U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 June 2007

In the Matter of

Case No.: 2007 SOX 30

JANICE M. FLESZAR
Complainant

v.

AMERICAN MEDICAL ASSOCIATION
Respondent

Appearances: Ms. Janice M. Fleszar
Pro Se (representing herself)

Mr. Scott E. Gross, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

INITIAL DECISION AND ORDER – DISMISSAL OF COMPLAINT

On February 28, 2007, I was assigned to conduct a hearing and render a decision in this case, concerning Ms. Fleszar's September 29, 2006 complaint, under § 806 of the Sarbanes-Oxley Act of 2002 ("Act" or "SOX").[1] Based on my review of the complaint's contents on April 17, 2007, I issued a Show Cause Order on whether Ms. Fleszar's September 29, 2006 SOX complaint should be dismissed for failure to state a cause of action since the Respondent is not a properly-named respondent. Both parties responded to the Show Cause Order.

Procedural History

In a letter to the Administrator of the American Medical Association ("AMA") Retirement and Savings Plan, dated September 29, 2006,[2] Ms. Fleszar filed a complaint under the employee protection provisions of SOX. According to Ms. Fleszar, her employer, AMA, discriminated against her because of her efforts starting in 2003 to report "possible illegal

[1]Public Law 107-204, 18 U.S.C. § 1514A, as implemented by 29 C.F.R. Part 1980.

[2]This letter was copied to Shirley Liu, Benefits Advisor, U.S. Department of Labor, Benefits and Security Administration.

practices and exercise [her] rights under the law as they relate to the Employee Retirement Income Securities Act (ERISA) . . . and the Family and Medical Leave Act." Since 2003, Ms. Fleszar has been informing AMA's human resources department ("HR") about "employment concerns and adverse actions such as retaliation, fraud, discrimination, and harassment."

On January 22, 2007, the Regional Administrator dismissed Ms. Fleszar's complaint because AMA was not a company subject to SOX. On February 26, 2007, Ms. Fleszar requested a hearing before the Office of Administrative Law Judges.

Parties' Positions

Ms. Fleszar

In her February 26, 2007 appeal of OSHA's dismissal of her complaint, Ms. Fleszar asserts the AMA is subject to the SOX whistleblower provisions because it has filed several, specific reports with the U.S. Securities and Exchange Commission ("SEC") concerning its defined benefit retirement plan. Additionally, the AMA entered into various arrangements with publicly traded companies, engaged in a mutual fund business, participated in real estate deals, and leased facilities to the federal government.

In response to the Show Cause Order, Ms. Fleszar asserts that since the AMA has filed numerous reports pursuant to § 15(d) of the Securities Exchange Act ("SEA"), the AMA is specifically subject to the whistleblower protection provisions under SOX. Additionally, under *Morefield v. Exelon Serv., Inc.,* 2004 SOX 2 (ALJ Jan. 28, 2004), SOX coverage extends to the AMA because it routinely contracts with publicly traded companies. In support of her complaint, Ms. Fleszar attached a 1980 defined benefits plan filing submitted by the AMA to the SEC.

AMA

Ms. Fleszar's SOX complaint should be dismissed for several reasons. First, the AMA is a private, not-for-profit corporation and not a publicly traded company. Further, the AMA has neither issued any securities under § 12 nor filed any report under § 15(d) of the SEA.[3] As a result, the AMA is not subject to the whistleblower protection provisions of § 806 of the Act. Second, although the AMA may have filed reports with the SEC related to its retirement program, those filings do not subject the AMA to § 806 because that provision specifically limits its applicability to companies who file reports under § 15(d). Third, the AMA's contracts with publicly traded companies does not subject the AMA to the § 806 provision unless it has acted on behalf of the publicly traded company. Fourth AMA's ventures into mutual funds, real estate, and government leases do not place the organization under § 806.

In a response brief, the AMA noted the 1980 ERISA filing submitted by Ms. Fleszar does not involve any past or current AMA-issued securities. Additionally, the cover page for the filing specifically indicates that the AMA does not have any securities registered under § 12(b)

[3]An affidavit by AMA's Division Counsel supports this assertion.

and is not required to make any § 15(d) filings. Further, *Morefield* is not applicable because the AMA is not a wholly owned subsidiary of a publicly traded company. Similarly, AMA's contacts and contracts with companies covered by SOX does not subject the AMA to § 806.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 806 of the Act, 18 U.S.C. § 1514A(a), and 29 C.F.R. § 1980.102 prohibit a company with either a class of securities registered under § 12 of the SEA of 1934 ("SEA"), 15 U.S.C. § 78l, or that is required to file reports under SEA § 15(d), 15 U.S.C. § 78o(d)[4] from discharging, demoting, suspending, threatening, harassing, or in any manner discriminating against an employee in the terms and conditions of employment because an employee engaged in any lawful act to provide information, caused information to be provided, or otherwise assisted in an investigation, regarding any conduct the employee reasonably believed constitutes a violation of 18 U.S.C. §§ 1341 (fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud), or any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders, when the information is provided to a federal regulatory or law enforcement agency, any member of congress, or a person with supervisory authority over the employee.

As established by the parties' pleadings, the AMA is a private organization that has not registered securities under § 12 of the SEA. Similarly, § 15(d) relates solely to reports of registered issuers of securities, and the AMA is not such an issuer.[5] Consequently, I find the AMA does not fall under either specific category of publicly traded company subject to the § 806 whistleblower provisions.[6]

Concerning the other alleged bases for § 806 coverage, I conclude the AMA's contractual relationships with publicly traded companies, standing alone, are insufficient to make the Respondent a covered employer under the whistleblower protection provisions. *See Goodman v. Decisive Analytics Corp.*, 2006 SOX 11 (Jan. 10, 2006). Likewise, the Respondent's contractual relationships with governmental entities do not subject the AMA to § 806 prohibitions. *See Judith v. Magnolia Plumbing Co.*, 2005 SOX 99, 2005 SOX 100 (ALJ Sept. 20, 2005). Finally, I find no basis for holding the AMA subject to § 806 provision due to real estate transactions or mutual fund activities.

[4]This provision imposes additional filing requirements on registered issuers of securities as determined by the SEC.

[5]In her response to the Show Cause Order, Ms. Fleszar alleges the AMA has filed reports under §15(d). However, in her more specific pleading contained in her request for a hearing, Ms. Fleszar identified various reports by number that the AMA submitted to the SEC and indicated the filings related to its defined benefits plan. Since those reports related to a defined benefits plan and did not involve the issuance of securities, they would not have been filed under § 15(d).

[6] *See Stevenson v. Neighborhood House Charter School*, 2005 SOX 87 (ALJ Sept. 5, 2005) (a company's ERISA requirement to file retirement plan documents with the SEC was insufficient to trigger SOX coverage).

Based on the above determinations, I find the AMA is not subject to the provisions of § 806 of the Act and thus not a properly named Respondent. As a result, Ms. Fleszar's complaint fails to state a cause of action. Since the AMA was not a publicly traded company, Ms. Fleszar also was not employee entitled to SOX whistleblower protection under 18 U.S.C.§1514A(a) and has failed to establish subject matter jurisdiction. Accordingly, Ms. Fleszar's SOX complaint must be dismissed.

ORDER

The September 29, 2006 SOX complaint of Ms. Janice M. Fleszar is **DISMISSED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: June 13, 2007
Washington, D.C.

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).