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Office of Administrative Law Judges
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Issue Date: 07 February 2006

CASE NO. 2005-SOX-00114

In the Matter of:

DR. JOHN STALCUP,
Complainant,
vs.

SONOMA COLLEGE, et al.,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the whistleblower protection provisions of the Sarbanes-Oxley Corporate and Criminal Accountability Act of 2002 ("SOX," "the Act"), 18 U.S.C. § 1514A.

PROCEDURAL HISTORY

On June 30, 2005, Complainant filed his complaint under the Act with the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA). On August 29, 2005, the Secretary of Labor, acting through the OSHA Regional Administrator, dismissed the complaint on the grounds that Respondents are not covered employers within the meaning of the Act. On September 29, 2005, Complainant filed with the Office of Administrative Law Judges an objection to the dismissal of his complaint and a request for hearing.

The case was assigned to me, and I issued a notice of trial on October 4, 2005, scheduling the trial for November 23, 2005. On November 16, 2005, I issued a notice of briefing schedule and continuance of trial, based on the parties' stipulation to brief the issue of coverage and waive trial until I made a finding of coverage.

On November 30, 2005, Complainant filed his opening brief ("CB") on the issue of whether Respondent is a covered employer within the meaning of the Act. Complaint submitted the accompanying exhibits on December 3, 2005, and they were received by this office on December 5, 2005.

By letters dated December 15, 2005, Respondent's counsel and Complainant's counsel stated that Respondent's counsel was seeking an extension of time for filing her responsive brief but that they were unable to come to an agreement that would accommodate her request. On December 16, 2005, I issued a revised notice of briefing schedule, in which I adjusted the briefing schedule.

On December 23, 2005, Respondent filed its response to Complainant's opening brief ("RB") on the issue of coverage. On January 10, 2006, Complainant filed its reply brief ("CR").

ISSUE

The issue to be decided is whether the whistleblower protection provisions of the Act should be interpreted to cover Respondent, a company that has filed a registration statement with the Securities and Exchange Commission that has neither become effective nor been withdrawn.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Parties' Positions:

Complainant argues that there is a drafting mistake or ambiguity in the whistleblower protection provisions of the Act, based on a perceived inconsistency between the coverage of that section and the definitions section of the Act, as well as the intent and policy behind the Act. (CB at 6-9) Complainant proposes that I resolve this alleged ambiguity by interpreting the whistleblower protection provisions to cover prospective public companies like Respondent. (CB at 9-10).

Respondent argues that the plain language of the whistleblower protection provisions demonstrates that Congress did not intend to cover prospective public companies. (RB at 1-3) Respondent asserts that the coverage provision should be given a narrow interpretation. (RB at 5-6).

Relevant Facts

On November 22, 2004, Respondent filed its Form SB-2 Registration Statement with the Securities and Exchange Commission ("SEC") under the Securities Act of 1933. (RB at 5). Complainant was terminated on April 4, 2005. (RB at 5). Respondent's registration statement had neither become effective nor been withdrawn at the time of the adverse actions alleged in Complainant's complaint. (CB at 5). Further, Respondent states that, as of the date of its brief, the registration statement still had not become effective, and no initial public offering ("IPO") had been consummated. (RB at 5).

Analysis

The whistleblower protection provisions of section 806 of the Act apply 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." (codified at 18 U.S.C. § 1514A(a)).

The first step in statutory interpretation is to examine the plain language of the statute. It is undisputed that Respondent is neither a company with a class of securities registered under section 12 of the Securities Exchange Act nor is it required to file reports under section 15(d) of the Securities Exchange Act. (CB at 6; RB at 2). Thus, under the plain language of section 806 of the Act, Respondent is not a covered employer. As the administrative law judge held in *Flake v. New World Pasta Company*, "Congress has unambiguously manifested its intent in the explicit language of section 1514A(a) [or section 806], which establishes the requisites for coverage under the Act." 2003-SOX-00018 (ALJ July 7, 2003), *aff'd*, ARB Case No. 03-126 (Feb. 25, 2004). Thus, "[i]t is unnecessary to look beyond the four corners of the statute to find a grant of jurisdiction that Congress declined to confer." *Id.* Here, although section 806 by itself appears unambiguous, because Complainant argues that there is ambiguity or evidence of a drafting mistake in the Act, to confirm its meaning I will examine section 806 in the context of the rest of the Act, the legislative intent, and the policy of the Act.

Complainant notes that Respondent falls within the definition of "issuer" provided in the definitions section of the Act. Section 2(a)(7) provides that

> "[t]he term 'issuer' means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C § 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. § 781), or that is required to file reports under section 15(d) (15 U.S.C. § 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. § 77a *et seq*.), and that it has not withdrawn." (codified at 15 U.S.C. § 7201).

Respondent does not fit within either of the first two criteria to be an "issuer," in that it does not have securities registered under section 12 of the Securities Exchange Act nor is it required to file reports under section 15 (d) of the Securities Exchange Act. However, Respondent does fall within the third criterion, in that it has filed a registration statement that has not yet become effective or been withdrawn.

Essentially, Complainant argues, "That the third criterion for publicly traded companies, those in the IPO process, is missing in section 806, but present in the SOX definitions section 2(a)(7) seem[s] anomalous…[and it] seems contrary to the express purpose of SOX which is to protect the investing public." (CB at 7). Complainant argues that I should resolve this alleged ambiguity by finding that Respondent is covered by section 806. Respondent argues in return that Congress intentionally did not include prospective public companies in the coverage of section 806 and that the coverage provision should be given a narrow interpretation. (RB 2-3, 5-6).

Complainant notes that the general definition of "issuer" applies to "all or most other sections of the Act, wherever the term 'issuer' is used." (CB at 8). He cites use of the term in sections 102 (15 U.S.C. § 7212), 201 (15 U.S.C. § 78j-1), 304 (15 U.S.C. § 7243), and 307 (15 U.S.C. § 7245). Complainant also points to section 205(d) (15 U.S.C. § 78j-1), which is a conforming amendment that applies the definition of "issuer" from section 2(a)(7) to the Securities Exchange Act (15 U.S.C. § 78k(f)). Complainant argues, "Since the SOX definitions

in Section 2 apply to the entirety of SOX, the exclusion of the third definition in Section 806 creates an ambiguity this court must resolve." (CR at 2). Complainant is correct that the definition in section 2(a)(7) presumptively applies in those provisions in the Act where the term "issuer" is used in a general, unqualified manner. It is important to note, however, that the definition given in the definitions section of an act is intended to apply only as a default meaning wherever there is a general reference to that term and not where there is a different or more specific use of that term, as in many places of the Act.

More importantly, however, the whistleblower protection provisions in section 806 do not use the term "issuer." Section 806 itself is titled "Protection for Employees of *Publicly Traded Companies* Who Provide Evidence of Fraud." (italics added). In addition, subsection (a) is titled "Whistleblower Protection for Employees of *Publicly Traded Companies*." 18 U.S.C. § 1514A(a) (italics added). Moreover, the provision itself applies to a "*company* with a class of securities…or that is required to file reports…or any officer, employee, contractor, subcontractor, or agent of such *company*." *Id*. Although "company" is not defined in the definitions section of the Act, the applicable regulations define "company" as "any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))." 29 C.F.R. § 1980.101 (2004). Thus, Complainant's arguments based on the definition of "issuer" from section 2(a)(7) and other uses of that term throughout the Act are misguided. Even if the general definition of "issuer" were intended to apply to every use of that term in the Act, there is no reason to apply that definition to section 806 where the term "issuer" is not used.

If Congress had intended for section 806 to have the same coverage as section 2(a)(7), it could have (and presumably would have) used the general term "issuer," as it did in most other sections of the Act. However, Congress' use of the term "publicly traded companies" in section 806, instead of the term "issuer," seems to make a clear statement of different coverage. The use of the term "publicly traded companies" seems to emphasize that the whistleblower protection provisions apply only to companies that are *already* publicly traded. In fact, as Respondent notes, section 806 only applies to "two specific classes of publicly traded companies." (RB at 1).

In suggesting that there was a drafting mistake in the Act, Complainant asks, "Why would Congress want to include prospective public companies under the third criterion for most of the remedies available under the Act, yet immunize these same companies from liability only under the whistleblower protection section of the [A]ct?" (CB at 8). While the reason may not be clear on the face of the Act, it is not proper to assume that Congress made a mistake in drafting the Act because prospective public companies are included in some provisions of the Act but not others. Rather, the fact that Congress used the general term "issuer" in most places in the Act (and presumably intended the meaning it provided in section 2(a)(7)) suggests that those instances where it used different terms or criteria for coverage were intentional.

For example, the Act includes various provisions that apply to different types of issuers or to only a subset of those issuers covered by the general definition in section 2(a)(7). *See, e.g.,* section 408 ("issuers reporting under section 13(a) of the Securities Exchange Act of 1934 (including report filed on Form 10-K), and which have a class of securities listed on a national

securities exchange or traded on an automated quotation facility of a national securities association…")(15 U.S.C. § 7266); or section 802 ("issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j-1(a)) applies")(15 U.S.C. § 1520).

Moreover, it should be noted that other sections of the Act, in addition to section 806, apply only to companies that fall within the first two criteria of section 2(a)(7). For example, section 807 applies to "an issuer 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))." 18 U.S.C. § 1348. Similarly, Section 1105 applies to "any issuer that has a class of securities registered pursuant to section 12, or that is required to file reports pursuant to section 15(d)." 15 U.S.C. § 78u-3. Thus, the fact that other sections of the Act apply to the same two categories of companies as section 806 undermines the argument that section 806 is the result of a drafting mistake.

Complainant notes that his review of the legislative history for the Act "yielded not a clue as to any rational basis for the exclusion of the third criterion from [section 806] of the Act." (CB at 8 n.2). That Congress provided for different coverage in section 806 than section 2(a)(7) and did not explain its reasons for doing so does not prove that a drafting mistake was made. Courts sometimes find that Congress has made a mistake in drafting a statute where the plain language appears to make a drastic change in the established law or the effect of the statute, but that change is not discussed in an otherwise extensive legislative history. *See, e.g., City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113 (2005)(Stevens, J., concurring); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004); *Chisom v. Roemer*, 501 US 380, 396 n.23 (1991); *Church of Scientology of California v. I.R.S.*, 484 U.S. 9, 17-18 (1987). However, this interpretive tool is not universally applied. *See, e.g., Chisom v. Roemer*, 501 US 380, 406 (1991)(Scalia, J., dissenting)("We are here to apply the statute, not legislative history, and certainly not the absence of legislative history."); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) ("[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute."); *Williams v. U. S.*, 458 U.S. 279, 295 (1982)(Marshall, J., dissenting). Moreover, a conclusion that a lack of explanation in the legislative history is evidence of a mistake often depends on other circumstances, including how drastic the change is and how unlikely it is that Congress had a rational reason for making the change.

The circumstances here do not support a conclusion that Congress' silence is evidence of a drafting mistake. The more limited coverage of section 806 compared with that of section 2(a)(7) is not very drastic, in that the number of prospective public companies that have filed registration statements is relatively few compared with the large number of public companies subject to the whistleblower provisions and the even larger number of wholly private companies not subject to them. As discussed above, the more limited coverage of section 806 is also not anomalous, in that other sections of the Act similarly apply to a different or smaller group of companies than those covered by section 2(a)(7). In addition, there are possible rational reasons why Congress may have decided to limit the coverage of section 806. Unlike many of the other sections of the Act that merely add SEC reporting requirements or increase regulation by the SEC, section 806 creates a rather significant private right of action for employees. Because section 806 is different in both purpose and effect from most of the other provisions of the Act,

there are logical reasons why Congress may have decided not to apply section 806 to prospective public companies. For all of these reasons, the absence of an explanation for the coverage chosen in section 806 should not be considered evidence of a drafting mistake.

Complainant also argues that the coverage of section 806 is contrary to the policies underlying the Act. He asserts, "If Congress provided coverage and protection for investors from [prospective public companies] under SOX, it is difficult to believe that Congress intended to exclude protection for whistleblowers attempting to protect the interests of these same investors from wrongdoing by this class of companies." (CR at 5). Although the difference in coverage may seem incomprehensible or unwise due to Congress' failure to clearly explain its rationale, it is not my role to second-guess their policy choice or rewrite the statute, in the absence of clear evidence of a drafting mistake. "[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do….[D]eference to the supremacy of the legislature, as well as recognition that congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *U.S. v. Locke*, 471 U.S. 84, 95 (1985). Here, the ordinary meaning of the words used in section 806 does not include prospective public companies like Respondent, and there is no persuasive evidence that the provision should be interpreted otherwise.

For all of these reasons, I find that Respondent is not a covered employer under the Act. Consequently, the complaint must be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that this case be dismissed.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

ABT:eh

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