



Issue Date: 02 December 2004

CASE NO.: 2004-SOX-00072

IN THE MATTER OF

**TOM HEANEY,
Complainant**

v.

**GBS PROPERTIES LLC
d/b/a PRUDENTIAL GARDNER REALTORS,¹
Respondent**

DECISION AND ORDER

Background

This case arises from a complaint filed by Tom Heaney (Complainant) against GBS Properties LLC d/b/a Prudential Gardner Realtors, alleging violations of the employee protection provisions at Section 806 of the SarbanesOxley Act of 2002, codified in 18 U.S.C. §1514A (Act). Enacted on July 30, 2002, the Act provides the right to bring a “civil action to protect against retaliation in fraud cases” under Section 806. The Act affords protection from employment discrimination to employees of companies with a class of securities registered under Section 12 of the Security Exchange Act of 1934 (15 U.S.C. 781) and companies required to file reports under Section 15(d) of the Securities Exchange of 1934 (15 U.S.C. 780(d)). Specifically, the law protects so-called “whistleblower” employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a

¹ At the outset of the hearing the parties agreed that Respondent’s proper name should be shown as GBS Properties LLC d/b/a Prudential Gardner Realtors (Tr. 6).

federal agency or Congress relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders.

On June 9, 2004, the Complainant filed a whistleblower complaint with the Occupational Safety & Health Administration (OSHA), U. S. Department of Labor. After an investigation, OSHA's regional director issued a letter dated August 12, 2004, advising the parties that the complaint lacked merit because Respondent was not a publicly traded company pursuant to the Act. On September 2, 2004, Complainant filed his objections with the Office of Administrative Law Judges, U. S. Department of Labor. A formal hearing was conducted before me in Metairie, Louisiana, on October 14, 2004, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Complainant's Exhibits 1-9 and ALJ Exhibits 1-5 were admitted into evidence. My findings are based on the entire record.

Issues

1. Whether Respondent is an "employer" within the meaning of the Act;
2. Whether Complainant is an "employee" within the meaning of the Act;
3. Whether Complainant engaged in protected activity which was covered under the Act;
4. Whether Respondent was aware of such protected activity;
5. Whether Respondent took adverse action against Complainant as a result of his protected activity; and
6. What damages, if any, Complainant suffered from such adverse action.

Findings of Fact

1. Respondent is a real estate sales company. While Respondent's attorney argued that Respondent is a privately held Louisiana corporation and not traded publicly, no evidence was offered to support his assertion.

2. To link Respondent with a publicly traded company, Complainant, who was pro-se², offered a number of exhibits in support of his position.

3. It appears from Claimant's exhibits: a) that real estate services are offered nationwide through a network of franchisees of The Prudential Real Estate Affiliates, Inc., a Prudential Financial company of The Prudential Insurance Company of America, who owns the "Rock" logo.

4. While all franchisees are independently owned and operated they use the Prudential trademark, advertise as members of the Prudential real estate network, adhere to franchise rules and have a common goal. Also, in Louisiana apparently no franchisor can enter into a franchisee agreement involving real estate sales unless the franchisor has appointed a state licensed real estate broker to act as its' representative.

5. Complainant has been a licensed real estate agent employed by Respondent for 8 years prior to his termination on April 20, 2004. In 2002 and 2003 Complainant received performance awards.

6. In addition to being a licensed real estate agent, Complainant testified he was a loan originator and because both of his positions require the sponsorship of a real estate broker and he was furnished an office out of which to work, Complainant maintains he was an employee of Respondent within the meaning of the Act.

7. On his birthday, April 12, 2004, Complainant more or less announced to his co-workers that he was leaving the employment of Respondent.

8. Five days prior to his termination, Complainant cleaned out his desk in preparation of his leaving, and five days following his termination he became a sales agent for another local real estate company.

² Both prior to and at trial (ALJ Ex. 5; Tr. 12), Complainant was advised of his need for an attorney, and also he was questioned as to what he wished to do concerning his unanswered subpoenas. He elected to go forward. (Tr. 12).

9. When exactly Complainant intended to voluntarily leave Respondent's employment is not clear, but he blames his abrupt termination on April 20, 2004, on three events: a) his concern over an unlicensed home inspector; b) Respondent's manager's refusal two weeks earlier to intervene in a dispute Complainant had with another agent; and c) his concern over a condominium project which Complainant said had EPA violations, including faulty wiring and lead base paint, all of which he maintains was known to Respondent.

10. As to the condominium project, Complainant has neither been on the premises nor sold any of those properties since 2002.

11. Complainant went to the state attorney general's office as well as the U.S. Attorney's office and local police departments about the unlicensed home inspector, but testified that his complaints were ignored. On cross-examination, while acknowledging that five days before his termination he had made a decision to leave the employment of Respondent, Complainant testified that he believes he was fired because "they were fearful that I would go speak about other things once I pulled up my desk and pulled my files out." (Tr. 104).

12. For damages, Complainant does not seek reinstatement, for he says he is physically fearful for his safety. What Complainant does seek is \$15,000 to \$16,000 for loss commissions.

Discussions and Conclusions of Law

While Complainant makes a compelling argument, to which no evidentiary defense has been offered, that Respondent is arguably an "agent" within the meaning of the Act to a publicly traded company, I see no reason to make that determination or a determination as to whether Complainant was an "employee" under the Act, for I find that regardless Complainant has failed to make out a prima facie case.

To establish a prima facie case of discriminatory treatment under the Act, Complainant must prove : (1) that he was engaged in an activity protected under the Act; (2) that he was the subject of adverse employment action; and (3) that a causal link exists between his protected activity and the adverse action of his employer. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 299 (6th Cir. 1987). The establishment of the prima facie case creates an inference that protected

activity was the likely reason for the adverse action. *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973). At a minimum, Complainant must present evidence sufficient to raise an inference of causation. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec'y June 23, 1992). I do not find Complainant has met his burden in this instance.

Certainly, Complainant's vocal concern over a purchaser's use of an unlicensed home inspector (which appears to be Complainant's behavior that precipitated his termination) is not protected activity envisioned by the Act. Complainant agreed that neither he nor Respondent had anything to do with the choice of the inspector, but rather the inspector was chosen by the prospective purchaser. Upon learning of the inspector's lack of a license, Complainant approached the inspector, alerted his fellow workers, went to the state attorney general's office and ultimately to the local police. With his desk cleared for departure and his plans to leave made, Respondent apparently simply hastened Complainant's departure upon learning about his behavior.

Likewise, the event of two weeks earlier was not protected activity under the Act when a conflict with another agent over the potential sale of property was not resolved to Complainant's liking.

The concerns of Complainant that most closely fall within the protection of the Act arguably were those of his past concerns over a condominium project which he thought the developer had built in violation of certain codes and about which he says Respondent, as broker, was aware. (Bank fraud against mortgage lenders as set out in 18 U.S.C. 1344.)

Complainant's short fall with his theory that he was terminated due to his concerns over the project is that he had neither sold nor set foot on the premises since 2002. Rather, since that time Complainant had continued in the uninterrupted employment of Respondent, even receiving awards. In other words, there is no temporal proximity between Complainant's concerns and his termination. From what Complainant said, there may well be lawsuits pending between the developer of that condominium project and some home owners, but there is no evidence, direct or circumstantial, of retaliatory animus on Respondent's part and/or discrimination against Complainant in violation of the Act.

In sum, I do not find Complainant has made out a prima facie case demonstrating that he engaged in protected activity under the Act or that he was

terminated for any such activity. Complainant seems to know well the path to other agencies, and it would appear to me his concerns lay more with either the state real estate commission or HUD in that they involve matters of real estate. In any event, I do not find a remedy for Complainant under the Act.

ORDER

For reasons stated, Complainant's complaint is hereby **DISMISSED**.

So ORDERED this 2nd day of December, 2004.

A

C. RICHARD AVERY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1979.110, 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. §§§ 1979.109(c) and 1979.110(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).