



Issue Date: 09 August 2012

CASE NO.: 2006-SOX-00053

In the Matter of:

RANDALL PITTMAN,
Complainant,

vs.

**DIAGNOSTIC PRODUCTS CORP.,
MICHAEL ZIERING, IRA ZIERING, SID
AROESTY, SEYFARTH SHAW, LLP, and
DELOITTE, TOUCHE,**
Respondents.

ORDER DENYING MOTION FOR RELIEF
(RULE 60(b)(6))

This case arises under the whistleblower protection provisions of the Sarbanes-Oxley Act. *See* 18 U.S.C. §1514A. I dismissed it on October 14, 2010, when Complainant elected to pursue the matter before the district court. *See* 18 U.S.C. §1514A(b)(1)(B).¹

¹ Complainant initially filed a Sarbanes-Oxley complaint against his former employer Diagnostic Products (currently Siemens Healthcare Diagnostics, Inc.) in connection with his termination from employment on January 12, 2005. After the Occupational Safety & Health Administration dismissed the claim as untimely filed, Complainant objected and requested a hearing. The case was docketed as OALJ No. 2006-SOX-00023. Complainant subsequently withdrew the request for hearing, stating that he would file separately against individual “agents” of his former employer rather than the employer itself.

Complainant then filed the present action. He names his former employer, Diagnostic Products, and certain alleged “agents” of the former employer: Michael Ziering, Ira Ziering, Sid Aroesty, Seyfarth Shaw, LLP, and Deloitte & Touche. OSHA found this complaint also untimely, and again Complainant objected and requested a hearing.

The case was assigned for hearing to Judge Alexander Karst. Judge Karst ordered Complainant to show cause why his claim should not be dismissed as untimely. In his response, Complainant conceded that a claim based on the termination of the employment would be untimely. He said his claim’s focus was retaliation for a post-termination email he’d written to the Securities and Exchange Commission, complaining about his former employer. He argued that some of the acts retaliating for the post-termination email occurred within the 90-day limitations period prior to his filing the current OSHA complaint.

Judge Karst decided that the alleged post-termination retaliatory acts were not legally sufficient adverse actions. He dismissed the claim, Complainant appealed, and the Administrative Review Board vacated the dismissal and remanded. ARB No. 06-079 (May 30, 2008). It held that Judge Karst’s decision was “conclusory” and that, on remand, the administrative law judge must state appropriate findings and conclusions as to whether the Act extends to post-termination retaliatory acts, and if so, whether the retaliatory acts that Complainant proffered were legally actionable. (Footnote continues . . .)

On July 18, 2012, Complainant moved to vacate the order of dismissal and reinstate his claim. He argues that, although he remains entitled to litigate his claim in the district court, this Office has jurisdiction to vacate its order dismissing the action and allow him to reinstate the proceedings here. *See* Fed.R.Civ.P. 60(b)(6). He also argues that, although the statute allows him to bring his claim in the district court, he has not done so, and thus the Department of Labor still has jurisdiction. Finally, Complainant argues that there is good cause to allow him to reinstate his claim as it will not prejudice Respondents but will benefit them in avoiding “additional legal costs and the possibility of multiple judgments against them should Complainant be allowed to proceed with his claims against Respondents in multiple forums.” Complainant has raised other Sarbanes-Oxley claims against these and other Respondents; they are in varying procedural statuses, and Complainant states that, if this motion is granted, he will move to consolidate those other actions.²

Although Complainant correctly contends that this Office has ancillary jurisdiction to consider his motion for relief, he fails to present sufficient facts to justify the relief he seeks, especially in the light of Sarbanes-Oxley’s procedural regime. I will therefore deny the motion.

Discussion

Complainant properly relies on the Federal Rules of Civil Procedure as a basis for this motion.³ Rule 60(b), Fed.R.Civ.P., addresses relief from an order.⁴ Rule 60(b) provides five categories of specific reasons to allow relief, together with a sixth provision for “any other reason that justifies

While the matter was on appeal, Complainant moved to add two respondents, Erich Reinhardt and Fritz Backus. He also added two other would-be respondents to the caption on papers he submitted to the Board: Chris Goss and Concentra, Inc. On his current motion, Complainant includes all of these and adds another respondent: St. Paul Travelers. I can find nothing on the record in which Complainant was granted leave to add party respondents. Erich Reinhardt, Fritz, Backus, Chris Goss, Concentra, Inc., and St. Paul Travelers are not parties.

² Complainant has filed five additional related Sarbanes-Oxley complaints with OSHA on which he has subsequently requested hearings. OALJ Nos. 2007-SOX-00015, 2007-SOX-00082, 2011-SOX-00029, 2011-SOX-00034, and 2012-SOX-00006. Some of these have reached the Administrative Review Board on appeal (*e.g.*, OALJ No. 2007-SOX-0015). He has filed about eight cases in the district court (C.D. Cal.) and four cases in the Ninth Circuit. Although he offers to consolidate OALJ Nos. 2007-SOX-00015 and 2007-SOX-00087 into the present action, one of these (2007-SOX-00015) was already adjudicated against him and appealed to the ARB, where it was pending until Complainant notified the Board that he would be pursuing the matter in the district court. At that point, the Board allowed Complainant to withdraw his complaint, and the Board closed it. The second case that Complainant proposes to consolidate is currently suspended pending the outcome of what was previously OALJ No. 2007-SOX-00015, in which Complainant raises many of the same allegations against the same or related parties.

³ The Sarbanes-Oxley Act and its implementing regulations do not address motions for relief from an order. *See* 18 U.S.C. §1514A; 29 C.F.R. §1980.107. When there is no specifically applicable regulation, Sarbanes-Oxley adopts this Office’s general procedural rules. 29 C.F.R. §1980.107(a). Those rules too are silent about motions for relief from orders. *See id.* §18. When our general procedural rules are silent and there is no other applicable statute, regulation, or executive order, our rules turn to the Federal Rules of Civil Procedure. *See id.* §18.1.

⁴ Relief based on clerical mistakes, oversights, and omissions are addressed separately in Fed.R.Civ.P. 60(a). Complainant does not assert that his motion falls within that provision, and nothing on the record suggests that it does.

relief.” Complainant does not argue that any of the five specific categories applies; he relies entirely on the sixth “catchall” provision.⁵

Relief under Rule 60(b)(6) “requires a finding of ‘extraordinary circumstances.’” *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985), citing *McConnell v. MEBA Medical & Benefits Plan*, 759 F.2d 1401, 1407 (9th Cir. 1985); *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981). Motions under this provision must be granted “sparingly as an equitable remedy to prevent manifest injustice.” *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010).

Complainant presents no extraordinary circumstances to justify shifting the litigation back to this forum. He points to nothing inequitable about holding him to his decision to pursue the matter in the district court. He offers no explanation for waiting nearly two years to change his mind.⁶ If he has not pursued the matter in the district court, that was his choice; there is nothing manifestly unjust about requiring that Complainant accept whatever follows if he now files in the district court after this long delay. Complainant may receive a complete remedy in the district court, limited only by the consequences of his delay.⁷

Indeed, the statutory regime is the opposite of what Complainant seeks to do. A person raising whistleblower claims under Sarbanes-Oxley must initiate the claim with the Secretary of Labor. 18 U.S.C. §1514A(b)(1)(A). Only if the Secretary has not issued a final decision within 180 days may the complainant bring an action in the district court. *Id.* §1514A(b)(1)(B). The statute offers nothing to a complainant who has filed with the Secretary, waited at least 180 days, elected the district court, and then changes his mind and wants to move the litigation back to the Department of Labor.⁸ To the extent that Complainant is correct when he observed that the

⁵ The five specific categories are: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) “the judgment is void”; and (5) the judgment has been satisfied, released, or discharged (or related circumstances). The dismissal here was based on Complainant’s representation that he elected to pursue the matter in the district court. None of the five enumerated subsections applies to this representation, and Complainant offers no argument to the contrary.

⁶ Complainant signed his notice of intent to file in the district court on September 20, 2010. He filed the present motion for relief on July 18, 2012.

⁷ Complainant argues, without merit, that because he never filed in the district court, his claim remains within the Secretary’s jurisdiction. What Complainant neglects is that I dismissed his claim. He did not appeal. The dismissal therefore became the final decision of the Secretary, without prejudice to whatever relief Complainant might find in the event he files in the district court. Complainant’s assertions notwithstanding, this matter is not currently pending before the Department of Labor.

⁸ Although not at all unique, Sarbanes-Oxley is unusual in that it essentially gives complainants two bites at the apple. For example, after OALJ No. 2007-SOX-00015 was adjudicated against Complainant and he appealed to the Administrative Review Board, Complainant took the option to start *de novo* in the district court, thereby circumventing this Office’s adverse decision. But the Act does not contemplate a third bite by allowing a party to move from the Secretary to the district court and then return to the Secretary.

matter should be litigated in one forum, not two, then that forum must be the one Complainant chose under the statutory regime: the district court.

SO ORDERED.

A

STEVEN B. BERLIN
Administrative Law Judge

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 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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, 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 copies), not to exceed ten 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).