

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 October 2014

Case Number: 2014-SOX-00035

In the Matter of:

EDWIN MOLDAUER,
Complainant

v.

CONSTELLATION BRANDS, INC.,
Respondent

Appearances: Edwin Moldauer, *Pro Se*
Auckland, New Zealand
For the Complainant

Paul M. Zieff, Esq.
Rogers Joseph O'Donnell
San Francisco, California
For the Respondent

DECISION AND ORDER DISMISSING THE COMPLAINT

Background

Edwin Moldauer (hereinafter “Complainant” or “Mr. Moldauer”) alleges a violation of the employee protection provisions in Section 806 of the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1514A (“SOX” or “the Act”), and applicable regulations issued at 29 C.F.R. Part 1980 (2010). Section 806 generally prohibits company retaliation for lawful cooperation with investigations and protects employees who suffer an adverse action for reporting allegations of financial fraud. The Act extends protection to employees of any company “with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781) or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 780(d))....” 18 U.S.C. § 1348(1). SOX complainants are governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C.A. § 42121. A

complainant alleging a violation of Section 806 must prove by a preponderance of the evidence: (1) that he engaged in protected activity or conduct; (2) that he suffered an adverse personnel action; and (3) that the protected activity was a contributing factor in the unfavorable action. *See, e.g., Villanueva v. Core Laboratories*, ARB 09-108, ALJ No. 2009-SOX-06, at 8 (ARB Dec. 21, 2011).

Procedural History

This is Complainant's third SOX related complaint against Constellation Brands Inc. ("Respondent") or one of Respondent's divisions. On April 24, 2003, Complainant filed his first complaint with the San Francisco Regional Office, U.S. Department of Labor ("DOL"), Occupational Safety and Health Administration ("OSHA") alleging that his former employer, Canandaigua Wine Co., a division of Respondent, retaliated against him when he was terminated on October 7, 2002 after reporting financial mismanagement. Though not specifically referencing SOX in the complaint, OSHA investigated it as a SOX complaint but eventually dismissed it as untimely on July 2, 2003. Mr. Moldauer then requested a hearing before the Office of Administrative Law Judges. On November 17, 2003, Administrative Law Judge ("ALJ") Karst granted Respondent's motion for summary judgment and dismissed the claim as untimely, a decision affirmed by the Administrative Review Board ("ARB" or "Board") on December 30, 2005.¹ Complainant did not appeal to federal circuit court.

Mr. Moldauer filed his second SOX complaint on June 26, 2008, alleging Canandaigua Wine Co. and Constellation Brands violated SOX when it terminated his employment in 2002 for reporting fraud. OSHA dismissed the complaint on September 4, 2008 as time barred, and Complainant requested a hearing. ALJ Johnson dismissed the complaint on December 29, 2008 as, among other reasons, untimely. Mr. Moldauer appealed the decision to the ARB, which later granted his motion to withdraw.²

On April 3, 2014, Mr. Moldauer filed his third, and instant, complaint alleging Constellation Brands retaliated against him in violation of the Act by terminating his employment in 2002 because he raised concerns to management about financial irregularities. The Regional Administrator for OSHA's New York Regional Office investigated and issued a final determination letter on May 12, 2014. Because Mr. Moldauer was terminated in October 2002, and failed to file within the statutory timeframe, OSHA dismissed his complaint.

On June 24, 2014, the Office of Administrative Law Judges received a letter from Complainant, with a postmark of June 13, 2014, in which he advises "find by this notice of objection to the findings of OSHA letter dated 12 May 2014. Kindly seeking further review by AJL (sic)." On June 26, 2014, Chief ALJ Stephen Purcell issued a *Notice of Docketing and Order to Show Cause* advising the parties that he would consider the timeliness of Mr. Moldauer's complaint as a preliminary matter and directed the parties to explain why

¹ *Edwin Moldauer v. Canandaigua Wine Co.*, ARB Case No. 04-22, ALJ No. 2003-SOX-26 (Dec. 30, 2005). The Board found that Canandaigua terminated Complainant's employment on October 7, 2002 and that Complainant was not entitled to modification of the limitations period.

² *Edwin Moldauer v. Constellation Brands, Inc. and Canandaigua Wine Co., Inc.* ARB Case No. 09-042, ALJ No. 2008-SOX-73 (Mar. 9, 2009).

Complainant's case should not be dismissed as untimely under the Act. On August 1, 2014, Complainant notified this Office that he had just received Chief Judge Purcell's June 26, 2014 *Notice of Docketing and Order to Show Cause* and requested an extension of time to respond. On August 7, 2014, Chief Judge Purcell granted Complainant's request, extending the deadline to September 3, 2014; the parties filed their respective responses on that date.

In his response, Complainant variably submits Attorney Zieff is disqualified, the United States Supreme Court confirmed Respondent's financial irregularities³ and Respondent "deliberately breached employment laws, willfully attempted to avoid liability by building a web of fraud, deception and retaliation between 2002 until now." He claims his complaint is timely filed because "prior to [his] departure from US he contacted the OSHA/DOL regional field office in Nov and Dec 2002. The contact name noted is Andrea. [I] received no information on SOX." See Reply to Order to Show Cause at 23. Complainant implies "[t]his supports tolling provision." Complainant also alleges the identity of the employer was concealed and under dispute for the period 2002 until 2013.⁴ He also argues his complaint is timely filed and subject to equitable tolling or estoppel. I disagree.⁵

Discussion

In its response to the *Order to Show Cause*, Respondent has essentially requested the case be dismissed through summary decision. Summary judgment is proper when the record (i.e., pleadings, affidavits and declarations offered with the motion and evidence developed in discovery) demonstrate that there are no genuine issues of material fact, and that the moving party is entitled to disposition as a matter of law.⁶ 29 C.F.R. § §18.40(d), 18.41(a); Fed. R. Civ. P. 56 (c). A genuine issue of material fact exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *Anderson*, 477 U.S. at 248. However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. *Id.* at 266.

³ Whether or not Respondent actually engaged in fraud is irrelevant to the determination whether the complaint was timely filed.

⁴ Complainant alleges the identity of the employer was concealed and under dispute for the better part of the period from 2002 until 2013. He also alleges the only party to this claim is Constellation Brands and the fraud was perpetrated "by two separate legal entities and companies: Constellation Brands, Inc. and Canandaigua Wine Co Inc." I need not determine which of the two companies Complainant may have worked for in 2002 as it is not necessary to resolution of the case.

⁵ I was assigned the case due to Chief Judge Purcell's imminent retirement.

⁶ See *Townsend v. Big Dog Holdings, Inc.*, 2006-SOX-28 (ALJ Feb. 14, 2006); see also *Richardson v. JP Morgan Chase & Co.*, 2006-SOX-82 (ALJ Jul. 7, 2006). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). A court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000). The party who brings the motion for summary decision bears the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Rusick v. Merrill Lynch & Co.*, 2006-SOX-45 (ALJ Mar. 22, 2006). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Timeliness of Complaint

Under the statute and applicable regulations then in effect, a SOX complaint must be filed no later than 90 days after the date that an alleged violation of the Act occurs, or after the date on which the employee became aware of the violation.⁷ 18 U.S.C. § 1514A(b)(2); 29 C.F.R. § 1980.103(d). Thus, an employer potentially violates SOX on the day that it communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer's action. *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001).

Respondent terminated Complainant's employment on October 7, 2002. On November 1, 2002, Complainant, represented by legal counsel, entered into a severance agreement. Mr. Moldauer alleges Respondent terminated his employment as a financial analyst in 2002 in retaliation for raising concerns to management about accounting irregularities. OSHA's New York Regional Office received Mr. Moldauer's SOX complaint on April 3, 2014, more than 90 days after he was terminated.

SOX's 90-day filing period may be equitably tolled for extenuating circumstances, including concealment by the employer of the existence of the adverse action, inability of the plaintiff to file within the statutory time period due to extraordinary events, such as a debilitating illness, injury, natural disaster, or mistakenly filing an otherwise timely complaint regarding the same statutory claim with another agency.⁸ *See School Dist. of City of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3rd Cir. 1981). Though alleging concealment of the financial fraud, Mr. Moldauer has not alleged concealment of the adverse action in this case, his termination from employment. He has also not alleged injury, illness or other extraordinary circumstance that prevented him from filing a timely complaint. Mr. Moldauer has also not presented any competent evidence that he filed the same claim with this or another government agency. Even assuming Complainant did contact OSHA/DOL in October/November 2002 and talked to "Andrea," it appears this was for informational purposes only. Mr. Moldauer does not allege nor has he presented any evidence the contact included or referenced a violation by Respondent related to mail fraud, wire fraud, bank fraud or securities fraud or a violation of SEC rules and regulations or even a retaliatory act. In other words, Complainant has presented no evidence he mentioned during the alleged October/November 2002 DOL contact that he was discriminated

⁷ Among other amendments to SOX, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L 111-201 (July 21, 2010), doubled the statutory filing period for SOX retaliation complaints from 90 to 180 days. However, the amended limitations period would not revive a SOX claim on which the previous statute of limitations had run. *See Berman v. Blount Parrish & Co, Inc.*, 525 F.3d 1057 (11th Cir. 2008). Regardless, even if Dodd-Frank provided for retroactive application of the extended filing period, the procedural change would not benefit Complainant, as the statute of limitations would have run in either circumstance.

⁸ As the complaining party, it is Mr. Moldauer's burden to demonstrate why equitable principles should be applied to toll the limitations period. *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995). However, as a pro se complainant lacking legal expertise, this Court will analyze Mr. Moldauer's complaint "with a degree of adjudicative latitude." *Hyman v. KD Resources, Inc., et al.*, ARB No. 09-076, ALJ No. 2009-SOX-20, slip. op. at 8 (ARB March 28, 2010) (*citing Ubinger v. CAE Int'l*, ARB No. 07-083, ALJ No. 2007-SOX-36, slip op. at 6 (ARB Aug. 27, 2008)). I note that Complainant has not been employed by Respondent since 2002. He alleges no specific retaliatory act(s) occurring within the 90 or 180 days before filing of his April 23, 2014 complaint and he does not allege blacklisting or interference with subsequent employment.

against by Respondent or that the protected activity was a contributing factor to his dismissal. Absent some connection of a protected activity to a retaliatory act, I find such contact neither constitutes a timely filing nor tolls the limitations period. *See Shelton v. Time Warner Cable*, ARB. No. 06-153, ALJ No. 2006-SOX-76 (ARB July 31, 2008) (affirming ALJ's decision to grant summary decision for employer on timeliness grounds because complainant's letters to OSHA, though sent within the statutorily required time period, failed to mention SOX or allege any acts or omissions complainant believed constituted SOX violations).

On the current record before me, I find Mr. Moldauer failed to file a SOX retaliation complaint with a government agency within the 90-day statutory limitations period. Additionally, Mr. Moldauer has not produced sufficient evidence invoking equitable principles that would justify tolling the limitations period in this case.

Conclusion

Mr. Moldauer filed his complaint on April 3, 2014. For the complaint to be timely, some retaliatory act must have occurred on or after October 5, 2013. It appears the only act alleged in the April 3, 2014 OSHA complaint is, again, Complainant's termination, which occurred on October 7, 2002. Since I have found no basis for tolling the limitations period, Mr. Moldauer's SOX complaint is untimely, and his complaint alleging a violation of the Sarbanes-Oxley Act's employee protection provisions must be dismissed.⁹

ORDER

The complaint for whistleblower protection under the Sarbanes-Oxley Act filed by Edwin Moldauer with the Occupational Safety and Health Administration on April 3, 2014 is hereby DISMISSED.

SO ORDERED:

STEPHEN R. HENLEY
Administrative Law Judge

⁹ Given that Complainant appears to raise identical claims in this case that he did in his two previous SOX cases, he is arguably precluded from bringing these claims against Respondent before this office and the principles of res judicata (claim preclusion) or collateral estoppel (issue preclusion) would also result in the dismissal of Mr. Moldauer's April 3, 2014 OSHA complaint.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time 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. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

You must file an original and four (4) copies of the petition for review with the Board, together with one (1) copy of this decision. In addition, within thirty (30) calendar days of filing the petition for review you must file with the Board: (1) an original and four (4) copies of a supporting legal brief of points and authorities, not to exceed thirty (30) double-spaced typed pages, and (2) an appendix (one (1) 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.

Any response in opposition to a petition for review must be filed with the Board within thirty (30) calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition of to the petition for review must include: (1) an original and four (4) copies of the responding party’s legal brief of points an authorities in opposition to the petition, not to exceed thirty (30) double-spaced typed pages, and (2) an appendix (one (1) copy only) consisting of relevant excerpts of the record of proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party. 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 (4) copies), not to exceed ten (10) double-spaced typed pages, within such time period as may be ordered by the Board. 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(c). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).