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Issue Date: 08 May 2009

CASE NO. 2009-SOX-00024

In the Matter of

JAMES E. PHILLIPS, JR.,
Complainant,

v.

DENVER WATER,
Respondent.

DECISION AND ORDER GRANTING SUMMARY DECISION

Introduction

This case arises under the whistleblower protection provision of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1514A (the "Act"). The Act and its implementing regulations at 29 C.F.R. Part 1980 protect employees who blow the whistle on violations of U.S. Security and Exchange Commission rules and regulations and other laws aimed at preventing fraud against shareholders.

In a complaint filed with the Occupational Safety and Health Administration on December 2, 2008, Complainant alleged that Respondent illegally terminated his employment after he complained about fraud and corruption at the Water Board. On January 7, 2008, OSHA published Findings dated January 5, 2008. It dismissed the claim, finding that Respondent did not fall within the ambit of Sarbanes-Oxley's whistleblower provision because it neither has a class of securities registered under section 12 of the Securities Exchange Act of 1934, nor is required to file reports under section 15(d) of that act. On January 24, 2009, Complainant timely requested a hearing before an administrative law judge. Respondent now moves for summary decision for the same reasons as OSHA found that the case had to be dismissed.[1]

[1] Respondent styled its motion as one to dismiss for lack of jurisdiction. It attached supporting documents. When Complainant did not respond, I issued an order directing him to show cause why his complaint should not be dismissed. Complainant filed an opposition on April 3, 2009 but did not address Respondent's arguments.

Meanwhile, Respondent was relying on matters outside the pleadings and had submitted unauthenticated documents in support of its motion. I therefore notified the parties that I was treating the motion as one for summary decision and that Respondent needed to supply certain additional evidence and to authenticate the exhibits on which it was relying.

Respondent filed a supplement, and Complainant filed an additional brief in opposition.

Although motions for summary decision routinely are decided on the written record without oral argument, I allowed oral argument by telephone on May 6, 2009. Both parties were present and argued.

Issue to be Decided

Respondent Water Board contends that it is a creature of the City and County of Denver and thus a political subdivision of the State of Colorado. It asserts that the only securities it issues are municipal bonds on which it is directly obliged to pay principal and interest. If these assertions are correct, it is exempt from Sarbanes-Oxley as a matter of law. Has Respondent established the factual predicate – based on undisputed facts – to support its contentions? I find that it has done so through the submission of appropriate governing documents and the affidavit of a local official, and that Complainant has offered no evidence to raise a genuine dispute.

Undisputed Facts[2]

The Constitution of Colorado incorporates as a home rule city the City and County of Denver. Colo. Const. Art. XX, §1. The Constitution authorizes in perpetuity the people of the city and county to make, alter, revise, or amend their charter. *Id.* §§4, 5, 6. It empowers the people of Denver (and other cities with population over 2,000) to "legislate upon, provide, regulate, conduct, and control . . . The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts. *Id.* §5(e).

The Charter of the City and County of Denver (2004) provides for a Board of Water Commissioners "to have complete control of a water works system and plant" for the city's inhabitants. Art. X, §10.1.1. The Charter describes the Board as "non-political"; the Mayor appoints the commissioners for six year terms, with each commissioner to receive annual compensation of $600. *Id.*, §10.1.1, 10.1.2. The Board's general powers are to:

> have and exercise all the powers of the City and County of Denver including those granted by the Constitution and by the law of the State of Colorado and by the Charter . . ., dealing in the name of "City and County of Denver, acting through its Board of Water Commissioners.

Art. X, §10.1.5.

> The Board has "sole discretion" to issue revenue bonds. *Id.*, §10.1.15. The bonds are "payable as to interest and principal solely from the net revenues of the Board. The Board shall pledge to pay the principal and interest on such bonds from revenues of the Board, which pledge shall be irrevocable. The bonds so authorized shall be sold and issued by action of the Board and no other ratification or authorization shall be required. . . .

Id.

[2] Respondent's evidence consists of certified official state records (State Constitution and Denver City Charter) and the declaration of David LaFrance, Director of Finance of the Board of Water Commissioners. These documents are attached to Respondent's "Supplement to Its Motion to Dismiss," filed April 20, 2009. Complainant offered argument but not evidence.

According to its Director of Finance, the Board "is a political subdivision of the State of Colorado and is not publicly traded. [It] does not register any securities under section 12 of the Securities Exchange Act of 1934, nor does it file any reports under section 15 of this Act." Affidavit of LaFrance, ¶¶2-3.[3]

Discussion

On a motion for summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 1905.40(c) (1994); F.R.Civ.P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under F.R.Civ.P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson* at 252.

Congress defined the scope of the employee protection provision in Sarbanes Oxley to cover any company with:

> a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), 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.

18 U.S.C. § 1514A(a). The question is whether Respondent is exempt from these obligations and thus not within Sarbanes-Oxley.

Section 12. Section 12 of the Securities Exchange Act of 1934 makes it unlawful "for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange." 15 U.S.C. § 78l(a). Exemptions include municipal securities – that is, "securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof." 15 U.S.C. § 78c(a)12(A)(ii); 15 U.S.C. § 78c(a)(29).

[3] Complainant objects to the Affidavit of LaFrance. He argues, offering no evidence, that Mr. LaFrance is involved in the fraud of which Complainant complains. I do not find this a sufficient showing of bias to disregard Mr. LaFrance's testimony. The facts to which Mr. LaFrance attests are publicly known, readily ascertainable, and not matters of opinion; if they misrepresent the Water Board's activity, Complainant should have been able to offer evidence to bring them into dispute. Complainant offered nothing to dispute the facts that Mr. LaFrance verified.

Complainant argues that the Water Board is not a political subdivision of the State of Colorado. Mr. LaFrance's affidavit is to the contrary, but the Charter expressly defines the Board as a "non-political." Charter, Art. X, §10.1.1.

Perhaps the language in the charter presents no more than a semantically-based, unsubstantial distinction: Perhaps "non-political" in the Charter means only non-partisan; whereas "political" in the Securities Exchange Act refers to part of the body politic, *i.e.*, a governmental entity, rather than partisanship. This appears likely, given the Colorado Supreme Court's holding that the Water Board's "rate making is a governmental legislative power."[4] The exercise of governmental legislative power points to a political entity.

But I need not reconcile the apparent inconsistency between Mr. LaFrance's affidavit and the City Charter. Rather, I find that the bond issuer here – the City and County of Denver acting through its Board of Water Commissioners – is an agency or instrumentality of the City and County of Denver, which in turn is a political subdivision of the State of Colorado. The City and County delegated to the Board responsibility to act in its place with respect to water supply to the people of Denver.

The city charter empowers the Board to issue revenue bonds and makes the Board directly responsible to pay principal and interest on the bonds.

Because the Water Board is an agency or instrumentality of the City and County of Denver, which is a political subdivision of the State of Colorado, and the Water Board is directly obliged to pay principal and interest on the bonds at issue, the Water Board's bonds are exempted securities for purposes of section 12 of the Securities Exchange Act of 1934.

Section 15. Section 15(d) of the 1934 Securities Exchange Act requires the filing of supplementary reports for any security for which an issuer is required to file a registration statement under the 1933 Securities Act. 15 U.S.C. § 78o(d). Explicitly exempted from the definition of securities covered by the 1933 Securities Act is "[a]ny security issued or guaranteed by the United States or any territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of one or more States or territories." 15 U.S.C. § 77c(a)(2).

The analysis and result is the same as for section 12. The Water Board most likely is a political subdivision, but to the extent it is not, it is a public instrumentality of the City and County of Denver, which in turn is a political subdivision of the State of Colorado.[5]

[4] *Bennett Bear Creek Farm Water and Sanitation District v. City and County of Denver acting by and through its Board of Water Commissioners,* 928 P.2d 1254, 1265 (Colo. 1996), *rehearing denied* (1997), *citing Cottrell v. City & County of Denver,* 636 P. 2d 703, 708-10 (Colo. 1981).

[5] Complainant also argued that there must exist some legal protection for someone who exposes fraud in a governmental agency. But Complainant's frustration notwithstanding, I decide only whether Respondent has foreclosed a remedy under Sarbanes-Oxley.

Conclusion

Respondent has no class of securities that must be registered under section 12 or reported under section 15(d). It is therefore not a company within the meaning of Sarbanes-Oxley's whistleblower protection provision. Complainant does not come within the whistleblower protections of Sarbanes-Oxley.

Respondent's motion for summary decision is GRANTED, and the Complainant is DISMISSED.

SO ORDERED.

A

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).