. United States*, 241 F.2d 252, 253 (9th Cir. 1956).

See Complainant's Response to Motion for Summary Decision, Exhibit 1, pp. 5-6; Motion, Exhibit 1, p. 6. See also Complainant's Request for Hearing Before an Administrative Law Judge filed July 3, 2017, p. 12.

2. On April 4, 2016, Complainant filed a whistleblower retaliation complaint with the Occupational Safety & Health Administration. OSHA dismissed his complaint on April 13, 2016, and Complainant requested a hearing before an Administrative Law Judge in OSHA Case No. 2016-SOX-00037, *Brooks v. Agate Resources, LLC*.

Motion, Exhibit 14, p. 1. Complainant argues at length (Answer, pp. 29-35) that he filed an *earlier* complaint with OSHA on September 26, 2013. But this was the issue in Case No. 2016-SOX-00037, as discussed more fully below, and Administrative Law Judge Steven B. Berlin decided this issue against Complainant.

3. In Case No. 2016-SOX-00037, Complainant alleged claims under the whistleblower protection provisions of the Affordable Care Act and the Sarbanes-Oxley Act.

Motion, Exhibit 14, p. 1; no contradictory facts alleged or demonstrated in Complainant's Response. In his Answer (pp. 36-44), Complainant raises a number of other issues,² but never denies having alleged claims under SOX and the Affordable Care Act in Case No. 2016-SOX-00037.

4. By Order issued March 6, 2017, Administrative Law Judge Steven B. Berlin found the April 4, 2016, complaint to OSHA untimely because there was no factual basis for equitable tolling, and denied Complainant's claims in Case No. 2016-SOX-00037.

² Among these, Complainant contends he is entitled to appointed counsel in this case under *Matthews v. Eldridge*, 424 U.S. 319 (1976) (Answer, pp. 41-42). In that case, the court held a recipient of Social Security disability benefits was not entitled to an evidentiary hearing before the termination of his benefits, and upheld the administrative procedures then in place. The court did not hold there is any constitutional right to appointed counsel in whistleblower claims under SOX, and I know of no authority to suggest such a right. Complainant also suggests the Office of Administrative Law Judges has been insufficiently concerned with the poor state of his health, and his lack of funds. I have made every effort to accommodate the Complainant's health problems, having granted multiple continuances, and a stay of five months, at his request. In fact, because of the Complainant's health, he has had almost seven months to oppose the Motion for Summary Decision. But to defeat the motion, he must offer something more than suspicion or conjecture. A non-moving party

cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary decision in the hope that something will turn up at trial. . . . The mere possibility that a factual dispute may exist, without more, is not sufficient to overcome convincing presentation by the moving party. The litigant must bring to the . . . court's attention some affirmative indication that his version of relevant events is not fanciful.

Conway v. Smith, 843 F.2d 789, 794 (10th Cir. 1988).

Motion, Exhibit 14. Clearly, Complainant believes Judge Berlin was wrong to do so, but does not deny, in his Response or his Answer, that Judge Berlin so ruled.

5. On or about March 20, 2017, Complainant appealed Judge Berlin's decision to the Administrative Review Board, which has not yet ruled on the appeal.

I take official notice of this fact, as recorded in the docket for Case No. 2016-SOX-00037, under 29 C.F.R. section 18.84. *See also* Motion, p. 3, fn. 7. No contradictory facts alleged or demonstrated in Complainant's Response or Answer.

6. Complainant filed his whistleblower complaint in this case (Case No. 2018-SOX-00046) on July 3, 2018.

Motion, Exhibit 1, p. 1; Exhibit 16, p. 1. No contradictory facts alleged or demonstrated in Complainant's Response or Answer.

7. Complainant's arguments that Respondent retaliated against him, on or after January 4, 2018, for protected activity are not properly supported under 29 C.F.R. section 18.72, subsections (c) and (d).

As I noted in the Interim Order and Order to Show Cause,

Respondent correctly points out that "SOX and ACA whistleblower protection statutes and their implementing regulations require Complainant to have filed his claim within 180 days after the alleged violation occurred (or in the case of SOX, within 180 days after the Complainant became aware of the alleged violation)." Motion, p. 7. The record shows Complainant filed such a complaint on April 4, 2016. Administrative Law Judge Steven B. Berlin ruled that complaint untimely, so the complaint in this case, filed on July 3, 2018, must be untimely too,³ except to the extent it alleges retaliatory acts occurring (or having been first discovered) within 180 days before its filing, as those could not have been included in the April 4, 2016, complaint.

(Interim Order and Order to Show Cause, pp. 4-5.)

On the record before me, it appears that when Judge Berlin ruled against Complainant in Case No. 2016-SOX-00037, Complainant took two steps. First, he

³ If Judge Berlin was *wrong* about the April 4, 2016, complaint being untimely, that would not give Complainant the right to file a new claim alleging otherwise. His remedy would be to do what he, in fact, has done – to appeal Judge Berlin's decision to the Administrative Review Board, and pursue such further proceedings as the Administrative Review Board may allow. I have no jurisdiction to review Judge Berlin's decision – certainly not while the matter is before the Board.

appealed Judge Berlin's decision, which he had every right to do. Second, he filed this case, based on the very same facts – something he had *no* right to do.

Accordingly:

1. Respondent's Motion for Leave to File Sur-Reply is DENIED.
2. Respondent's Motion for Summary Decision in this case is GRANTED, without prejudice to the determination of the pending appeal in Case No. 2016-SOX-00037.

SO ORDERED.

CHRISTOPHER LARSEN
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).