U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 September 2005

CASE NO.: 2005-SOX-00087

In the Matter of

JANICE WILSON STEVENSON
Complainant

v.

NEIGHBORHOOD HOUSE CHARTER SCHOOL
Respondent

Appearances:

Janice Wilson Stevenson,
Cambridge, Massachusetts, *pro se*

Ilene Robinson Sunshine and Beth L. Jacobson,
(Sullivan & Worcester, L.L.P.),
Boston, Massachusetts, for the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER GRANTING SUMMARY DECISION AND DISMISSING COMPLAINT

This case arises out of a complaint of discrimination filed by Janice Wilson Stevenson ("Complainant") against Neighborhood House Charter School ("NHCS" or "Respondent") pursuant to the employee protection (whistleblower) provisions of Section 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 ("Sarbanes-Oxley" or the "Act"). The Complainant filed a complaint with the Occupational Safety and Health Administration of the U.S. Department of Labor ("OSHA") on July 1, 2005, claiming that she was terminated as a result of a report she made to her employer regarding suspected fraudulent activity.

OSHA dismissed the Sarbanes-Oxley complaint without investigation based on a determination that the Respondent is not subject to the provisions of 18 U.S.C. Section 1514A of the Act. OSHA No. 1-1270-05-013 (July 8, 2005). On July 24, 2005, the Complainant appealed

OSHA's determination to the Office of Administrative Law Judges ("OALJ"), requesting a formal hearing. The matter is before me on NHCS's motion for summary decision and the Complainant's response in opposition.[1] Upon consideration of the matter, I have concluded for the reasons set forth below that no genuine issue of material fact exists and that NHCS is therefore entitled to summary decision in its favor.

I. Background

The Complainant was employed by NHCS as an "independent contractor" from May 2004 to June 2005 through TuckNT, a consulting firm. Respt. Mot. Sum. Dec. at 3 (August 15, 2005); Compl. at 2 (July 1, 2005). On May 27, 2005, the Complainant reported her concerns about Dean Jagdish Chokshi's use of petty cash and the NHCS ATM/credit card to Robert Melzer, a member of NHCS's Board finance committee and Vice President of NHCS's Board of Trustees. Compl. at 1 (July 1, 2005); Compl. Amend. Resp. Mot. Sum. Dec., Att. 4 (Aug. 30, 2005). Although the Complainant thought that her report was anonymous, she claims that Dean Chokshi became aware of her concerns on June 1, 2005. Compl. at 2 (July 1, 2005). Dean Chokshi terminated the Complainant on June 3, 2005. *Id*.

II. Motion for Summary Decision

NHCS supports its Motion for Summary Decision with two claims: (1) NHCS is not covered by Section 806 the Act; and (2) The Complainant cannot establish that her reports of alleged fraudulent activity are protected activity under the Act. Respt. Mot. Sum. Dec. at 2-3 (Aug. 15, 2005).[2] NHCS asserts that it is not an employer subject to the provisions of Sarbanes-Oxley, which covers "any company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) and any company 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. § 1514A(a). Respt. Mot. Sum. Dec. at 2 (Aug. 15, 2005). Further, NHCS contends that the Complainant has failed to prove that she reasonably believed that the alleged wrongful acts violated Sections 1341, 1343, 1344, or 1348 of 18 U.S.C., as the actions do not fall under any of

[1] In addition, the Complainant has filed a motion to remove and impeach an affidavit by Kevin Andrews submitted on behalf of the Respondent. Compl. Mot. For Removal (Sept. 2, 2005). However, as the Complainant has not raised any question of fact in this motion that is material to the issue of Sarbanes-Oxley jurisdiction, it is unnecessary for me to rule on the Complainant's motion.

[2] In addition, NHCS contends that the Complainant is not an employee for purposes of the Act, as she is an independent contractor working for NHCS through TuckNT. Respt. Mot. Sum. Dec. at 3 (Aug. 15, 2005). In view of my conclusion that NHCS is not a company covered by Sarbanes-Oxley's whistleblower anti-discrimination provisions, it is unnecessary to address this alternative defense. However, it is noted that the Act's implementing regulations define "employee" as "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." 29 C.F.R. § 1980.101 (2004). It appears that that the Complainant would likely be considered an employee under this definition, as her employment could be, and ultimately was affected by NHCS and its representatives. Further, the court has upheld that an employee of a private subsidiary company was within the definition of an employee of the public parent company because her employment could be affected by the officers of the parent company. *See Collins v. Beazer Homes USA, Inc*., 334 F. Supp.2d 1365, 1374 n.7 (N.D. Ga. 2004).

the categories of protected activity covered by Sarbanes-Oxley. Respt. Mot. Sum. Dec. at 3 (Aug. 15, 2005).

III. The Complainant's Opposition

The Complainant responds to NHCS's motion for summary decision by claiming that NHCS is an employer within the meaning of Sarbanes-Oxley, that she had a reasonable belief that fraudulent activity was occurring, and that she has been discriminated against for making reports of suspected fraudulent activity to her employer. Compl. Amend. Resp. (Aug. 30, 2005).[3] The Complainant asserts that NHCS is an employer within the meaning of Sarbanes-Oxley, even though it is not a publicly traded company, because NHCS's pension plan is subject to the requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1001**,** and because the trustee of the pension plan, MFS Investments, is required to file periodic reports with the Securities and Exchange Commission pursuant to Section 15(d) of the Securities Exchange Act. *Id.* at 3. Further, she argues that Sarbanes-Oxley applies to private companies because it imposes sanctions on employer pension plan sponsors and fiduciaries for willful violations of ERISA's financial statement and other reporting and disclosure requirements, and pursuant to Sections 302 (15 U.S.C. § 7241) and 404 (15 U.S.C § 7262) of Sarbanes-Oxley which require corporate responsibility and the application of Internal Control Procedures to pension and benefit expenses. Compl. Amend. Resp. at 3-4 (Aug. 30, 2005). She also suggests that NHCS has violated Section 401 (15 U.S.C. § 7261) and Section 406 (15 U.S.C. § 7264) of the Act because the Employer engages in (1) underreporting of wages to the extent that fraud is being perpetrated; (2) underreporting of its pension expenses by denying eligible employees participation; and (3) understatement of payroll tax liabilities. Compl. Amend. Resp. at 4-5 (Aug. 30, 2005). She further argues that because NHCS has public debt in the form of Qualified Zone Academy Bonds ("QZAB"), the Employer is subject to required reporting under Rule 10b5 (17 C.F.R. § 240.15c-2-12) and Rule15c2-12 (17 C.F.R. § 240.10b-5) under the Securities Exchange Act of 1934. Compl. Amend. Resp. at 6 (Aug. 30, 2005). Finally, the Complainant asserts that NHCS receives funds from both private donors and public corporations and she advances a rather creative argument that such donors, as well as the QZAB holders, are much like the shareholders of a publicly traded company. Thus, the Complainant contends that she has established that NHCS is an employer subject to Section 806 of Sarbanes-Oxley and that her case should be heard on the merits.

IV. Discussion, Findings of Fact and Conclusions of Law

The issues presented by the motion for summary decision are whether NHCS is a covered employer under Sarbanes-Oxley and whether the Complainant's reports of suspected fraudulent activity to her employer constitute protected activity under the Act. If NHCS can show that the answer to either of these questions is in the negative, the Employer is entitled to summary decision in its favor.

[3] The Complainant also claims that the Secretary of Labor deprived her of procedural due process as a result of the investigator's failure to investigate her complaint. Compl. Amend. Resp. at 2 (Aug. 30, 2005). While OSHA declined to investigate the merits of the complaint, it did fully consider and investigate the Complainant's allegations relating to Sarbanes-Oxley jurisdiction.

Under the Rules for Practice and Procedure for Administrative Hearings, "any party may…move with or without supporting affidavits for a summary decision on all or any part of the proceeding." 29 C.F.R. § 18.40(a). An administrative law judge "may enter summary judgment for either party if . . . there is no genuine issue as to any material fact and [the] party is entitled to summary decision." 29 C.F.R. § 18.40(d). To demonstrate that it is entitled to summary decision, "the moving party must either…produce affirmative evidence which negates an essential element of the nonmovant's complaint…or show…that the nonmovant has no evidence to support an element of the complaint." *Eash v. Roadway Express, Inc.,* ARB No. 00-061, slip op. at 4, 2002 WL 31932545 (December 31, 2002), citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-158 (1970); *Celotex Corp. v. Catrett*, 477 U.S. 317 at 325 (1986). In ruling on a motion for summary decision, "the judge does not weigh the evidence or determine the truth of the matters asserted, but only determines whether there is a genuine issue for trial . . . In making this determination, the ALJ is to view all the evidence and factual inferences in the light most favorable to the non-moving party." *Stauffer v. Wal-Mart Stores, Inc*., USDOL/OALJ Reporter (HTML), ARB No. 99-107, OALJ No. 1999-STA-00021 slip op. at 6 (ARB November 30, 1999), citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986); *Adickes v. Kress & Co.,* 398 U.S. 144, 158-9 (1970); Miller and Kane § 2725 at 425-28. If the nonmoving party "produces enough evidence to create a genuine issue of material fact," it defeats the motion for summary decision. *Eash v. Roadway Express, Inc.,* ARB No. 00-061, slip op. at 4, 2002 WL 31932545 (December 31, 2002), citing *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986). However, if the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact and the moving party is entitled to summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

Section 806 of the Sarbanes-Oxley Act states in relevant part:

> (a) 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 or conditions of employment because of any lawful act done by the employee--
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct 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, when the information or assistance is provided to or the investigation is conducted by--

> (A) a Federal regulatory or law enforcement agency;
> (B) any Member of Congress or any committee of Congress; or
> (C) a person with supervisory authority over the employee…; or
>
> (2) to file, cause to be filed…or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged 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. Section 806 of the Act offers protection for employees of publicly traded companies who provide information or participate in an investigation of violations including frauds and swindles (18 U.S.C. § 1341), fraud by wire, radio, or television (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344), securities fraud (18 U.S.C. § 1348), rules and regulations of the Securities and Exchange Commission, and any other provision of Federal law relating to fraud against shareholders. *Hopkins v. ATK Tactical Systems*, USDOL/OALJ Reporter (HTML), ALJ No. 2004-SOX-19 slip op. at 5 (ALJ May 27, 2004). The Congressional Record states that the purpose of Section 806 of the Act is to "provide whistleblower protection to employees of publicly traded companies . . . when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent," and to "protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." 148 Cong. Rec. S7420, 2002 WL 1731002 (daily ed. July 26, 2002).

The first question presented by NHCS's motion for summary decision is whether NHCS is an employer subject to Section 806 of Sarbanes-Oxley. There has been no showing that NHCS 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 one 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. § 1514A(a). Although the Complainant asserts that NHCS is covered by Sarbanes-Oxley because it has a retirement plan with benefits subject to reporting and disclosure requirements under ERISA, the requirements of ERISA are irrelevant in determining whether or not a company is covered by Sarbanes-Oxley, which is determined solely by whether the company has a class of stock registered under Section 12 of the Securities Exchange Act of 1934 or whether it is required to make reports pursuant to Section 15(d). *See Flake v. New World Pasta Co.*, ARB Case No. 03-126, 2004 WL 384738*3 (Feb. 25, 2004). Nothing in the language of Sarbanes-Oxley or in its legislative history suggests that being subject to reporting requirements under one federal law, such as ERISA, automatically extends coverage of any other federal legislation, such as Sarbanes-Oxley, to a company. The Complainant's assertion that NHCS is subject to the provisions of Sections 302, 401, 404 and 406 of the Sarbanes-Oxley, and Rules 10b5 and 15c2-12 promulgated under the Securities Exchange Act of 1934 is also irrelevant in determining whether NHCS is covered by Sarbanes-Oxley's whistleblower provisions because none of these rules and provisions subject NHCS to the reporting requirements of Section 15(d) of the Securities Exchange Act. Therefore, I conclude that NHCS is not a covered employer under Section 806.

Likewise, nothing in the language of the Sarbanes-Oxley extends coverage of Section 806 to a private company simply because it receives funds from private donors or public companies. Although the Complainant likens NHCS's private and public donors and QZAB holders to stockholders, there is no indication that Congress intended for a private company to fall within the purview of Sarbanes-Oxley simply because it receives funds from private donors or public companies. To the contrary, this administrative law judge has held that even when a company is a contractor or subcontractor of publicly traded companies, "there is nothing in the language of Sarbanes-Oxley or its legislative history that suggests that Congress intended to bring the employees of non-public contractors, subcontractors and agents under the protective aegis of Section 806." *Minkina v. Affiliated Physicians Group*, USDOL/OALJ Reporter (HTML), ALJ No. 2005-SOX-00019, slip op. at 8 (ALJ February 22, 2005). Similarly, administrative law judges have held that subsidiaries of publicly traded companies are also not covered under Sarbanes-Oxley when the parent company is not named in the complaint. *See*, *e.g.*, *Dawkins v. Shell Chemical, LP*, USDOL/OALJ Reporter (HTML), ALJ No. 2005-SOX-41 (ALJ May 16 , 2005) (dismissing a complaint brought against a non-publicly traded subsidiary of a publicly traded company because the parent company was not named in the complaint); *Powers v. Pinnacle Airlines Inc.*, USDOL/OALJ Reporter (HTML), ALJ No. 2003-SOX-18 (ALJ March 5, 2003) (dismissing a complaint because the named respondent was not a publicly traded company, even though the respondent's parent company was publicly traded). *Cf. Gonzalez v. Colonial Bank*, USDOL/OALJ Reporter (HTML), ALJ No. 2004-SOX-39 (ALJ Aug. 20, 2004) (denying summary decision when the employee of a non-publicly traded subsidiary had named both the publicly traded parent company and the non-publicly traded subsidiary in the complaint, holding that the remedial purposes of Sarbanes-Oxley called for a broad interpretation of what constitutes a covered employer).

Since NHCS is neither a publicly traded company nor a subsidiary of a publicly traded company, it is clear that it cannot be found to be a covered employer under the Whistleblower protection provisions of Section 806 of the Sarbanes-Oxley Act. Consequently, the complaint must be dismissed for lack of jurisdiction.[4]

V. Order

The Respondent's motion for summary decision is GRANTED, and the complaint is DISMISSED in its entirety.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

[4] In view of this determination, it is unnecessary to reach NHCS's alternative argument that the Complainant cannot establish that she engaged in any activity protected by the Act.

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).