

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 September 2005

In the Matters of

ROBERT J. JUDITH
Complainant

v.

MAGNOLIA PLUMBING COMPANY, INC.
Respondent

Case No. 2005-SOX-00099

KAREN FEENEY
Complainant

v.

MAGNOLIA PLUMBING COMPANY, INC.
Respondent

Case No. 2005-SOX-00100

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For the Complainants

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For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT**

These cases arise from claims of whistleblower protection under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A ("the Act"), enacted on July 30, 2002. The Act and implementing

regulations at 29 C.F.R. Part 1980 prohibit retaliation by publicly-traded companies against their employees who provide information to their employers, a federal agency, or Congress, alleging violation of any Federal law relating to fraud against shareholders. In this case, Complainant Robert Judith alleges that his employer, Magnolia Plumbing Company, Inc., terminated him due to his knowledge of bribery of government inspectors on respondent's projects as well as knowledge of numerous Occupational Safety & Health Administration ("OSHA") violations. Complainant Karen Feeney alleges that she was terminated due to her knowledge of and complaints to governmental authorities regarding violations of fair wage standards related to employee wages earned in conjunction with governmental contracts.

The Respondent has filed a motion for summary decision on the grounds that it is not subject to the Act because it is not a publicly traded company as defined in Section 806 of the Act; it does not have a class of securities registered under Section 12 of the Securities Exchange Act of 1934; and it is not required to file reports under Section 15(d) of the Securities Exchange Act of 1934. The Complainants filed a Memorandum in Opposition to Respondent's Motion for Summary Judgment.

By its terms, Sarbanes-Oxley applies only to a "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. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company." 18 U.S.C § 1514A(a). In support of its motion for summary judgment, the Respondent has filed the affidavit of Thomas M. Gambriel, the Chief Financial Officer of Magnolia Plumbing, declaring under penalty of perjury that Magnolia Plumbing "is a privately held company headquartered in Washington, D.C." and it "is not a publicly traded company." Mr. Gambriel also stated that "Magnolia Plumbing does not have a class of securities registered under Section 12 of the Securities Exchange Act of 1934. Magnolia Plumbing is not required to file reports under Section 15(d) of the Securities Exchange Act of 1934." Declaration ¶¶ 2, 4.

The complainants have not disputed these assertions. However, they argue that the Act should apply because Magnolia Plumbing has numerous contracts with municipal and federal governments. The Act does cover contractors and subcontractors, but the entity in question must be a contractor or subcontractor of a publicly traded company subject to the provisions of Sections 12 and 15(a) of the Securities Exchange Act of 1934. Federal and municipal governments are not publicly traded companies.

The complainants also make a public policy argument. They say that the purpose of the Act is to protect "whistleblowers" who seek to bring acts of malfeasance before the public and therefore, they should be allowed to proceed with the case. While protecting whistleblowers may be desirable, Congress has not chosen to protect all whistleblowers through the Sarbanes-Oxley Act, whose primary purpose is "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." PL 107-204 (HR 3763). If a company is not publicly traded, the Act simply does not apply. Pursuant to 29 C.F.R. § 18.40, I find that there is no genuine issue of material fact, and the Respondent is entitled to judgment as a matter of law.

In light of this decision, the hearing scheduled for October 6, 2005 is cancelled.

ORDER

IT IS ORDERED that the respondent's motion for summary judgment is **granted**, and the complaints in these matters are **dismissed**.

A

JEFFREY TURECK
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).