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Issue Date: 08 January 2009

CASE NO: 2008-SOX-00074

In the Matter of:

EDWARD TALISSE**,**
Complainant,

v.

UBS AG, UBS SECURITIES LLC, and
UBS SECURITIES JAPAN LTD,
Respondents.

DECISION AND ORDER GRANTING SUMMARY DECISION AND DISMISSING COMPLAINT

This matter arises out of a complaint filed by Edward Talisse ("Complainant") against UBS AG, UBS Securities LLC, and UBS Securities Japan LTD ("UBSSJ") (collectively "Respondents") 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"). The Regional Administrator of the Occupational Safety and Health Administration dismissed the complaint for lack of jurisdiction, and Complainant requested a formal hearing. Respondents have filed a motion to dismiss on several grounds. Respondents allege first that Complainant's allegation of discrimination is not cognizable under the Act because the conduct alleged in this matter occurred overseas, and the Act does not apply extraterritorially. Second, Respondents allege that because Complainant's actual employer was UBSSJ, under a seconding arrangement with UBS Securities LLC, and both of those entities are privately-held, his claim is not cognizable under the Act. Third, Respondents allege that this tribunal lacks personal jurisdiction over UBSSJ, as it is a foreign company with insufficient ties to the United States to exercise such jurisdiction.

Complainant opposes respondent's motion, asserting that the facts show that his employment had sufficient connection with the United States to bring it within the scope of the Act, that the hiring and termination decisions were made in the United States, and that the employment relationship was governed by United States law.

In deciding this matter, I have fully read and considered Respondents' motion and the attached affidavits of Martin Leverton and Matthew Morro, and Complainant's opposition with the attached affidavit of the Complainant. As I did not authorize the filing of any additional briefing, I have not read nor have I considered Respondents' letter of December 26, 2008 or Complainant's letter of December 29, 2008. For the reasons set forth below, I conclude that this

claim must fail for lack of jurisdiction because the Act does not apply extraterritorially, and the circumstances of this case show that applying the Act would violate that principle. As I will grant the motion to dismiss for lack of jurisdiction on grounds of extraterritorially, I will not address Employer's alternative grounds for dismissal.

Material Undisputed Facts

1. Complainant is a United States citizen. [Talisse Affidavit ¶ 2.]
2. Complainant was recruited by Respondents to work in Tokyo, Japan, selling Japanese securities. [Leverton Affidavit ¶¶ 5, 9.]
3. At the time he was recruited, Complainant was working in Tokyo for Morgan Stanley. [Leverton Affidavit ¶ 5.]
4. The written offer of employment to Complainant came from UBS Investment Bank, with an address in New York, New York.[1] [Talisse affidavit, Exhibit A.]
5. Complainant was offered the position of Salesperson within the Fixed Income Area of Respondent UBS Securities LLC. [Talisse affidavit, Exhibit A.]
6. The position offered to Complainant was located in Tokyo, Japan. [Talisse affidavit, Exhibit A.]
7. The securities that Respondent sold were subject to Japanese regulation. [Leverton Affidavit ¶ 9.]
8. Complainant's office was located at all relevant times in Tokyo. [Leverton Affidavit ¶ 8.]
9. Although Respondent was recruited and hired in Japan, he was hired as an expatriate employee. [Leverton Affidavit ¶ 7.]
10. At the time Complainant was hired by UBS Securities LLC, he was immediately "seconded" to UBS Securities Japan, a Japanese subsidiary of UBS AG and affiliate of UBS Securities LLC [Leverton Affidavit ¶ 7; Talisse Affidavit ¶ 13 and Exhibit C.]
11. At some time prior to his termination, Complainant reported to his employer that the UBS trading desk in Tokyo was engaged in widespread price manipulations and front-running of securities. [Talisse Affidavit, ¶ 15.]
12. In March of 2008, Complainant was investigated on allegations that he had disclosed confidential client information to customers of UBSSJ. [Leverton Affidavit ¶ 12.]
13. A disciplinary hearing into the allegations against Complainant was held in Japan on March 26, 2008. [Leverton Affidavit ¶ 13 and Exhibit B.]
14. At the hearing, Complainant represented that it was important that he remain in Japan for at least one more year. [Leverton Affidavit, Exhibit B.]
15. After the disciplinary hearing, Complainant was informed in person and by letter dated April 16, 2008 that his international assignment on behalf of UBS Securities LLC and his secondment to UBSSJ were terminated effective that date. [Leverton Affidavit ¶ 15 and Exhibit D.]
16. Complainant's termination was represented to be for cause. [*Ibid.*]
17. Complainant appealed the termination decision to an appeal panel in Japan. [Leverton Affidavit ¶ 16 and Exhibit E.]

[1] UBS Investment Bank is not a party to this action.

18. After the appeal hearing, Complainant was informed that his international assignment and secondment to UBSSJ were terminated effective May 15, 2008. [Leverton Affidavit, Exhibit E.]
19. Complainant was terminated from UBS Securities LLC for cause, for the same reasons, on May 20, 2008. [Leverton Affidavit ¶ 18 and Exhibit F.]
20. After his termination, Complainant was disciplined by the Japanese Securities Dealers Association. [Leverton Affidavit ¶ 19.]
21. UBS Securities LLC is a privately-held limited liability company; it does not have a class of securities registered under the Securities Exchange Act of 1934, nor is it required to file reports under that statute. [Morro Affidavit, ¶¶ 3, 4.]

Applicable Law

1. *General*

Section 806 of the Act provides whistleblower protection for employees of publicly-traded companies who provide information or participate in an investigation relating to violations of certain criminal statutes relating to fraud, rules or regulations of the Securities and Exchange Commission, or any provisions of Federal law relating to fraud against shareholders.[2] To be protected, the information must have been provided to the employee's superior or to another employee with the authority to investigate, discover, or terminate the misconduct, to federal law enforcement or regulatory personnel, or to members of Congress; or the employee must have participated in proceedings relating to the violation. Actions brought under the Sarbanes-Oxley Act are governed by the burdens of proof set forth under 49 U.S.C. §42121(b), the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21."). 15 U.S.C. §1514A(b)(2)(C); *Halloum v. Intel Corporation*, ARB No. 04-068, ALJ No. 2003-SOX-7 (ARB Jan. 31, 2006); see also 29 C.F.R. §1980.104 (discussing general burdens of proof for SOX claim).

In this matter, there is a dispute of material fact concerning whether the actions of UBSSJ, a non-publicly-traded corporation, can be imputed to UBS AG, a publicly-traded corporation. I will therefore assume for the purposes of this Decision and Order that they can be so imputed. The issue then is whether this claim is cognizable under the Act under the specific factual circumstances of this case, involving overseas employment of the Complainant.

2. *Procedural Posture*

Respondents have moved to dismiss this claim, but have not cited to a Rule of Administrative Procedure or a Federal Rule of Civil Procedure on which they rely. Because the parties agreed to conduct discovery into the issues involved in this motion, and because both parties have in fact submitted evidence along with their briefs, I deem the motion to have been brought under Fed. R. Civ. P. 12(b)(1). Because I consider the evidence submitted with the

[2] Although Complainant has not stated with specificity what violations of law he believes took place, I will again assume for purposes of this decision that the information he provided to Respondent's Director of Billing, to the Pennsylvania unemployment office, and to the FBI were sufficiently detailed and involved violations of the statutes identified in Section 1514A.

moving and opposing briefs, which are matters outside the pleadings, I treat the Respondents' motions to dismiss for lack of jurisdiction as a motion for summary decision pursuant to 29 C.F.R. §§18.40-18.41. *See* 29 C.F.R. §18.1, Rule 12(b)(6), Federal Rules of Civil Procedure.

3. *Application of the Act*

The parties do not dispute that the whistleblower protection provision of the Act does not apply extraterritorially, and the leading case on the issue so holds. *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006). The issue to be determined is whether the facts of this case would require an extraterritorial application of the Act, thereby removing subject-matter jurisdiction, or whether those facts bring it within the domestic application of the Act. A review of some of the cases addressing this issue is appropriate, and demonstrates that this tribunal lacks subject-matter jurisdiction.

In *Carnero, supra,* the First Circuit held that the Act did not apply extraterritorially, and examined whether the facts of that case would require an extraterritorial application. Carnero was a citizen of Argentina, and was employed in Argentina and Brazil by foreign subsidiaries of BSC, the respondent. His initial place of work was in Buenos Aires, Argentina, and he worked in Argentina and Brazil at various times. Carnero alleged that his termination by the Brazilian subsidiary in 2002 and by the Argentinean subsidiary in 2003 was in retaliation for his reporting to supervisors employed by BSC – a publicly-traded Delaware corporation with headquarters in Massachusetts – that the foreign subsidiaries were engaged in accounting misconduct, including inflation of sales figures. The Court found that the whistleblower provision of the Act did not apply under those circumstances. The significant facts for the Court were that Carnero was directly employed by BSC's foreign subsidiaries rather than by the respondent itself, and that the alleged fraudulent conduct reported by Carnero was instituted in Latin America. *Carnero,* 433 F.3d at 3. The Court affirmed the District Court's dismissal of Carnero's complaint since he was a resident of foreign countries "directly employed by foreign companies operating in those countries." *Id.* at 18.

The Administrative Review Board cited with approval to the *Carnero* holding in *Ede v. The Swatch Group,* ARB No. 05-053, ALJ Nos. 2004-SOX-68 and 69 (ARB June 27, 2007). The *Ede* complainants were employed by a foreign subsidiary of the respondent. They worked in a foreign country, where all of the conduct of which they complained also took place. The ARB found that the complaint was not cognizable under the Act, and affirmed the administrative law judge's dismissal. In doing so, the Board observed that the *Carnero* court had held that "that SOX section 806 does not protect employees such as [the complainants] who work exclusively outside the United States," and affirmed the ALJ's dismissal of the complaint. Subsequently, an administrative law judge applied *Ede* in *Ahluwalia v. ABB, Inc., et al.*, 2007-SOX-44 (A.L.J. September 24, 2007). In that matter, the complainant was first employed in the United States and then in Switzerland and the United Arab Emirates. His job duties in the UAE did not require any contact with the United States. Determining that he was bound by *Ede*, the ALJ dismissed the complaint.

In *Concone v. Capital One Financial Corporation, et al.,* 2005-SOX-00006 (A.L.J. December 3, 2004), the administrative law judge held that a complaint by an employee who was

employed exclusively overseas was not cognizable under the Act. In doing so, the ALJ quoted the opinion of the District Court in the *Carnero* matter (the First Circuit had not yet issued its decision at the time *Concone* was decided), quoting with approval the District Court's observation that "[n]othing in [the Act] remotely suggests that Congress intended it to apply outside the United States." *Concone* at p. 3.

In *Beck v. Citigroup, Inc., et al.*, 2006-SOX-00003 (A.L.J., August 1, 2006) the administrative law judge dismissed a complaint brought by an investment banker who worked in the German subsidiary of the respondent, a publicly-traded corporation. Accepting the allegations of the complaint as true in that case, the ALJ found that the complainant was employed in Frankfurt, Germany, although his work brought him frequently to the United States and required almost daily contact with respondent's New York headquarters. The complainant reported to a supervisor in Germany, as well as additional supervisors in London and New York. He made allegations of misconduct to his supervisors in Germany and London; after he did so, he was terminated, and the decision to terminate him was made or approved and ratified by Citigroup officials located in New York. Based on those facts, the complainant argued that the Act was applicable because the decision to terminate him was made in New York and because the overseas conduct had a "substantial domestic effect." *Id.* at 7. The ALJ, however, determined that there was no jurisdiction under the Act: complainant was a German national employed in Germany by a German subsidiary of Citigroup, Inc., and was not a case of an American employee assigned to work overseas. The ALJ further found that the allegations that the misconduct was reported to officials in the United States and that U.S.-based officials may have been involved in the decision to terminate the complainant's employment were not sufficient to bring the matter within the scope of the Act, as "they [did] not alter the foreign nature of the employment relationship." *Id.* at 7-8.

In *O'Mahony v. Accenture Ltd., et al.,* 537 F.Supp.2d 506 (S.D.N.Y. 2008), the district court found that the facts alleged in the complaint were sufficient to make it a domestic matter, rather than an extraterritorial matter. Indeed, the court declined to make a determination as to whether the Act applies extraterritorially. *Id.* at 515. Instead, the court found that in three critical areas, the facts were sufficiently different from those in *Carnero* to show that the Act should apply to O'Mahony's claim. First, Carnero was employed and paid exclusively by foreign subsidiaries of a United States corporation, while O'Mahony was employed a compensated by a United States subsidiary of a foreign corporation. O'Mahony was employed in the United States for much of her employment, and paid by a domestic company for virtually all of it; thus, the concerns of the *Carnero* court that exercising jurisdiction would interfere with an essentially foreign employment relationship did not exist in *O'Mahony*. Second, in *Carnero*, the alleged fraud by the employer occurred overseas, while in *O'Mahony* it occurred within the United States. Third, Carnero brought his action against a United States parent corporation based on alleged misconduct abroad by its foreign subsidiary, while O'Mahony brought her action against the foreign parent corporation and its United States subsidiary for misconduct that allegedly occurred in the United States. *Id.* at 511. The district court found, therefore, that the matter did not raise concerns of extraterritorial application of the Act, and that the allegations of the complaint were sufficient to bring it within the Act.

In *Penesso v. LCC International, Inc.*, 2005-SOX-16 (ALJ March 4, 2005) the administrative law judge denied a motion to dismiss for lack of jurisdiction due to the alleged extraterritorial nature of the claim. In doing so, the ALJ noted that most of the misconduct alleged in the complaint occurred in the United States, and further noted that the complainant was a citizen of the United States, unlike Carnero.

Conclusions of Law

Applying the guidance from the applicable case law, it appears that while the specific facts differ from case to case, the most important considerations are the location of the employment that forms the basis of the complaint and the location of the alleged misconduct by the employer. These were the deciding factors for the First Circuit in *Carnero*, for the Administrative Review Board in *Ede*, and for the ALJ in *Concone*, and they explain the results in each of the other cases summarized above – including those in favor of the complainant, such as *O'Mahony* and *Penesso*. Other factors, such as the citizenship of the complainant and the location of the official who made the allegedly retaliatory decision are not decisive. This approach is consistent with the overarching concern explained in *Carnero* that the Act should not be applied to situations in which the employment relationship is more properly regulated by foreign law than by U.S. law.

I find, therefore, that Complainant's complaint is not cognizable under the Act. The factors leading me to this conclusion are that (1) Complainant was recruited while he was working in Tokyo; (2) Complainant was recruited for the purpose of working in Tokyo; (3) Complainant worked in Japan for the entirety of his employment with Respondents; (4) Complainant was directly employed by UBSSJ, and not by UBS AG or by UBS LLC; (5) Complainant's work involved the sale of securities that were subject to Japanese laws, rather than U.S. laws; (6) the disciplinary hearing that resulted in the termination of Complainant's employment occurred in Japan; (7) the appeal panel that upheld Complainant's termination did so in Japan; (8) the misconduct reported by Complainant occurred overseas; (9) Complainant's alleged performance and conduct malfeasance occurred overseas; (10) while contesting his termination, Complainant told his employer that it was important for him to remain in Japan for at least another year; and (11) after his termination, Complainant was disciplined by Japanese securities regulators, but not by U.S. regulators. In short, virtually every relevant fact has its genesis in overseas activity. This matter clearly falls within the *Carnero* court's observation that the Act is not intended to cover matters outside the nation's borders. Even more clearly, this matter falls within the holding of the ARB in *Ede*, a holding by which I am bound. Just as in *Ede*, Complainant in this matter worked overseas and the alleged misconduct by Respondent occurred overseas. As "SOX section 806 does not protect employees such as [the complainants] who work exclusively outside the United States," it does not protect Complainant herein, who also worked exclusively outside the United States.

Complainant's attempts to bring this matter within the purview of the Act are unavailing. First, Complainant attempts to distinguish *Carnero* by pointing to his U.S. citizenship, while Carnero was not a citizen. Although the First Circuit mentioned in passing that Carnero was a

non-citizen, that fact was not important to its holding.[3] Instead, the Court focused on the nature and location of Carnero's employment. Complainant likewise cites *Penesso, supra,* for the proposition that his U.S. citizenship makes a difference. In fact, the ALJ in *Penesso* denied a motion for dismissal largely on the basis that much of the complainant's protected activity took place in the United States, unlike the facts of the instant matter.[4] I also note that the ARB's binding decision in *Ede, supra,* did not address the citizenship of the complainants in that matter, leading to the conclusion that the citizenship of the complainant is far less important than the location of the employment.

Second, Complainant points out that the letter confirming his hiring came from a UBS affiliate located in New York. That fact is of little moment: by virtue of his secondment, Complainant was directly employed by UBSSJ, a foreign corporation. Once Complainant's secondment to UBSSJ was terminated, UBS Securities LLC also terminated the payroll arrangement, as his services with UBSSJ were no longer required.

Third, Complainant argues that Respondents are estopped to argue that Complainant worked for a foreign subsidiary, as they represented to the Social Security Administration that he was an employee of a United States corporation. Indeed, Respondents did represent to SSA that Complainant was directly employed by a U.S. corporation. [Talisse affidavit, Exhibit G.] The principle of judicial estoppel, however, is not properly raised in this case. That doctrine requires a finding that the party against whom it is asserted attempted to manipulate the judicial system by trying to obtain favorable outcome in two different proceedings by making opposing statements. The doctrine is intended to protect the courts rather than the litigants. *Allen v. Zurich Ins. Co.*, 667 F.2d 1162 (4th Cir. 1982). The doctrine is to be applied only where a clearly inconsistent position is taken, *Himel v. Continental Ill. Nat'l Bank*, 596 F.2d 205 (7th Cir. 1979), or where the party to be estopped has previously convinced the court to accept its position in its earlier litigation. *Eagle Foundation v. Dole*, 813 F.2d 798 (7th Cir. 1987). In this case, the inconsistent statement was given not in an adversary proceeding, but as part of a report required by SSA when a company employs an individual overseas. Additionally, the report itself does not specify whether Complainant was employed by UBS AG, UBS Securities LLC, or UBSSJ; it identifies both the U.S. employer and the Japanese employer simply as "UBS." It is unclear that the statement is inconsistent with Respondents' position in this proceeding. I therefore decline to apply judicial estoppel.

I have considered the remainder of Complainant's arguments in opposition to the motion to dismiss, and I find them to be without merit.

Complainant was hired to work in Japan, did work in Japan, and reported misconduct in Japan, and the decision to terminate his direct employment was made in Japan. The facts do not establish a sufficient domestic connection to warrant coverage under the Act.

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[3] Indeed, the *Carnero* Court hypothesized that the Act might apply to the claim of a U.S. employee who is temporarily assigned to work overseas. *Carnero*, 433 F.3d at 18, fn. 17. It did not suggest that the claim of a U.S. employee who worked overseas before and during his employment with Respondent, and who told his employer that it was important that he remain in Japan, might be covered.

[4] Additionally, the ALJ in *Penesso* observed that further discovery may develop facts showing a greater nexus with the United States, militating in favor of jurisdiction. In this matter, however, I previously ordered a discovery schedule specifically related to the issues raised here, and presumably that discovery was completed.

Conclusion

The facts of this case show that Complainant's claim is based on overseas employment and overseas misconduct, and therefore is not cognizable under Section 806 of the Act. As his employment with Respondents was exclusively overseas, and the alleged misconduct by Respondents also occurred overseas, the cases – particularly *Carnero* and *Ede* – require me to conclude, and I do so conclude, that there is no subject matter jurisdiction over this claim.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. Respondents' motion for summary decision is GRANTED;
2. Complainant's complaint is DISMISSED for lack of jurisdiction; and
3. The hearing scheduled to begin on March 30, 2009 in New York, New York is CANCELLED.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
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).