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Office of Administrative Law Judges
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Issue Date: 23 February 2006

Case No.: 2006-SOX-00030

In the Matter of

GARY W. RENO
Complainant

v.

WESTFIELD CORPORATION, INC.
Respondent

ORDER DISMISSING COMPLAINT
ON SUMMARY DECISION

Complainant, Gary W. Reno, filed a complaint against Respondent, Sirva, Inc., under the whistleblower protection provisions of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. §1514A. Complainant alleges that Respondent took adverse actions against him by discriminating against him, creating a hostile work environment and discharging him after he informed Limited Brands, Inc. that Respondent was fraudulently overcharging them for the care of common area space in the Richland Mall. Complainant originally filed his complaint with the Secretary of Labor who found it lacked merit. Complainant then appealed to the Office of Administrative Law Judges. A formal hearing is scheduled for March 21, 2006. On December 16, 2005, Complainant filed a Motion to Amend His Complaint and to Join Limited Brands, Inc. as a Respondent. He then filed a Motion to Strike the Record of the Initial Pre-hearing Conference on December 27, 2005. Respondent subsequently filed a Motion for Summary Decision, and, in the alternative, a Motion for a Protective Order on January 9, 2006. Complainant promptly responded and Respondent then filed a Reply.

I have carefully considered the parties' arguments, and I shall address the motions in turn.

Motion for Summary Decision

Summary Judgment Standard

The Rules of Practice and Procedure for administrative hearings are set forth at 29 C.F.R. Part 18. Summary Judgment can be granted "if the pleadings, affidavits, material obtained by discovery…or matters officially noticed show that there is no genuine issue as to any material fact." 29 C.F.R. § 18.40(d). Respondent, as the moving party, has the burden to prove

Complainant's case lacks evidence to support his claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden then shifts to the non-moving party (the Complainant) to bring forth evidence illustrating a genuine issue of material fact does exist. *Id*. The Court must look at the record as a whole and determine whether the fact-finder could rule in Complainant's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The evidence must be construed in favor of the non-moving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001). However, "if the non-moving party fails to sufficiently show an essential element of his case, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.'" *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at 5 (ARB September 30, 2005), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Findings of Fact and Conclusions of Law

18 U.S.C.A. § 1514A of the Sarbanes-Oxley Act ("Act") is designed to hold publicly traded companies responsible for fraudulent activity. Section 1514A is a whistleblower provision that provides protection for employees of these publicly traded companies who provide information or assist in the investigation of conduct which the employee reasonably believes constitutes a fraudulent activity that violates federal law. 18 U.S.C. § 1514A(a)(1). The Act protects those employees of companies "with a class of securities registered under Section 12 of the Securities Exchange Act of 1934." *Id*. Complaints under this provision are filed with the Secretary of Labor, who is to investigate and adjudicate the matter. 49 U.S.C.A. § 42121(b) of the Wendell H. Ford Aviation Investment and Reform Act sets forth the standards of proof in a Section 1514A claim. 18 U.S.C.A. § 1514A(b)(2)(C). "Accordingly, to prevail, a complainant must prove that: (1) the complainant engaged in a protected activity; (2) the respondent knew that the complainant engaged in protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Reddy*, ARB No. 04-123, p.7. If a complainant proves all four elements, the burden shifts to the employer to prove by clear and convincing evidence that it would have taken the same action had the protected activity not occurred. *Bechtel v. Competitive Tech., Inc.,* ALJ No. 2005-SOX-00033, p. 26 (October 5, 2005). However, first Complainant must prove that he is a covered employee and Respondent is a covered employer under the Act.

Complainant was employed by the Respondent, Westerfield Corporation, between April 8, 2002 and July 19, 2005. Respondent is a wholly-owned subsidiary of the Westerfield Group, an Austrian Corporation. Respondent is in the business of managing shopping centers. Complainant alleges in his complaint that on June 3, 2005, he faxed a letter to one of Respondent's tenants, Limited Brands Inc., informing its President, Barry Kaufman, that Respondent was fraudulently overcharging the company for the care of common area space. Complainant contends that as a result, he was discriminated against and discharged on July 19, 2005.

In its Motion for Summary Decision, Respondent contends that it is not subject to the whistleblower provisions of Section 1514A because it is not a company subject to the Act. Section 1514A provides protection to employees against retaliation by companies with a class of

securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)). The Act also covers any officer, employee, contractor, subcontractor, or agent of such companies, because the employee provided information to the employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. The current evidence proves, and Complainant concedes, that Respondent is not a publicly traded company. However, Complainant argues that Respondent is a contractor of Limited Brands, Inc., a publicly traded company, and therefore, is liable to him under Section 1514A.

Congress failed to define the word "contractor" when enacting Section 1514A. *Black's Law Dictionary* (8th ed. 2004), defines a contractor as a party to a contract and more specifically as one who contracts to do work or provide supplies for another. Complainant urges that the broad definition should be used and that any person entering into a contract should be a contractor under Section 1514A. Respondent, of course, seeks to use the more specific definition requiring an actual contract to do work for another. If Complainant's argument is used, any company entering into any contract with a publicly traded company could be subject to Section 1514A liability.

Regardless of which definition is used, Complainant has failed to provide evidence that Respondent fits within the parameters of either definition. To overcome a motion for summary decision, the nonmoving party must go beyond the pleadings and present evidence of a remaining issue of material fact. *Celotex*, 477 U.S. at 325. Complainant has failed to present evidence that a contractual relationship to perform work or any other type of contract for that matter exists between Respondent and Limited Brands, Inc. Complainant argues that, due to the settlement agreement entered into between Respondent and Limited Brands, Respondent should now be considered a contractor under the Act. However, the mere fact that a settlement agreement was entered into between Respondent and Limited Brands does not establish a contractor relationship under the Act. Otherwise, the number of individuals and companies which entered into settlement agreements daily would also now be considered contractors. I have great difficulty believing Congress intended to subject any company entering into a settlement agreement with a publicly traded company to possible liability under the Act. This definition is not within the purpose of the statute: to hold publicly traded companies and those acting on their behalf liable for fraudulent activity. While a person who contracts with another is per se a contractor, such is not the use of the word intended by Section 1514A.

Even if Complainant had provided evidence to establish a material fact as to whether Respondent is a contractor under Section 1514A, his claim would still fail. Merely being a contractor or agent of a publicly traded company is not enough to impose liability under Section 1514A. The contractor or agent when discriminating against the employee must have been acting on **behalf** of the publicly traded company. *Minkina v. Affiliated Physician's Group*, 2005-SOX-19 (ALJ Feb. 22, 2005); *Goodman v. Decisive Analytics Corp.*, 2006-SOX-11 (ALJ January 1, 2006); *Brady v. Calyon Securities*, 2005 WL 3005808 (S.D.N.Y. 2005). Complainant disagrees with this contention and relies on *Kalkunte v. DVI Financial Services, Inc.*, No. 2004-SOX-56 (ALJ July 18, 2005), to support his argument that Respondent falls within the Act.

(Complainant's Response, pp. 9-10). Complainant states that *Kalkunte* stands for the proposition that liability under Section 1514A extends beyond publicly traded companies. (Complainant's Response, p. 10). Although there is some support for this statement, Complainant neglects to acknowledge that *Kalkunte* is distinguishable from his claim. In *Kalkunte*, the publicly traded company, DVI Financial Services, Inc., hired a non-publicly traded company, AP Services, to act as its agent and manage its day to day operations while it went through bankruptcy. AP actually took control of DVI's management and even had control over its employees. The complainant was an employee of DVI but was discriminated against and was fired by AP, which had "the power to evaluate DVI's employees' value to the company and to terminate those who were no longer needed." *Kalkunte*, 2004-SOX-56, at 9. The Administrative Law Judge found AP liable under the statute because of the control it had over the employees of the publicly traded company. That is not the case here. There is no evidence of any interaction between the employees of Respondent and the employees of Limited Brands, Inc. Neither company has ever had control over the other or over the other's employees. Limited Brands, Inc. never had control over Complainant's job whatsoever. Respondent simply collects fees from Limited Brands, Inc.

Respondent argued that *Minkina v. Affiliated Physician's Group*, 2005-SOX-19 (ALJ Feb. 22, 2005), should be applied to this case. In *Minkina*, the complainant filed a Section 1514A claim against her employer which was a non-publicly traded company. The complainant argued that since her employer was a subcontractor of a publicly traded company, it was liable to her under the Act. *Minkina*, 2005-SOX-19 at 3. However, the Administrative Law Judge found that under Section 1514A(a), holding officers, employees, contractors, subcontractors and agents of publicly traded companies liable under the Act, only applied when those parties were engaging in discrimination on behalf of a covered employer. *Id*. at 5. Complainant disagrees with *Minkina* and states that he believes the Administrative Law Judge was wrong in his interpretation of the Act. (Complainant's Response p. 11). However, Complainant neglects to address the many other decisions which have reached the same conclusion.

In *Goodman v. Decisive Analytics Corp.*, 2006-SOX-11 (ALJ January 1, 2006), a complainant claimed SOX liability against his employer, a privately held company, on the basis that the employer worked as a contractor for a publicly held company. *Goodman*, 2006-SOX-11 at 6. However, the Administrative Law Judge found that the general language in Section 1514A(a) concerning contractors of publicly held companies did not subject the complainant's employer to liability. He found that, "the Act prohibits publicly traded companies and, in part, any contractor…of such company from taking an adverse employment action against an employee of the publicly traded company." *Id*. Like in *Minkina*, the court found that in order to be subject to liability, the contractor must act on behalf of the publicly traded company. *Id*. Any other interpretation would extend protection beyond that envisioned by Congress. *Id*.

Like the previous administrative law judges, I also interpret Section 1514A(a) to hold contractors of publicly held companies liable only when they act on behalf of the publicly traded company. There is no evidence before me which establishes that when allegedly discriminating against and terminating Complainant, Respondent acted on behalf of Limited Brands, Inc. Accordingly, I find Respondent is not a covered employer under the Act and therefore, the Court lacks jurisdiction to hear the case.

Motion to Amend Complaint

On December 16, 2005 Complainant filed a Motion to Amend his Complaint and to Add Limited as a Respondent. Complainant wishes to join Limited Brands, Inc., its subsidiary, Limited Real Estate, and its President, Mr. Barry Kaufman, as parties to the action. He also seeks to add new factual allegations to the complaint. 20 C.F.R. § 18.5(e) allows a complainant to amend his complaint as a matter of right before the filing of an answer or when "necessary to avoid prejudicing the public interest and the rights of the parties." The general rule is that amendments to complaints should be "freely granted." *Foman v. Davis*, 371 U.S. 178, 182 (1962). However, the Supreme Court specified some boundaries for amending complaints and specifically stated that a complaint should not be amended when it would be futile. *Id*.

First, allowing Complainant to amend his complaint to add factual allegations would be futile, for it would fail to state a viable claim. As stated above, Respondent is not a covered employer under the act and adding additional factual allegations to the complaint will not change Respondent's status. Therefore, Complainant's motion to add additional factual allegations is denied.

Second, allowing Complainant to amend his complaint to join Limited Brands, Inc., their subsidiary Limited Real Estate, and its President, Mr. Barry Kaufman, to the action would also be futile. As stated above, Limited Brands, Inc. had no control over Respondent's employees, including Complainant. Limited Brands, Inc. had no control over Complainant's employment position. Complainant argues that when Mr. Kaufman informed Respondent of the allegations of fraud, Mr. Kaufman and Limited Brands, Inc. discriminated against him. Section 1514A holds employers liable who take adverse employment actions against employees who provided information regarding fraudulent activity to the employer or to a Federal agency. Complainant has not alleged that Limited Brands, Inc., its subsidiary, Limited Real Estate, or Mr. Kaufman took an adverse employment action against him. Actually, Complainant cannot make such an allegation because these parties had no control over Complainant's employment. There are no facts to indicate the parties could be liable to Complainant under the Act. Therefore, I deny Complainant's motion to join Limited Brands, Inc., its subsidiary, Limited Real Estate, and President, Mr. Barry Kaufman, as parties to this action.

ORDER

IT IS HEREBY ORDERED that Respondent's Motion for Summary Decision is GRANTED and Complainant's Motion to Amend his Complaint is DENIED. Therefore, Complainant's Motion to Strike the Telephone Conference and Respondent's Motion for Protective Order are Moot. Complainant's complaint is DISMISSED with prejudice. Accordingly, the hearing scheduled for March 21, 2006 in Cincinnati, Ohio is canceled.

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JOSEPH E.KANE
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. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("ARB"), U.S. 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 will 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 ARB. 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.