U.S. Department of Labor

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Issue Date: 03 December 2004

Case No.: 2005-SOX-00006

In the Matter of

LUCA CONCONE

Complainant

v.

CAPITAL ONE FINANCIALCORPORATION;
CAPITAL ONE BANK (EUROPE) PLC;
CAPITAL ONE FINANCIAL INTERMEDIARY SPA

Respondent

RECOMMENDED DECISION AND ORDER
DISMISSING THE COMPLAINT

This proceeding arises from a complaint filed on June 24, 2004 by Luca Concone (Complainant) against Respondent alleging that Respondent violated § 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) by discharging him from employment on April 23, 2004. The applicable regulations are contained in 29 C.F.R. Part 1980, effective on August 24, 2004. The Act protects employees of publicly traded companies from acts affecting their employment because the employee has acted

> to provide information . . . [to a Federal regulatory or law enforcement agency, member of Congress, a supervisor of the employer, etc.] 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 . . . .

18 U.S.C. § 1514A(a)(1).

On or about October 5, 2004 the Occupational Safety and Health Administration (OSHA) denied the complaint. On November 3, 2004 Complainant requested a formal hearing. This case was then assigned to me to hear and decide. On November 9, 2004 I issued an "Order to Show Cause Why the Complaint Should Not be Dismissed" (Order). Complainant and Respondent

filed initial responses to the Order on November 26 and additional argument on December 2, 2004.

This case presents the question of whether Complainant, a foreign national whose entire employment by Respondent was outside the United States, is a covered "employee" under the Act. For the reasons set forth below, I find that the Act does not cover persons who were employed outside the United States, and therefore the complaint must be dismissed.[1]

Complainant, a national of Italy, concedes that he was employed by Respondent only in the United Kingdom and Italy. (Complainant's 11/26/04 Response, p. 2)[2] However, Complainant notes that § 1107 of the Sarbanes-Oxley Act, 18 U.S.C. § 1513(e), which prohibits retaliation against persons who report a "Federal offense" to a "law enforcement officer," has extraterritorial effect, pursuant to the pre-existing provision in 18 U.S.C. § 1513(d).[3] Complainant argues, "Therefore, the Act protects whistleblowers, regardless of their nationality or location . . . ." (Complainant's 11/26/04 Response, pp. 4-5; Complainant's 12/2/04 Reply, pp. 1-2)

Based on the same statutory provisions, Respondent argues the contrary. Respondent posits that in enacting Sarbanes-Oxley to provide extraterritorial application "to the criminal

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[1] Respondent argues, in addition, that the complaint should be dismissed because (1) Complainant was not directly employed by the only publicly traded company named by him as a respondent, Capital One Financial Corporation, (2) the two other named companies are non-public wholly-owned subsidiaries of Capital One Financial Corporation, and (3) Capital One Financial Corporation "does not share a commonality of management and purpose with" the other named companies. (Respondent's 11/26/04 Response, pp. 4-5) I make no determination regarding the factual or legal merits of this argument. I note, however, the cogent ruling of Administrative Law Judge Stuart A. Levin that under the Act a covered employer is responsible for the conduct of its wholly-owned non-public subsidiaries. Morefield v. Exelon Services, Inc, et al., 2004-SOX-00002 (Jan. 28, 2004).

[2] The complaint states that Complainant was employed on November 4, 2002 in England by Capital One Bank (Europe) PLC as United Kingdom Country Manager, and on March 6, 2003 also was appointed Chairman of the Board of Capital One Financial Intermediary SPA in Italy. Complainant alleges that as a result of his protected activity under the Act, including notifying Respondent of "accounting irregularities" under "Italian law," Respondent harassed him in "violation[] of his rights under United Kingdom and European Union Laws . . . and finally terminated [his] employment . . ." (Complaint, ¶¶ 10, 12, 13, 16) Complainant further alleges that some of Respondent's misconduct reported by him violates Italian criminal law. (Complaint, ¶ 17)

[3] Section 1513(d) states: "There is extraterritorial Federal jurisdiction over an offense under this section." In addition to the prohibitions in § 1107 of the Sarbanes-Oxley Act, 18 U.S.C. § 1513(e), set forth above, § 1513 prohibits retaliatory killing or attempted killing of a witness, victim, or informant (18 U.S.C. § 1513(a)), and retaliatory bodily injury or damage to property (18 U.S.C. § 1513(b)). Violations of all these provisions carry criminal penalties. Violation of § 1513(e) is punishable by a fine or imprisonment up to 10 years, or both.

sanction in Section 1107" and failing to add an extraterritoriality provision extending § 806 to acts outside the United States, Congress revealed the intent to limit "the civil whistleblowing protection only to U.S. citizens working within the United States." (Respondent's 11/26/04 Response, p. 6)

The language of the Act and the regulations do not provide a definitive answer to the question of whether an individual who was not employed in the United States is a covered "employee." The Act does not contain a definition of "employee." The regulation at 29 C.F.R. § 1980.101 defines "employee" as follows:

> *Employee* means an individual presently or formerly working for a company . . . or an individual whose employment could be affected by a company . . . .

The Department of Labor has advised that the permanent regulations in 29 C.F.R. Part 1980 are intentionally silent regarding the question at hand. In its commentary to the final regulations the Department noted two relevant private sector suggestions to change § 1980.101 during the comment period prior to the promulgation of the final regulations. The first suggestion was that the "regulatory definition of 'company' should exclude foreign issuers to the extent that it relates to foreign national employees who do not work in United States facilities of the foreign issuers." The second was that the Act "should not apply to employees employed outside the United States by United States corporations or their subsidiaries . . . ." To these suggestions the Department replied:

> The purpose of this rule is to provide procedures for the handling of Sarbanes-Oxley discrimination complaints; this rule is not intended to provide statutory interpretations. Because the regulatory definition of "company" simply applies the language used in the statute, [the Department] does not believe any changes to the definition are necessary.

69 Fed. Reg. No. 163, p. 52105 (Aug. 24, 2004).

In Carnero v. Boston Scientific, Civ. Action No. 04-10031-RWZ, 2004-WL-1922132 (U.S. Dist. Ct., D. Mass., Aug. 27, 2004), involving a foreign national, the complaint under the Act was dismissed because the employee "worked exclusively overseas." The Court held that, "Nothing in [the Act] remotely suggests that Congress intended it to apply outside the United States." (Slip op. at 3) The Court relied on Smith v. United States, 507 U.S. 197 (1993) and Foley Bros. v. Filardo, 336 U.S. 281 (1949) for the proposition that the laws of the United States are meant to apply only within the United States, "absent any evidence of contrary intent." (Slip op. at 2)

I agree with Respondent's core contention that in Congress' failure to make § 806 apply extraterritorially – while doing so for violation of the criminal provision in § 1107 of the Sarbanes-Oxley Act, 18 U.C. § 1513(e) – it revealed a clear intention not to extend the protection

of § 806 to persons who were employed wholly outside the United States.[4] Under these circumstances, Complainant's contrary argument that the extraterritoriality provision in the criminal code at 18 U.S.C. § 1513(d) applies to violations of § 806, which allows only non-criminal remedies, simply has no foundation. In this regard, it also should be noted that the Department of Labor has authority to enforce § 806 through the medium of a civil complaint filed by a discriminate, but it does not have jurisdiction over violations of § 1107 of Sarbanes-Oxley (18 U.S.C § 1513(e)). Violations of § 1107 must be prosecuted criminally by the U.S. Department of Justice. As Respondent argues, 18 U.S.C. § 1513 "is a criminal statute that only applies to prosecution by the United States Government . . . . [It] does not create a private cause of action." (Respondent's 12/2/04 Memorandum, pp. 3-4)

Complainant attempts to distinguish Carnero because in that case no allegations of criminal misconduct were made, while he "reported not only accounting and financial irregularities, but also criminal acts . . . to a federal investigative body (the DOL)." Complainant states, "In retaliation for reporting such criminal misconduct [Respondent] stepped up its harassment and 'interference' with [his] 'employment and livelihood', as reported to the DOL on July 15, 2004." (Complainant's 11/26/04 Response, p. 6; Complainant's 12/2/04 Reply, p. 5) I find that here Complainant misconstrues § 1107 of the Sarbanes-Oxley Act, 18 U.S.C. § 1513(e). As noted above, that provision prohibits retaliatory acts against persons because they have reported a "Federal offense" to a "law enforcement officer." (Section 1107 describes such prohibited acts as "any action harmful to any person, including interference with the lawful employment or livelihood of any person.") However, Complainant has failed to set forth any "Federal offense" – i.e., any violation of U.S. law – that was committed by Respondent, other than the alleged violation of § 806 of Sarbanes-Oxley, itself. As I have found that § 806 does not have extraterritorial application, no Federal offense has been shown.[5]

Complainant concludes his argument with reference to Supreme Court decisions that he contends "clearly favor the extraterritorial application of United States federal laws." (Complainant's 11/26/04 Response, pp. 7-9)[6] However, in none of these cases was a clear intent

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[4] I need not and do not decide whether Respondent is correct in arguing that § 806 applies only to U.S. citizens working within the United States. However, I see no reason why the Act should not protect foreign nationals working in the United States. Nor do I conclude that the District Court's decision in Carnero turned on the circumstance that the employee in that case was a foreign national, as is Complainant in the instant case. Although the Court referred to the employee's foreign nationality, Carnero appears to be based solely on the fact that the employee was employed outside the United States.

[5] Complainant's argument is circular: § 806 applies because it has extraterritorial effect, and it has extraterritorial effect because it involves his report of a violation of § 806 which is a "Federal offense" under § 1107.

[6] Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993); United States v. Sisal Sales Corp., 274 U.S. 268 (1927); Steele v. Bulova Watch Co., 344 U.S. 280 (1952); Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970); Kawakita v. United States, 343 U.S. 717 (1952); Ford v. United States, 273 U.S. 593 (1927).

of Congress shown to withhold exterritorial application of the involved statute, as it has been shown in the instant case with regard to the Act. Nor do those decisions conflict with the general rule expressed by the Supreme Court in Smith v. United States, supra, and Foley Bros. v. Filardo, supra, that the laws of the United States are meant to apply only within the United States, absent evidence of the contrary intent. Foley Bros. is particularly instructive as it is somewhat similar to the instant case in that the plaintiff was an overseas employee who sued his U.S. employer. The employee worked on federal projects in Iraq and Iran under the employer's contracts with the United States. He sued for overtime wages allegedly due under the Federal Eight Hour Law (time-and-a-half pay for all hours over eight in a day) applicable to contracts to which the United States was a party. Violation of the law made an employer liable for back pay as well as penalties. Although the applicability language of the law was unlimited in that it applied to "Every contract made to which the United States is . . . a party," the Supreme Court held that the law did not apply to contracts involving work in a foreign country. The Court first stated the following principle:

> The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States * * * is based on the assumption that Congress is primarily concerned with domestic conditions.

336 U.S. 281, 285. The Court then expressed concern about whether the United States had the authority, and whether Congress intended, to regulate the working hours "of a citizen of Iran who chanced to be employed on a public work of the United States in a foreign land." 336 U.S. at 286. Although the Court discussed the difference between overseas work performed by a U.S. citizen and by a foreign national, its primary concern was that if the law had extraterritorial application it would attempt to give the United States "authority . . . over the labor laws or customs of Iran or Iraq" although "nothing [was] brought to our attention indicating that the United States had been granted by the respective sovereignties [such] authority . . . ." The Court went on to state:

> An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.[7]

336 U.S at 286. With this problem in mind, the District Court in Carnero v. Boston Scientific Corp., supra, expressed concern that

> application of [the Act] overseas may conflict with foreign laws, which is especially likely in this case where plaintiff seeks to be reinstated to his job.

[7] Presumably, a country's labor laws would apply not only to its own citizens but also to foreigners working within its borders.

(Slip op. at 3) Similarly, in the instant case Complainant seeks reinstatement, back pay, front pay, reimbursement for lost pension, "and other benefits in an amount to be determined." (Complaint, p. 5, ¶ (2)) Were the Act to be given extraterritorial application in the instant case, the requested remedy could conflict with the laws of England and Italy, where Complainant was employed by Respondent. This is additional reason to conclude that Congress did not intend to make the Act apply to persons employed wholly outside the United States.

In sum, I find that Complainant is not a covered employee under the Act because he was employed by Respondent outside the United States. Consequently, the complaint herein must be dismissed.

ORDER

It is ORDERED that the complaint herein is dismissed.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).