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Issue Date: 19 September 2005

Case No: 2005-SOX-0057

In the Matter of

LAWRENCE G. BOTHWELL,
Complainant,

v.

AMERICAN INCOME LIFE,
Respondent.

RECOMEMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

On May 31, 2005, American Income Life (AIL) filed a Motion for Summary Decision, pursuant to 29 C.F.R. §§ 18.40 and 18.41(a). AIL argues that Lawrence G. Bothwell's (Complainant) complaint lacks jurisdiction because he cannot show that AIL is subject to the provisions of the Sarbanes-Oxley Act (SOX or the Act) or that Complainant is an employee entitled to the protections of the Act. On June 30, 2005 Complainant filed a Response. AIL then filed a Reply on July 8, 2005.

In his Response, Complainant added Torchmark Corporation (Torchmark) as a Respondent. Finding that Complainant had raised an issue concerning whether Torchmark should have been included in this matter, this Court Ordered that Torchmark be added as a Respondent with leave to address its status as a respondent. On August 16, 2005 Torchmark filed an Objection To Being Added as a Respondent. Complainant then filed a Response on August 31, 2005 and Torchmark filed a Reply on September 7, 2005.

FINDINGS OF FACT

The following facts are not in dispute:

1. Complainant was hired by an independent company to act as an insurance agent in Oklahoma.

2. AIL appointed Complainant with authority to sell AIL's products. Complainant signed an "agent contract" with AIL. This contract labeled Complainant's position

as an agent and stated that he was not an employee of AIL, but would act as an independent contractor. (RX C). [1]

3. Complainant worked for AIL from July 2004, until November 2004. During this time, he only worked for AIL. (CX D).

4. Complainant alleges AIL required he use a "canned presentation" that was taught to him during AIL's training sessions. Complainant alleges he was reprimanded for performing "needs-based-analysis" instead of the AIL presentation. (CX D).

5. Except for one week, Complainant alleges he was not allowed to set his own appointment schedule or his own work hours. Also, all of his work was completed in AIL's Oklahoma City office. (CX D).

6. Complainant alleges AIL required that Complainant join a union and pay monthly dues. AIL also required that Complainant be subject to the terms of a collective bargaining agreement. (CX D).

7. Complainant was terminated in November, 2004.

8. On February 14, 2005, Complainant filed a complaint with the Department of Labor under Section 806 of the Act. The complaint was filed against AIL and references AIL as being "a TMK subsidiary." The complaint make no further mention concerning Torchmark.

9. The complaint was timely filed as to AIL.

10. Complainant alleges he was terminated in November 2004, for raising concerns regarding AIL's implementation of standards and ethics in its marketing structure.

11. AIL is a wholly-owned subsidiary of Torchmark.

12. AIL is not a publicly traded company with securities registered under Section 12 of the Securities Exchange Act of 1934, nor is it subject to the reporting requirements of Section 15(d) of that Act.

13. Torchmark is a publicly traded company with securities registered under Section 12 of the Securities Exchange Act of 1934, and is it subject to the reporting requirements of Section 15(d) of that Act.

[1] AIL submitted factual citations with its Motion for Summary Decision and its Reply. These documents will be referenced as (RX). Complainant submitted factual citations with his Response. These documents will be referenced as (CX). Torchmark Exhibits will be referenced as (TX).

14. In a March 22, 2005 letter Complainant allegedly sent to OSHA, Complainant requests OSHA "commission again (or anew) an investigation into the matter between TMK, AIL and I."

15. On April 4, 2005, the OSHA Regional Administrator found that AIL was not a publicly traded company with securities registered under Section 12 of the Securities Exchange Act of 1934, nor is it subject to the reporting requirements of Section 15(d) of that Act. The OSHA Regional Administrator dismissed the complaint.

16. AIL was the only company investigated by OSHA in regard to this complaint.

17. On May 3, 2005, Complainant filed an objection to the OSHA findings. The objection only names AIL as violating the Act.

18. There is no allegation or evidence that Complainant was ever an employee of Torchmark.

DISCUSSION OF LAW AND FACTS

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds "the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. Id. Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. Lincoln v. Reksten Mgmt., 354 F.3d 262 (4th Cir. 2003); Green v. Ingalls Shipbulding, Inc., 29 BRBS 81 (1995) (stating the purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact). However, granting a summary decision is not appropriate where the information submitted is insufficient to determine if material facts are at issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

Complainant's Relationship with AIL

SOX provides protection for "employees" of publicly traded companies. AIL first argues that Complainant is not protected by the whistleblower provisions of the Act because he is not considered an employee of AIL. Instead, AIL asserts Complainant's relationship to the company was as an independent contractor.

According to 29 C.F.R. § 1980.101, an employee under section 806 of the Act is "an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative." The Supreme Court has found that when a statue has the term employee and does not provide a helpful definition, a court is to presume Congress meant to describe the conventional master-servant relationship as understood in common law. Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992) (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)). To determine whether a hired party is an employee under the common law of agency, the Court considered:

> [T]he hiring party's right to control the manner and means by which the product is accomplished. Among other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hiring party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. (quoting Reid, 490 U.S. at 751-52). This analysis has been applied to whistleblower cases. See Reid v. Methodist Medical Center of Oak Ridge, 93-CAA-4 (Sec'y Apr. 3, 1995); Peck v. Safe Air International, Inc., 2001-AIR-3 (ALJ Dec. 19, 2001); Plumlee v. Dow Chemical Co., 1998-TSC-8 (ALJ Feb. 25, 1999) (finding the test as stated in Darden is applicable under a variety of whistleblower statutes).

With these factors in mind, the evidence is viewed in the light most favorable to Complainant. While the agent contract signed by Complainant and AIL (RX C) does label Complainant's position as an independent contractor, this does not necessarily mean he is not a covered employee. See, e.g., Royce v. Bechtel Power Corp., 83-ERA-3 (ALJ Mar. 24, 1983), aff'd, (Sec'y July 11, 1985); Faulkner v. Olin Corp., 85-SWD-3 (ALJ Aug. 16, 1985), aff'd, (Sec'y Nov. 18, 1985).

Complainant presented evidence demonstrating that AIL retained control over how Complainant exercised the means by which his work was performed. For instance, Complainant asserts he was required to report to the Oklahoma State General Agent every day at a specific time as AIL instructed. Complainant was given a specific list of individuals he was to contact each day and appointments he was obligated to keep. Complainant's presentation had to conform to the "canned presentation" prepared by AIL and he was not allowed to decide how to accomplish any tasks without first receiving input. Furthermore, Complainant's work hours and appointment schedule were outside of his control. He was also required to complete all of his work at AIL's Oklahoma City office.

Complainant also mentions he worked only for AIL from July, 2004 until November, 2004 and did not provide consulting services to any other company. Moreover, Complainant asserts that the terms of his employment required that he join a union and pay monthly dues. His employment was also governed by the terms on a collective bargaining agreement. It is also of note that the contractual relationship between Complainant and AIL was for an indefinite time period, which is a characteristic of an employer/employee relationship. (RX C).). I find Complainant has demonstrated that there is a genuine issue regarding whether he was an employee of AIL.

Is a Subsidiary of a Publicly-Traded Company a Covered Employer Subject to the Act

AIL next contends that the complaint should be dismissed on the grounds that AIL is not a publicly-traded company and is not a covered employer subject to the Act. Indeed, the whistleblower provisions of the Act apply to two specific classes of publicly traded companies:

> Whistleblower protection for employees of publicly traded companies – No *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*, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms of employment because of any lawful act done by the employee . . .

18 U.S.C. § 1514A (emphasis added). The applicable regulations also define a "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).

AIL clearly does not fit within this definition of a company. AIL is not a publicly traded company with securities registered under Section 12 of the Securities Exchange Act of 1934 nor is it subject to the reporting requirements of Section 15(d) of the Securities Exchange Act of 1934. Nor is there any evidence or allegation that AIL acted as an officer, employee, contractor, subcontractor or agent of any such company. Complainant, however, asserts AIL is a covered employer under SOX because it is a subsidiary of a publicly traded company, Torchmark.

Complainant's argument ignores the clear statutory language, as well as, the legislative intent behind the adoption of SOX. In drafting the whistleblower protection in SOX, Congress specifically defined the employers subject to its limitations. If Congress had wanted to include non-publicly traded subsidiaries of publicly-traded parent companies as covered employers, it could have done so in drafting the statute. *See* Getman v. Southwest Securities Inc., ARB No. 04-059 (7/29/05) ("If Congress had wanted to protect a refusal as distinct from providing information, it could have done so in drafting SOX").

Furthermore, the legislative history of the Act indicates that Congress did not intend for the Act to view subsidiaries and parent companies as one entity. In fact, while discussing the bill before the Senate, Senator Sarbanes specifically addressed the limited scope of the Act. Senator Sarbanes stated that he wished to "make very clear that [the Act] applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to [provide] companies, who make up the vast majority of companies across the country." 148 Cong. Rec. S7351 (daily ed. July 25, 2002) (statement of Sen. Sarbanes). Therefore, I disagree with Complainant's interpretation of the Act. To include non-publicly traded subsidiaries as a "company" merely because it has a publicly traded parent, would widen the scope of the Act beyond the intentions of Congress.

The undisputed facts establish that Complainant was never an employee of Torchmark. The undisputed facts establish that, even if Complainant was an employee of AIL, AIL is not a covered employer under the Act. As the undisputed facts establish that Complainant is not an employee of an employer covered by the Act, summary decision dismissing the complaint is appropriate.

Was Torchmark Properly Named as a Respondent

Notwithstanding my previous findings, I will examine whether Complainant has properly made Torchmark a party to this matter. Torchmark argues that it was not properly added as a party to the complaint as Complainant only named AIL as the negligent company and as the only respondent in his complaint. Consequently, only the alleged wrongdoing by AIL, and not any of Torchmark, was investigated at the OSHA level. Furthermore, Complainant's May 3, 2005 letter appealing these findings makes no mention of Torchmark. It was not until Complainant's Response to AIL's Motion for Summary Decision that Complainant unilaterally added Torchmark as a Respondent. Torchmark argues that Complainant cannot circumvent the fact that his employer (AIL)

is not a publicly traded company by unilaterally adding another corporate entity that is publicly traded (Torchmark) as a Respondent after OSHA has given its determination. See Powers v. Pinnacle Airlines, Inc., 2003-AIR-12 (ALJ March 5, 2003). Furthermore, Torchmark asserts this attempt to add it as a party is untimely according to the applicable regulations. See 29 C.F.R. § 1980.103 (requiring a complaint be filed within 90 days after an alleged violation of the Act occurs).

Conversely, Complainant asserts that he has consistently requested that Torchmark be made a party to this matter. These requests include a May 27, 2005 letter to the Department of Labor specifically stating his complaint included Torchmark as a Respondent. Also, Complainant's original complaint, dated February 14, 2005, references AIL as being "a TMK subsidiary." Furthermore, on March 22, 2005 Complainant sent a letter to DOL requesting that OSHA "open an additional investigation into Torchmark under the guise and instruction of Section 806 of the Sarbanes-Oxley Act using all that has already been provided." As Complainant points out, these last two letters were written before OSHA's results were issued on April 4, 2005. Complainant also asserts these letters were amendments to his original complaint, and relate back to the date of that original pleading.

I find that the original complaint, dated February 14, 2005, named only AIL as a respondent. Torchmark was not mentioned in any context other than being referenced as the parent of AIL. Torchmark was not investigated by OSHA and it was not until Complainant's March 22, 2005, letter that he purports to "authorize (and request) OSHA to open an additional investigation into TMK" and provided contact information for Torchmark. (For purposes of this motion only, the Court finds Complainant did send the March 22, 2005 letter to OSHA). However, Complainant again fails to allege any facts that could conceivably make Torchmark liable under the Act. Further, this attempt to add Torchmark is untimely, as it was made more than ninety days after the date of the termination. *See* 29 C.F.R. § 1980.103.

Complainant argues that his complaint against Torchmark should be allowed to relate back to the date of his original complaint. Under Federal Rule of Procedure 15(c), a claim will only relate back to the date of the original complaint if three conditions are met: (1) the amended complaint involves the same transactions or occurrence as the original complaint; (2) the new party had notice of the action prior to the expiration of the statute of limitations such that the party will not be prejudiced in maintaining a defense on the merits; and (3) the new party knew or should have known that but for a mistake in identity, the action would have been brought against him.

It is undisputed that Torchmark did not have notice of this action prior to expiration of the statute of limitations. Accordingly, the relation back doctrine is not applicable.

The Court finds that any claim against Torchmark is not properly before the Court as it was not investigated by OSHA, was untimely and Torchmark was not Complainant employer.

Accordingly, the Court finds Torchmark is not a proper party because it has not been timely named as a respondent. The Objection of Torchmark Corporation to Being Added as a Party is hereby GRANTED.

Complainant Does Not Allege or Show Facts Sufficient to Pierce the Corporate Veil

Even assuming Torchmark was named as a Respondent to this action, Complainant's claim does not automatically fall under the purview of SOX. Only in certain circumstances has it been held that employees of non-public subsidiaries of publicly traded companies can be covered by the whistleblower provisions of the Act. Grant v. Dominion East Ohio Gas, 2004-SOX-63 (March 10, 2005). Even in decisions holding that the whistleblower protections found in the Act apply to employees of a non-public subsidiary of a publicly traded company, the administrative law judges have required the complainants to name the publicly traded parent as a respondent and to show sufficient commonality of management and purpose to justify piercing the corporate veil and holding the parent company liable for its subsidiary's actions. See Dawkins v. Shell Chemical, LP, 2005-SOX-41 (ALJ May 16, 2005); Gonzales v. Colonial Bank & The Colonial Bancgroup, Inc., 2004-SOX-39 (ALJ Aug. 20, 2004).

To find that the parent and the subsidiary act as one entity merely because a parent-subsidiary relationship exists is contrary to long standing principles of corporate law. In U.S. v. Bestfoods, et. al., 524 U.S. 51 (1998), the Supreme Court examine the liability of a corporate parent for the acts of its subsidiary under CERCLA. The Court stated that when (but only when) the corporate veil is pierced, a parent corporation may be charged with derivative CERCLA liability for its subsidiary's actions in operating a polluting facility. The Court stated that "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries . . . nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible." Id. at 61 The Court went on to state that the mere fact that there exists a parent-subsidiary relationship between two corporations does not make the one liable for the torts of its affiliate. Id.; see also Powers v. Pinnacle Airlines, Inc., 2003-AIR-12 (ALJ March 5, 2003).

I find Complainant has not presented any argument or evidence sufficient to show that the corporate veil should be pierced because of AIL's actions regarding Complainant's termination. Courts have found parent companies liable for their subsidiaries' actions when the two corporate identities are used interchangeably. Hughart v. Raymond James & Assoc., Inc., 2004-SOX-9 (ALJ Dec. 17, 2004) (citing United States v. Bestfoods, et. al., 524 U.S. 51 (1998)). The liability, however, will only extend to an area where the parent has exerted its influence or control. Complainant alleges the following are indicia that AIL and Torchmark are used interchangeably: Torchmark combines the litigation costs of all of its beneficiaries into one liability, refers to its subsidiaries as "distribution systems in Torchmark," the directors and officers are the same for Torchmark and all of its subsidiaries, and Torchmark released a statement

to investors claiming to have gained efficiencies from integrating administrative functions of its operating subsidiaries.

This evidence is insufficient to justify piercing the corporate veil and ignoring the existence of separate corporate entities. While there may be some commonality of certain aspects of management, there is no indication that AIL was acting as an agent for its parent company with respect to employment practices towards Complainant or any other employee. There is no indication that Torchmark took any part in hiring or terminating Complainant, or had a role in payment of Complainant's salary. There is also no argument or evidence suggesting Complainant had any interaction with employees of Torchmark or was supervised by anyone but AIL personnel. Thus, there is no indication that Torchmark was sufficiently involved in the management and employment relations of AIL to justify a piercing of the corporate veil in this matter. Even with the evidence viewed in the light most favorable to Complainant and even if the action against Torchmark had been timely, the evidence is insufficient to justify piercing the corporate veil.

Is Complainant responsible for AIL's Attorney Fees?

AIL argues it should be awarded reasonable attorney fees incurred in responding to Complainant's complaint. According to 29 C.F.R. § 1980.109(b) (2004), if a complaint is frivolous or brought in bad faith, the named party may be entitled to an attorney fee, not exceeding $1000. I do not find that Complainant's allegations are frivolous or were brought in bad faith. Therefore, AIL's request for attorney fees is denied.

RECOMMENDED ORDER

Torchmark's Objection to Being Added as a Party is hereby GRANTED.

AIL's Motion for Summary Decision is hereby GRANTED, on the basis that it is not a covered employer subject to the Act, and the claim shall be DISMISSED.

AIL's request for attorney fees is DENIED.

A

LARRY W. PRICE
Administrative Law Judge

LWP/TEH
Newport News, VA

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).