U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 September 2007

CASE NO.: 2007-SOX-44

In The Matter of:

SURESH AHLUWALIA
Complainant

v.

ABB, INC.
ABB TRANSMISSION & DISTRIBUTION, LTD.
Respondents

DECISION AND ORDER GRANTING MOTION TO DISMISS

Respondents, ABB, Inc. and ABB Transmission & Distribution, Ltd. ("ABB T&D, Ltd."), move that the complaint filed by Complainant, Suresh Ahluwalia, under the whistleblower protection provisions at Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, codified at 18 U.S.C. § 1514A ("SOX" or "the Act") be dismissed for lack of subject matter jurisdiction. Complainant asserts that his employment was terminated because he engaged in activities protected by the Act.

Respondents argue that the complaint should be dismissed because the Act does not have extraterritorial application and Complainant is a non-citizen who worked for ABB T&D, Ltd., a foreign company, and all relevant conduct occurred outside the United States. Respondents also contend that ABB, Inc. and ABB, Ltd. should be dismissed as not properly named.

Procedural Background

Complainant commenced this action by a complaint filed before the U. S. Department of Labor Occupational Safety and Health Administration ("OSHA") on February 15, 2007. The complaint named ABB T&D, Ltd. and ABB, Ltd. as Respondents, and asserted that "Respondents relieved [Complainant] of duties." OSHA dismissed the claim against Respondent ABB T&D, Ltd. because ABB T&D, Ltd. is a United Arab Emirates ("UAE") corporation that only does business in Abu Dhabi, and is not a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 and is not required to file reports under Section 15(d) of the Securities Exchange Act of 1934. OSHA also dismissed the complaint against Respondent ABB, Ltd. because OSHA found the evidence showed that no one employed by Respondent ABB, Ltd. was involved in the hire, performance or termination of Complainant,

and that Respondent ABB, Ltd. was not involved in the daily operation or decision-making of Respondent ABB T&D, Ltd.

Moreover OSHA found that it lacked jurisdiction to investigate the complaint because it found that the Act is meant to apply only within the territorial jurisdiction of the United States, and Complainant's work with Respondent ABB T&D, Ltd. took place at all times relevant to the complaint in Abu Dhabi, UAE, and as such was outside the United States.

Complainant filed a timely appeal with the Office of Administrative Law Judges ("OALJ"). His appeal named ABB T&D, Ltd. and ABB, Inc. as Respondents. He did not appeal OSHA's findings regarding ABB, Ltd. His complaint does not provide any reasoning for adding ABB, Inc. as a Respondent. It merely reiterates the allegation that he made before OSHA that, "Respondents relieved [Complainant] of duties."

After Respondents' filed their Motion to Dismiss, Complainant filed an "Amended and Supplemental Complaint" before the undersigned Administrative Law Judge in which he added ABB, Ltd. as a Respondent and asserted that all three Respondents "operate as a joint enterprise, and each participated in the unlawful acts and practices described in this complaint."

Motion to Dismiss

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 CFR, Part 18 ("the Rules") provides no rule governing consideration of motions to dismiss. In the absence of a guiding rule provided by the Rules, 29 C.F.R. § 18.1 provides that the Federal Rules of Civil Procedure "shall be applied."

Federal Rules of Civil Procedure 12(b)(1) and (6) address motions to dismiss for lack of subject matter jurisdiction and failure to state a claim. Here, Respondents' Motion to Dismiss places at issue whether Complainant's complaint is sufficient on its face to establish subject matter jurisdiction and state a recognizable claim under SOX. During this consideration, Complainant's factual assertions are accepted as true. However, the Complainant bears the burden of proof to establish jurisdiction. *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F.Supp.2d 9, 13-14 (D.D.C. 2001).

Sarbanes-Oxley Act

The whistleblower protections of Section 806 of the Act are codified at Title 18, Chapter 73 Section 1514A, under the caption "Civil action to protect against retaliation in fraud cases." Subsection (a) of 1514A provides that the whistleblower protection provisions apply to companies "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))." The registration and reporting requirements of the Securities Exchange Act of 1934 "apply to U.S. and foreign companies listed on U.S. securities exchanges." *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 5 (1st Cir. 2006). Moreover, the prohibition on retaliation against whistleblowers is not limited to publicly listed corporations themselves; rather, 1514A specifies that no "officer, employee, contractor, subcontractor or

agent" of listed corporations can engage in prohibited conduct either. This has been construed to extend the bar on retaliation against whistleblowers to privately held subsidiaries of publicly traded parents. *Carnero,* 433 F.3d at 6.

Sarbanes-Oxley prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other way discriminating against employees who provide information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. Employees are also protected from retaliation when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed relating to a violation of the above-referenced fraud statutes, SEC rules or Federal law.

Jurisdiction

Lack of Extraterritorial Jurisdiction.

It is uncontested that Complainant's employment took place outside the United States. ¶¶ 4 and 5 of Complainant's Declaration states that in 1999 he was transferred to ABB's Group headquarters in Zurich, Switzerland, where he worked consolidating ABB Group accounts, and in 2003 was transferred to Abu Dhabi to work for ABB T&D, Ltd. See also the Respondents' submission of a declaration by Christopher C. Hudson, ABB's regional Human Resources Manager for the area including ABB T&D, Ltd., stating that Complainant entered an employment agreement with ABB T&D, Ltd. on June 13, 2003, in Abu Dhabi, UAE, according to which none of Complainant's duties required any contact with the United States.

The facts of this case are on all fours with a recent decision of the Administrative Review Board ("ARB") in *Ede v. The Swatch Group, Ltd.*, ARB No. 05-053 ALJ Nos. 2004-SOX-69 and 69 (ARB June 27, 2007). In *Ede*, the ARB sustained an appeal of an Administrative Law Judge's dismissal in a case involving two foreign employees of a foreign subsidiary of a publicly traded corporate parent seeking the Act's protections. The ARB held that "section 806 does not protect employees such as [the complainants] who work exclusively outside the United States." In *Ede*, the complainants worked in Switzerland, Hong Kong and Singapore for a subsidiary of a Swiss corporation, and "they never worked…within the United States." The ARB's reasoning relied on the decision of the First Circuit Court of Appeals in *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, (1st Cir. 2006). In *Carnero*, the First Circuit considered the case of an Argentinian citizen employed in Brazil who sought the Act's whistleblower protections after informing his employer's American parent about fraud occurring at two Latin American subsidiaries. The court accepted for purposes of considering the foreign application of the Act that "if [his] whistleblowing activities had occurred in this country relative to similar alleged misconduct by domestic subsidiaries, he might well have a potential claim under the whistleblower protection provision of the Sarbanes-Oxley Act." *Carnero,* 433 F.3d at 6. The court concluded, however, that the Act's whistleblower protections have no foreign application. It reasoned that a "foreign employee…who complains of misconduct abroad by overseas subsidiaries" may not maintain a suit against a listed American parent company. *Id* at 7.

Complainant presents two arguments in support of the existence of subject matter jurisdiction. He argues initially that the *Carnero* decision was wrongly decided and instead the "more enlightened view is that SOX needs to have the extraterritorial effect necessary to accomplish its fundamental purpose." However, the decision of the ARB in *Ede*, supra, is binding precedent here. Moreover, the *Carnero* reasoning is consistent with the well-established presumption against extraterritorial application of Congressional statutes. "Where, as here, a statute is silent as to its territorial reach, and no contrary congressional intent clearly appears, there is generally a presumption against its extraterritorial application." *Id.* at 6.

Complainant's second argument is that the parent and subsidiary are jointly liable for a violation of Section 806 of SOX, and, likewise, that a SOX claim may proceed against a non-publicly traded subsidiary under the theory that the subsidiary is an agent of the parent company.[1] However, Complainant's second argument misses the mark. Jurisdiction is lacking because the activity protected by the statute occurred outside the United States, not because liability of the Complainant's employer fails to extend to the parent company. In *Carnero*, the court interpreted SOX as being able to be read as embracing an agent-subsidiary's retaliation against a protected employee. The court assumed that if the discriminatory activity was committed in the United States by the subsidiary the activity would have been covered by SOX. The lack of jurisdiction was a consequence of the overseas location of the employment, not the subsidiary status of the employer, or its agency relation to the parent company.

ABB, Inc. Not Named in OSHA Complaint.

Complainant named ABB, Inc. as a respondent for the first time in his appeal to the OALJ. ABB, Inc. is an American subsidiary of ABB, Ltd. and sister subsidiary to ABB T&D, Ltd. It is a Delaware corporation and is neither a parent corporation nor a subsidiary of ABB T&D, Ltd.[2] As ABB, Inc. was not named in the complaint before OSHA, OSHA made no finding on its potential liability.

Complainant argues at page 21 of his Memorandum in Opposition of Motion to Dismiss that ABB, Inc. was named as a respondent. But Complainant is wrong. His complaint is styled with a caption heading showing *Suresh Ahluwalia against ABB, Ltd. and ABB Transmission & Distribution, Ltd*. The only place in his complaint he references ABB, Inc. is in a paragraph providing addresses for the parties.[3]

29 C.F.R. § 1980.103(d) provides that a complaint must be filed within ninety (90) days of the occurrence of the alleged violation of the Act. Complainant alleged in his complaint that Respondents relieved him of his duties on or about November 23, 2006, and stopped paying wages to him on or about January 31, 2007. Complainant did not name ABB, Inc. as a

[1] Complainant's Amended and Supplemental Complaint alleges that Respondents "operate as a joint enterprise, and each participated in the in the unlawful acts and practices described in this complaint."
[2] Declaration of Christopher C. Hudson, ¶¶ 14-16.
[3] Complainant also suggests in his Memorandum that an error in not naming a party could be corrected in the future by amendment under 29 CFR 18.5(e). Complainant might be correct that such an amendment could have been granted if he was able to meet the requisites for an amendment *nunc pro tunc*. *Wilson v. Bolin Associates, Inc.*, 91-STA-4 (Sec'y Dec. 30, 1991)

Respondent until his appeal to the OALJ on May 2, 2007, more than ninety days after the occurrence of the discriminatory act. As the complaint against ABB, Inc. was untimely, no jurisdiction over ABB, Inc. exists. A requirement that a party be named in a complainant's complaint to OSHA is not a mere procedural detail, but is necessary so that the party can offer a defense to allegations of retaliatory conduct.

ABB, Ltd. not named in appeal to OALJ

Complainant did not name ABB, Ltd. as a respondent in his appeal to the OALJ. He subsequently listed ABB, Ltd. as a respondent in the "Amended and Supplemental Complaint" he filed with the undersigned Administrative Law Judge on July 2, 2007.

29 C.F.R. § 1980.106(a) provides that an objection to OSHA's Findings and Order must be filed with the OALJ within thirty days of receipt of those findings. If an objection is not timely filed, it becomes the final decision of the Secretary not subject to judicial review. OSHA's Findings and Order concluding, inter alia, that ABB, Ltd. did not engage in conduct prohibited under the Act, was issued on April 4, 2007. Thus, the OSHA finding regarding ABB, Ltd. became final on, or about, May, 4, 2007, and was not subject to objection on July 2, 2007, when Complainant filed his supplemental complaint.

Conclusion

The Motion to Dismiss is granted because the Complainant has failed to satisfy his burden, by a preponderance of the evidence, that subject matter jurisdiction exists, in that the Complainant's employment occurred exclusively outside the United States and thus is not covered by the Act's protections. To that end, the Complainant has not alleged that protected activity or retaliation occurred within the United States. Because no material fact exists relating to Complainant's employment, protected activity or retaliation occurring outside the United States, this case is dismissed.

Also, ABB, Inc. and ABB, Ltd. are dismissed because of the failure of Complainant to properly and timely name them as Respondents

ORDER

In consideration of the aforesaid it is hereby ORDERED the Motion to Dismiss filed by Respondents is granted.

A
THOMAS M. BURKE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(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. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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. § 1980.109(c). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).