U.S. Department of Labor

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Issue Date: 23 June 2008

CASE NO.: 2008-SOX-00004

In the Matter of:

ARLENE ROWLAND,
Complainant,

vs.

PRUDENTIAL EQUITY GROUP LLC,
Respondent.

DECISION AND ORDER DISMISSING CLAIM

This case arises under the employee protection provision of Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. §1514A. This provision protects employees who blow the whistle on violations of U.S. Security and Exchange Commission rules and regulations and other laws related to fraud against shareholders. Complainant names as Respondent her former employer Prudential Equity Group LLC ("Prudential"). She alleges that, by filing a certain action in federal district court to confirm an arbitration award against her, Prudential retaliated against her for raising an earlier complaint under SOX.

On April 3, 2008, Prudential moved to dismiss. Among other arguments, it asserts that it is immune because the alleged retaliatory act consists of petitioning the government, here in the form of filing an action in a court. I find the argument meritorious and will grant the motion.

INTRODUCTION AND PROCEDURAL HISTORY

Prudential formerly employed Complainant as a financial advisor assigned to its Scottsdale, Arizona office. In February 2003, Complainant demanded arbitration against Respondent before the National Association of Securities Dealers ("NASD"). She alleged that Respondent had violated certain federal and state employment discrimination laws and federal whistleblower protection statutes (under SOX); she also alleged infliction of emotional distress and other claims. Judicial Notice, Exh. 2.[1]

[1] At Respondent's request I take official notice of decisions, determinations, and documents that these parties filed in related litigation in the federal district court, this Office, and the NASD. I refer to those which Complainant submitted as "Cmpt. Opp." refers to "Complainant's Responsive Opposition to Respondent's Motion to Dismiss" and its attached documents filed on May 16, 2008, in the present action. I refer to those which Prudential submitted as "Judicial Notice, Exh. __." The documents are publically available and readily discernable; they are adjudicative facts. Neither party has objected to these documents as submitted by the other party. *See* Fed.R.Evid 201. To the

While the arbitration was pending, on October 26, 2004, Complainant filed an action in the U.S. District Court (D. Ariz.) (Case No. CV 04-2287-PHX-EHC). Cmpt. Opp. Exh. Q. She raised the same claims and added others. *Id.* Nearly six months later, she moved to dismiss the arbitration proceeding without prejudice so that the entire matter could be decided in federal court.

On June 7, 2005, the NASD arbitration panel granted Complainant's motion to dismiss conditioned on Complainant's agreement to pay Respondent's fees and costs plus the routine NASD arbitration fees. Complainant accepted the conditions by letter dated June 17, 2005. Judicial Notice Exh. 2. She expressed her "appreciation to the Panel" for its "careful determination" of her motion. *Id.* Respondent sought $198,049.78 in fees and costs. On April 21, 2006, the panel issued its award. *Id.* It reduced Respondent's charges to $137, 795.82. It set the NASD forum and other fees owed at $5,250. It dismissed without prejudice and allowed Complainant until May 24, 2006, to pay the award.

Complainant, however, did not pay the award timely or at all. Instead, she filed a SOX complaint with the U.S. Department of Labor, dated July 19, 2006. In addition to Prudential, she also named the NASD as a respondent. She asserted that Prudential influenced the NASD panel to bill her unlawfully with Prudential's litigation expenses in order to discourage her from pursuing her employment discrimination ("EEO") claims in federal court. Judicial Notice, Exh. 7. On October 30, 2006, the Secretary found no cause to believe that Respondents had violated SOX (and also that the NASD was not a proper respondent because it was not and had never been Complainant's employer). *Id.*, Exh. 8. On December 5, 2006, Complainant filed a request for hearing before an administrative law judge. *See* 2007-SOX-00006. Based on her finding that Complainant failed to comply or respond to several orders, including an order to show cause, presiding ALJ Anne Beytin Torkington dismissed the complaint on July 2, 2007. *Id.*, Exh. 15.

Meanwhile, on April 16, 2007, Prudential had filed its own action in the U.S. District Court (D. Ariz.) (Case No. CV 07-801-PHX-EHC). Cmpt. Exh. DD. It sought an order confirming the arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. §9. On June 19, 2007, Complainant moved to dismiss for lack of jurisdiction and on other bases. Respondent opposed and moved that the arbitration award be confirmed.

With the cross-motions pending, Complainant initiated the present action with the Department of Labor on July 13, 2007. Judicial Notice, Exh. 16. She recapitulated some of the some theories and allegations as she had raised previously in the action that Judge Torkington dismissed. Primarily, however, she alleged that Prudential's filing of the arbitration confirmation action in the district court violated SOX because it was done in retaliation for her having raised her claims. She alleges that other employees – who had not raised SOX actions – were not required to pay fees or costs in arbitration claims. She makes other allegations to suggest retaliation.

Months later, on March 25, 2008, the district court reached a decision on Complainant's motion to dismiss and Prudential's cross-motion to confirm the arbitration award. The court denied Respondent's motion and granted Prudential's application to confirm. The court specifically

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extent that this goes outside the pleadings, I take Respondent's motion as for summary decision, and I decide it as such.

confirmed the amount owing as $137,795.82 plus interest at the legal rate from April 21, 2006, until satisfied in full. It appears that Complainant appealed, and the appeal is pending.

DISCUSSION

A court should not dismiss a complaint for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see also Halperin Shipping Co., Inc. v. United States,* 13 CIT 465, 466 (1989). The Court must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party. *See United States v. Islip,* 18 F.Supp.2d 1047, 1051 (1998) (citing *Gould, Inc. v. United States,* 935 F.2d 1271, 1274 (Fed.Cir.1991)).

This case presents a narrow theory of recovery: that when Respondent filed the action to confirm the arbitration award, it was retaliating against Complainant on account of her protected SOX activity. Complainant offers considerable evidence about why the arbitration decision was unfair and a wide gamut of other facts that have been adjudicated in her previous actions. This evidence could conceivably be useful if the present action were to be tried; their use might be, for example, to establish a background or show a pattern or habit. But this evidence would be relevant only to the extent that they would support the action based on Respondent's filing the action to confirm the arbitration award: this is the sole basis for this claim not already adjudicated adversely to Complainant.

As to that single remaining theory, Prudential asserts that it is immune under the so-called *Noerr-Pennington* doctrine. *See United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961). I will find this argument meritorious.

The right to petition the government for redress of grievances is Constitutionally protected. *See* U.S. Const., amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). This right to petition is one of "the most precious of the liberties safeguarded by the Bill of Rights." *Mine Workers v. Illinois Bar Assn.,* 389 U.S. 217, 222 (1967),

Thus, in an anti-trust case the Supreme Court held that "efforts to influence public officials do not violate the antitrust laws even [if] intended to eliminate competition." *Pennington,* 381 U.S. at 669-70. Any interpretation of the Sherman Act that made political lobbying a violation would invade the right to petition the government and raise important Constitutional questions. *Noerr,* at 137-38 (1961). Those who petition the government for redress thus are generally immune from liability. *See, Noerr*.

The Supreme Court has extended *Noerr-Pennington* beyond the anti-trust area and beyond efforts to influence public officials:

> The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right

> to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). *See White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (citing cases).

Immunity does not, however, extend to activities "ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 525 (2002), *quoting*, *Noerr* at 144. In such instances, application of the Sherman Act would be justified.'" *California Motor Transport Co.* at 511, quoting *Noerr*, 365 U.S., at 144.[2]

To avoid *Noerr-Pennington*, a plaintiff must show that the suit is a sham both objectively and subjectively. *Professional Real Estate Investors, Inc. v. Columbia Pictures*, 508 U.S. 49, 59 (1993). An objectively baseless suit is one where "no reasonable litigant could realistically expect success on the merits." It can be "evidenced by repetitive lawsuits carrying the hallmark of *insubstantial* claims." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (emphasis by court). A sham is "private action that is not genuinely aimed at procuring favorable government action," as opposed to "a valid effort to influence government action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S., at 500, n. 4.

A suit that is subjectively baseless is one in which the litigation *is an attempt to achieve* the unlawful act directly, not merely a case in which the outcome happens to achieve that same purpose. Thus, in the anti-trust setting, the subjective prong requires the litigant's subjective motion to be to a "concea[l] an attempt to interfere *directly* with the business relationships of a competitor ... through the use [of] the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon." *Professional Real Estate Investors, Inc.*, at 60-61 (internal quotation marks omitted; emphasis in original).

If the challenged litigation is found to be objectively meritless, the court can then examine the litigant's subjective motives. *Id.* at 59. If, however, the suit is objectively reasonable, the litigant's subjective motives are irrelevant. *Id.* at 65. A successful "effort to influence governmental action . . . certainly cannot be characterized as a sham." *California Motor Transport*, at 502. For "a purely subjective definition of 'sham' would undermine, if not vitiate, *Noerr*. And despite whatever "superficial certainty" it might provide, a subjective standard

[2] The sham exception reflects the fact that certain speech is not protected. "It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport*, 404 U.S. at 514 (citation omitted). "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control." *Id.* (citation omitted). Yet "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of [the Supreme] Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." *Id.* (citation omitted). Thus, any statutory interference with First Amendment rights must be evident by clear Congressional intent. *See Noerr* at 138.

would utterly fail to supply "real 'intelligible guidance.'" *Allied Tube, supra,* 486 U.S., at 508, n. 10.

Again, the Supreme Court has applied this analysis beyond the anti-trust context: "Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." *Professional Real Estate Investors, Inc.* at 57 (citations omitted). Thus, "by analogy to *Noerr's* sham exception, we held that even an 'improperly motivated' lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless," *citing, Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 743-744 (1983).

> *A winning lawsuit* is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in *post hoc* reasoning by concluding" that an ultimately unsuccessful "action must have been unreasonable or without foundation." The court must remember that "[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit."

Professional Real Estate Investors, Inc. at 60 (citations omitted, emphasis added).

In the present case, Prudential's access to the courts is a classic example of speech protected under *Noerr-Pennington.* Prudential is immune unless Complainant can show that the application to confirm the arbitration award was a sham. Objectively, however, Prudential prevailed on this application; the district court decided that the award was enforceable. By definition this therefore cannot have been a sham.

The pendency of Complainant's appeal of the court's decision does not change the result for the present purpose. First, the pendency of an appeal has no effect on the finality or binding effect of a trial court's holding particularly when a case has been fully litigated on its merits. *Rice v. Department of Treasury*, 998 F.2d 997, 999 (Fed. Cir. 1993), *citing SSIH Equipment S.A. v. United States Int'l. Trade Com'n*., 718 F.2d 365, 370 (Fed. Cir. 1983). Second, even if the appellate court overturns the decision in favor of Prudential, the fact that a district court found the claim meritorious – even if ultimately an erroneous conclusion – demonstrates on its face that this cannot be a case in which "no reasonable litigant could realistically expect success on the merits."

CONCLUSION

Respondent is immune to this action because the action is based on Respondent's filing a federal lawsuit, which lawsuit was not a sham. Accordingly,

IT IS ORDERED that Respondent's motion to dismiss be, and it hereby is, GRANTED.

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STEVEN B. BERLIN
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).