U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 04 March 2005

In the Matter of

MARC C. PENESSO
Complainant

v.

LCC INTERNATIONAL, INC.
Respondent

Case No.: 2005 SOX 00016

ORDER DENYING MOTIONS FOR DISMISSAL and SUMMARY JUDGMENT

On February 1, 2005, Respondent filed a motion to dismiss or for summary judgment. Respondent contended that: (1) the complaint is untimely; (2) Complainant cannot show that protected behavior was the cause of any unfavorable personnel action; and (3) the whistleblower provisions of the Sarbanes-Oxley Act do not have extraterritorial application. Complainant responded on February 25th, contending that: (1) a motion for summary judgment was premature; (2) there are genuine issues of material fact between the parties; (3) the complaint alleges numerous acts of discrimination which occurred within 90 days of the filing of the complaint; and (4) the complaint does not require the extraterritorial application of the Sarbanes-Oxley Act. Claimant also points out that during a January 25, 2005 conference call, the respondent agreed to limit its impending motion for summary judgment to the issue of the timeliness of the complaint since complainant's counsel was recently retained and discovery was ongoing. Nevertheless, since complainant answered all of respondent's arguments in his response to the motion, and ruling on them at this time will permit the parties to focus on their trial preparation rather than wasting their time filing or responding to similar motions closer to the June 13th hearing date, I will address all of the issues raised by the respondent.

The complaint in this case was filed on May 28, 2004. Apparently, it was filed by telephone with a follow-up letter dated the same day. *See* Regional Investigator's Final Investigative Report at 1. In a nutshell, complainant, who was employed in Italy by the Italian subsidiary of an American Corporation headquartered in McLean, Virginia, which is listed on NASDAQ exchange, alleges that he reported improper and fraudulent financial dealings which took place in Italy to corporate officers in the United States both by telephone and in person. He alleges he was retaliated against for raising these concerns by being demoted, denied commissions for the year 2003, and subjected to a hostile work environment.

In *Williams v. Lockheed Martin Corp*., ARB Nos. 99-54 & 99-064, OALJ Nos. 1998-ERA-40, 42 (Sept. 29, 2000), the Administrative Review Board stated:

> The standards applicable to summary decision are rooted in the Office of Administrative Law Judges (OALJ) regulations as well as Board and federal court case law. OALJ Rule 18.40, 29 C.F.R. §18.40, which is modeled on Rule 56 of the Federal Rules of Civil Procedure, permits an ALJ to enter a summary decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." *Id.* . . . In deciding a motion for summary decision, we view the factual evidence in the light most favorable to the nonmoving party.

Timeliness of Complaint

Under §806, the employee protection provisions of the Sarbanes-Oxley Act, 18 U.S.C. §1514A, actions "shall be commenced not later than 90 days after the date on which the violation occurs." §1514A(b)(2)(D). Respondent contends that all of the violations of which it is accused occurred more than 90 days prior to May 28, 2004. In his response to respondent's motion, complainant provides documentary evidence that he was still the Director of Sales and Business Development on February 10, 2004 (EX 3) and alleges that he was not notified he was demoted to Marketing and Sales Director until March 1, 2004; provides documentary support for his contention that he was not denied commissions for 2003 until March 18, 2004 (EX 8 - accepting complainant's translation as correct); [1] and cites his exclusion from a monthly sales and budget meeting on March 8, 2004 and Carlo Baravelle's threat to fire him on March 18, 2004 as examples of incidents promoting a hostile work environment which occurred within 90 days of the complaint. Since at this stage of the proceeding the factual evidence must be viewed most favorably to the non-moving party, the motion to dismiss based on the untimeliness of the complaint is denied.

Relationship of Protected Activity to Adverse Actions

Respondent contends that the complainant cannot establish that his protected conduct was related to respondent's decision not to pay him commissions for the year 2003 or to change his job title. Respondent alleges that the determination not to pay commissions was made before the complainant engaged in protected activities, and applied to all its employees; and likewise, the complainant's job title had changed well before he engaged in protected activity. Complainant responds that the decision not to pay him the 2003 commissions he had earned was made sometime after he had engaged in protected activity, and as late as February 10, 2004 his job title had not changed. Both parties support their contentions with affidavits and documentary evidence. It is clear that there are material facts in dispute between the parties which makes summary decision on this issue inappropriate.

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[1] Complainant also cites Exhibit 7 attached to respondent's motion to dismiss to support his position, while respondent cites itto support its position that 2003 commissions were cancelled early in 2003. Clearly, this document is ambiguous.

Extraterritoriality

Finally, respondent argues that §1514A – the employee protection provision of the Sarbanes-Oxley Act – has no extraterritorial application, and therefore there is no jurisdiction over this claim which concerns the complainant's employment in Italy. In support of its position, respondent, *inter alia*, cites the cases of *Concone v. Capital One Financial Corp*., 2005-SOX-00006 (ALJ Dec. 3, 2004), and *Carnero v. Boston Scientific Corp*., 2004 WL 1922132 (D. Mass. Aug. 27, 2004). In holding that §1514A does not apply to an employment relationship which takes place out of the United States, both Judge Kaplan in *Concone* and Judge Zobel in *Carnero* relied on the canon of construction that laws of the United States are presumed not to have extraterritorial effect in the absence of a clear contrary intent. Section 1514A is silent regarding extraterritorial effect, leading both judges to hold that the employees in their respective cases were not covered by the protections afforded under §1514A.

However, the facts in this case are materially different. For one thing, Mr. Penesso is a United States citizen, whereas the employees in *Concone* and *Carnero* were not. Second, much of the protected activity in this case took place in the United States, when complainant came to respondent's headquarters in McLean, Virginia to inform corporate officers of the financial improprieties he believed were taking place in Italy. On other occasions, he directly communicated his concerns with corporate officials in the United States. Third, respondent admitted in its response to the first pre-hearing order that at least one of the alleged retaliatory actions – the decision not to issue bonuses in 2003 - took place in the United States. Accordingly, unlike *Concone* and *Carnero*, this case has a substantial nexus to the Unites States, and it is appropriate for the complainant to bring this claim under §1514A of the Sarbanes-Oxley Act.[2]

Therefore, respondent's motion to dismiss or for summary judgment is **denied**.

Finally, seeing the exhibits attached to the parties' pleadings has brought a problem to light, *i.e*., that much of the documentary evidence which is liable to be offered into evidence in this case is written in Italian. Each party is ordered to provide **an English translation** of any document listed on its pre-hearing statement (*see* the January 26, 2005 *Pre-Hearing Order*) which is in any language other than English. The translations shall be exchanged with opposing counsel at the time the documents are exchanged. Specific objections to the opposing party's translations shall be filed not later than June 3, 2005. The failure to object to a translation filed by the opposing party shall be considered an admission that the translation is accurate.

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JEFFREY TURECK
Administrative Law Judge

[2] It is possible that during discovery and through evidence presented at the hearing, further activities relevant to this case which took place in the United States will come to light, making the claim for jurisdiction under §1514A even more persuasive.