U.S. Department of Labor

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Issue Date: 20 November 2007

Case No.: 2007-SOX-00088

In the Matter of

KRISTEN LEWANDOWSKI
Complainant

v.

VIACOM INC.
PARAMOUNT PICTURES CORPORATION
PARAMOUNT PICTURES CORPORATION
Respondents

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION

The Complainant's Complaint and Procedural History

This proceeding arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A et seq. ("the Sarbanes-Oxley Act" or "the Act") enacted on July 30, 2002. The Sarbanes-Oxley Act provides the right to bring a "civil action to protect against retaliation in fraud cases" to employees who "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344 or 1348 [of title 18], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders…." 18 U.S.C. § 1514A(a)(1). The Sarbanes-Oxley Act extends such protection to employees of 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))." 18 U.S.C. § 1514A(a).

On May 8, 2007, the Complainant, Kristin Lewandowski, ("Complainant"), a former employee of Paramount Pictures, Inc., filed a Complaint with the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") against Paramount Pictures, Inc. and Viacom, Inc. under section 806, the employee protection provision of the Sarbanes-Oxley Act.[1] Her Complaint alleged that, on February 14, 2007, she was summarily terminated from

[1] As stated herein, the "Complaint" is the document the Complainant filed with OSHA.

employment; she asserted that her termination from employment was in retaliation for reports she made about her supervisor's activities. Complaint, at 10. The Complainant was employed as a story editor in the New York Literary Affairs department of Paramount Pictures. Id., at 2. In her Complaint, the Complainant stated that she informed officials at Paramount corporate headquarters that her supervisor, Patricia Burke, routinely violated the Viacom Business Conduct Statement, an internal policy to which Paramount employees were subject, by divulging to competitors confidential information about potential projects before Paramount had a chance to bid on them. Id., at 9-10. The Complaint also characterized Ms. Burke's activities as a "fraudulent practice." Id., at 7. Appended as an Exhibit to the Complaint was a copy of an e-mail she sent to Paramount officials on January 28, 2007, informing them of her supervisor's practices. Exhibit F.[2]

On June 26, 2007, the Respondents submitted a "statement of position" to OSHA in response to the Complaint.[3] The Respondents disagreed with many of the factual assertions the Complainant made in her Complaint. In addition, the Respondents argued that the Complaint should be dismissed because the Complainant was employed by Paramount, which is not a publicly traded company and is not subject to the Act, and she was never employed by the parent company, Viacom, which is a publicly traded corporation.

After an examination by OSHA, on August 8, 2007, the Secretary of Labor, acting through her agent, the OSHA Regional Administrator, dismissed the Complainant's Complaint. The Complaint was dismissed because the Regional Administrator concluded that the Complainant's actions pertained to "internal management issues unrelated to reasonably perceived violations" of the enumerated provisions found at 18 U.S.C. § 1514A, and so were not protected activity under the Act. Because the Regional Administrator dismissed the Complaint on the grounds that the Complainant did not engage in protected activity, the Administrator did not reach the issue of whether the Complainant was an employee covered by this provision of the Act.[4]

By correspondence dated September 5, 2007, the Complainant objected to the Administrator's findings and preliminary order and requested a hearing before an Administrative Law Judge ("ALJ").[5] The matter was subsequently assigned to me.

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[2] Except as otherwise noted, "Exhibits" referred to herein are Exhibits to the Complainant's Complaint.

[3] As stated herein, the "Response" is the document the Respondents filed with OSHA.

[4] In the Dismissal Order, the Regional Administrator stated that "there is evidence that Viacom and Paramount are an integrated employer for purposes of coverage" under the Act. Dismissal at 1.

[5] By letter dated September 11, 2007, the Respondents objected to the Complainant's objections to the Regional Administrator's findings, asserting that the Complainant's objections "are wholly insufficient insofar as she provided no specificity as to the findings of fact or law to which she objects" and did not comply with 29 C.F.R. § 1980.106. I find that the applicable regulation requires only that a complainant indicate whether her objection is to the findings and/or the preliminary order; the regulation does not mandate that a Complainant articulate with any

Under the applicable regulations, an administrative law judge's review of a complaint under section 806 of the Act is de novo. 29 C.F.R. § 1980.107(b).[6] For the purpose of this Order, based on my examination of the record and the parties' responses to my Order of September 11, 2007, I presume that the adverse action upon which this matter is based is the Complainant's termination of employment.[7]

The Respondents' Motion for Summary Decision and the Complainant's Opposition

On October 3, 2007, the Respondents filed a "Motion to Dismiss" with accompanying Memorandum of Law.[8] I construe this motion as a Motion for summary decision. See § 18.40. In response, on November 2, 2007, the Complainant filed a "Memorandum of Law in Opposition" to Respondents' Motion.[9]

The Respondents asserted the following, in support of their Motion to Dismiss:

1. The Complaint is deficient as a matter of law because the Complainant's disclosures regarding her supervisor's actions do not constitute protected activity under the Act; and

2. The Complainant was not an employee of Viacom, Inc., but rather was an employee of Paramount, Inc., an entity which is not publicly traded, and therefore is not subject to the specific provision of the Act under which the Complaint was made.

In her opposition to the Motion to Dismiss, the Complainant asserted that her Complaint established sufficient questions of material fact to withstand the Respondents' Motion to Dismiss and also averred the following:

1. Her actions constituted protected activity, as defined in the Act; and

2. She has alleged sufficient facts to present the issue as to whether she should be considered an employee of Viacom as well as of Paramount.

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specificity the nature of her objections. I find that the Complainant has complied with the regulatory requirement.

[6] Unless otherwise noted, citations to the Code of Federal Regulations (C.F.R.) are to Title 29.

[7] On September 11, 2007, I issued an Order to the parties, directing them to provide written statements setting forth their positions on, among other things, "the discrete acts performed by the Employer for which the employee asserts subject matter jurisdiction under the Act." Order, at 2. Although both parties responded to my Order, neither party provided me with specific information on this issue.

[8] The Respondents' Motion specifically cited 29 C.F.R. § 18.6, Fed.R.Civ.P. 12(b)(1)[lack of subject matter jurisdiction]and Fed.R.Civ.P. 12(b)(6)[failure to state a claim upon which relief can be granted].

[9] By Order dated October 5, 2007, I granted the Complainant's Motion for Extension of Time to submit a response to the Respondents' Motion.

Adjudication of Motions for Summary Decision

Rules for the adjudication of complaints made under section 806 of the Sarbanes-Oxley Act are set forth at 29 C.F.R. § 1980, as supplemented by the Department of Labor's procedural rules set out in 29 C.F.R. part 18. These rules permit a party to move for a summary decision. § 18.40(b). An administrative law judge may grant summary decision in favor of a party where no genuine issue of material fact is found to have been raised. § 18.41(a). The standard for granting summary decision is essentially the same as that set forth in the Federal Rules of Civil Procedure governing summary judgment in the federal courts. Reddy v. Medquist, Inc., Case No. 04-123 (ARB: Sept. 30, 2005). See also Fed.R.Civ.P. 56(c). No genuine issue of material fact is raised when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The moving party bears the initial burden of demonstrating there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In adjudicating a motion for summary decision, I must view all facts and inferences in the light most favorable to the non-moving party. Celotex, 477 U.S. at 323; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 261 (1986). This includes factual ambiguities and inferences related to credibility. See Petrosino v. Bell Atlantic, 385 F.3d 210, 219 (2d Cir. 2004).

A party opposing the motion may not rest upon the mere allegations or denials of the pleading. "Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." § 18.40(c). As the regulation states, an administrative law judge may enter summary decision if "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." § 18.40(d).

Neither party submitted any affidavits or other evidence in support of its position on the Motion to Dismiss. Therefore, the only evidence I have before me regarding the content of the disclosures the Complainant avers constituted protected activity are the Complainant's Complaint (including exhibits) and the Respondents' Response (including exhibit).[10]

Facts Not in Dispute

Based upon the pleadings filed to date, I find the following facts relating to this matter are uncontroverted.

[10] Also before me are the parties' responses to my Order of September 11, 2007. However, these responses merely reiterate the positions the parties took in their initial filings with OSHA, which are already in the record.

1. The Complainant was employed as a Story Editor by Paramount Pictures, Inc., from May 2005 until her termination of employment on February 14, 2007.[11] Complaint at 2,10; Exhibits A, B; Response at 3, 6.

2. Paramount Pictures is a wholly-owned subsidiary of Viacom, Inc. Complaint at 1; Response at 1.

3. On May 31, 2005, the Complainant signed the "Viacom Business Conduct Statement" (VBCS). By her signature, the Complainant acknowledged that she read and understood the VBCS and agreed to follow the policies set forth therein, including promptly disclosing anything the VBCS required her to disclose. Complaint at 3; Exhibit B.

4. On January 28, 2007, the Complainant sent an e-mail to Brad Weston, then a senior official at Paramount, in which she alleged, among other things, that her supervisor, Patricia Burke, divulged "confidential information and property" to competitors outside the company. Complaint at 8; Exhibit F; Response at 5; Exhibit A to Response.[12]

5. Mr. Weston responded by e-mail the same day to the Complainant, and informed her he would be in touch with "HR" and would contact her shortly. Complaint at 9; Exhibit G.

6. Within a few days of the e-mail, Paramount commenced an investigation of the Complainant's allegations, which included interviews with the Complainant and Ms. Burke. Complaint at 9-10; Response at 6.

Based upon my examination of the record, I find that many other facts regarding this matter are in dispute. For example, the Complainant asserts she was never told the reason for her termination from employment, but infers she was fired because of her alleged protected activity, and she notes that her firing took place approximately two weeks after she sent the e-mail to Mr. Weston complaining about her supervisor's actions. Complaint at 10-11. On the other hand, the Respondents aver the Complainant was terminated for insubordination, and allege the Complainant knew that her supervisor had sought to terminate her employment before the Complainant sent the e-mail to Mr. Weston on January 28, 2007. Response at 5.

Whether the Complainant Engaged in "Protected Activity"

The Sarbanes-Oxley statute states that complaints are governed by the legal burdens of proof set forth in 49 U.S.C. § 42121(b), and shall be governed by the rules and procedures applicable to that statute. 18 U.S.C. § 1514A(b)(2)(A) and (C).[13] The elements of a prima facie

[11] The statement on page 2 of the Complaint that the Complainant began working for Paramount in May 2006 appears to be a typographical error. I note the Complainant submitted a job application in May 2005 and signed the Viacom Business Conduct Statement on May 31, 2005 (Exhibit A, B).

[12] The Respondents appended a copy of the same e-mail to its Response.

[13] This statute is the Wendell H. Ford Aviation Investment and Reform Act for the 21 Century [AIR 21].

case under the Sarbanes-Oxley Act, incorporating the standards of the AIR 21 statute, are as follows:

1) The employee engaged in protected activity or conduct;
2) The employer knew that the employee engaged in the protected activity;
3) The employee suffered an unfavorable personnel action; and
4) The protected activity was a contributing factor in the personnel action.

Allen v. Stewart Enter., Inc., Case No. 06-081 (ARB: July 27, 2006); Getman v. Southwest Securities, Inc., Case No. 04-059 (ARB: July 29, 2005).

Prior to hearing, the Complainant is required to establish a prima facie case; that is, to produce enough evidence to allow the trier of fact to infer the facts at issue as to all elements. Summary decision in favor of the Respondents is appropriate only if the Respondents can demonstrate that, under the facts as set forth in the pleadings, affidavits, etc., no rational trier of fact could find in favor of the moving party, as to one or more of the elements. See generally James v. New York Racing Ass'n, 233 F.3d 149, 152 (2d Cir. 2000).

Because this matter involves a Motion for Summary Decision, and not a hearing on the merits, the burden of persuasion rests most heavily on the Respondents. Indeed, the non-movant's burden at this stage of the proceedings to survive a motion for summary decision is minimal. See Jute v. Hamilton Sutherland Corp., 420 F.3d 166, 173 (2d Cir. 2005)[Title VII case].

In this instance, the evidence is that the Complainant made disclosures to Mr. Brad Weston, a Paramount official, via an e-mail she sent to him on January 28, 2007. Exhibit F. In pertinent part, the Complainant's e-mail states the following regarding her supervisor:[14]

> I ran into some trouble because the books and info I gathered, which was highly confidential and meant for Paramount only, was leaked to people outside the studio. It was Patricia [Burke] who leaked this information and material. For example, she would speak daily with John Delaney, an employee of Disney based producer Scott Rudin….She would also offer books I brought in to Delaney before the Paramount executives in LA (or I) had a chance to read and evaluate. Under her tutelage, her new assistant began to do the same. That is, he began to share confidential Paramount information and property with our competitors….
>
> Yesterday, I received an email from Patricia asking that I send her my book memo, the same sensitive information and material I send to LA, to her simultaneously. Since I believe she will begin confiding this highly confidential information and property to people outside of Paramount, I am very concerned….
>
> Now that I am faced with Patricia's new request to have access to my material and information, I am worried. Worried for the reasons I just explained – because this would be a detriment to Paramount….

In her Complaint, the Complainant also stated that she provided to a Paramount attorney, who was investigating the allegations she made in her e-mail, copies of "Faxed Coverage" sheets

[14] I have omitted other complaints the Complainant made in this e-mail, (for example, that her supervisor offered the same projects to multiple producers within Paramount), because the Complainant does not assert these constitute protected activity under the Act.

showing that Patricia Burke "had been routinely faxing potential Paramount projects" to "competitors at other studios …." Complaint at 9; Exhibit J.

As noted above, the Complainant characterized her supervisor's actions as "fraudulent." Complaint at 7. In the Complaint, the Complainant explained her conclusion regarding her supervisor's actions thusly:

> At least several projects that Paramount should have had the first opportunity to develop were divulged to other production companies, thus making the purchase of said project (sic) significantly higher and thus fraudulently inflating Paramount's costs in possible production, and/or Paramount was not able to negotiate the rights to certain projects because other production companies were able to negotiate with the owner of the play or book, thus denying Paramount the right to produce a potentially profitable product, again defrauding management and Paramount shareholders.

Discussion

Section 806 of the Sarbanes-Oxley Act, the "Whistleblower Protection" section, does not protect all disclosures made by employees from employer retaliation, but only conduct described in the statute. The section protects employees who provide information they reasonably believes constitutes a violation of any of the following:

> -- 18 U.S.C. § 1341 (mail fraud); § 1343 (wire/radio/television fraud); § 1344 (bank fraud); or § 1348 (securities fraud); or
> -- any rules or regulations of the Securities and Exchange Commission; or
> -- any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a).

The Act protects disclosures made to a person with supervisory authority over an employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct. Id.

By its terms, the Act does not mandate that the employee report activity constituting an actual violation of an enumerated provision, but requires only that the employee "reasonably believes" the conduct about which she provides information constitutes a violation of the specified laws, regulations, etc. See Halloum v. Intel Corp., Case No. 04-068 (ARB: Jan. 31, 2006). However, the information the employee provides must "state particular concerns which, at the very least, reasonably identify a respondent's conduct that the complainant believes to be illegal." Fraser v. Fiduciary Trust Co. Int'l., 417 F. Supp 2d 310, 322 (S.D.N.Y. 2006). In Fraser, the District Court dismissed a portion of the plaintiff's Sarbanes-Oxley complaint because it found that it was "barren of any allegations of conduct that could alert Defendants that Fraser believed the company was violating any federal rule or law related to fraud on shareholders." 417 F. Supp. 2d., at 322.

In its role as the appellate authority over administrative law judge decisions involving Sarbanes-Oxley complaints, the Department of Labor's Administrative Review Board "Board", has held that generalized complaints about mismanagement or conclusory accusations about

financial improprieties, where the employee's communications do not "definitively and specifically" relate to any of the enumerated statutes, are not protected activity. Stojicevic v. Arizona-American Water, Case No. 05-081 (ARB: Oct. 30, 2007), slip op. at 8, quoting Platone v. FLYi, Inc., ARB No. 04-154 (ARB: Sept. 29. 2006), slip op. at 17. See also Harvey v. Home Depot U.S.A, Inc., Case No. 04-114, 04-115 (ARB: June 2, 2006).

In Stojicevic, the Complainant, a project manager for a utilities company, made a series of complaints about his employer, including allegations that his employer made financially unsound choices, and that its engineering projects did not comply with technical and engineering standards. He also contended that the employer's failure to alert and inform shareholders and others of his concerns amounted to deception. The administrative law judge dismissed Stojicevic's complaint, finding that his allegations did not constitute protected activity. The Board affirmed. Citing its own Decision in Harvey v. Home Depot U.S.A., Inc., the Board held: "Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected under [the Act]. To bring himself under the protection of the act, an employee's complaint must be directly related to the listed categories of fraud or securities violations….(citations omitted). A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough."

Moreover, the Board has also held that, in determining whether a complainant engaged in protected activity, the relevant inquiry is not what is alleged in the OSHA complaint, but what the complainant communicated prior to the employer's adverse action. Platone v. FLYi, Inc., Case No. 04-154 (ARB: Sept. 29. 2006). In Platone, the Board reversed the administrative law judge's recommended decision, in which, after a full hearing, the judge found the complainant had engaged in protected activity. The Board specifically held: "In determining whether Platone engaged in protected activity, the relevant inquiry is not what she alleged in her … OSHA complaint, but what she actually communicated to her employer prior to the …termination." Slip op., at 17. The Board noted that the complainant's e-mail exchange, in which she reported an alleged flight pay abuse problem, did not provide information about conduct she reasonably believed constituted a violation of the enumerated statutes in section 806. Rather, her e-mails raised a possible violation of internal union policy and discussed whether her employer could recover additional compensation from the union. The Board also held that Platone did not engage in protected activity because her allegations did not "even approximate any of the basic elements of a claim of securities fraud." Platone, slip op., at 22.

Most recently, in Nixon v. Stewart & Stevenson Services, Inc., Case No. 05-066 (ARB: Sept. 28, 2007), the Board reiterated its holdings that a complainant must demonstrate that he or she engaged in protected activity prior to the employer's adverse action, and must actually communicate a concern that the employer's conduct implicates one of the enumerated statutes. In Nixon, the complainant, an environmental manager for a federal defense contractor, sent a series of letters to a state regulatory commission alleging that his employer violated a number of state laws relating to hazardous waste handling. In his OSHA complaint, Nixon alleged that his

employer's purportedly false responses to the state commission, sent by mail, constituted mail fraud. The administrative law judge granted the employer's motion for summary decision, and found that Nixon provided no evidence the employer's letters were part of a scheme to defraud, as is required under the mail fraud statute.[15]

The Board affirmed the administrative law judge's decision. Although the Board accepted the factual assertions of Nixon as the non-moving party, it held that he failed to communicate a concern that the employer's conduct constituted one of the enumerated statutory violations. As the Board noted: "To the extent that Nixon argues that he generally asserted fraud in his Complaint, his argument is unavailing. In determining whether Nixon engaged in protected activity, the relevant inquiry is not what he alleged in his Complaint but what he actually communicated to the Respondent prior to his April 20, 2004 termination. Nixon proffered no evidence to the ALJ or to us showing that he provided information to the Respondent before his April 20, 2004 termination, which he reasonably believed showed that the Respondent engaged in mail fraud." Nixon, slip op. at 11. As the Board stated, "the employee only has to show that he reasonably believed that there was a violation [of an enumerated provision] and conveyed that belief to his employer." Slip op., at 11 (emphasis added).

In the instant matter, the record of the Complainant's disclosures is devoid of any evidence the Complainant conveyed a belief that there was a violation of any of the provisions enumerated under Section 806 of the Act before her termination from employment. The Complainant's OSHA Complaint states she told Paramount that her supervisor was engaged in wire fraud; wire fraud, set forth at 18 U.S.C. § 1343, is one of the enumerated provisions. However, an examination of the record indicates there is no evidence upon which I can draw such an inference. The Complainant's e-mail to Mr. Weston does not mention the specific manner – whether fax, telephone or otherwise – in which Patricia Burke was allegedly making unauthorized disclosures to competitors. I must find, therefore, that the e-mail does not communicate the Complainant's reasonable belief that the wire fraud was committed.

Although the Complainant's Complaint states she informed the attorney who was investigating her allegations that Patricia Burke used the fax machine, and her Complaint has a handwritten listing of documents supposedly sent over the fax (Exhibit J), I find this allegation also does not constitute an allegation of wire fraud. The Complaint does not allege that the Complainant told the investigating attorney that Patricia Burke was engaged in wire fraud, but only that Patricia Burke was using the fax machine to communicate with competitors. Based on the record before me, I find that these disclosures do not evidence a reasonable belief of a violation of 18 U.S.C. § 1343; the facts the Complainant allege do not even approach the elements of a scheme to defraud, which is necessary for the offense of wire fraud. See generally McNally v. United States, 483 U.S. 350 (1987); See also United States v. Starr, 816 F.2d 94 (2d Cir. 1987).

[15] Nixon also alleged that his disclosures showed a reasonable belief that his employer would ultimately be subjected to legal proceedings and financial penalties, which could eventually trigger SEC reporting requirements. The administrative law judge found there was no evidence of any known action that would require the employer to disclose anything to the state commission, and granted the employer's motion for summary judgment on that ground as well.

In her Opposition to the Respondents' Motion to Dismiss, the Complainant relies on the case of Hendrix v. American Airlines, Inc., Case No. 2004-AIR-00010, 2004 SOX-00023 (ALJ: Dec. 9, 2004). In that case, after a hearing, an administrative law judge found that the complainant had engaged in protected activity when he participated in an investigation centering on a co-worker's use of aircraft parts to create sculptures, for his own profit, and management's actions in condoning this activity. The administrative law judge found the complainant reasonably believed the co-worker was committing fraud against the employer and its shareholders by creating art objects for personal gain out of company material on company time.[16] The administrative law judge's decision cited no caselaw or other authority supporting this conclusion. However, the administrative law judge also found that the employer would have taken the same actions, in the absence of the complainant's protected activity, and so ultimately found in favor of the employer. The case was never appealed to the Administrative Review Board.

The administrative law judge's decision in Hendrix is clearly distinguishable from the instant case. Hendrix involved a determination made by a trial-level judge, on specific facts. Therefore, it has little precedential value in this proceeding, which involves adjudication of a dispositive motion. More importantly, the administrative law judge's decision in Hendrix pre-dates the Board's decisions in Harvey and Stojicevic, in which the Board clarified that, in order to constitute protected activity, a complainant's allegations must be specific and must bring sufficient alleged facts to the complaint within the ambit of the enumerated statutes.

In this matter, the record is devoid of any indication that, prior to her termination from employment, the Complainant communicated a reasonable belief that she was reporting criminal activity, let alone the specific types of criminal activity enumerated in the statute. Unlike Hendrix, the case on which the Complainant most heavily relies, there is no indication, from the record before me, that the Complainant even conceived Patricia Burke's activities were criminal. Indeed, the Complainant's e-mail to Mr. Weston indicates she was distressed about Ms. Burke's activities principally because they made her (the Complainant) look bad, and secondarily because they would be detrimental to Paramount. She does not even suggest that Patricia Burke might be engaged in a crime. Additionally, the Complainant provides no additional information about her disclosures to the investigating attorney from which I can reasonably infer she alleged, at that time, that her supervisor's conduct was criminal.

Conclusion

As set forth in the foregoing discussion, and construing all facts of record in the light most favorable to the Complainant, I find that the Complainant has not demonstrated that her actions could constitute protected activity. Specifically, I find that, prior to her termination of employment, there is no evidence that the Complainant communicated, either through her e-mail to Mr. Weston or in her discussions with the Paramount attorney assigned to investigate her allegations, a reasonable belief that her supervisor, Patricia Burke, was engaged in wire fraud, a

[16] Moreover, Hendrix's disclosures were made in the course of a management-directed investigation, in which he other employees were interviewed about the co-worker's activities.

violation of 18 U.S.C. § 1843, or any other of the provisions enumerated in section 806 of the Act.

Therefore, I find that the Complainant has failed to establish a prima facie case. See Fraser v. Fiduciary Trust Co. Int'l., 417 F. Supp 2d 310, 322 (S.D.N.Y. 2006); Platone v. FLYi, Inc., Case No. 04-154 (ARB: Sept. 29. 2006); Nixon v. Stewart & Stevenson Services, Inc., Case No. 05-066 (ARB: Sept. 28, 2007).

Order

Upon due consideration, as set forth above, I GRANT the Respondents' Motion to Dismiss.

Because I have decided this matter based on the Complainant's failure to provide evidence that she engaged in protected activity, I do not reach the issue of whether the Complainant is an employee of a company covered by Section 806 of the Act.[17]

SO ORDERED.

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Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

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 ("Board"), US 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

[17] I note that in the pleadings the Complainant alleges that her Employer, Paramount, is "a company that has a class of securities registered under Section 12 of the Securities and Exchange Act of 1934," and also asserts that the Complainant has alleged sufficient facts to defeat the Respondents' position that she is not an employee of both Paramount and Viacom. Complaint at 2; Opposition to Motion at 1, 20. The Respondents aver that Paramount is a wholly-owned subsidiary of Viacom, Inc., and as such is not subject to section 806 of the Act. Response at 7; Motion at 11. Apparently, whether Paramount (not Viacom) falls within the statutory definition of a covered company is a matter of fact that the parties dispute.

exception is taken. Any exception not specifically urged ordinarily shall 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 Board. 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. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).