U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 February 2020

Case Number: 2019-SOX-00016
OSHA No.: 2-4173-17-139

In the Matter of:

PAUL BERG,
Complainant,

v.

RAYMOND JAMES FINANCIAL, INC.,
CARILLON TOWERS ADVISORS, INC., AND
COUGAR GLOBAL INVESTMENTS, LTD.,[1]
Respondents.

ORDER OF DISMISSAL

The above-captioned matter arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act of 2002 ("SOX"), as amended, 18 U.S.C. § 1514A, and SOX implementing regulations at 29 C.F.R. Part 1980.

On August 31, 2017, Paul Berg ("Complainant") filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") alleging, in part, that Respondent Cougar Global Investments, Ltd. terminated his employment on March 7, 2017 in retaliation for internally reporting to all three Respondents that he believed representations made to investors violated federal securities law. On November 30, 2018, the Secretary of Labor, acting through the Regional Administrator of OSHA, issued a determination letter ("Secretary's Findings") dismissing the complaint,[2] finding no reasonable cause to believe that Respondent violated the whistleblower protection provisions of SOX. The letter notified Respondent and Complainant that they "have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge ("ALJ"). The parties were specifically advised that "[i]f no objections are filed, these Findings will become final and

[1] Raymond James Financial, Inc. is a multinational investment bank and financial services company based in St. Petersburg, Florida. Also based in St. Petersburg, Florida, Carillon Tower Advisors, Inc., is an investment advisor registered with the Securities and Exchange Commission and a wholly owned subsidiary of Raymond James Financial. Based in Toronto, Canada, Cougar Global Investments, Ltd., is a non-resident investment advisor registered with the Securities and Exchange Commission and an affiliate of Carillon Tower Advisors.

[2] The Secretary's Findings indicate that they were served on Complainant in care of his attorney.

not subject to court review." The letter also provided the parties with the address of the Office of Administrative Law Judges ("OALJ") to mail any objections.

On December 27, 2018, OALJ received a letter from Complainant's counsel, dated December 26, 2018. While the letter refers to the November 30, 2018 OSHA Findings, Complainant did not specifically object to it or request a hearing before an ALJ. Complainant instead advised that he intended to "file a de novo action in Federal court, based on his original charge filed under Sec. 806, pursuant to 20 CFR 1980.114, and requests that the Secretary take no further action in this proceeding."[3]

Because of Complainant's notice of intent to file an action in federal court, and to promote the efficient use of judicial resources, I issued *Order Suspending Administrative Proceedings Pending Filing of Federal District Court Complaint* on January 7, 2019, and directed Complainant to notify this court when such action had been taken.[4] However, when no notice was forthcoming, I issued an order on June 24, 2019 scheduling a hearing on the merits of the complaint for November 6, 2019 in New York City, New York.[5]

On October 17, 2019, Respondents filed a letter contending that Complainant "failed to file proper objections and to request a hearing with respect to the Department's findings that were issued . . . on November 30, 2018," and that the Findings are now final and "not subject to any further Department or judicial review." Respondents contend that the complaint should be dismissed.

By letter dated October 18, 2019, Complainant, through counsel, filed a *Motion for Continuance*, requesting "a continuance of the hearing scheduled for November 6, 2019 for a period of six months, until May 5, 2020 . . . ." Complainant explained that the continuance "will permit Mr. Berg to begin, and perhaps resolve, a de novo proceeding in federal district court, and thus avoid duplication of judicial resources, as well as that of the parties." Complainant stated that "Respondents' argument [that the OSHA Findings have become final] is baseless" and that "Mr. Berg is clearly entitled to file a de novo action in federal court, and to seek a stay of proceedings here pending that filing."[6]

On October 21, 2019, I issued an *Order to Show Cause* ("Order"), cancelling the hearing and instructing Complainant to show cause, within fourteen days, why this matter should not be dismissed for a failure to timely object to the OSHA Findings and/or request a hearing on the

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[3] Under the enforcement provisions of SOX, if the Secretary of Labor has not issued a final decision within 180 days after the filing of the complaint, and the delay is not due to the bad faith of the employee, the employee may bring an original 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)(B).

[4] *See Stone v. Duke Energy Corp.*, 432 F.3d 320, 322-23 (4th Cir. 2005) (explaining that jurisdiction is conferred on a district court "when a qualifying complainant files his complaint there"); *see also Despain v. BNSF Ry. Co.*, 186 F. Supp. 988, 991 (D. Ariz. 2016) (Federal Railroad Safety Act).

[5] On July 3, 2019, this Office received the copy of the order addressed to Complainant's attorney, Jonathan Ben-Asher, at his address of record, marked "Return to sender, no mail receptacle, unable to forward."

[6] To date, it appears that Complainant has yet to file any action in a United States federal district court.

record.[7] Respondent was given ten days from receipt of any filing to respond. To date, Complainant has not filed a response to the Order.

Discussion

The regulations at 29 C.F.R. § 1980.106(a)-(b) state:

> Any party who desires review, including judicial review, of the findings and preliminary order…must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1980.105(b). The objections and/or request for a hearing must be in writing and state whether the objections are to the findings and/or the preliminary order, and/or whether there should be an award of attorney fees… If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or preliminary order will become the final decision of the Secretary.

Complainant's December 26, 2018 letter to OALJ did not explicitly object to the November 30, 2018 OSHA Findings and did not specifically request a hearing. Instead, Complainant unambiguously requested that the Department "take no further action." I find Complainant's December 26, 2018 letter not only is not an appeal of the November 30, 2018 OSHA findings, it is in fact an affirmative statement that Complainant would not appeal, at least within the Department of Labor. As Complainant has not filed a response to the Order to Show Cause, I find Complainant never filed an objection to the Secretary's Findings or request a hearing before an ALJ. Accordingly, given the lack of objections or request for hearing, I find that the Secretary's Findings issued on November 30, 2018 have become final and are no longer subject to this court's review.[8]

Order

Based on the above, the complaint filed by Paul Berg on August 31, 2017 is hereby DISMISSED.

SO ORDERED.

STEPHEN R. HENLEY
Chief Administrative Law Judge

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[7] The order also provided that Complainant could notify this court that he actually has filed an original action at law or equity for de novo review in an appropriate district court of the United States, and that failure to respond at all could result in an entry of a default decision in accordance with 29 C.F.R. § 18.57(b).

[8] Although Complainant filed a motion for continuance of the hearing on October 18, 2019, even if considered an implicit request for hearing, I find that request, filed over 300 days after receipt of the Secretary's Findings, is untimely. The regulations provide that written objections or a request for hearing must be filed within thirty days of receipt of the findings.

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).