U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 21 October 2008

CASE NO.: 2008-SOX-40

In the Matter of:

GEREON MERTEN
Complainant

v.

BERKSHIRE HATHAWAY, INC.
FLIGHTSAFETY INTERNATIONAL, INC.
Respondents

ORDER GRANTING MOTION TO DISMISS

Respondents, Berkshire Hathaway, Inc. and FlightSafety International, Inc., move for dismissal of the complaint filed by Complainant, Gereon Merten, under the whistleblower protection provisions at Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, codified at 18 USC § 1514A ("SOX" or "the Act").

Procedural History

Complainant initiated this action by filing a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on November 14, 2007 alleging that FlightSafety International, Inc. (FSI) and Berkshire Hathaway, Inc. (Berkshire) (collectively, Respondents) violated the whistleblower protection provisions of the Act. He asserts that his employment was terminated from FSI after warning Respondents' officers of unspecified interference he observed with "internal controls."

OSHA issued an April 11, 2008, Determination in which it dismissed Complainant's complaint as it found no reasonable cause to believe that Respondents violated the Act. Complainant filed objections to OSHA's Determination, and the complaint was transferred to the Office of Administrative Law Judges (OALJ).

Respondents sought leave to file a motion to dismiss during a July 3, 2008, telephonic conference. An Order granting Respondents' request was issued the same day, setting a July 21, 2008 deadline for submission of the motion, which was later extended to July 28, 2008. Respondents' Motion to Dismiss with supporting affidavit was received on July 28, 2008. On August 15, 2008, Complainant submitted an Answer in Opposition to Respondents' Motion to Dismiss.

Complainant has also filed a request to add two individuals as parties and to supplement the complaint with additional allegations of adverse personnel actions. *See* Request to Amend Complaint dated August 11, 2008. Respondents filed a reply to Complainant's response to the Motion to Dismiss on September 8, 2008.

Background

Complainant was employed by FSI, from December 26, 1995 until October 31, 2007. Answer to Motion to Dismiss (Answer) p. 1. FSI is a subsidiary of Berkshire. FSI is not a public traded company. Affidavit of Thomas W. Riffe. (Aff.) p. 2. Berkshire is a conglomerate holding company and is a publicly traded corporation subject to the Security Exchange Act. FSI's primary focus is aviation training for fixed-wing and rotorcraft at learning facilities in the United States, Canada, France, and the United Kingdom. Aff. p.2. FSI fully owns FlightSafety Texas Inc. (FST). FST is not a publicly traded corporation. *Id.*

Complainant was employed by FSI in various instructional roles in Savannah, Georgia. Affidavit, p. 2. Complainant accepted a position of Corporate Project Manager/Manufacturer Liaison at the Fairchild-Dornier Manufacturing location in Oberpfaffenhofen, Germany in September 2002. In May 2002, Complainant was reassigned to Hurst, Texas as a project manager for training courseware support. *Id.* p.2 Respondents contend that Complainant took a position with FST when he accepted the assignment at Fairchild-Dornier, and continued in the employment of FST when he transferred to the Hurst, Texas facility. *Id.* p. 2. In contrast, Complainant asserts that he was never an employee of FST but remained an employee of FSI during his employment at Fairchild-Dornier and at Hurst. Aff. pp. 4, 5.

On October 12, 2007, Complainant was notified by FSI's Corporate Director HR that his employment as a Manager, Project Management, would be terminated, effective October 31, 2007. Answer p. 2. Complaint of Complainant (Comp.) p. 1. His complaint contends that he was removed from his position of Manager, Project Management, on June 1, 2007. Comp. pp.1, 6. After June 1, 2007, Complainant held the position of Senior Project Manger, assisting Gerry McRae with Project Management while McRae worked on obtaining a position for Complainant. Answer p. 9.

Complainant asserts that his employment termination notification on October 12, 2007, was a result of his e-mail to senior management complaining of interference with internal controls, and that Complainant was being targeted as a "perceived internal whistleblower." *Id.* p. 1. Complainant contacted an Ethics Hot-Line set up by Berkshire Hathaway on October 16, 2007 "to have matters resolved at the appropriate level." *Id.* p. 2.

Respondents respond that Complainant's position was eliminated as a result of FSI reorganizing and centralizing project management nationwide, including the functions at the Hurst, Texas location. Aff. p. 3. Respondents state that Complainant was informed by FST on or about May 31, 2007, that his position was one that would not receive future funding, and that on June 1, 2007, FSI informed Complainant that his position had been eliminated but that it would continue to employ him during the transition period. Aff. p. 3.

Objection to Affidavit

Complainant's Answer in Opposition to the Motion to Dismiss objects to consideration of an Affidavit of Thomas Riffe, submitted by Respondents as Exhibit A to their Motion to Dismiss. Complainant objects that the Affidavit is misleading and is not based on personal knowledge. Complainant's objection has no merit. His contention that Riffe's testimony is misleading involves a disagreement over the effect of a June 1, 2007 notification to Complainant that his position was eliminated. Complainant does not disagree that he was notified that his position as Manager, Project Management, had been eliminated. His concern is that the Affidavit does not state that he had other job duties that would allow him to continue to work. However, the Affidavit does state that Complainant was informed that he would continue to be employed during a transition period. The Affidavit testimony and Complainant's version of the notification are not so dissimilar as to disregard the Affidavit. Complainant's objection that Riffe lacks personal knowledge is based on his contention that Riffe's position as Director of Human Resources for FSI and his personal familiarity with Complainant's employment would not give him personal knowledge over Complainant's employment. Riffe's statement was given under oath and, other that the disagreement over the affect of the June 1, 2007 notification, it is not contradicted by Complainant. More importantly, any disagreement over the June 1, 2007 notification is irrelevant to the jurisdictional issue raised by the Motion to Dismiss.

Complainant's objection to consideration of the Affidavit of Thomas Riffe is overruled.

Motion to Dismiss

The regulations promulgated under SOX specify that the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR § 18.1 et seq.) govern claims under the Act before the OALJ. The Rules of Practice, however, do not provide a rule applicable to the instant Motion to Dismiss. In such a circumstance, 29 CFR § 18.1 provides that the Rules of Civil Procedure for the District Courts of the United States shall be applied.

Federal Rules of Civil Procedure 12(b)(1) governs matters in which a party seeks dismissal based upon the absence of subject matter jurisdiction, and 12(b)(6) addresses a failure to state a claim upon which relief can be granted. Respondents assert lack of jurisdiction to hear Complainant's complaint because he was not employed by an employer covered by the Act and thus Complainant's claim is not cognizable under the Act.

Coverage under § 806

Section 806 of the Act, codified at 18 U.S.C. § 1514A, provides whistleblower protection for employees of publicly traded companies. Section 806 provides that the employee protection provisions apply to companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934. The Act also prohibits "any officer, employee, contractor, subcontractor, or agent of such company" from engaging in prohibited conduct.

Section 806 protects employees who have engaged in protected activity and as a result have been subject to discharge, demotion, suspension, threats, harassment, or other manner of discrimination. Protected activity, under the Act, includes communicating information regarding conduct the employee reasonably believes constitutes a violation of section 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 bank fraud, or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. The Act also protects employees who initiate or participate in proceedings relating to a violation of the above-referenced statutes, SEC rules, or Federal law.

Respondents contend that Complainant's claim must be dismissed because Complainant is not a protected employee under § 806 as he was not employed by a publicly traded company subject to the Act.

Initially, the parties disagree as to the identity of Complainant's employer. Complainant's complaint alleges that he was employed by FSI. Respondents assert that Complainant's position was transferred to FST, a non-public wholly owned subsidiary of FSI, when he accepted the assignment at Fairchild-Dornier, and that he continued in the employment of FST when he transferred to the Hurst, Texas facility. *Id*. p. 2. Complainant supports his contention that he always worked for FSI with documentation, including internal correspondence, business credit card, and personnel reviews that show FSI as his employer. Whether Complainant was employed by FSI or by FST is of no consequence to this motion to dismiss as neither entity has a class of securities registered under section 12, and neither is required to file reports under section 15(d) of the Security Exchange Act. Aff. p. 2. It is assumed for purpose of this Motion to Dismiss that Complainant was at all time relevant to this complaint employed by FSI.

Complainant first argues that as an employee of FSI he was protected by SOX as § 806 covers the subsidiaries of publicly traded parent companies. As support Complainant cites *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 (Jan 28, 2004); and *Gonzalez v. Colonial Bank*, 2004-SOX-39 (Aug. 20, 2004). In both cases, Administrative Law Judges held that SOX protects employees of private subsidiaries owned by publicly traded parents. However, subsequent decisions by the Administrative Review Board and the Courts have held that being a subsidiary of a publicly traded company does not alone allow for coverage under § 806 of SOX. In *Roa v. Daimler Chrysler*, (E.D.Mich. May 14, 2007), the district court granted summary judgment against the Plaintiff in a SOX whistleblower suit where the Defendant was not itself a public company, but only the subsidiary of its publicly traded parent, and the publicly traded parent had not been named in the complaint. In *Flake v. New World Pasta Co.,* ARB No. 03-126, ALJ No. 2003-SOX-018 (ARB Feb. 25, 2004) and *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB Case No. 04-149 (May 31, 2006), the Board held that SOX coverage is limited by its text to publicly traded companies and any officer, employee, contractor, subcontractor, or agent of such company. In *Andrews v. ING North America Insurance Corp.,* ARB No. 06-071, ALJ Nos. 2005-SOX-50 and 51 (ARB Aug. 29, 2008), the Board again held that a non-public subsidiary is not covered by SOX unless the parent company is a covered company and the subsidiary or its employee acted as its agent.

Thus, the mere fact that the Complainant's employer, FSI, is a subsidiary of Berkshire, a publicly traded corporation, is insufficient to bring his employment within the coverage of SOX. Complainant must show that FSI acted as an agent of Berkshire.

The Board's decision in *Klopfenstein* offered the following guidance to determine whether a subsidiary is an agent of a public parent for the purpose of SOX coverage:

> Whether a particular subsidiary or its employee is an agent of a public parent for purposes of the SOX employee protection provision should be determined according to principles of the general common law of agency. General common law principles of agency are set forth in the Restatement of Agency, a "useful beginning point for a discussion of general agency principles." Although it is a *legal concept*, "agency 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."Rest. 2d Agen. § 1(1), comment *b*. The function of the ALJ is to ascertain whether these factual elements are present. [footnotes omitted]

Klopenstein, p. 14.

Guidance on whether a subsidiary is an agent is also offered by Court decisions that use an "integrated enterprise test." to address potential responsibility of a parent company for the activities of subsidiaries to effectuate federal labor-related policies. *Pearson v. Component Technology Corp.*, 247 F.3d 471, 485 (3rd Cir. 2001). The test was initially developed by the National Labor Relations Board as "a sort of labor-specific veil-piercing test." *Id.* at 485, 486. The intent of the test is to focus on labor relations and economic realities, rather than corporate formalities, to determine whether a parent corporation and its subsidiary are both liable for statutory violations. *Id.* at 486.

According to *Pearson*, the integrated enterprise test has been applied by courts in other employment contexts, including the Labor Management Relations Act, *see International Bhd. of Teamsters Local 952 v. American Delivery Serv. Co., Inc.*, 50 F.3d 770 (9th Cir.1995); Title VII and the Age Discrimination in Employment Act, *see Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir.1993); the Americans with Disabilities Act, *see EEOC v. Chemtech Int'l Corp.*, 890 F.Supp. 623 (S.D.Tex.1995); and the Fair Labor Standards Act, *see Takacs v. Hahn Auto. Corp.*, No. C-3-95-404, 1999 WL 33117265 (S.D.Ohio Jan. 4, 1999). Department of Labor regulations have also adopted the integrated enterprise test for the Family Medical Leave Act. *See* 29 C.F.R. § 825.104(c)(2). *Id.* at 486.

The integrated employer test has four elements: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *Id.*

The first prong, interrelation of operations, relates to a parent corporation's involvement in its subsidiary's day-to-day affairs. It has been described as "ultimately focus[ing] on whether

the parent corporation excessively influenced or interfered with the business operations of its subsidiary, that is, whether the parent *actually exercised* a degree of control beyond that found in the typical parent-subsidiary relationship." *Lusk v. FoxmeyerHealth Corp.,* 129 F.3d 773, 778 (5th Cir. 1997) (emphasis in original). Examples of this sort of interrelation include, shared employees, services, records, office space, and equipment, commingled finances, and handling by the parent of subsidiary tasks such as payroll, books and tax returns. *Romano v. U-Haul Int'l*, 233 F.3d 655, 667 (1st Cir. 2000).

The second element of the integrated employer test regards common management. This factor requires inquiry into whether the parent and subsidiary corporations share common officers and managers. *Frank v. U.S. West, Inc., supra*. The Eighth Circuit in *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977) found evidence of common management where the same person served as president of two corporations, and where family members were shareholders, officers and directors of both corporations.

The centralized control of labor relations is the third, and often cited as the most important, element in the integrated employer test. *See Romano* at 666. The 10th Circuit Court of Appeals, in *Frank v. U.S. West, Inc. supra*, explained that the "critical question is what entity made the final decisions regarding employment matters related to the person claiming discrimination? A parent's broad general policy statements regarding employment matters are not enough to satisfy this prong. To satisfy the control prong, a parent must control the day-to-day employment decisions of the subsidiary." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1363 (10th Cir. 1993). In *Frank*, the court found no evidence of centralized control over labor relations where the proffered evidence included only broad policies established by the defendant parent corporation and adopted by its subsidiaries. *Id.* In particular, the court characterized the parent corporation's establishment of an equal opportunity policy, and an identity statement setting guidelines for the fair treatment of subsidiary employees, as the sort of "broad general policies that in no way evidence an attempt by [the parent corporation] to exercise day-to-day control over employment decisions." *Id.*

The fourth element of the test relates to common ownership. It is undisputed that Respondent FSI is a wholly owned subsidiary of Berkshire. As previously stated, this fact, standing alone, is not sufficient to establish parent liability. *See Flake, supra, Klopfenstein, supra,* and *Frank, supra*.

Pearson emphasized that "[n]o single factor is dispositive" and the final determination "ultimately depends on all circumstances of the case." *Pearson* at 486. Other Circuits have stressed that the control of labor operations prong, i.e. dealing with control of employment decisions "is the most important of the four factors." *See, e.g., Romano, supra*. The test has been described as "ultimately an inquiry into whether the two companies operated at arm's length." *Pearson* at 491.

Complainant's Answer to Respondents' Motion to Dismiss sets forth facts and conclusions to establish that FSI acted as Berkshire's agent with regard to his employment. However, the assertions he sets forth do not show a principal-agent relationship. They do not show a control by Berkshire over FSI, an interrelationship of operations, common management,

or centralized control of labor relations. Complainant relies in general on four points, expressed through exhibits to his Answer, to establish Berkshire's involvement in the day day-to-day operations of FSI, or otherwise establish an agency relationship. They are Berkshires annual shareholder report, employee complaint procedure and corporate-wide 24-hour hotline, Code of Business Conduct and Ethics, and a publication titled "Control Environment."

Complainant argues that Berkshire's annual shareholder report and SEC filings show FSI employees to be its own, as well as acknowledging the existence of a principal-agent relationship between it and subsidiary officers. Answer p. 23, 24. Exhibits to Complainant's Answer (EX.) EXs. 21 and 24. However, the reports that Complainant attaches as exhibits do not support his argument. Those reports, only describe the assets of Berkshire including subsidiaries and disclose the number of employees of the subsidiaries.

Complainant argues that Berkshire's employee complaint procedure and corporate-wide 24-hour hotline is evidence of Berkshire's control over FSI employees. *Id.* p. 24, EXs. 23 and 24. But the hotline complaint procedure merely warns that unethical and illegal acts can have serious consequences for the entire Berkshire organization, that employees have an obligation to report such illegal acts to their supervisor, and if the employees are unable to, or uncomfortable with, reporting to a supervisor, they have the option to report such activities anonymously through a hotline number. The exhibits do not discuss whether any resulting investigation would be initiated by Berkshire or the subsidiary.

Complainant also references Berkshire's Code of Business Conduct and Ethics as evidence that FSI is an agent of Berkshire. He contends that since the Code applies to all Berkshire directors, officers, and employees, as well as directors, officers and employees of each subsidiary, it represents control over FSI employees. Complainant also contends that the requirements that FSI comply with the Code, that the CEO of Berkshire certify whether he is aware of corporate wide ethics violation, and FSI officers being agents with regard to enforcement of the code, are all indicative of a principal-agency relationship. *Id.* p. 24, 25, 26. EX 26, 27, 28, 31. Berkshire's requirement that directors, officers and subsidiaries comply with its Code of Business Conduct and Ethics, and educate employees about it, does not translate to the control that that *Klopfenstein* and *Pearson* discuss as indicia of excessive influence or interference with operations of a subsidiary. Moreover, the Business Code does not provide that FSI employees are agents of Berkshire for reporting or accepting reports of violations. Rather, the Code provides that Berkshire's directors and officers report violations to Berkshire's Audit Committee and all others, which logically would include directors and officers of subsidiaries, report violations to supervisors, managers and other appropriate personnel. See EX 26, p. 4, ¶ 4.

Complainant also references Berkshire's 2007 annual report and a publication titled "Control Environment" as evidence that Berkshire is involved in day day-to-day operations of FSI. Id. p.24, 25 EX 24, 28. However, these reports do not evidence day-to-day involvement. The annual report focuses on Berkshire establishing and maintaining adequate internal control over financial reporting as required by the Security and Exchange Act. The "Control Environment" publication is not indicia of agency. Rather, it promotes standards of behavior with the intent of achieving integrity and ethical values.

Applying Complainant's Answer to the integrated establishment test shows no interrelated operation. There is no evidence that Complainant and Respondents share employees, or facilities. The record instead shows that Berkshire is headquartered in Omaha, Nebraska; whereas FSI is headquartered in New York. Nor is there an allegation of the sort of financial intermingling that the Court highlighted in *Romano, supra*. There is no evidence whatsoever that Berkshire was involved in FSI's payroll, books or tax returns. Complainant has offered evidence to support a finding that FSI and FlightSafety Texas shared officers and directors; however no such evidence has been offered to support a similar finding with regards to Berkshire and FSI. It is undisputed that Berkshire and FSI do not have common officers or directors.

None of Complainant's allegations allege any involvement by Berkshire in employment decisions made at FSI generally or in Complainant's case specifically. Rather, the hotline complaint procedure and the Business Code are exactly the sort of general policies, highlighted in *Frank*, that are distinct from involvement in the firing alleged here. Moreover, there is no allegation that Complainant's use of the complaint hotline implicates Berkshire in his discharge.

In summation, considering the principal-agent relationship criteria described by *Klopfenstein* and the integrated enterprise test discussed in *Pearson*, Complainant has not set forth facts that would support a finding that FSI is an agent of Berkshire for purposes of SOX employee protection. Complainant has not satisfied his burden of establishing that Respondents are employers subject to SOX.

Complainant asserts in his Conclusion to his Answer, that he "is/was an employee of both Berkshire and FSI." This bald assertion that he was an employee of Berkshire is not supported by any evidence of record, and in fact contradicts his complaint that avers he was terminated from his work with FSI in retaliation for protected activities.

Respondents' Motion to Dismiss is granted.

Request to Amend

Complainant also requests that he be permitted to amend his complaint by adding two individuals as parties, FSI's President and CEO, and FSI's Vice President and CFO, and to supplement his complaint with nine additional adverse personnel actions to which he was subjected while employed at FSI. As Complainant's amendment does not name an officer, employee, contractor or officer of Berkshire, or allege that Berkshire was a party to the new adverse personnel actions, it would not affect the result herein.

Complainant's request to amend complaint is denied.

ORDER

It is hereby **Ordered** that Respondents' Motion to Dismiss is granted and the complaint of Complainant, Gereon Merten, is dismissed.

A
THOMAS M. BURKE
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).