U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 04 September 2003

CASE NO.: 2003-SOX-23

IN THE MATTER OF:

ROBERT J. MCINTYRE, PRO SE

Claimant

v.

**MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.
and MERRILL LYNCH & COMPANY**
Respondent

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION, GRANTING COMPLAINANT'S MOTION FOR LEAVE TO AMEND CAPTION, AND SETTING DATE OF HEARING

On August 20, 2003, Complainant filed a Pre-hearing Statement of Position in which he alleged "Merrill Lynch & Co. and Thomas J. Mosley" engaged in a "current and continuing pattern of discrimination," namely by blacklisting his employment records "within the securities industry on at least three separate occasions within the past ninety days" and by blacklisting his employment records "outside the securities industry within the past week." He argued Respondent continuously and presently refuses to expunge incorrect information included in a form U-5 Uniform Termination Notice for Securities Industry Regulation (the U-5), despite a National Association of Securities Dealers (NASD) arbitration award in Complainant's favor regarding various claims, including wrongful termination and retaliation, intentional infliction of emotional distress and defamation.

Complainant contended "Merrill Lynch & Co." also withheld payment of amounts due to him under a "Financial consultant Capital Account Award Plan ("FCCAAP") sponsored by Merrill Lynch & Company, Inc. (the parent company). He averred that the U-5 and the withheld FCCAAP payment constitute prohibited activity by Section 806 of the Sarbanes-Oxley Act (the Act), codified at 18 U.S.C. 1514A, and argued the alleged discriminatory conduct was in retaliation for reporting "fraudulent business conduct to regulatory

authorities." Consequently, Complainant sought statutory relief including reinstatement, back pay, and other damages.

On August 21, 2003, Respondent submitted its Motion for Summary Decision an affidavit of its attorney, Ellen J. Casey, who indicated Respondent, "Merrill Lynch," was "not a publicly traded company, nor has it been a public company at any time during [Complainant's] employment with Merrill Lynch, i.e., from November 17, 1986 through July 11, 2000." Respondent also submitted the affidavit of its attorney, Charles A. Gall, who indicated that, on July 26, 2000, an arbitration panel attempting to resolve a complaint raising "various claims" between Complainant and Respondent awarded Complainant $35,000.00 plus costs of $2,425.00 without stated reasons.

In its Motion for Summary Judgment, Respondent argued Complainant is not entitled to protection under the Act because Complainant was "not an employee of Merrill Lynch when the Act became effective." Respondent argued that it is "not a publicly traded company" subject to the Act. According to Respondent, the fact its parent company is a publicly traded company is "irrelevant," relying on the holding of Powers v. Pinnacle Airlines, Inc., 2003 AIR-12, slip op. @ 3-4 (DOL Mar. 5, 2003)(an administrative law judge granted summary decision against a complainant who, without leave of court, "unilaterally added" a publicly traded parent corporation of the respondent because "the mere fact of a parent-subsidiary relationship between two corporations does not make one company liable for the torts of its affiliate" and because the complainant failed to "even allege any facts that would justify piercing the corporate veil"). According to Respondent, "the language of the Act is clear – to be applicable, the complaining party must be employed by a publicly traded company."

Respondent argued the Act does not Apply to Complainant's claims because the alleged discriminatory conduct, namely the filing of a U-5 form and the FCCAAP withholding occurred prior to the Act's enactment in 2002. Respondent argued Complainant's claims are barred by the statute of limitations because Complainant's "first letter to the Department of Labor raising the issues was dated March 21, 2003, over two years after the latest conduct [a December 2000 FCCAAP payment] about which the Complainant complains." Lastly, Respondent argued Complainant's "problems locating employment are not the result of blacklisting, but his own failure to perform in a satisfactory manner, namely that he was terminated by a subsequent employer for "lack of production" and that "his NASD records reflect fiscal irresponsibility." In support of its contentions, Respondent submitted a U-5 and an NASD report indicating an unsatisfied lien dated October 17, 1996 against Complainant in favor of Great Lakes Greater Education Corporation.

On August 28, 2003, an Order Postponing Hearing and Order to Show Cause issued by the undersigned in which Complainant was directed to file a response to Respondent's Motion for Summary Decision.[1]

On August 29, 2003, Complainant filed a Motion for Leave to Amend Caption of Case No: 2003-SOX-23 to Include "Merrill Lynch & Co,, Inc.," in which he responded to Respondent's contentions that Complainant is not entitled to relief under the Act. Complainant argued that a genuine issue of material fact exists concerning the degree of control exerted by the parent over Respondent. Specifically, he argued the parent corporation, which is publicly traded, exercises a "sufficient indicia of control" to qualify as a "joint employer," a matter that is "essentially a factual issue," relying on the holding of Tanforan Park Food Purveyor's Counsil v. N.L.R.B., 656 F.2d 12358, 1360 (9th Cir. 1981).

In support of his contention that the parent exercises control over its subsidiaries Complainant produced evidence that he has traded correspondence regarding his claim against Respondent through the parent corporation. Likewise, he produced evidence that the parent corporation referred the matter to Ellen J. Casey, who arguably responded in her capacity as Director and Senior Counsel of the parent and subsidiary entities. Complainant produced excerpts of the "Merrill Lynch & Co., Inc. Corporate Governance Guidelines" and the "Merrill Lynch & Co, Inc. Guidelines for Business Conduct: Merrill Lynch's Code of Ethics for Directors, Officers and Employees" which indicate: (1) "'Merrill Lynch' means Merrill Lynch & Co., Inc. and all of its subsidiaries and affiliates;" (2) "'Merrill Lynch persons' means the employees, officers and directors of Merrill Lynch;" (3) "'Directors' means the directors of Merrill Lynch & Co., Inc.; and (4) "'Employees' means the employees and officers of Merrill Lynch."

According to Complainant, by the corporate governance and structure of the parent company and its subsidiaries, the parent exerts full control over its subsidiaries "under the aegis of one firm, one Board of Directors, one CEO, one Audit Committee, one nominating and Corporate Governance Committee, one Finance Committee, etc." Thus, the parent company "hires and fires all Merrill Lynch employees, sets their wage rates and

[1] On September 4, 2003, Complainant requested an extension of time because of sickness in which to file his response to Respondent's motion for summary judgment. In light of the information cited herein I find that Complainant has provided sufficient information to raise genuine issues of material fact concerning the employer status and agency relationship between Respondent and Merrill Lynch & Co., so as to make it unnecessary for Complainant to respond further to Respondent's motion for summary judgment.

compensation policy, determines their vacation, holiday and work schedules, and supervises them, and as such should be treated as joint employer with [Respondent]."

Complainant produced a copy of the parent corporation's 2002 annual report, which is available online at the parent corporation's website. The report indicates the parent corporation, "through its subsidiaries and affiliates," provides capital markets services, investment banking and advisory services, wealth management, asset management, insurance, banking and related products and services on a global basis. Complainant argues the holding of Powers, supra, is inapposite to the facts at hand which involve a direct subsidiary providing a valuable service for its parent, a publicly-traded company within the ambit of the Act.

Citing to the parent corporation's publicly accessible website, Complainant argues that a summary decision in favor of Respondent based on a finding that it is merely a subsidiary of a publicly traded parent corporation would have "vast and draconian repercussions" for a very large number of employees within the parent corporation and its global subsidiaries which would "adversely affect the public investors who own the US$1.2 trillion dollars in financial assets that are currently managed by those employees."

The rules governing motions for summary judgment are set forth in 29 C.F.R. § 18.40 and § 18.41 and the Federal Rules of Civil Procedure, Rule 56. In essence, they permit the entry of a motion for summary judgment or decision if the evidence (pleadings, affidavits, material obtained by discovery, or matters officially noticed) shows there is no genuine issue as to any material fact and that the moving party is entitled to it as a matter of law. Celotex Corp. vs. Catrett, 477 U.S. 317, 91 L. Ed.2d 265, 106 S. Ct. 2548 (1986); Melton vs. Teachers Ins. & Annuity Assn. of America, 114 F.3d 557 (5th Cir. 1997). A fact is material if proof of such would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by one of the parties. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), cert. denied, 481 U.S. 1029 (1987). Once a party moving for summary judgment makes a prima facie showing that there is no genuine issue of material fact and that the movant is therefore entitled to judgment as a matter of law, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. If the nonmovant fails to meet this burden, then judgment must be entered in favor of the movant. Hopper vs. Frank, 16 F.3d 92 (5th Cir. 1994).

I agree with Complainant, who is pro se, that genuine issues of material fact remain in dispute. Specifically, there is a genuine issue of material fact as to whether the parent company and Respondent constitute a "joint employer." Superficially distinct entities may be exposed to liability upon a finding that they represent a single, integrated enterprise. Schweitzer v. Advanced Telemarketing Corp., 104 F.3d 761, 763 (5th Cir 1997); see also Stephenson v. Nat'l Aeronautics & Space Admin., ARB Case No. 96-080, ALJ Case no. 94-

TSC-5 (February 13, 1997); Williams v. Lockheed Martin Energy Systems, Inc., ARB Case No. 98-059, ALJ Case No. 95-CAA-10 (January 31, 2001); Ruud v. Westinghouse Hanford Co., ARB Case No. 96-087, ALJ Case No. 88-ERA-33 (November 10, 1997)(affirming that the connection between two separate corporations was close enough to attribute the actions of one corporation to the other for whistleblower protection purposes). The Administrative Review Board has held:

> . . . in a hierarchical employment context, an employer that acts in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that the employer does not directly compensate or immediately supervise the employee. A parent company or contracting agency acts in the capacity of an employer by establishing, modifying, or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment.

Stephenson, supra. See Doe ex rel. Doe v. Saint Joseph's Hosp., 788 F.2d 411, 422-25 (7th Cir.1986) (the absence of an employment relationship is not dispositive particularly at the pleading stage).

The criteria for deciding whether nominally separate business entities are a single employer are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. Radio and Television Broadcast Technicians Local Union 1264 V. Broadcast Serv. of Mobile, Inc., 380 U.S. 255, 256, 85 S.Ct. 876, 877 (1965); Armbruster v. Quinn, 711 F.2d 1332, 1337 (6th Cir.1983); Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983); Schweitzer, 104 F.3d at 763-764. I find Complainant's contention that the parent company has a relationship with Respondent such that they should be considered a single employer is supported to some degree by the companies' financial reports, the corporate governance guidelines, the FCCAAP,[2] and publications publicly available online at the parent company's website, namely that: (1) the operations between the parent company and Respondent are interrelated; (2) the entities share common management; (3) there are common boards directing labor relations and governance; and (4) Respondent is the wholly-owned, direct subsidiary of the parent company.

[2] According to the FCCAAP, the "Company" means ML & Co. and all of its affiliates. "ML & Co." means Merrill Lynch and Co., Inc. (Complainant's exhibit 10, pp. 2-3).

Alternatively, Complainant also appears to argue that a genuine issue of material fact exists regarding the relationship between Merrill Lynch & Co, Inc. (the parent corporation) and Respondent, its subsidiary. Although Respondent asserts the Act is "clear" and that a complaining employee "must be employed by a publicly traded company," Respondent failed to note that, according to the Act:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), **or any officer, employee, contractor, subcontractor, or agent of such company**, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against **an employee** in the terms and conditions of employment because of any lawful act done by the employee . . . .

18 U.S.C. § 1514A(a)(1)(2003) (emphasis added). The Act does not define the terms "contractor, subcontractor, or agent of such company," nor does it define "employee," a term used without any words of limitation. Moreover, the Act provides that "a person" who alleges discharge or other discrimination by "any person" in violation of the whistleblower protection provisions of the Act may seek relief under the Act. 18 U.S.C. § 1514A(b)(1). Elsewhere, the Act provides that "an employee" who prevails in an action under the Act may recover remedies under the Act. 18 U.S.C. § 1514A(c)(1).

On its website, the parent corporation explains that the Securities and Exchange Commission "requires that we make available to customers the annual and semi-annual balance sheets for Merrill Lynch, Pierce, Fenner & Smith, Incorporated [the subsidiary] and Subsidiaries." Merrill Lynch & Co., Financial Information about MLPF&S, <http://askmerrill.ml.com/mlpfs/> (accessed August 29, 2003). A review of the most recent balance sheet for the subsidiary indicates:

> ***Description of Business*** - [the subsidiary], together with its subsidiaries (the "Company"), provides investment, financing, and related services to individuals and institutions on a global basis. Services provided to clients include securities brokerage, trading, and underwriting; investment banking, strategic services, including mergers and acquisitions, and other corporate finance advisory activities; origination, brokerage, dealer and related activities in swaps, options, forwards, exchange-traded futures, other derivatives and foreign exchange products; securities clearance and settlement services and investment advisory and related record keeping services. **The Company is a wholly-owned subsidiary of Merrill Lynch & Co., Inc. (the "Parent")**.

Merrill Lynch & Co., Merrill Lynch, Pierce, Fenner & Smith, Incorporated and Subsidiaries Consolidated Balance Sheet as of December 27, 2002 and Independent Auditors' Report, <http://askmerrill.ml.com/12_27_02.pdf> (accessed Aug. 29, 2003).

Further, the parent corporation's website indicates "Merrill, Lynch & Co." opened for business on January 6, 1914. Merrill Lynch & Co., Company History Timeline <http://www.ml.com/about/history_ml/1900s.asp> (accessed Aug. 29, 2003). By the 1950s, the company evolved after a long history of mergers and acquisitions to become Merrill Lynch, Pierce, Fenner and Beane. In 1958, the company changed its name to Merrill Lynch, Pierce, Fenner & Smith, was incorporated and joined the board of the New York Stock Exchange. Merrill Lynch & Co., Company History Timeline,<http://www.ml.com/about/history_ml/1950s.asp> (accessed Aug. 29, 2003). Two years after going public in 1971, the company became "the first in the securities business to adopt a holding company format, with Merrill Lynch & Co., Inc. as the parent and Merrill Lynch, Pierce, Fenner & Smith as the **operating subsidiary**" to "provide more flexibility." Merrill Lynch & Co., Company History Timeline, <http://www.ml.com/about/history_ml/1950s.asp> (accessed Aug. 29, 2003)(emphasis added).

Moreover, it appears that the services provided by Respondent, namely investment, financing, and related services are consistent with the parent's stated services, namely capital markets services, investment banking and advisory services, wealth management, asset management, insurance, banking and related products and services. Likewise, it appears that the individuals and entities to whom the services are rendered by the subsidiary company, namely individuals and institutions on a global basis, are consistent with those to whom the parent provides its services, namely individual investors, businesses of all sizes, governments and governmental agencies as well as financial institutions.

It is noted that both the parent and the subsidiary use the same corporate logo and title. See generally Merrill Lynch & Co., Merrill Lynch <http://www.ml.com/> (accessed August 29, 2003). Respondent refers to itself in brief as "Merrill Lynch," which is the same term the parent uses to identify itself on its website. Id. It is further noted that the parent corporation publicly and candidly states the subsidiary "**also conducts business as 'Merrill Lynch & Co.'**" Merrill Lynch & Co., Selected Legal Entities <http://www.ir.ml.com/factbookML.pdf> (accessed Aug. 29, 2003)(emphasis added). Moreover, a December 31, 2001 check drafted pursuant to arbitration proceedings between Complainant and Respondent includes the same corporate logo with the term "Merrill Lynch" atop the check. (CX-5). Accordingly, there is a genuine issue of material fact concerning the subsidiary's actions as an agent with arguable express, implied and apparent authority to act on behalf of its parent, a publicly traded corporation subject to the Act. See generally Pritzker v. Merrill Lynch, Pierce, Fenner & Smith,7 F.3d 1110, 1121-1122 (3d Cir. 1993) (in a matter involving an agreement to arbitrate, the court found that the interests of

Merrill Lynch Asset Management, Inc. (MLAM) were "directly related to, if not predicated upon, MLPF&S's [Merrill Lynch Pierce Fenner & Smith's] conduct" and concluded that claims against MLAM were subject to compulsory arbitration in accordance with terms found in a contract to which MLAM was not a signatory).

I find Respondent's reliance on the administrative law judge's decision in Powers, supra, a holding which is not binding on this office, is misplaced. There, a complainant filed a claim against a respondent under the Aviation and Investment and Reform Act for the 21st Century (AIR 21) and alternatively argued her claim had merit under the Sarbanes-Oxley Act. Her claim under the Sarbanes-Oxley Act was dismissed by OSHA, which determined that: (1) the respondent was not a publicly traded company; (2) the respondent's impact on Northwest Airlines, its parent company, was "questionable at best;" and (3) there was no evidence of a material impact on stock worth or an adverse action. 2003-AIR-12, slip op. @ 1-2.

Thereafter, the complainant in Powers unilaterally, and without leave of court, amended the caption of her complaint against the respondent to include Northwest Airlines, a publicly traded company, which ostensibly could be subject to the provisions of the Act, and requested a formal hearing before OALJ. In response, the respondent filed a sworn affidavit of its Chief Financial Officer, who indicated the respondent was not a publicly traded company, nor was it a publicly-traded company or direct subsidiary of a publicly traded company. Rather, the affidavit indicated the respondent was a wholly- owned subsidiary of NWA, Inc., a wholly-owned subsidiary of Northwest Holdings Corporation, which was itself a wholly-owned subsidiary of Northwest Airlines Corporation. 2003-AIR-12, slip op. @ 2-3.

In Powers, the judge concluded that the complainant amended the caption of her complaint "in the hope that it [Northwest Airlines Corporation, the parent corporation,] can be found liable for the actions of its indirect subsidiary, [the respondent]." The judge added:

> However, this ignores the general principle of corporate law that a parent corporation is not liable for the actions of its subsidiaries. In other words, the mere fact of a parent-subsidiary relationship between two corporations does not make one company liable for the torts of its affiliate. Nor has the complainant even alleged any facts that would justify piercing the corporate veil and ignoring the separate corporate entities.

2003-AIR-12, slip op. @ 3-4 (citing United States v. Bestfoods, 524 U.S. 51, 118 S.Ct. 1876, 1884, 141 L.Ed.2d 43 (1998)).

Unlike the facts presented in Powers, the facts submitted by the parties in the present claim establish Respondent is a wholly-owned direct subsidiary of the parent company. Complainant has alleged facts which arguably justify piercing the corporate veil. Complainant, who presented evidence that he previously communicated with Respondent through its parent company regarding the instant claim, now seeks leave to amend the caption of this matter to properly include the potentially liable parent company. Consequently, the holding of Powers, supra, is unhelpful for a resolution of the instant claim.

Moreover, it is noted that, in Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338 (D.C.Cir.1973), the Court held that a hospital discriminated against a male private duty nurse, who was not an employee of the hospital, by refusing to refer him to female patients requesting a private nurse. The Court explained that, even though the parties "did not contemplate any immediate or future relationship of direct employment in the sense of the usual indicia of such employment . . . . ", interference with the employment relationship between the nurse and the patients could constitute a violation of Title VII. 488 F.2d at 1342. The court added:

> To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

Id. at 1341.

In the present matter, a finding that Respondent is not covered under the Act merely because it is a subsidiary of a parent company would arguably allow the parent company to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with employment opportunities available to employees of its subsidiaries that are not publicly traded, while it could not do so with respect to employment in its own service under the Act. Consequently, under the holding of Sibley, supra, such a finding would condone continued use of the criteria for employment which Congress prohibited.

Lastly, I find that genuine issues of material fact exist regarding Respondent's alleged discriminatory conduct, namely the alleged continuous and ongoing interference with his employment opportunities by blacklisting his employment records, which allegedly occurred within 90 days of Complainant's August 20, 2003 filing and after the implementation of the Act. Applicants for employment and former employees are protected from discrimination by their prospective and former employers, although no employer-employee relationship existed at the time of the alleged discrimination." Hill, supra, slip op. @ 6 (citing Flanagan

v. Bechtel Power Corp., Case No. 61-ERA-7, (Sec'y June 27, 1986); Egenrieder v. Metropolitan Edison Co., Case No. 85-ERA-23, (Sec'y April 20, 1987)).

Complainant argues numerous instances of the conduct occurred recently, while Respondent contends Complainant's inability to gain employment is related to his inability to perform and his fiscal responsibility, relying in part on a lien which predated Complainant's employment with Respondent. The disparity between the parties' contentions is itself a genuine and material factual issue which is not yet resolved on the facts presented.

CONCLUSION AND ORDER

In light of the foregoing, Respondent's Motion for Summary Decision is **DENIED**. Complainant's Motion to Amend Caption is **GRANTED**. The parties are hereby ordered to attend a formal hearing on **SEPTEMBER 30, 2003, AT 9:00 A.M., IN THE AUSTIN, TEXAS AREA.** The exact location will be given by subsequent notice.

A

CLEMENT J. KENNINGTON
Administrative Law Judge