U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 14 June 2006

Case No.: 2006-SOX-00080

In the Matter of

FRANK DEUTSCHMANN
Complainant

v.

FORTIS INVESTMENTS
Respondent

ORDER

Complainant filed a complaint with the Occupational Safety and Health Administration of the U.S. Department of Labor on December 27, 2005. The Complainant alleged that his employer, Fortis Investments (Respondent), violated provisions of the Sarbannes-Oxley Act ("the Act"), 18 U.S.C. § 1514A, when the company terminated him on September 29, 2005. OSHA issued its finding on March 29, 2006, saying that there was insufficient evidence to support a finding that Respondent violated the Act and that the Respondent was not a covered employer within the meaning of the Act.

Under the Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, an administrative law judge may grant a motion for summary judgment if "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d); See.Fed. R. Civ. P. 56(c). All inferences are to be read in favor of the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

The applicable section, Section 806 of the Act, reads:

Sec. 1514A. Civil action to protect against retaliation in fraud cases

`(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. 78l), 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 and 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 such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> `(2) to file, cause to be filed, testify, participate in, 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.

Sarbannes-Oxley Act of 2002, Section 806 (to be codified at 18 U.S.C. 1514A)

The named Respondent, Fortis Investments, is not a covered employer under the Act. Fortis Investments neither has a class of securities registered under Section 12, nor are they required to file reports under Section 15(d) of the Securities Exchange Act of 1934. Complainant has two arguments. The first is that Respondent is a covered employer under the Act because they are an "officer, employee, contractor, subcontractor, or agent of such company," in that they are a subsidiary of Fortis Investment Management ("FORTIS"), a company which is a covered employer. Secondly, Complainant argues that the Respondent is subject to SOX as a subsidiary of a publicly traded corporation, or that the parent company itself should be held liable by piercing the corporate veil.

FORTIS, the Respondent's parent company, is a Belgium-based financial services corporation and is not a party to this action, nor would it be appropriate to add FORTIS as a party now. See Bothwell v. American Income Life, 2005-SOX-57 (ALJ September 19, 2005). Complainant brought his case against Fortis Investments alone; he has never amended his complaint to include the parent company, the parent company did not appear before OSHA, and, in fact, there is no indication that there is evidence of a sufficient intertwining of management that would warrant a piercing of the corporate veil. See Dawkins v. Shell Chemical, LP, 2005-SOX-41 (ALJ May 16, 2005). To bring suit against a parent company for the actions of a subsidiary, the complainant would have to name the parent as a respondent and provide

sufficient evidence that the two companies are so intertwined that one would consider them to be one entity. See Dawson, supra; Powers v. Pinnacle Airlines, Inc., 2003-AIR-12 (ALJ March 5, 2003)(complainant could not get around the fact that her employer was not a publicly traded company by unilaterally adding the parent company); U.S. v. Bestfoods, et al., 524 U.S. 51, 61 (1998)(mere fact of a parent-subsidiary relationship does not make one company liable for the torts of an affiliate). Complainant relies on Morefield v. Exelon Services, Inc., which says that the employees of non-public subsidiaries of publicly traded companies are covered by the whistleblower protection provisions of Sarbanes-Oxley. Morefield v. Exelon Services, Inc., et al., 2004- SOX-2, at 3 (ALJ January 28, 2004). However, the ALJ in Morefield distinguished his case from Pinnacle by saying that the publicly traded parent company was before him as a respondent, unlike in Pinnacle. Here, our case is like Pinnacle, not Morefield; the parent company, FORTIS, is not a party in this case, and therefore, like in Pinnacle, there is no respondent before me that is subject to the Act.

More recently, however, the Administrative Review Board revived the claims of a fired vice president of a private subsidiary of a publicly held Texas company, where the parent company was not named as a respondent. Klopfenstein v. PCC Flow Techs. Holdings Inc., DOL ARB, No. 04-149 (5/31/06). The Board reversed the Administrative Law Judge, saying the ALJ erred in not using the common law rule of agency in determining whether the complainant had properly named the respondents. The Board ruled, "[W]e do not interpret the Act to require a complainant to name a corporate respondent that is itself 'registered under § 12 [of the Securities Exchange Act] or ... required to file reports under § 15(d),' so long as the complainant names at least one respondent who is covered under the Act as an 'officer, employee, contractor, subcontractor, or agent' of such a company." In determining whether the subsidiary is an "agent" of the publicly held corporation, the Board said that principles of the common law of agency should be used.

I would say that pursuant to Klopfenstein, Complainant could pursue his claim on a theory of agency. However there is one huge difference between this case and Klopfenstein. In Klopfenstein, the Board said it was enough to name a company that was an agent of a company covered under the Act. That is not the case here, because even assuming Respondent is an agent of FORTIS, FORTIS is not a company covered under the Act. Respondent has provided letters and affidavits stating that neither the Respondent nor the parent company is a covered employer under the Act:

> Neither Fortis Investments nor any of its parent companies have registered their shares under section 12 or become reporting companies under section 15(d) of the 1934 Act. Fortis' shares are listed on exchanges located in Belgium and the Netherlands; they are not listed on a U.S. exchange.

(Letter from outside counsel for Respondent, Respondent's Exhibit B). The same is reiterated in the affidavit of Anthony Del Re, Executive Vice President and Director of Risk Management for Fortis USA. (Respondent's Exhibit A). Complainant contests that FORTIS has a class of securities registered in the United States, called American Depository Receipts, or "ADRs". (Respondent's Exhibit C). However, Respondent attests to the fact that securities under the ADR program are exempt from registration under the SEC Rule 12g3-2(b), and therefore are not

securities registered under section 12 or required to file reports under section 15(d) of the Securities Exchange Act. (Respondent's Exhibit B). Furthermore, the United States Court of Appeals for the First Circuit recently decided that Section 806 of SOX does not apply extraterritorially. Carnero v. Boston Scientific Corp., Nos. 04-1801, 04-2291 (January 5, 2006).

Even reading all reasonable inferences in favor of the non-moving party, such as the Respondent was acting as an agent of FORTIS or that there is sufficient evidence to pierce the corporate veil, the fact remains that Respondent is not a covered employer under the Act and neither is its parent company. Neither the Respondent nor its parent has a class of securities under section 12 or is required to report under section 15(d) of the Securities Exchange Act. All the evidence before me indicates this fact. Complainant did not put forth any evidence indicating that ADRs would make a company subject to the Act. There is no way to read this evidence in any light that would be favorable to the Complainant. Accordingly,

IT IS HEREBY ORDERED that summary decision in favor of Respondent Fortis Investments is **GRANTED**.

IT IS FURTHER ORDERED that the hearing scheduled for June 21and 22, 2006 in New York City is **CANCELED**.

A

PAUL H. TEITLER
Administrative Law

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, 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. §§ 1980.109(c) and 1980.110(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).