



In the Matter of:

ROBERT J. MCINTYRE,

ARB CASE NO. 04-055

COMPLAINANT,

ALJ CASE NO. 2003-SOX-23

v.

DATE: July 27, 2005

**MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,**

and

MERRILL LYNCH & COMPANY,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Robert J. McIntyre, *pro se*, Austin, Texas

For the Respondent:

**Charles A. Gall, Esq., Robert E. Sheeder, Esq., *Jenkins & Gilchrist,*
*Dallas, Texas***

FINAL DECISION AND ORDER DISMISSING APPEAL

Robert J. McIntyre filed a complaint on March 21, 2003, under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX),¹ and its implementing regulations² with the Department of

¹ 18 U.S.C.A. § 1514A (West Supp. 2003).

² 29 C.F.R. Part 1980 (2004).

Continued . . .

Labor's Occupational Safety and Health Administration (OSHA). McIntyre alleged that Merrill Lynch, Pierce, Fenner and Smith discriminated against him because he engaged in activity SOX protects.³ OSHA investigated the complaint and concluded that Merrill Lynch did not violate the Act. McIntyre then requested a hearing before a Department of Labor Administrative Law Judge (ALJ). The ALJ conducted that hearing on October 21-23, 2003.

Before the ALJ decided his case, McIntyre, began a proceeding in the U.S. District Court for the Western District of Texas on December 23, 2003, seeking a de novo hearing on his SOX claim.⁴ Thereafter, on January 16, 2004, the ALJ, apparently without notice that McIntyre had begun proceedings in the district court, issued a Recommended Decision and Order (R. D. & O.) recommending dismissal of McIntyre's OSHA complaint.⁵ McIntyre filed a Petition for Review of the R. D. & O. with this Board on February 10, 2004.⁶ Unaware that McIntyre was proceeding in the district court, we issued a Notice of Appeal and Order Establishing Briefing Schedule on March 15, 2004.

³ Title VIII of Sarbanes-Oxley is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806 covers companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78l, and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such companies. Section 806 protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such violation or alleged violation. 68 FR 31864 (May 28, 2003).

⁴ Complainant's First Brief at 1-2. *See also* CIVIL DOCKET FOR CASE #: 03-CV-948, *McIntyre v. Merrill Lynch, Pierce, et al*, U. S. District Court, Western District of Texas (Austin).

⁵ The record contains no evidence that McIntyre notified the ALJ (or this Board) that he intended to file a complaint in the district court as 29 C.F.R. § 1980.114 (b) requires.

⁶ *See* 29 C.F.R. § 1980.110(a). The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under SOX. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002).

If the Board has not issued a final decision within 180 days of the date on which the complainant filed the complaint and there is no showing that the complainant has acted in bad faith to delay the proceedings, the complainant may bring an action at law or equity for de novo review in the appropriate United States district court, which will have jurisdiction over the action without regard to the amount in controversy.⁷ Thus, since the Board had not issued a final order within 180 days from the date McIntyre filed his SOX complaint with OSHA, and because McIntyre has opted to pursue his SOX complaint in district court rather than at the Board, we **DISMISS** his appeal.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

⁷ 18 U.S.C.A. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114.