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Issue Date: 03 May 2018

CASE NO.: 2017-CFP-00007
OSHA NO.: 7-7080-16-139

In the Matter of:

PETER LINDNER
Complainant,

v.

CITIMORTGAGE INC.,
Respondent.

ORDER GRANTING REQUEST TO CERTIFY ISSUE FOR INTERLOCUTORY APPEAL AND ORDER STAYING PROCEEDINGS

This proceeding arises under the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567 (herein the "CFPA"), and Section 806 of the Sarbanes Oxley Act ("SOX"), 18 U.S.C. § 1514A, and the regulations promulgated thereunder at 29 C.F.R. Part 1985 and 20 C.F.R. Part 24.

On April 16, 2018, Respondent filed Respondent's Motion for Certification of March 22, 2018 and April 5, 2018 Decisions on Standing for Interlocutory Review and for Immediate Stay of These Proceedings ("Motion") in the above-captioned matter. To date, Complainant has filed no objection, and the time to do so has passed. *See* 29 C.F.R. § 18.33(d)(noting that a party to the proceeding may file an opposition or response within 14 days and failure to do so may result in the requested relief being granted).

In its Motion, Respondent requested that, pursuant to 28 U.S.C. § 1292(b), I certify for review by the Administrative Review Board the issue of Complainant's standing to bring suit under the CFPA and SOX and stay these proceedings pending the Administrative Review Board's review and disposition of the issue. Respondent contends that Complainant is not an "employee" or "covered employee" under the Acts, thus does not have standing to bring a claim under the Acts. Respondent avers that I erred in my interpretation of *Lawson v. FMC LLC,* 134 S. Ct. 1158 (2014) and the Acts' implementing regulations in rendering my decision.

Respondent specifically argues that *Lawson* addressed only SOX claims not CFPA claims and notes that my ruling that *Lawson* "should extend to CFPA claims appears to [be] a question of first impression." Motion at 5. Respondent further asserts that my ruling that "SOX

and CFPA protection to a contractor's employees extends beyond the employment relationship to discriminatory acts by the contractor's publicly traded client likewise is an issue for disagreement."

Respondent argues that interlocutory review is "appropriate here because immediate review of the question will materially advance the final disposition of the proceeding. If Complainant does not have standing, his case must be dismissed, obviating any need for further discovery, a hearing on the merits or even disposition of the equitable tolling issue." *Id.* at 6. Respondent further argues that interlocutory review will promote judicial economy by resolving a fundamental jurisdictional issue.

On March 22, 2018, citing *Lawson*, I issued an order denying Respondent's motion to dismiss on the basis of lack of standing noting that Complainant, as an independent contractor employed by Respondent, was covered by CFPA and SOX, and has standing to bring a claim under both CFPA and SOX. Respondent thereafter filed a motion for reconsideration, arguing that (1) Lawson only addressed SOX claims, and (2) "that there must be an employment relationship between the plaintiff and the alleged discriminator and that no SOX cause of action lies against a contractor of a publicly traded company that did not employ the plaintiff." Motion at 3 (citing *Bogenschneider v. Kimberly-Clark Global Sales, LLC*, 2015 WL 796672 (W.D. Wis. Feb. 25, 2015)). Moreover, Respondent argued that the "*Lawson* court concluded that 'no contractor may discriminate against its own employee for whistleblowing,' and Complainant was never CitiMortgage's 'own employee'…. *Lawson* would only operate to protect [Complainant] from discrimination by ***Lindner Corporation*.**" Reconsideration Motion at 3-4.

On April 5, 2018, I issued an order denying Respondent's motion for reconsideration. I noted that the CFPA and SOX regulations define the term "employee" similarly, thus I declined to distinguish *Lawson* in that regard. Moreover, I noted, both Acts' whistleblower provisions were enacted to encourage the reporting of fraud by public companies. SOX, I noted, defines an "employee" as "an individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person;" the CFPA defines a "covered employee" as "an individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person or service provider." 29 C.F.R. § 1980.101(g); 29 C.F.R. § 1985.101(i) (emphasis added).

Respondent had previously argued in its October 2017 Motion for Summary Disposition that "by their express terms, both the CFPA and SOX are intended to protect employees and applicants," and "[t]here is absolutely no evidence that Complainant was employed by an entity, and certainly no evidence that he was employed by CitiMortgage." Respondent's October 27, 2017 Motion for Summary Disposition at 9. Complainant, Respondent argued, was engaged as an independent contractor via his business Lindner Corporation, which contracted with TSR to perform services for Respondent, thus was not an employee.

Without determining whether or not Complainant was effectively an "employee" of Respondent, I found that Complainant had standing to bring this claim because the regulations' use of the phrase "or an individual whose employment could be affected by a covered person." In light of the purpose of the Acts and in light of the regulatory definition of employee, I

declined to read *Lawson* as narrowly as Respondent suggested. I found that Complainant was an individual, even as an independent contractor, whose employment could be affected by Respondent. Simply put – in Complainant's opinion his employment was terminated as a retaliatory act for whistleblowing; by Respondent's account, Complainant's employment was terminated in the usual course as the result of the completion of contract wherein Complainant was a subcontractor.

ORDER GRANTING REQUEST FOR CERTIFICATION OF ISSUE

The Board has held that when a party seeks interlocutory review of an administrative law judge's order, it is proper to follow the procedure provided for United States District Court judges at 28 U.S.C. § 1292(b), which requires that the District Judge state in writing that the issue is an appropriate one for appeal. *See Plumley v. Fed. Bureau of* Prisons, 86-CAA-6 (Sec'y Apr. 29, 1987); *Jordan v. Sprint Nextel Corp*., ARB No. 06-105, ALJ No. 2006-SOX-41 (ARB June 19, 2008).

The statute specifically provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

The Board has consistently held that piecemeal appeals and appeals of interlocutory orders are disfavored. *See, e.g., Hasan v. Commonweath Edison Co*., ARB No. 990097, ALJ No. 1999-ERA-17 (ARB Sept. 16, 1999); *Welch v. Cardinal Bankshares Corp*., ARB No. 03-014, ALJ No. 2002-AIR-21 (ARB Jan. 24, 2003). In the instant matter, however, I find that the issue of standing "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Accordingly,

It is hereby **ORDERED** that Respondent's request is **GRANTED**. The issue of whether Complainant has standing to bring his claim under the CFPA and SOX is **CERTIFIED** to the Administrative Review Board to consider Respondent's interlocutory appeal, and that all proceedings at this level are **STAYED**[1] pending the Administrative Review Board's ruling on the interlocutory appeal, or refusal to accept the appeal for consideration.

[1] The parties are notified that the stay applies only to case 2017-CFP-00007.

SO ORDERED.

CARRIE BLAND
Administrative Law Judge

Washington, D.C.