



Issue Date: 30 April 2019

CASE NO.: 2018-CFP-00005

In the Matter of:

RHONDA MCINTYRE,
Complainant,

v.

POPE FUNERAL HOME,
Respondent.

ORDER GRANTING SUMMARY DECISION and DENYING COMPLAINT

This matter involves allegations made under the employee protection provisions of 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 (“CFPA”) and the regulations promulgated thereunder at 29 C.F.R. Part 1985. Specifically, Complainant Rhonda McIntyre alleges that she was subjected to adverse employment action by Respondent Pope Funeral Home after she engaged in activities that are protected under CFPA. For the reasons explained below, I will grant summary decision in favor of Respondent and dismiss the complaint.

Procedural History

On April 30, 2018, Complainant filed an administrative complaint with the Occupational Safety and Health Administration, alleging that she had been terminated by Respondent in retaliation for having engaged in protected activity under the CFPA and under the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (“SOX”). On June 1, 2018, OSHA dismissed the complaint, finding that Respondent is not a “company” as defined in SOX, and is not a “covered person” or “service provider” as defined in CFPA. Ms. McIntyre filed a timely objection to the OSHA findings and requested a hearing. The matter was forwarded to the Office of Administrative Law Judges, and assigned to me.

On July 20, 2018, I issued an Order to Show Cause, requiring Complainant to show why her claim under CFPA should not be dismissed on the grounds that Respondent is not a covered person or service provider, and why her claim under SOX should not be dismissed on the grounds that Respondent is not an entity that can be held liable under SOX. After receiving Complainant’s response, I found that she had satisfied the Order to Show Cause with respect to the CFPA claim, but not with respect to the SOX claim, and dismissed the latter.

On February 11, 2019, Respondent Pope Funeral Home filed a motion to dismiss the complaint. Complainant Rhonda McIntyre filed a timely opposition to that motion. Upon review of the pleadings, I determined on my own motion under 29 C.F.R. § 18.72(f) to consider granting summary decision in favor of Respondent, and gave the parties the opportunity to submit evidence and argument on the sole issue whether Respondent is a “covered person” or “service provider” under CFPA. Both parties did so.

Legal Standards

Summary Decision

Summary decision may be entered pursuant to 29 C.F.R. § 18.72 under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Gillilan v. Tennessee Valley Authority*, 91-ERA-31 at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1 at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision “must set forth specific facts showing that there is a genuine issue of fact for the hearing.” 29 C.F.R. § 18.40(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). When a respondent moves for summary decision on the ground that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex Corp. v. Catrett, supra*.

CFPA

CFPA prohibits employment discrimination by a “covered person or service provider.” A “covered person” is defined as:

- (A) any person that engages in offering or providing a consumer financial product or service; and
- (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.

12 U.S.C. § 5481(6). A “service provider” is defined as:

(A) In general

The term "service provider" means any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that—

- (i) participates in designing, operating, or maintaining the consumer financial product or service; or

(ii) processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes).

(B) Exceptions

The term "service provider" does not include a person solely by virtue of such person offering or providing to a covered person—

(i) a support service of a type provided to businesses generally or a similar ministerial service; or

(ii) time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media.

(C) Rule of construction

A person that is a service provider shall be deemed to be a covered person to the extent that such person engages in the offering or provision of its own consumer financial product or service.

12 U.S.C. § 5481(26). Thus, to be either a covered person or a service provider, Respondent must be involved in offering or providing a consumer financial product or service, either directly or by providing support services to one who offers or provides such product or service directly.

CFPA defines consumer financial product or service as follows:

The term “consumer financial product or service” means any financial product or service that is described in one or more categories under—

(A) paragraph (15) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or

(B) clause (i), (iii), (ix), or (x) of paragraph (15)(A), and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (A).

12 U.S.C. § 5481(5).

Undisputed Facts

Ms. McIntyre provided a large amount of documentation purporting to show misconduct by Respondent toward customers and employees in the performance of its business. Most of the documentation is unrelated to the issue whether Respondent is a covered person or a service provider. Although they are summarized below, they do not relate to that issue; my findings are limited to those relevant to whether Respondent is a covered person or service provider.¹

Respondent sells funeral service to its customers using a written agreement entitled Funeral Goods and Services Selection, revised in July of 2002, utilized by Respondent to establish a contract for funeral services between Respondent and a client seeking funeral services, contained a section entitled “Promissory Note.” That section read:

¹ I have reviewed every page of each party’s submissions.

Full payment is due no later than _____. If any payment is not paid when due an unanticipated LATE CHARGE of _____% per month (**ANNUAL PERCENTAGE RATE** _____%) on the unpaid balance will be due. I agree to pay the Balance Due listed on this Statement, plus any LATE Charge. In the event I default in payment to this funeral establishment, I agree to pay reasonable attorneys fees and court costs in addition to any Late Charge applicable. I understand and agree that I am assuming personal liability for the charges set forth in this Statement and that this is in addition to the liability imposed by law upon the estate of the deceased. By my signature below, I hereby agree to all of the above and acknowledge receipt of a copy of this Statement.

Below that paragraph is a space for a signature by the client, followed by a paragraph reading:

ACCEPTANCE This funeral establishment agrees to provide all services, merchandise and cash advances indicated on this Statement.

Below that sentence is a space for a signature by a licensed mortician or funeral director.

Attached to the form is a document entitled "TERMS AND CONDITIONS" which includes the following provisions:

VI. CASH ADVANCES

Cash advances are typically paid directly for you to 3rd parties at no additional cost or finance charges unless otherwise disclosed. Such as **Clergy fee, organist fee, death certificates cemetery charges, printing**, etc. All cash advances must be paid in full prior to the rendering or ordering of such services.

VII. PAYMENT DEFAULT

[Pope Funeral Home] will charge 1 ½% interest (18% per annum) per month on unpaid balances. Upon default of terms and conditions, PFH and/or its legal representatives shall be entitled to recover costs and reasonable attorney fees in any action or proceeding to collect on unpaid balances. Late charges for default of payment shall be charged to an account on the expiration of 30 days after original contract sale date. Late charges shall be \$30 per month until paid.

Respondent's form was revised on November 1, 2014, with no change to paragraphs VI and VII set forth above. [Complainant's Exhibit B; Respondent's Exhibit A.] The revised form, however, does not contain the "Promissory Note" provisions set forth above.

Respondent accepts payment for its services in the form of cash, check, money order, certain credit or ATM cards, and certain life insurance or "pre-funded preneed policies." [Complainant's Exhibit B; Respondent's Exhibit A.] Respondent does not offer mortgages or consumer loans, extends no credit and does not engage in credit reporting or counseling. It is in the business of selling funerals, including the funeral services and off-the-shelf retail products used in a burial. Transactions are "cash on the barrel," with payment in full expected before any

services are provided. If a check bounces, or a credit card is declined, or the like, the only recourse by Respondent is to file a small claims suit. [Respondent's Exhibit B.]

Respondent is Not a Covered Person

Under the CFPB, a "covered person" includes one who engages in offering or providing a consumer financial product or service and any affiliate of such a person if the affiliate acts as a service provider to such person. 12 U.S.C. § 5481(6).

Respondent Does Not Offer or Provide a Consumer Financial Product

A "consumer financial product" is defined at 12 U.S.C. § 5481(5), which lists a large number of products in the definition. I limit the discussion here to the definitions that Ms. McIntyre asserts may apply to this matter, specifically subsections (A)(1) and (A)(4).

Complainant argues that Respondent extends credit and services loans by virtue of the "Promissory Note" language appearing on the pre-2014 version of the goods and services agreement. Specifically, she argues:

Definition: A promissory note, sometimes referred to as a note payable, is a legal instrument (more particularly, a financial instrument and a debt instrument), in which one party (the *maker* or *issuer*) promises in writing to pay a determinate sum of money to the other (the *payee*), either at a fixed or determinable future time or on demand of the payee, under specific terms. The promissory note is no different than extending a loan.

Complainant's brief, pp 5-6. Ms. McIntyre refers to the language in the "Promissory Note" and paragraphs VI and VII of the "Terms and Conditions" as "loan language." Contrary to her belief, however, a promissory note is not a loan by a different name. It is, rather, a promise to pay an existing debt on specific terms, and because of those requirements is a negotiable instrument. *See* Maryland Code, Commercial Law, § 3-104; D.C. Code, § 28:3-104.² The goods and services agreement used by Respondent clearly does not constitute a promissory note, regardless how it is labelled. Instead, it is a straightforward contract by which Respondent calculates the total cost of goods and services selected by its customer, provides that cost to the customer, and advises the customer that payment is due before goods and services are provided. The customer is free to reject the proposed terms and go elsewhere; and if the customer accepts the terms, Respondent is not obligated to provide the agreed goods and services until the customer makes payment in full. The agreement does not reflect an existing debt, as is required to qualify as a promissory note; indeed, there is no debt at all until Respondent provides the first good or service. Respondent's only recourse for non-payment due to a bounced check, declined credit card, or the like is to file a small-claims action against the client; it cannot sue on the purported "promissory note" itself. So the language of the Funeral Goods and Services Selection contract, before or after 2014, regardless of its label, is not a promissory note, irrespective whether a promissory note is a consumer financial product.

² It appears from the parties' briefs that Respondent owns funeral homes in both Maryland and the District of Columbia. It is not clear in which facility Complainant worked, but as she bases much of her argument on Maryland law, it appears that she worked in that state. It doesn't matter, though: the relevant law is identical in both jurisdictions.

Ms. McIntyre additionally argues that the use of an agreement to assign insurance proceeds in payment of the funeral goods and services provided by Respondent is “of great disturbance.” She alleges that the assignments are not notarized at the time of signature, and Respondent does not require identification of the person signing the assignment document. These concerns, however, do not convert the assignment of insurance proceeds into a consumer financial product; they are merely one means for a customer to pay Respondent for the agreed goods and services.

Complainant argues that certain cash advance items convert the Funeral Goods and Services Selection agreement into a consumer financial product. Specifically, she alleges that it is illegal for Respondent to charge a fee “on a[n]...insurance” unless it is done through a funding company. She has not, however, explained how, even assuming that Respondent’s practice is illegal (Complainant has provided no authority for that proposition), that makes the agreement a consumer financial product. Ms. McIntyre additionally argues, with respect to the cash advance items, that the only fee Respondent is *required* to incur is the burial permit. Again, she has provided no authority for that assertion, but assuming she is correct, that does not preclude Respondent from offering to advance other fees as a service to its customers. In any event, doing so does not convert the agreement into a consumer financial product.

Ms. McIntyre next argues that Respondent threatened its employees’ jobs for permitting customers to purchase caskets from a third party, and that doing so violates a Federal Trade Commission rule that allows customers to have fair access to consumer goods and services. Again, even if true, that does not convert the agreement into a consumer financial product, and Ms. McIntyre has not shown that it does.

Complainant devotes almost 18 pages of her brief to showing that Respondent engaged in questionable business practices, mainly by overcharging or undercharging clients for various goods and services, or by charging for goods and services that were not provided. Complainant’s brief, pp. 8-25. I make no findings on the issue whether Respondent’s business practices were illegal, or improper; indeed, it is as likely that those preparing the 164 identified contracts were sloppy as that they acted improperly. And given that Respondent has not responded (and need not respond) to Complainant’s allegations with respect to those contracts, I obviously don’t have the full story. But it doesn’t matter, because again, even assuming that there was something shady going on, that doesn’t turn the agreements into consumer financial products.

Complainant argues next that Respondent mishandled several “preneed” contracts, which are contracts entered into before the death of the person whose funeral is being planned. Maryland law, says Complainant, strictly regulates the use of the funds paid at the time a preneed contract is executed. In brief, the funds must be placed in an interest-bearing escrow or trust account at an appropriate financial institution, and must only be used for the goods and services specified in the contract. The law specifies certain consequences if the customer does not make full payment, and provides that it is an unfair trade practice for a seller (here, Respondent) to alter the terms and conditions of the preneed contract. Ms. McIntyre identified several occasions on which, she claims, Respondent failed to abide by its legal responsibilities with respect to

preneed contracts. Again, even assuming that Respondent's actions violated Maryland law, those actions do not convert the preneed contracts into financial consumer products.³

Ms. McIntyre next argues that Respondent violated contracts for limousine, flower, and banquet-room services that were provided by other entities owned by Respondent's owner. She also accused those entities, without explanation or evidence, of money laundering and improprieties in the solicitation of clients. It appears that she believes it is improper for Respondent to provide services from other entities owned by Respondent using client funds to do so. She has not explained why it is improper, or why it is different from Respondent obtaining limousine or flower services from entities not owned by Respondent's owner. In any event, she has not explained how these practices constitute the provision of a consumer financial product, and they do not.

Accordingly, I find that Respondent is not a covered person under 12 U.S.C. § 5481(6)(A) because it does not engage in offering or providing a consumer financial product or service.

Respondent is Not a Covered Person as an Affiliate

Under 12 U.S.C. § 5681(6)(B), a "covered person" includes "any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person." If Respondent is an affiliate of one who engages in offering a consumer financial product or service, then Respondent is a covered person under this definition.

Complainant has alleged that Pope Funeral Home is an affiliate of a number of other business entities under the common ownership of the Pope family. Specifically, she asserts that Pope Funeral Home, Limousine Associates Service, the Pope Family Fellowship Room, Nate's Flowers & Gift Baskets, and a section of Pope Memorial Gardens are a common enterprise of The Pope Companies and ALEXPOPE Inc. All of the entities have business addresses in Forestville, Maryland (except for Pope Memorial Gardens, located in Adelphi), and they share common ownership and key executives.

"Affiliate" is not defined in Title 12, Chapter 53, Subchapter V, which is the subchapter under which this complaint was filed. The definitions section of Chapter 53, 12 U.S.C. § 5301(1), provides that "affiliate" has the same meaning as in 12 U.S.C. § 1813. Section 1813, in turn, defines "affiliate" in terms of entities that are affiliated with depository institutions, and gives it the same meaning as in 12 U.S.C. § 1241(k). Section 1241(k) defines "affiliate" to mean "any company that controls, is controlled by, or is under common control with another company." Parsing the various definitions is not a simple thing, but ultimately it is unnecessary to decide whether Respondent is an "affiliate" as defined in the relevant statute; assuming that it is, there is no evidence that it is an affiliate of an entity that engages in offering a consumer financial product or service. Complainant alleges that The Pope Companies offers an Escrow Management Account to all the companies she identifies as being affiliated. She further alleges that The Pope Companies extends credit, late charge fees, interest, and default terms, and offers corporate credit through issuing credit card or online credit card account.

³ I note additionally that there is no allegation that Respondent maintains escrow accounts itself; Ms. McIntyre explains that it places the funds into an escrow account at a qualified financial institution.

Again, Ms. McIntyre has offered no evidence in support of her assertions, and I can find on that basis alone that Respondent is not an affiliate of The Pope Companies within the meaning of the CFPA. But even assuming that she is correct, what she describes is a business arrangement between various commercial entities, and not an arrangement between any of those companies and a consumer. Under 12 U.S.C. § 5481(5), a consumer financial service or product something that “is offered or provided for use by consumers primarily for personal, family, or household purposes.” As no consumers are involved in the purported business arrangement between The Pope Companies and Pope Funeral Home, the latter is not a covered person under 12 U.S.C. § 5681(6)(B).⁴

Conclusion

Based on the foregoing, I find that Respondent is not a “covered person” under either definition of 12 U.S.C. § 5681(6).

Respondent is Not a Service Provider

In general, a “service provider” is “any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service...” This definition brings into the scope of the CFPA’s employee-protection provisions an employee of an entity that provides material service to a covered person, even if the entity is not itself a covered person. Thus, if Pope Funeral Home provides material service to a covered person, it is a service provider subject to the anti-discrimination provisions of the CFPA.

Ms. McIntyre identified several entities, listed above, that fall under the umbrella of The Pope Companies. The various entities, she says, are intertwined in ownership and management, and engage in interlocking business activities in support of each other. What Complainant has not shown, however, is that any of the various entities offers or provides a consumer financial product or service. If she is correct that The Pope Companies provides some business credit to the other entities, then, as discussed above, its activities do not involve consumers, and it is not a covered person. Complainant has not shown that any of the other companies offers or provides consumer financial products to their customers or clients. I find, therefore, that they do not, and they are likewise not covered persons.

Because Pope Funeral Home does not provide material support to any covered person, it is not a service provider under the CFPA.

Conclusion

Respondent Pope Funeral Home is neither a covered person nor a service provider under the CFPA. Respondent therefore cannot be held liable under the CFPA, and the complaint must be dismissed.⁵

⁴ In addition, the evidence shows that Respondent did not provide material service to any of the other entities, but that they provided services to Respondent.

⁵ Respondent argues that it is excluded from coverage under 12 U.S.C. § 5517 as a merchant, retailer, or other seller of non-financial goods and services. I am skeptical – that section excludes such entities from action by the CFPB,

ORDER

Based on the foregoing, IT IS ORDERED:

1. Summary decision in favor of Respondent Pope Funeral Home is GRANTED; and
2. The complaint in this matter is DENIED.⁶

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ, Jr./ksw
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

but not explicitly from the employee-protection provisions of the CFPA – but I need not address it. Assuming that Respondent is not excepted under § 5517, the record shows that it is not a covered person or service provider under the CFPA.

⁶ 29 C.F.R. § 1985.109(d)(2) requires denial of the complaint, as opposed to dismissal, when the administrative law judge determines that a respondent has not violated the CFPA. As I find that Respondent herein is not subject to the CFPA, I necessarily conclude that it did not violate the CFPA and deny the complaint.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1985.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1985.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1985.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1985.109(e) and 1985.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1985.110(b).