



Issue Date: 19 October 2004

CASE NO. 2004-SOX-00074

In the Matter of:

Sean Gallagher,
Complainant,

vs.

**Granada Entertainment USA, ITV plc,
Paul Jackson, Jane Turton and Stephen Davis ,**
Respondents.

Order Partially Granting Complainant's Motion to Add Individual Respondents

The Assistant Secretary of Labor for Occupational Safety and Health found Granada Entertainment USA and ITV plc had not violated Section 806 of the Sarbanes-Oxley Act of 2002¹ (Act) when they discharged Complainant from employment. The findings were forwarded to the Office of Administrative Law Judges that day, with copies of the original complaint documents. Complainant's objections to the finding initiated this proceeding. He has moved to join as parties all the individuals and entities named in his OSHA complaint.

The complaint has gone through several iterations. The original appears to have been filed by e-mail on March 18, 2004, and assigned OSHA Complaint Number 58072. It was not a pleading under Rule 8(a), Fed. R. Civ. P., but a complaint in the ordinary sense, as the Secretary's regulations contemplate. 29 C.F.R. § 1980.103(b); *see also* the discussion of the public comments concerning what complaints should contain published at 69 F.R. 52104, 52106 (Aug. 24, 2004) (adopting the final procedural rules for Sarbanes-Oxley claims). Complainant supplemented the original filing with copies of letters he addressed to the Attorneys General of California and New York, and to the Department of Labor office in New York, reporting suspected violations of securities, tax, employment and immigration laws by the Respondents' officers, in-house and outside lawyers, accountants and employees, identifying many individuals by name. Exhibit B to his Notice of Objections to the OSHA findings lists the other occasions when he submitted additional materials to the investigator.

The most complete claim for employment protection under the Act is the revised complaint, which was assigned OSHA Complaint Number 63292. He described in it his termination on February 9, 2004 by Stephen Davis (then the President of Granada America and formerly the President and Chief Executive Officer of Carlton America), and Jane Turton (the

¹ 18 U.S.C.A. § 1514A (West Supp. 2004).

Commercial Director of ITV/Granada UK), that was to become effective as of May 20, 2004 when his employment contract expired. The corporate Respondents agree that these two officers met with Complainant at its Sherman Oaks, California offices (Davis in person and Turton via telephone from London) on February 9, 2004 to inform him of this decision. Opposition to Request to Add Parties at 7 & Ex. B (Declaration of S. Davis). Before that meeting Paul Jackson, the Chief Executive Officer of Granada America, and Turton had decided Complainant's employment would not be extended. *Id.* at Ex. N (Declaration of P. Jackson).

Most other whistleblower statutes give employees remedies against their employer, so a complainant's employer is the proper respondent. *See e.g., Fox v. EPA*, 2004-CAA-4 (ALJ Mar. 17, 2004) (dismissing eight individuals named as respondents in an employment protection claim filed under several whistleblower Acts, including Clean Air Act; the Comprehensive Environmental Response, Compensation and Liability Act; the Safe Drinking Water Act; the Toxic Substances Control Act; the Federal Water Pollution Control Act; and the Solid Waste Disposal Act). That dismissal relied on the decisions of the Administrative Review Board in *Bath v. United States Nuclear Regulatory Commission*, ARB No. 02-041, ALJ No. 2001-ERA-41 (ARB Sept. 29, 2003) and *Lewis v. Synagro Technologies, Inc.*, ARB No. 02-072, ALJ No. 2002-CAA-12 (ARB Feb. 27, 2004). Ms. Fox failed to show "that anyone other than her actual employer controlled the terms, conditions and privileges of her employment." The judge found that "only her employer can provide [her] the affirmative relief she seeks" *Fox v. EPA*, *supra*, at 3.

The Sarbanes-Oxley statute and regulations are broader than previous whistleblower protections, and do not restrict the parties to a complainant and an employer. *See, e.g.*, the text of 18 U.S.C. § 1514A(b)(2)(B), that requires the Secretary to give notice that a complaint has been filed to both "the employer" and "the person named in the complaint."

Final regulations adopted to implement the Act published at 69 F.R 52104 *et seq.* (Aug. 24, 2004), and codified at 29 C.F.R. § 1980.101, define a "named person" broadly. The term includes "the employer and/or the company or company representative named in the complaint who is alleged to have violated the Act." The summary and discussion in the final rule says:

The definition of "named person" includes the employer as well as the company and company representative who the complainant alleges in the complaint to have violated the Act. Thus, the definition of "named person" will implement Sarbanes-Oxley's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action. We anticipate, however, that in most cases the named person likely will be the employer." 69 F.R 52104, 52105 (Aug. 24, 2004).

The definition of "company representative" in 29 C.F.R. § 1980.101 also is broad, encompassing "any officer, employee, contractor, subcontractor or agent of a company."

Two parts of the final regulations should be harmonized with these definitions. Each "named person" has an opportunity to preempt a full investigation by demonstrating to OSHA with clear and convincing evidence at an early meeting that he or she "would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or

conduct.” 29 C.F.R. § 1980.104(c). This implies that only someone in a position to take unfavorable personnel actions would be a “named person.”

If OSHA determines a full investigation is warranted, 29 C.F.R. § 1980.104(e) guarantees each “named person” an opportunity to (1) learn the substance of the evidence supporting the complaint, by reviewing redacted confidential statements or summaries of them; (2) submit a written response; (3) meet with the investigator to present statements in support of the position that there was no discrimination against the complainant; and (4) present factual and legal arguments about why no preliminary relief should be awarded. 69 F.R. 52104, at 52107. These procedural safeguards also imply that any “named person” would have had direct authority over a complainant, and are consistent with the assumption that the employer and the named person(s) ordinarily are the same.

These guaranteed procedures were included to implement the Supreme Court’s determination in *Brock v. Roadway Express, Inc.*, 481 U. S. 252 (1987), that the Secretary needed to have reliable checks against mistaken decisions in place before ordering the preliminary reinstatement of whistleblowers. *Brock* involved the Surface Transportation Assistance Act of 1982.² The Act incorporates a similar preliminary reinstatement remedy. *See*, 18 U.S.C.A. § 1514A(b)(2) [incorporating the remedies in § 519 (the employee protection provision) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, *codified at* 49 U.S.C.A. § 42121(b)(2)(A) (West Supp. 2004)]; 69 F.R. at 52107. Interim relief may be granted pending a full trial when the employer has had the opportunity to protect its property interests (*viz.*, its payroll costs) by learning the substance of the employee’s allegations and proof of discrimination, responding in writing, meeting the investigator, and presenting rebuttal evidence. It is not entitled to confront and cross-examine witnesses then.

The materials transmitted here with the findings do not show whether OSHA followed these procedures for individuals or entities besides Granada Entertainment USA and ITV plc. If it did not, procedural errors cannot be remedied now, for a judge may not remand the matter to OSHA. 20 C.F.R. § 1980.109(a). Any error is harmless, however. The property interests implicated by preliminary reinstatement solely are those of employers, who pay the whistleblower’s salary and benefits, not those of individual “named persons.” Moreover, no preliminary relief was ordered.

This is a *de novo*, on the record proceeding. 5 U.S.C. A. § 554(a) (West 2004); 29 C.F.R. § 1980.107(b). Individuals and entities may be added as parties when they were not joined below through error. Based on the allegations Complainant made in his revised complaint (OSHA Complaint Number 63292), and the declarations attached to the opposition to the request to add parties, the executives named as those who terminated Complainant’s employment may be added as “named parties.”

Complainant seeks much more, however. He would join “any person or business entity . . . whose acts in concert with or at the direction of the Employer . . . lead to” his discharge. Motion at 3. Respondents estimate that would add more than 30 individuals or entities. The Secretary’s regulations do not contemplate anything approaching that unwieldy

² Codified at 49 U.S.C.A. § 31105 (West Supp. 2004).

number of respondents in a proceeding, which may explain why OSHA treated the corporate employers as the Respondents. Only individuals who were Complainant's superiors at Granada Entertainment USA or ITV plc could discriminate against him "in the terms or conditions of his employment" as Congress used the phrase in 18 U.S.C. § 1514A(a) and the Secretary applied it in 29 C.F.R. § 1980.102(a).

The Act does permit more than reinstatement, by allowing the Secretary to award "compensation for any special damages sustained as a result of the discrimination." 18 U.S.C. § 1514A(c)(2)(C); 29 C.F.R. § 1980.109(b). The availability of damages does not convert this statutory proceeding into a common law tort action, permitting joinder of persons or entities who were not the Complainant's superiors as if they were joint tortfeasors.

Order

It is ordered that:

1. Paul Jackson, the Chief Executive Officer of Granada America, Jane Turton, the Commercial Director of ITV/Granada UK, and Stephen Davis, President of Granada America are joined as Respondents, and the caption of the proceeding is amended as stated above;
2. Counsel for the current corporate Respondents shall forward a copy of this order to those three corporate officers, and file a statement confirming that service within 14 days;
3. The three individuals shall file an appearance personally or by counsel within 14 days after this order is served on them; and
4. The three individuals shall file statements of their position in conformity with the notice of trial and pretrial order, as amended.

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WILLIAM DORSEY
Administrative Law Judge