



In the Matter of:

**ANTONIO ANDREWS,
NIQUEL BARRON,**

ARB CASE NO. 06-071

COMPLAINANTS,

**ALJ CASE NOS. 2005-SOX-050
2005-SOX-051**

v.

DATE: August 29, 2008

ING NORTH AMERICA INSURANCE CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Lorna Sills Katica, Esq., *Katica Law Group, LLC*, Atlanta, Georgia

For the Respondent:

Kurt A. Powell, Esq., *Hunton Williams, LLP*, Atlanta, Georgia

FINAL DECISION AND ORDER OF REMAND

Antonio Andrews and Niquel Barron (the Complainants) appeal from a recommended decision and order granting a motion to dismiss their joint complaint brought under the employee protection section of the Sarbanes-Oxley Act (SOX).¹ We reverse and remand.

¹ 18 U.S.C.A. § 1514(A) (West 2007).

BACKGROUND

On June 4, 2004, the Complainants filed a whistleblower complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). They alleged that ING Groep, N.V., a Dutch corporation, which is listed on the New York Stock Exchange, and one of its subsidiaries, ING USA Holding Corporation, and Derrick Reynolds, Allen Wilson, and Robert Guinn, individually, conspired to terminate them for "reporting significant security problems with ING's computer network" in violation of SOX's whistleblower provisions. SOX's section 806 prohibits certain covered companies and their contractors, subcontractors, and agents from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer, or a Federal agency, or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. SOX also protects employees who file, testify in, participate in, or otherwise assist in a proceeding filed or about to be filed relating to a violation of the aforesaid fraud statutes, SEC rules, or federal law.²

The complaint was served on ING North America Insurance Corporation (ING NAIC), the corporation that employed and terminated the Complainants. ING NAIC is a subsidiary of a subsidiary of a subsidiary of a subsidiary of ING Groep, N.V. and is not a publicly traded corporation.³ OSHA investigated the allegations and treated ING NAIC as the sole respondent.⁴ OSHA found that the SOX did not cover ING NAIC because it did not have a class of securities registered under section 12 and was not required to file reports under section 15(d) of the Securities Exchange Act of 1934.⁵ OSHA further determined that because Andrews and Barron had not shown that they engaged in protected activity, it would not investigate whether ING NAIC might be a covered employer because of its status as a wholly-owned subsidiary of ING Groep, N. V., which, as noted, is a publicly traded foreign corporation.⁶

² *Id.*

³ Administrative Law Judge's (ALJ) Feb. 17, 2006 Decision and Order Granting Respondent's Motion to Dismiss (D. & O.) at 4.

⁴ ALJ Exhibit (ALJX) 2 (Mar. 24, 2005 OSHA Determination) at 1.

⁵ *Id.* A covered employer is a company with "a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or . . . 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.A. § 1514A(a).

⁶ ALJX 2 at 1-2.

When the Complainants objected to OSHA's findings, the case was assigned to a Labor Department Administrative Law Judge (ALJ), and a hearing date was scheduled. Upon joint motion, the hearing was postponed to November 30, 2005. On the day before the hearing, the Complainants filed a Motion to Amend the Complaint to add the parent company, ING Groep N.V., as a respondent. The ALJ found that the Complainants "abandoned that motion," and the trial proceeded as scheduled.⁷ At the close of the Complainants' case, ING NAIC moved to dismiss since the publicly traded parent, ING Groep, N.V., was not a party and the Complainants had not proved that ING NAIC was a covered employer under SOX. ING NAIC also argued that the Complainants had not proven protected activity.⁸ The ALJ took the motion under advisement and completed the hearing. The parties later briefed the ALJ on the coverage issue. The ALJ recommended that the complaint be dismissed because the Complainants had not proved that ING NAIC is a covered employer. The Complainants appealed to the Administrative Review Board (ARB or Board).

DISCUSSION

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under SOX.⁹ The Board reviews the ALJ's factual determinations using the substantial evidence standard.¹⁰ In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision"¹¹ Therefore, the Board reviews the ALJ's conclusions of law de novo.¹²

The record demonstrates that ING NAIC is not a covered company under SOX because it is not registered under the Securities Exchange Act's section 12 nor is it required to file reports under section 15(d).¹³ But the record also shows that ING Groep, N.V. is a publicly traded company listed on the New York Stock Exchange and that ING NAIC is a four-time removed

⁷ D. & O. at 2 n.2.

⁸ Hearing Transcript, p. 455-459.

⁹ Secretary's Order No. 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a) (2007).

¹⁰ 29 C.F.R. § 1980.110(b).

¹¹ 5 U.S.C.A. § 557(b) (West 1996).

¹² Cf. *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) (analogous provision of Surface Transportation Assistance Act); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991) (same).

¹³ D. & O. at 4.

subsidiary of ING Groep, N.V. The Complainants here repeat their argument to the ALJ that ING NAIC acted as an agent of ING Groep, N.V. and therefore is covered since SOX applies to any public “company . . . or any . . . agent of such company.”¹⁴ They also argue that they did not abandon their attempt to add ING Groep, N.V. as a respondent. In rejecting the Complainants’ agency argument, the ALJ wrote:

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.^[15]

Shortly after the ALJ’s decision, we issued *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*¹⁶ There, the ALJ relied upon our decision in *Flake v. New World Pasta Co.*¹⁷ in concluding that the SOX does not provide a cause of action against a non-public subsidiary. We rejected that reading of *Flake* and also the proposition that a subsidiary cannot by definition be an agent.

Nothing in *Flake*, the Act [SOX], the interim and final regulations, and the common meaning of the term “agent” gives us reason to conclude that a subsidiary, or an employee of a subsidiary, cannot *ever* be a parent’s agent for purposes of the employee protection provision.

Whether a particular subsidiary or its employee is an agent of a public parent for purposes of the SOX employee protection provision should be determined according to principles of the general common law of agency. General common law principles of agency are set forth in the Restatement of Agency, a “useful beginning point for a discussion of general agency principles.”^[18]

Therefore, on remand the Complainants must be given an opportunity to prove by a preponderance of evidence that ING Groep, N.V. is a covered company and that ING NAIC acted as its agent.

¹⁴ 18 U.S.C.A. § 1514(A).

¹⁵ D. & O. at 5.

¹⁶ ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006).

¹⁷ ARB No. 03-126, ALJ No. 2003-SOX-018 (ARB Feb. 25, 2004).

¹⁸ *Klopfenstein*, slip op. at 13-14.

Furthermore, SOX does not require a complainant to name a corporate respondent that is itself “‘registered under section 12 . . . or that is required to file reports under section 15(d)’ so long as the complainant names at least one respondent who is covered under the Act as an ‘officer, employee, contractor, subcontractor, or agent’ of such a company.”¹⁹ Thus, since they do not have to name ING Groep, N.V. as a respondent, the issue whether or not the Complainants abandoned their motion to amend the complaint to name ING Groep, N.V. is moot.

CONCLUSION

Since the record contains at least some evidence that ING Groep, N.V. is a covered company for SOX purposes and that ING NAIC is its subsidiary, and since the Complainants are not required to name ING Groep, N.V. as a respondent and are entitled to prove that ING NAIC acted as its agent, we **DENY** the motion to dismiss and **REMAND** for proceedings consistent with the foregoing.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

¹⁹ *Id.* at 13.