U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 March 2008

CASE NO.: 2007-SOX-24

In the Matter of:

MONIQUE SRIVASTAVA

Complainant

v.

HARRIS INVESTMENT MANAGEMENT, INC., and BANK OF MONTREAL

Respondents

DECISION AND ORDER GRANTING
RESPONDENTS' MOTION FOR SUMMARY DECISION
AND DISMISSING COMPLAINT

This case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (the Act), 18 U.S.C.A. § 1514A1, and its implementing regulations found at 29 CFR § 190. Monique Srivastava (hereinafter Complainant) filed a Complaint on August 10, 2006 against Harris Investment Management (HIM) and the Bank of Montreal (BMO) (hereinafter collectively Respondents), alleging discrimination in violation of the Act. On January 10, 2007, the Occupational Safety and Health Administration (OSHA) dismissed the Complaint, finding that Complainant was not a covered employee under the Act. Complainant appealed. The case was referred to the Office of Administrative Law Judges (OALJ), where both parties commenced discovery on the issue of jurisdiction.

On January 30, 2008, Respondents filed a Motion for Summary Decision, arguing that the court lacks jurisdiction to hear the claim. Respondents argue that HIM is not a publically traded company, and, therefore, Section 806 of the Act is not applicable. Respondents additionally argue that they cannot be "bootstrapped" into Section 806 coverage merely because they are the third-tier subsidiary of a publically held parent, BMO.

Claimant filed a Brief in Support of the Denial of Respondent's Motion for Summary Decision on March 3, 2008. Claimant conceded that HIM is not a publically traded company, but asserted that jurisdiction exists because the relationship between BMO and HIM is sufficient to establish that HIM is an agent of BMO, or, in the alternative, that the corporate veil should be pierced.

After a grant of extension of time, Respondents filed a Reply Brief in Support of Respondents' Motion for Summary Decision on March 26, 2008. Respondents assert that HIM was not acting as an agent of BMO at the time that it decided to terminate Complainant. Respondents further argue that HIM and BMO are separate corporate entities, not "alter egos."

STATEMENT OF THE CASE

Complainant was employed at HIM from November of 2001 until June 5, 2006 as a quantitative analyst. In April of 2006, Complainant noticed that her supervisor, Ernesto Ramos, had instituted material changes in the models that HIM used to invest institutional money and mutual fund assets. According to Complainant, these changes were not "back tested" or approved by the Investment Policy Committee (IPC), and were, therefore, in violation of rules and regulations requiring that any material changes to the models be approved by the IPC and be disclosed to shareholders. Complainant informed her supervisor that his actions were in violation of SEC regulations and company policy. When her supervisor failed to take corrective action, she notified Thomas Johnson, a senior partner, who indicated that he would refer the matter to the President and Chief Investment Officer of HIM, Bill Leszinske.

Thereafter, Complainant's supervisor asked her to make changes to the models. Complainant indicated her reluctance to pursue unauthorized action, which resulted in a course of verbal abuse and harassment by Complainant's supervisor. Johnson did not respond to Complainant's attempts to follow up with her concerns. As a result, Complainant drafted an e-mail directed to the portfolio managers and the research group advising that Ramos' actions were in violation of SEC rules and were not approved by the IPC. Complainant did not send the e-mail to the portfolio managers and the research group, but did forward the e-mail to Johnson on March 25, 2006. On June 5, 2006, Complainant was asked to attend a meeting with the Vice President of Human Resources, Donna Mallo, and Ernesto Ramos. She was then informed that her employment was terminated because she was doing "minimal" work and was not meeting performance standards. Complainant asserts that she always received positive evaluations, and, as late as March of 2006, received a raise and a bonus for the work she had performed.

STANDARD OF REVIEW

29 CFR § 18.40 (d) provides that an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained in 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. In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

The moving party bears the initial burden to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party meets this burden, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact. The non-moving party may not rest upon mere allegations, but must

present affirmative evidence in order to defeat a properly supported motion for summary decision. *Anderson*, 477 U.S. at 247; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

DISCUSSION

Section 806 of the Sarbanes-Oxley Act provides whistleblower protection to employees of publically traded companies. Section 806 states, in pertinent part:

> 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 -

18 U.S.C. § 1514A.

It is undisputed that HIM does not fall within the requirements of Section 806: HIM does not have a class of securities registered under section 12 of the Securities Exchange Act of 1934, nor is it subject to the reporting requirements of section 15(d) of the Securities Exchange Act of 1934. Complainant has conceded that HIM is not a publically traded company and is not subject to the requirements of the Act. (Complainant's Brief at 3). Unless Complainant can demonstrate that HIM's parent company, BMO, can be held liable for the acts of its subsidiary, Complainant's suit must be dismissed on jurisdictional grounds.

It is a general principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries. *United States v. Bestfoods, et al*., 524 U.S. 51, 61 (1998). However, the mere fact that HIM and BMO have separate corporate identities does not fully insulate BMO from liability. "A non-public subsidiary of a publically held parent company could be subject to the Act's whistleblower provisions if the evidence establishes that it acted as an agent of the publically held parent." *Savastano v. WPP Group, PLC, et al*., 2007-SOX-34 (ALJ July 18, 2007). The Administrative Review Board has found that, "whether a particular subsidiary or its employee is an agent of a public parent for the purposes of SOX should be determined according to the principles of general common law agency…[which] depends on 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 principle is to be in control." *Klopfenstein, v. PCC Flow Technologies Holdings, Inc*., A.R.B. No. 04-149 (A.R.B. May 31, 2006); See also, Rest. 2d Agen. §1(1), comment b. The agency relationship must relate to employment matters in order to fall within the whistleblower protection provisions. *Klopfenstein*, A.R.B. No. 04-149. "Consequently, in an employment discrimination case the parent company may be liable where it controlled or influenced the work environment of, or termination decision about, an employee of its subsidiary company." *Neuer v. Bessellieu*, 2006-SOX-132, 4 (ALJ Dec. 5, 2006).

In cases addressing the agency relationship between a parent and its subsidiary, the analysis focuses on the extent to which the parent company participated in the challenged employment action. In *Savastano v. WPP Group, PLC, et al*., the ALJ granted respondent's motion for summary decision, holding that the complainant had failed to allege facts that would support a finding that either her non-publicly traded employer or its non-publicly traded holding company were acting as agents of the publicly traded parent in connection with the termination of her employment. 2007-SOX-34 (ALJ July 18, 2007). Specifically, the ALJ found that the complainant had not contradicted the respondents' claims that: (1) the subsidiary acted and was run independently from the parent; (2) there was no overlap in the officers; (3) the companies had separate offices, operations, and officers and were rarely, if ever, involved in one another's daily activities; (4) no officer or employee of the parent exerted any control over the terms and conditions of the complainant's employment; and (5) no officer or employee of the parent had anything to do with the decision to hire or terminate the complainant. *Savastano*, 2007-SOX-34 at 7. Likewise, in *Bothwell v. American Income Life*, the ALJ granted respondent's motion for summary decision on jurisdictional grounds where there was no evidence that the subsidiary was acting as an agent of the parent with respect to employment practices toward the complainant. 2005-SOX-57 (ALJ Sept. 19, 2005). The ALJ in *Bothwell* noted that the parent took no part in hiring or terminating the complainant, had no role in the payment of his salary, and the parent's employees had no interaction with the complainant. 2005-SOX-57. Furthermore, in *Hughart v. Raymond James & Associates, Inc*., the ALJ found that there was no Section 806 jurisdiction over the subsidiary because the complainant was paid by the subsidiary, only had daily interaction with the subsidiary, and, most importantly, the supervisors who directed complainant's work were employed exclusively by the subsidiary. ALJ No. 2004-SOX-9, 43-45 (Dec. 17 2004).

By contrast, in cases where the parent company was involved in employment decisions affecting the complainant, an agency relationship has been found. For example, in *Klopfenstein* the ARB identified the fact that the parent company was directly involved in the complainant's termination as a crucial factor in finding an agency relationship.[1] A.R.B. No. 04-149 at 15-16. Similarly, in *Robinson v. Morgan Stanley*, the ALJ found jurisdiction over an employee of a non-public subsidiary of a publically traded parent company because there was a direct supervisory chain from the public parent to the wholly owned subsidiary and because the termination decision rested with the public parent. 2005-SOX-44 (ALJ Mar. 26, 2007). In *Neuer v. Bessellieu*, the ALJ found that the complaint survived a 12(b)(1) motion based, in "most significant" part, on the complainant's allegation that the subsidiary president's termination decision had the approval of the parent company's CEO. 2006-SOX-132, 4 (ALJ Dec. 5, 2006).

Thus, there must be a factual predicate for finding an agency relationship pertaining to employment matters affecting the Complainant in order to find that HIM was acting as an agent of BMO. Respondents argue that HIM's subsidiary relationship to BMO does not make them an agent, and, therefore, does not put HIM within the purview of the Act. HIM alleges that, in addition to operating independently from BMO, it maintained its own officers. HIM further asserts that BMO was not involved in the daily operations of HIM. Rather, HIM argues that

1. The ARB found that the parent company had participated in the employment decision because the executive vice president of the parent made the decision to terminate the complainant and the parent company initiated and directed the investigation that led to the complainant's dismissal.

BMO's role was limited to oversight and regulatory compliance, services for which HIM was charged a fee. According to Respondents, the firing and hiring of Complainant was done exclusively by HIM personnel. HIM cites to the fact that Complainant interviewed exclusively with HIM employees and reported only to HIM employees as further support for the conclusion that BMO played no role in making employment decisions regarding the Complainant. Similarly, HIM asserts that it made the decision to terminate Complainant without the advice, counsel, or approval of BMO.

Complainant, on the other hand, argues that there is sufficient evidence to find that HIM is an agent of BMO. Complainant asserts that HIM employees reported to BMO officers, and were required to obtain authority from BMO to offer bonuses and other incentives to retain HIM employees. As support for her allegations, Complainant presented examples of several employees who, between the years 1998 and 2003, elected to leave HIM, and were offered incentives to remain with HIM after the president of HIM sought, and obtained, approval from BMO. Complainant has also indicated that BMO officers instructed the president of HIM to reduce HIM's workforce after a showing of poor profits, suggesting that BMO retained the authority to terminate employees.

Complainant, however, has made only general allegations of control, and has failed to show that BMO exercised any control over *her* employment and termination. [Emphasis added]. Complainant has not contested that HIM alone interviewed, hired, managed, evaluated, and paid her. (Complainant's Response to Statement of Facts, ¶¶ 8, 12-13, 16-19). Complainant has not disputed that "no employee of BMO made the decision to terminate Complainant or provided input into that decision." (Complainant's Response to Statement of Facts, ¶ 23). With respect to the termination of her employment, Complainant has conceded that Ernesto Ramos, HIM's Director of Quantitative Research, made the decision to terminate her with input from HIM President Bill Leszinske and Human Resources Vice President Donna Mallo, neither of whom were ever employed by BMO. (Complainant's Response to Statement of Facts, ¶ 20-22). In fact, Complainant has not even alleged that anyone at BMO even knew about any decisions regarding her employment. Rather, Complainant relies exclusively on the experiences of former high-level employees in the unique situation where the company sought to retain them by offering incentives beyond normal protocols. Furthermore, the examples cited by Complainant fail to show any control exercised contemporaneously with Complainant's employment, the examples she cited having occurred up to eight (8) years before her termination. All of the case law, however, focuses on the role played by the publically traded parent at the time of the events in question. This general involvement in HIM employment decisions does not turn HIM into BMO's agent with respect to Complainant's employment.

Additionally, Complainant's argument extends the Act's coverage beyond its intended scope. Under Complainant's argument, the mere fact that a publically traded parent company has directed employment decisions, at any point in time with respect to any employee, is sufficient to establish an agency relationship. Thus, under Complainant's interpretation, an employee of a non-publically traded company could extend the Act's coverage merely by alleging general authority of the publically traded parent to make employment decisions without reference to his/her case. Such a position is not supported under the plain language of the Act or its application. A narrow interpretation of the agency relationship is justified in light of the plain

language of the statute, which extends the Acts requirement only to employees of publically traded companies.

Complainant's reliance on *Platone v. Atlantic Airlines Holdings, Inc.*, ALJ No. 2003-SOX-27 (April 30, 2004), for the proposition that separate corporate identities will not insulate the parent from liability where the subsidiary is a mere instrumentality of the parent, is accurate in principle, but fails in its application. In finding that the parent and subsidiary were so interrelated as to represent one entity, the ALJ in *Platone* relied on evidence not present in the instant case.[2] The ALJ found that the parent company had no employees, but was comprised only of the subsidiary which was its "operating arm." The ALJ also found that the entities shared officers and wholly disregarded the separate corporate identities in dealings with the public, employees, and the SEC. Furthermore, the ALJ found that the termination decision was made by an employee of the subsidiary who served on the parent's board.

Under such facts, it is clear that the parent and the subsidiary were operating as one corporate identity; however, the facts alleged by Complainant do not mimic those of *Platone*, and are insufficient to find that HIM and BMO are one entity. Complainant presents numerous examples of the "interweaving" of HIM and BMO: use of BMO's registered trademark on her pay stubs and 401(k) statements; letters welcoming her to the "Bank of Montreal group of companies;" orientation materials referencing the vision and values of the BMO group; an employment application reading "thank you for applying with the Bank of Montreal U.S. Group of Companies;" and a separation agreement which prohibited Complainant from releasing confidential material without the consent of the General Counsel for the Bank of Montreal. The court, however, has refused to extend the Act's coverage in cases where similar facts have been alleged, including the provision of benefits, corporate-wide ethics policies, and the use of the parent's letterhead. *Hughart v. Raymond James & Associates, Inc.*, ALJ No. 2004-SOX-9, 43-45 (Dec. 17 2004). Rather then demonstrate that HIM and BMO are one corporate entity, the facts cited by Complainant support a finding that there is a bona fide parent-subsidiary relationship between the two companies.

Therefore, I find that there is no genuine issue of material fact and Respondents are entitled to summary decision. There is no indication that HIM was acting as an agent of BMO with respect to Complainant's employment, either in terms of her hiring or termination. Complainant has not refuted the argument that the hiring and firing decisions with respect to her employment were made by HIM employees without advice, counsel, or approval of BMO. Furthermore, the facts presented by Complainant are not sufficient to establish that HIM is the alter ego of BMO nor do they justify piercing the corporate veil.

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2. The ALJ in *Platone* listed the factors to be considered in determining whether a subsidiary is a mere instrumentality of the parent; the existence of common stock ownership; common officers and directors; common business departments; filing of consolidated financial statements and tax returns; parent financing of the subsidiary; parent causing incorporation of the subsidiary; operation of the subsidiary with grossly inadequate capital; payment by the parent of salaries and other expenses; sole source of business for the subsidiary is the parent; parent uses the subsidiaries property as its own; daily operations of the two corporations are not kept separate; and the subsidiary does not observe basic corporate formalities. ALJ No. 2003-SOX-27, 21 (April 30, 2004)

ORDER

IT IS HEREBY ORDERED THAT Respondents' Motion for Summary Decision is GRANTED and that the complaint herein is DISMISSED.

A

DANIEL L. LELAND
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, Suite S-5220, 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).