U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 February 2006

CASE NOS: 2005-SOX-50
2005-SOX-51

IN THE MATTER OF

ANTONIO ANDREWS
NIQUEL BARRON
Complainants

v.

ING NORTH AMERICA INSURANCE CORPORATION,
Respondent

DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

This case arises from complaints alleging violations of the employee protection provisions at Section 806 of the Sarbanes-Oxley Act of 2002, codified in 18 U.S.C. §1514A (Act). Enacted on July 30, 2002, the Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under Section 806. The Act affords protection from employment discrimination to employees of companies with a class of securities registered under Section 12 of the Security Exchange Act of 1934 (15 U.S.C. 781) and companies required to file reports under Section 15(d) of the Securities Exchange of 1934 (15 U.S.C. 780(d)). Specifically, the law protects so-called "whistleblower" employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§1341, 1343, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders. All actions brought under Section 806 of the Sarbanes-Oxley Act are governed by 49 U.S.C. §42121(b). 18 U.S.C. §1514A(b)(2)(B).

Background

1. By letter dated June 4, 2004, Complainants filed a combined complaint against "ING GROEP, N.V., a Dutch corporation which is listed on the New York Stock Exchange, its subsidiary, ING USA Holding Corporation, and Derrick Reynolds, Allen Wilson and Robert Guinn, individually…." (ALJ EX 1).

2. By letter dated March 24, 2005, OSHA recited that Complainants had filed a complaint against ING North America Insurance Corporation (Respondent) and determined that such an entity was not a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 or was it required to file reports under Section 15d of the Securities Exchange Act of 1934. Nevertheless, because a determination was made by OSHA that Complainants failed to demonstrate they engaged in protected activity, the complaints were denied by OSHA without further addressing whether a wholly owned subsidiary of ING GROEP, N.V., was a covered employee within the meaning of the Act (ALJ EX 2).

3. While failing to object to the absence of determinations concerning the other parties named in the complaint, Complainants appealed the March 24, 2005 determination of OSHA to the Office of Administrative Law Judges (ALJ EX 3).

4. The case was initially set for trial on September 27, 2005, but at the joint request of the parties the trial was postponed until November 30, 2005 (ALJ EX 4).

5. At the onset of the trial it was noted on the record that despite previous confusion as to the parties in this case, the only parties to the case were the two Complainants and Respondent, ING North America Insurance Corporation[1], and it was further acknowledged one of the issues for my determination was whether or not the Respondent was an employer within the meaning of the Act (Tr. 17, 18)[2].

6. The trial lasted two very full days and involved a number of witnesses and much documentary evidence. Following the conclusion of Complainants' case on the second day, Respondent's counsel moved to dismiss the case upon the grounds that Respondent was not a covered employer under the Act (Tr. 455).

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[1] The corporation with whom complainants had been employed and the corporation by whom the complainants had been terminated.

[2] By motion dated November 28, 2005, and faxed to this office on November 29, 2005, Complainants had filed a Motion to Amend the Complaint to name ING Groep, N.V. as a respondent, but that motion was abandoned by Complainants and the following day the trial went forward against Respondent only.

7. After argument and because the record was so close to being concluded and any determination I made on the issues needed to be in the form of a written decision, I declined to grant the motion until I could visit the state of the law (Tr. 465, 466). The remaining two witnesses were then called and the trial went to completion.

8. Upon reflection of Respondent's motion, and after a review of the decisions which have been rendered on this subject, by letter dated January 12, 2006, I invited both parties to brief the sole issue of whether or not Respondent standing alone was a covered employer under the Act. Both parties have now done so.

Discussion and Conclusions of Law

Section 806 of the Act states, in relevant part:

> No 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)), 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 -
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by -
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer

> who has the authority to investigate, discover, or terminate misconduct)….

18 U.S.C. §1514A(a)(1); see also 29 C.F.R. §1980.102(a),(b)(1).

In this instance, no contention is made that the named Respondent is a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or is it a company required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)).

Based on the plain language of the Act and the acknowledgement that Respondent is not a public traded company with securities registered under Section 12 or a company required to file reports under Section 17d of the Exchange Act, Respondent urges dismissal of this Complaint. Complainants, on the other hand, argue that Respondent alone is covered under the Act because: 1) the original Complaint named the parent corporation, ING Groep, N.V., 2) ING Groep, N.V. is a foreign corporation not subject to service under the Act, 3) the corporate veil should be pierced to show a commonality of management and 4) Respondent was an agent of ING Groep, N.V.

Respondent's Exhibit 38 is the deposition of Paula Cludray-Engelke, chief counsel and corporate secretary for Respondent. The witness had never heard the name ING USA Holding Company, but testified Respondent is a Delaware corporation that is not publicly traded. It is an insurance corporation and does not file under Section 15d of the Securities Exchange Act. ING Groep, N.V. is a Netherlands corporation located in Amsterdam. Respondent is a wholly owned corporation owned by ING America Holdings, Inc., which in turn is a wholly owned subsidiary of ING Insurance International BV which is a wholly owned subsidiary of ING N.V. which is a wholly owned subsidiary of ING Groep, N.V.

The witness went on to testify that only ING Groep, N.V. is public traded and that Respondent and ING Groep, N.V. do not share common directors. Neither do the two share employees, administrative functions, nor does ING Group have any involvement in the day to day management of Respondent or personnel decisions including hiring and terminations decisions, but ING Groep, N.V. does publish a world-wide code of business conduct which applies to all the entities.

Obviously, Respondent does not fit the definition of a company within the meaning of the Act; and neither the statutory language of the Act nor its legislative history suggests Congress intended to include alone a non-publicly traded subsidiary of a publicly traded parent company as a covered employer.

Arguing that ING Groep, N.V. had been named in their June 4, 2004 complaints filed with OSHA, Complainants suggest that "it would be inequitable to penalize complainants for a procedural technicality" on OSHA's part. This argument, however, ignores the fact that complainants' appeal to this office failed to note any error or omission of parties on OSHA's part (ALJ EX 3). In fact, Complainants' silence remained until the day prior to trial when a motion was faxed to this office seeking to "Amend The Complaint To Name Proper Parties". Such motion was abandoned, however, and the following day the case against Respondent alone proceeded to trial.

As to the inability of Complainants to sue the public traded company, ING Groep, N.V., because of its foreign status, despite such speculation on Complainants' part, Complainants have made no attempt to do so[3], even though the Act requires the naming of such a company and their participation is indispensable if Complainants wish to show a commonality of management in purpose and/or if an attempt is made to pierce the corporate veil[4].

As to Complainants' argument that Respondent was an agent of the publicly traded ING Groep, N.V., not only does this ignore the specific requirement that "such" public traded company be a named respondent to the action, but I do not find a subsidiary, as Respondent, to be an "agent" within the meaning of the Act. Though at a distance, Respondent is owned by the publicly traded company.

[3] While there is some question whether the whistleblower provisions of the Act extend to conduct beyond this countries borders, here Complainants' employment and terminations all occurred in the United States.

[4] A remedy used to charge a parent corporation with derivative liability for the actions of its subsidiary. *See* discussion *U.S. v. Best Foods, et al*, 524 US 51 (1998).

ORDER

Respondent's Motion to Dismiss is **GRANTED** and Complainants' Complaints are **DISMISSED** for the reason that Respondent alone is not covered under the Act.

So ORDERED this 17th day of February, 2006, at Covington, Louisiana.

A

C. RICHARD AVERY
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, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. 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.

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).