U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 July 2007

CASE NO.: 2007-SOX-00034

In the Matter of

ANETTE SAVASTANO
Complainant

v.

WPP GROUP, PLC,
WPP GROUP USA, INC.,
THE KANTAR GROUP, AND
CANNONDALE ASSOCIATES
Respondents

Appearances:

Anette Savastano, Norwalk, Connecticut, *pro se*

Daniel A. Feinstein and Heath J. Rosenthal
(Davis & Gilbert LLP), New York, New York,
for the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER GRANTING SUMMARY DECISION AND DISMISSING COMPLAINT

This case arises out of a complaint of discrimination filed by Anette Savastano ("Complainant") against WPP Group, PLC ("WPP"), WPP Group USA, Inc. ("WPP USA"), The Kantar Group ("Kantar"), and Cannondale Associates ("Cannondale") (collectively referred to as "Respondents," except where specifically noted) pursuant to the employee protection provisions of 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 (hereinafter "Sarbanes-Oxley" or the "Act"). The Complainant filed a complaint with the Occupational Safety and Health Administration of the U.S. Department of Labor ("OSHA") alleging that she was terminated by Respondent, Cannondale Associates, in retaliation for investigating and reporting various financial improprieties.

By letter dated February 1, 2007, the Regional Administrator for OSHA, acting as agent for the Secretary of Labor ("Secretary"), notified the Complainant of the Secretary's preliminary finding that there was no reasonable cause to believe that the Respondents violated the Act. OSHA No. 1-0080-06-013 (Feb. 1, 2007). By letter faxed to the Office of Administrative Law Judges ("OALJ") on March 9, 2007, the Complainant filed a notice of appeal of OSHA's determination and requested a *de novo* hearing before an Administrative Law Judge ("ALJ") pursuant to 29 C.F.R. § 1980.106. This matter is before me on the Respondents' Motion for Summary Decision ("Mot. Sum. Dec.") and the Complainant's Response in Opposition ("Compl. Resp."). Upon consideration of the matter, I have concluded for the reasons set forth below that no genuine issue of material fact exists and that the Respondents are therefore entitled to summary decision in their favor.

I. Background[1]

Cannondale is a non-public company that is part of Kantar. Mot. Sum. Dec. at 3 (April 16, 2007). Kantar is a group of non-public, indirect subsidiaries of WPP USA. *Id.* WPP USA is a non-public, indirect, wholly-owned subsidiary of WPP. *Id.* WPP is a public company organized under the laws of England and Wales and has hundreds of subsidiaries throughout the world. *Id.* Cannondale generally operates as an independent and distinct company from WPP, with separate operations, management, employees, personnel policies, clients and offices. *Id.*

Cannondale hired the Complainant on February 28, 2005. Prior to being hired, the Complainant was interviewed by Jack Ryder, Cannondale's chief executive officer, and other members of Cannondale's senior management team.[2] *Id.* Ryder never held a position with WPP. *Id.* No WPP employee interviewed the Complainant or otherwise had any involvement in Cannondale's decision to hire her. *Id.* While at Cannondale, the terms and conditions of the Complainant's employment were set entirely by Cannondale. *Id.* Cannondale established the Complainant's salary and provided her benefits. Mot. Sum. Dec. at 4. Cannondale evaluated the Complainant's performance without any input from WPP. *Id.*

In January of 2006, Cannondale terminated the Complainant's employment. *Id.* Ryder and other members of Cannondale's senior management team made the decision to terminate the Complainant, with limited involvement from Robert Bowtell, Kantar's chief financial officer. *Id.* Like Ryder, Bowtell never held a position with WPP. *Id.* Neither WPP nor any of its employees had any involvement in the decision to terminate the Complainant. *Id.*

II. Motion for Summary Decision

The Respondents seek summary decision on two issues: (1) whether the Complainant's appeal of OSHA's dismissal of her complaint is untimely; and (2) whether the Complainant is a protected employee under Section 806 of the Act because Cannondale is not a public company,

[1] The factual background is taken from the Respondents' Motion for Summary Decision since the Complainant did not set out a factual background in her Response.

[2] The Complainant contends that she was interviewed by both Cannondale and Kantar personnel for her position at Cannondale. Compl. Resp. at 2.

nor is Cannondale an agent of WPP. Mot. Sum. Dec. at 1-2. Regarding the timeliness issue, the Respondents assert that the Complainant had thirty (30) days from the receipt of OSHA's decision dismissing her complaint to appeal that decision to the OALJ. Mot. Sum. Dec. at 1. The Respondents' attorneys received a copy of OSHA's decision on February 5, 2007 in New York, New York. *Id.* OSHA also sent a copy of its decision to the Complainant's attorney in New York, New York. *Id.* Therefore, the Respondents argue that the Complainant, through her attorney, also received OSHA's decision on February 5, 2007, thirty two (32) days before she filed her appeal with the OALJ on March 9, 2007. Consequently, the Respondents argue that the Complainant's appeal is untimely and should be dismissed. *Id.*

The Respondents further argue that the Complainant is not an employee covered by Section 806 of the Act because she worked exclusively for Cannondale, a private company. Mot. Sum. Dec. at 2. The Respondents contend that while the Administrative Review Board ("ARB") stated in *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 04-149, ALJ No. 2004-SOX-11 (ARB May 31, 2006) (*Klopfenstein*) that employees of non-public subsidiaries of public companies may be protected by the Act when the subsidiary acts as an agent of its public parent, Cannondale's relationship with its public parent, WPP, and WPP's lack of involvement in the Complainant's employment, precludes a finding that Cannondale acted as WPP's agent. *Id.* The Respondents assert that Cannondale operates independently from WPP, that WPP is not involved in Cannondale's day to day decisions, and that there is no overlap in the officers of WPP and Cannondale. Moreover, the Respondents contend that no WPP employee controlled the terms and conditions of the Complainant's employment. Instead, they assert that the decisions to hire and terminate the Complainant did not involve WPP. *Id.* Thus, the Respondents contend that the Complainant's claims fail as a matter of law, and her complaint should be dismissed. *Id.*

III. The Complainant's Opposition

The Complainant responds that her appeal was timely, and that she is a covered employee within the meaning of Section 806 of the Act. Compl. Resp. at 2 (June 15, 2007). The Complainant asserts that her former attorneys, Berenbaum Menken Ben-Asher & Bierman LLP, received OSHA's decision letter on February 7, 2007. *Id.*; Compl. Ex. A. Accordingly, she submits that the appeal filed on March 9, 2007 was filed thirty (30) days after her attorney received OSHA's decision letter. Compl. Resp. at 2.

The Complainant also argues that the Act prohibits not just a public company from taking discriminatory action, but also any officer, employee, contractor, subcontractor, or agent of such company. *Id.* She alleges that Cannondale does not act distinctly from WPP, and she also claims that the Respondents' suggestion that WPP was not involved in her recruitment and dismissal is not true. *Id.* The Complainant contends that she was interviewed by both Cannondale and Kantar personnel for her position at Cannondale. *Id.*

The Complainant states that she worked to bring Cannondale's reporting procedures in line with the requirements imposed by Kantar, which in turn served the purpose of ensuring the accuracy of WPP's financial reporting in accordance with SEC regulations. *Id.* She alleges that WPP commissioned audits by Deliotte & Touche, the findings of which the Complainant was

required to implement. Compl. Resp. at 2-3. She also points out that Cannondale's finances, like the finances of all WPP subsidiaries, were published to WPP for the purpose of preparing WPP's consolidated reports. Compl. Resp. at 3. The Complainant argues that under Section 401 of Sarbanes-Oxley, the financial reports of public issuers are required to be prepared in accordance with the generally accepted accounting principles ("GAAP") which require that the financial reports of a company include the consolidated financial information of all of its subsidiaries. *Id.* Thus, the Complainant argues that Ryder, the CEO of Cannondale, was required to certify the accuracy of Cannondale's reports so that WPP, in turn, could certify the accuracy of its financial reporting at all levels as required by Section 302 of Sarbanes-Oxley. *Id.*

The Complainant points to the language in WPP's annual report and argues that WPP shared a common purpose with its subsidiaries, who acted as its agents in many respects. *Id.* She notes that WPP emphasizes in the annual report the "rigorous" requirements its subsidiaries must meet in order to ensure the accuracy of its budgets and the truthfulness of its financial reports. *Id.* In describing its relationship with its subsidiaries, WPP explains that it relieves them of much administrative work; WPP encourages and enables operating companies of different disciplines to work together for the benefit of clients; and WPP can function as a 21st century equivalent of the full-service agency. *Id.* The Complainant also adverts to statements in WPP's annual report that the contribution of its 92,000 employees, representing a vast variety of skills, has gone to make up that parent company total. *Id.* at 4. The Complainant states that WPP has stringent internal controls over the reporting of its subsidiaries, which are distributed to the subsidiaries through its WPP Policy Book and its intranet, which the Complainant had access to. *Id.* She further asserts that WPP subsidiaries are required to submit monthly operating reports which are reviewed locally, regionally, and globally – *i.e.*, by Cannondale, Kantar, and WPP. *Id.*

Lastly, the Complainant argues that even if the activities of Cannondale are as independent as the Respondents suggest, she nonetheless qualifies as a covered employee of a subsidiary of publicly traded WPP. *Id., citing Morefield v. Exelon Services, Inc.*, USDOL/OALJ Reporter (PDF), ALJ No. 2004-SOX-2 (ALJ Jan. 28, 2004) at 8 (*Morefield*) ("the term 'employee of publicly traded company,' within the meaning of Sarbanes-Oxley, includes all employees of every constituent part of the publicly traded company, including, but not limited to, subsidiaries and subsidiaries of subsidiaries which are subject to its internal controls, the oversight of its audit committee, or contribute information, directly or indirectly, to its financial reports."). Thus, the Complainant contends that she has established that she is an employee subject to Section 806 of the Act and that her case should be heard on the merits.

IV. Discussion, Findings of Fact and Conclusions of Law

A. Availability of Summary Decision

"One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses. . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Under the Rules for Practice and Procedure for Administrative Hearings, "[a]ny party may . . . move with or without supporting affidavits for a summary decision on all or any part of the proceeding." 29 C.F.R. § 18.40(a). "[An] administrative law judge may enter summary

judgment for either party if . . . there is no genuine issue as to any material fact and [the] party is entitled to summary decision." 29 C.F.R. § 18.40(d). A "material fact" is one whose existence affects the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The party moving for summary judgment always bears the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met its burden, its opponent must do more than simply show that there is some doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "The nonmoving party must come forward with facts showing that there is a genuine issue for trial." *Id.* at 587 (citations omitted).

In ruling on a motion for summary decision, "[t]here is no requirement that the [ALJ] make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial. . . ." *Anderson*, 477 U.S. at 250. In making this determination, the ALJ is to view all the evidence and factual inferences in the light most favorable to the non-moving party. *Reddy v. Medquist, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 04-123, ALJ No. 2004-SOX-35 at 5 (ARB Sept. 30, 2005), *citing Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999). However, if the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact and the moving party is entitled to summary decision. *Celotex*, 477 U.S. at 322-23.

B. Timeliness of the Complainant's Appeal and Request for Hearing

The first question presented by the Respondents' Motion for Summary Decision is whether the Complainant filed a timely appeal of OSHA's dismissal of her complaint. The Complainant had thirty (30) days from receipt of the Secretary's findings to file objections and request a hearing before an ALJ. *See* Decision Letter at 2; *see also* 29 C.F.R. § 1980.106(a). The Complainant asserts that her former attorneys, Berenbaum Menken Ben-Asher & Bierman LLP, received OSHA's decision letter on February 7, 2007. Compl. Resp. at 2; *see also* Compl. Ex. A. Accordingly, the appeal filed on March 9, 2007 was filed thirty (30) days after the Complainant's counsel received OSHA's decision letter. Therefore, I conclude that the Complainant's appeal was timely.

C. Coverage Under Section 806

The second question presented by the Respondents' Motion for Summary Decision is whether the Complainant is a covered employee under Section 806 of the Act. Section 806 of Sarbanes-Oxley offers protection for employees of publicly traded companies who provide information to a covered employer or a Federal Agency or Congress relating to alleged violations of mail fraud (18 U.S.C. § 1341), fraud by wire, radio, or television (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344), securities fraud (18 U.S.C. § 1348), rules and regulations of the

Securities and Exchange Commission, and any other provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A. *See also Klopfenstein*, ARB No. 04-149 at 1 n.1. Section 806 of Sarbanes-Oxley states in relevant part:

> (a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES - No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms or conditions of employment because of any lawful act done by the employee--
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> (1) to 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, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
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> (A) a Federal regulatory or law enforcement agency;
> (B) any Member of Congress or any committee of Congress; or
> (C) a person with supervisory authority over the employee…; or
>
> (2) to file, cause to be filed…or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, 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. The Congressional Record states that the purpose of Section 806 of the Act is to "provide whistleblower protection to employees of publicly traded companies . . . when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent," and to "protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." 148 Cong. Rec. S7420, 2002 WL 1731002 (daily ed. July 26, 2002).

There has been no showing that Cannondale, Kantar, or WPP USA are companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781), or that [are] 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). The Complainant was an employee of Cannondale, and she was never an employee of Cannondale's public parent, WPP.

The Complainant relies on the above-quoted language from *Morefield* to support her position that employees of subsidiaries of a publicly traded parent company are covered by the Section 806 protections. However, *Morefield's* approach to non-public subsidiaries is inconsistent with the ARB's holding in *Klopfenstein*, and it has not been followed in later cases. *See Rao v. Daimler Chrysler Corporation*, No. 06-13723, 2007 U.S. Dist. LEXIS 34922, at *9-12 (E.D. Mich. May 15, 2007) (*Rao*); *Lowe v. Terminix Int'l Co., LP*, USDOL/OALJ Reporter (PDF), ALJ No. 2006-SOX-89 at 7-8 (ALJ Sept. 15, 2006); *Bothwel v. Am. Income Life*, USDOL/OALJ Reporter (PDF), ALJ No. 2005-SOX-57 at 6 (ALJ Sept. 19, 2005). In *Klopfenstein*, the ARB rejected an interpretation of Sarbanes-Oxley that would "require a complainant to name a corporate respondent that is itself 'registered under § 12 or . . . required to file reports under § 15(d),' so long as the complainant names at least one respondent who is covered under the Act as an 'officer, employee, contractor, subcontractor, or agent' of such a company." *Klopfenstein*, ARB No. 04-149 at 13. The ARB further held that a non-public subsidiary of a publicly held parent company could be subject to the Act's whistleblower provisions if the evidence establishes that it acted as an "agent" of its publicly held parent. *Id.* at 13-14. The ARB concluded that "[w]hether a particular subsidiary or its employee is an agent of a public parent for purposes of [Sarbanes-Oxley] should be determined according to principles of general common law agency . . . [which] depends upon the existence of required *factual elements*: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control." *Id.* at 14-15, quoting Rest. 2d Agen. 1(1), comment b. The ARB instructed that an ALJ must make factual findings necessary to properly apply agency principles in determining whether a non-public subsidiary or its employees acted as the publicly held corporation's agents with regard to the challenged personnel action. *Id*. at 15-16. Thus, for an employee of a non-public subsidiary to be covered under Section 806, the non-public subsidiary must act as an agent of its publicly held parent, and the agency must relate to employment matters. *Rao*, 2007 U.S. Dist. LEXIS 34922, at *15; *Brady v. Calyon Secs. (USA)*, 406 F. Supp. 2d 307, 318 n.6 (S.D.N.Y. 2005).

Here, the Complainant has alleged no facts that would tend to support a finding that either Cannondale or Kantar were acting as agents of WPP in connection with the termination of her employment at Cannondale. She has not contradicted the Respondents' claims that: (1) Cannondale acts and is run independently from WPP; (2) there is no overlap in the officers of Cannondale and WPP; (3) WPP and Cannondale have separate offices, operations and officers and are rarely, if ever, involved in one another's daily activities; (4) no officer or employee of WPP exerted any control over the terms and conditions of the Complainant's employment; and (5) no WPP officer or employee had anything to do with the decision to hire or terminate the Complainant. Indeed, the Complainant makes no allegation that anyone at WPP even knew about any decisions regarding her employment. While the Complainant does identify statements from WPP's annual report that indicate that WPP's non-public subsidiaries may act as WPP's agents for purposes of collecting and reporting financial data, there is no factual predicate for a finding that there is any agency relationship pertaining to employment matters.

Viewing all the evidence and factual inferences in the light most favorable to the Complainant, I find that she has failed to make a showing sufficient to establish that Cannondale acted as an agent of WPP, its publicly held parent, in terminating the Complainant's employment. Since Cannondale is neither a covered employer itself nor an agent of WPP in regard to employment matters, the Complainant cannot establish that she is a covered employee under the whistleblower protection provisions of Section 806 of the Act. Consequently, I conclude that there is no genuine issue of material fact and that the complaint must be dismissed.

V. Order

The Respondents' motion for summary decision is **GRANTED**, and the complaint is **DISMISSED** in its entirety.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

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(a). 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).