U.S. Department of Labor

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Issue Date: 04 March 2008

Case No.: 2008-SOX-00016

In the Matter of:

JANICE FLESZAR,
Complainant,

v.

AMERICAN MEDICAL ASSOCIATION,
Respondent.

Appearances: Janice Fleszar
Pro Se Complainant

James S. Whitehead, Esquire
For the Respondent

Before: John M. Vittone
Chief Administrative Law Judge

DECISION AND ORDER DISMISSING THE COMPLAINT

This matter arises out of a complaint filed by Janice Fleszar ("Complainant") against American Medical Association ("Respondent" or "AMA") under 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.A. § 1514A ("SOX" or the "Act"). Based on my review of the record, I issued an Order to Show Cause on January 22, 2008, on whether the complaint should be dismissed for failure to state a cause of action because the Respondent is not subject to SOX. Both parties have responded to the Order to Show Cause. This threshold question of whether the Respondent is subject to Section 806 of SOX must be resolved before any consideration of the merits of the case may be considered.

PROCEDURAL HISTORY

The Complainant filed a previous complaint against the Respondent which was dismissed by Judge Stansell-Gamm on June 13, 2007, on the basis that the AMA is not subject to the provisions of Section 806 of the Act. *Fleszar v. American Medical Association,* OALJ No. 2007-SOX-00030 (June 13, 2007). That matter is currently on appeal to the Administrative Review Board as case number ARB No. 07-091.

On October 22, 2007, the Complainant filed the present complaint against the AMA alleging that her employment has been wrongfully terminated since the first complaint was filed. A final determination letter was issued by Occupational Safety and Health Administration ("OSHA") on December 4, 2007. In the Secretary's Findings, OSHA determined that the Respondent is not a company within the meaning of the Act because it does not have 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. Additionally, OSHA determined that the Complainant is not an employee covered under the Act because she was not an employee of a company subject to SOX. Consequently, OSHA determined that it lacks jurisdiction to conduct an investigation and dismissed the complaint.

The Complainant submitted her objections to the Secretary's Findings on January 8, 2008. In the objections, the Complainant provided her explanation of the jurisdictional basis for her claim – including emails and a "Response to Notice of Appeal And/Or Order Establishing Briefing Schedule" submitted to the Administrative Review Board on January 4, 2008, in conjunction with the previous complaint currently on appeal. After a review of the record, I ordered the parties to brief the issue of whether the Respondent is a company subject to the applicable SOX provisions.

ARGUMENTS OF THE PARTIES

Complainant's Argument

The Complainant makes several arguments that the Respondent is subject to the whistleblower provisions of SOX. Her first argument is that the AMA has a class of registered securities under Section 12 of the Security and Exchange Act of 1934 ("SEA") and is required to file reports under Section 15(d). *Complainant's Brief* at 10. The Complainant provides no proof of that and admits that she cannot locate or produce AMA-certified shareholder reports. *Id.*

The Complainant also argues that the AMA has entered into arrangements with publicly-traded companies such as Oppenheimer Capital and investment advisors and, thus, should be treated as a publicly traded company. *Complainant's Brief* at 11-16. Complainant suggests that Oppenheimer Capital is connected to the Respondent through a transaction involving AMA Investment Advisors. *Id.* at 12-14. The Complainant then implies that the AMA is actually a subsidiary of Oppenheimer and is "insulat[ing] itself from exposure to the Act through unique business arrangements." *Id.* at 15. The Complainant states that she believes the AMA has acted on behalf of a publicly-traded company "at least in its relationship with Oppenheimer and

perhaps others with whom [the AMA] has partnered and profited." The Complainant attached multiple documents, most of which concern the merits of her complaint rather than the question at hand. *Id.* at Exhibits A-O. The remaining exhibits are a variety of documents concerning Oppenheimer Capital and AMA Investment Advisors, among others, and do not indicate that the Respondent is a publicly-traded company.

Respondent's Argument

The Respondent argues that Judge Stansell-Gamm correctly concluded in the previous case that the AMA is not subject to the whistleblower provision of SOX. *Respondent's Brief* at 1. To support this argument, the Respondent notes that the AMA is not subject to SOX Section 806 because it is a not-for-profit corporation under the Illinois Not For Profit Corporation Act and is exempt from federal income taxes as a not-for-profit organization under Section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. § 501(c)(6). *Id.* at 4. The Respondent notes that it has issued no securities registered under SEA Section 12 and is not required to file reports under SEA Section 15(d). *Id.* The Respondent argues that, as such, the AMA is not subject to the whistleblower protection provisions of Section 806 of SOX and the filing of any other type of document or report with the SEC does not trigger SOX coverage. *Id.*

The Respondent then addresses the Complainant's exhibits and allegations about the AMA's relationships with other entities. The Respondent notes that AMA Investment Advisors, which did not issue registered securities and was not required to file SEA Section 15(d) reports, provided investment advice to the AMA until the AMA sold it to Oppenheimer Capital in the 1990s – long before SOX Section 806 went into effect. *Respondent's Brief* at 5. The Respondent notes that the AMA is not a partner in, or subsidiary of, Oppenheimer, has no ownership or control of AMA Investment Advisors, and should not be subject to the SOX whistleblower provisions because of contracting or doing business with publicly traded companies. *Id.* at 6. The Respondent concludes by stating that the Complainant's arguments regarding the AMA's relationships with other companies "amount to nothing more than rampant speculation without factual basis" and "[s]uch unsupported conjecture simply does not establish that the AMA was acting on behalf of a publicly traded company when it took the actions alleged in this case." *Id.* at 7.

In support of its argument, the Respondent offers the Declaration of Michael Katsuyama, Division Counsel for the AMA. *Respondent's Brief* at Exhibit B. Mr. Katsuyama stated that the AMA is a not-for-profit corporation, is exempt from federal income tax, has not issued any securities that are registered under Section 12 of the SEA, and is not required to file any reports under Section 15(d) of the SEA. *Id.* Mr. Katsuyama also stated

> [t]o the extent that the AMA has filed any documents or reports with the SEC, no such filing was ever made pursuant to Section 15(d) of the SEA. The last occasion on which the AMA filed any documents with the SEC was in 2002, and such documents were not filed pursuant to Section 15(d) of the SEA.

Id. Mr. Katsuyama noted that AMA Investment Advisors was an entity that the AMA sold to Oppenheimer Capital in the 1990s and that AMA Investment Advisors did not issue any securities registered under SEA Section 12 and was not required to file any reports under SEA Section 15(d). Mr. Katsuyama concluded by stating that the AMA no longer has an affiliation with AMA Investment Advisors, is not a partner in or subsidiary of Oppenheimer Capital, and has no affiliation with the other entities mentioned by the Complainant in her brief. *Id.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I concur with the findings of fact and conclusions of law Judge Stansell-Gamm made in his June 13, 2007, decision, and conclude that his sound reasoning remains applicable in the present claim. *Flezar, supra.* As Judge Stansell-Gamm noted, Section 806 of the Act, 18 U.S.C. § 1514A, 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) 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, 1343, 1344, or 1348, 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.

The AMA is a private organization that has not registered securities under Section 12 of the SEA. Additionally, Section 15(d) of SEA relates solely to reports of registered issuers of securities. The AMA is not such an issuer. The Complainant has offered no evidence to rebut that and, in fact, admits she can find no such reports filed with the SEC by the AMA. As a non-profit, non-publicly traded company, the AMA is not subject to Section 806 of SOX. *Paz v. Mary's Center for Maternal & Child Care*, ARB No. 06-031, ALJ No. 2006-SOX-7 (ARB Nov. 30, 2007).

Additionally, the Complainant's broad allegation that the AMA should be subject to SOX because of possible contractual relationships with publically-traded corporations is insufficient to bring the Respondent under the Act. *See Goodman v. Decisive Analytics Corp.*, 2006 SOX 11 (Jan. 10, 2006). After a review of the Complainants many documents, I find no basis for subjecting the AMA to Section 806 of SOX. Consequently, I concur completely with Judge Stansell-Gamm's previous decision that the AMA is not subject to the provisions of Section 806 of SOX and thus not properly named as a Respondent. The AMA is not a publicly traded company and the Complainant is not an employee entitled to SOX whistleblower protection. Accordingly, the Complainant's SOX complaint is dismissed.

ORDER

The Complainant's October 22, 2007, SOX complaint is hereby DISMISSED. SO ORDERED.

A

John M. Vittone
Chief 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).