



**In the Matter of:**

**SURESH AHLUWALIA,**

**ARB CASE NOS. 08-008**

**COMPLAINANT,**

**ALJ CASE NO. 2007-SOX-044**

**v.**

**DATE: June 30, 2009**

**ABB, INC., ABB, LTD., and  
ABB TRANSMISSION &  
DISTRIBUTION, LTD.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Richard Renner, Esq., *Tate & Renner*, Dover, Ohio**

*For the Respondent:*

**Eric A. Savage, Esq., *Little Mendelson*, Newark, New Jersey**

**FINAL DECISION AND ORDER**

This case arises under the employee protection provision of the Sarbanes-Oxley Act of 2002 (SOX)<sup>1</sup> and its implementing regulations.<sup>2</sup> Suresh Ahluwalia filed a complaint alleging that the Respondents, ABB, Inc., ABB, Ltd., and ABB Transmission

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<sup>1</sup> 18 U.S.C.A. § 1514A (West 2006).

<sup>2</sup> 29 C.F.R. Part 1980 (2008).

& Distribution, Ltd., violated the SOX by discharging him from employment. On September 24, 2007, an Administrative Law Judge (ALJ) issued a Decision and Order Granting Motion to Dismiss (D. & O.), in which he recommended dismissal of the complaint. We affirm.

## BACKGROUND

It is undisputed that, at all times relevant to this case, Ahluwalia was a citizen of the United Kingdom who was employed in Abu Dhabi, United Arab Emirates, by ABB Transmission & Distribution, Ltd. (ABB T&D), a company formed under the laws of the United Arab Emirates.<sup>3</sup> ABB T&D is a subsidiary of ABB, Ltd., a Swiss holding company whose principal place of business is located in Zurich, Switzerland.<sup>4</sup>

Ahluwalia began employment with ABB T&D in October 1988. On November 23, 2006, ABB T&D told Ahluwalia that if he did not resign from employment he would be discharged.<sup>5</sup> According to Ahluwalia, he received official notice of his termination on February 2, 2007.<sup>6</sup> Between October 1988 and the date of his firing, Ahluwalia had not been employed by either ABB, Ltd. or ABB, Inc., a corporation formed under the laws of Delaware.

On February 15, 2007, Ahluwalia filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that ABB, Ltd. and ABB T&D violated the SOX by discharging him from employment. Ahluwalia did not name ABB, Inc. as a respondent in his complaint, but ABB T&D requested that ABB, Inc. review and respond to correspondence received from Ahluwalia's counsel, who was located in the United States.<sup>7</sup>

OSHA dismissed Ahluwalia's complaint on April 4, 2007. He appealed the dismissal to the Department of Labor's Office of Administrative Law Judges (OALJ). On July 2, 2007, Ahluwalia filed an amended complaint naming ABB, Inc. as a respondent.

On June 1, 2007, ABB, Inc. and ABB T&D filed a Motion to Dismiss Ahluwalia's complaint. The companies argued that the SOX's employee protection

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<sup>3</sup> Memorandum of Respondents in Support of Motion to Dismiss at 3-4.

<sup>4</sup> *Id.* at 4; Memorandum of Respondents in Further Support of Motion to Dismiss at 4.

<sup>5</sup> Complainant's Memorandum in Opposition to Motion to Dismiss at 4.

<sup>6</sup> *Id.* at 6.

<sup>7</sup> Secretary's Findings at 2 (Exhibit B of Memorandum of Respondents in Support of Motion to Dismiss).

provision did not apply to Ahluwalia's complaint because he was a foreign citizen employed by a foreign company outside of the United States.<sup>8</sup> Ahluwalia responded to the Motion by arguing that his employment was covered because he was an "ABB employee," and because the employee protection provision of the SOX "prohibit[s] retaliation anywhere in the world that affects reports made to the Securities and Exchange Commission."<sup>9</sup>

The ALJ issued a Decision and Order Granting Motion to Dismiss (D. & O.) on September 24, 2007. The ALJ concluded that the complaint against ABB, Inc. was untimely and that Ahluwalia had failed to name ABB, Ltd. in his appeal to the OALJ. He also concluded that the SOX's employee protections did not apply to Ahluwalia because he was employed in a foreign country by a foreign company.<sup>10</sup> Ahluwalia petitioned this Board to review the D. & O.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the SOX.<sup>11</sup> Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's findings of fact under the substantial evidence standard.<sup>12</sup> The Board reviews an ALJ's conclusions of law de novo.<sup>13</sup>

### DISCUSSION

SOX Section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation

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<sup>8</sup> Memorandum of Respondents in Support of Motion to Dismiss at 1.

<sup>9</sup> Complainant's Memorandum in Opposition to Motion to Dismiss at 6.

<sup>10</sup> D. & O. at 3-4.

<sup>11</sup> Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110.

<sup>12</sup> 29 C.F.R. § 1980.110(b).

<sup>13</sup> Cf. *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) (analogous provision of Surface Transportation Assistance Act); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991) (same).

of 18 U.S.C.A. §§ 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. Employees are also protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed relating to a violation of the aforesaid fraud statutes, SEC rules, or federal law.<sup>14</sup>

The Board addressed the issue of whether Section 806 applies to foreign nationals employed by foreign companies in *Ede v. The Swatch Group*.<sup>15</sup> In *Ede*, the complainants were residents of foreign countries employed by foreign subsidiaries of the Swatch Group, a Swiss Corporation, in Switzerland, Hong Kong, and Singapore. Neither of the two complainants had worked in the United States for the Swatch Group. Citing to the decision of the First Circuit Court of Appeals in *Carnero v. Boston Scientific Corp.*, which states that Section 806 “does not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation’s borders,”<sup>16</sup> we held that Section 806 does not protect residents of foreign countries employed by foreign companies operating in those countries.<sup>17</sup>

Ahluwalia’s employment status was the same as that of the employees in *Ede* and *Carnero*. He was a foreign national employed by ABB T&D, a foreign corporation, outside of the United States.<sup>18</sup> Ahluwalia did not challenge these dispositive facts in his response to the Motion to Dismiss. The ALJ found that Section 806 did not apply to Ahluwalia,<sup>19</sup> and we concur.

In his brief before us, Ahluwalia states that he informed the SEC that “ABB” engaged in fraudulent acts. He argues that, by providing the SEC with this information, he is covered under Section 806 because the “SOX can and does prohibit retaliation anywhere in the world that affects reports made to the [SEC].”<sup>20</sup> We disagree. Even if

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<sup>14</sup> 18 U.S.C.A. § 1514A(a).

<sup>15</sup> ARB No. 05-053, ALJ Nos. 2004-SOX-068, -069 (ARB June 27, 2007).

<sup>16</sup> *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 18 (1st Cir. 2006).

<sup>17</sup> *Ede*, slip op at 4. See also *Salian v. Reedhycalog UK*, ARB No. 07-080, ALJ No. 2007-SOX-020, slip op. at 7-8 (ARB Dec. 31, 2008) (SOX’s whistleblower protection provision inapplicable to a resident of India working in the United Arab Emirates for a United Kingdom-based subsidiary of a publicly-traded company based in the United States).

<sup>18</sup> Respondents’ Statement of Position, Affidavit of Sharon Kaosk at 1-2, Exhibit A at 1, Exhibit D at 1, and Exhibit F at 1.

<sup>19</sup> D. & O. at 5.

<sup>20</sup> Complainant’s Brief at 18.

Ahluwalia reported fraud committed by the Respondents to the SEC, such reporting does not defeat the jurisdictional restrictions described in *Carnero*. And Ahluwalia does not cite to any legal authority that would give us jurisdiction over his SOX complaint simply because he reported fraud to the SEC.

Ahluwalia also argues that the Respondents “engaged in joint employment” of him because ABB T&D is a subsidiary of ABB, Ltd.<sup>21</sup> We have held that, in some circumstances, a subsidiary may be considered an agent of a public parent for purposes of coverage under Section 806.<sup>22</sup> But our lack of jurisdiction in this case is a consequence of Ahluwalia’s status as a foreign national working in a foreign country for a foreign company, not the subsidiary status of ABB T&D.

Finally, Ahluwalia argues that the ALJ erred by failing to allow discovery prior to the dismissal of the complaint.<sup>23</sup> But the facts necessary to resolve this case, i.e., that Ahluwalia was a foreign national employed by a foreign corporation outside of the United States, were before the ALJ when he issued his Decision and Order.

#### CONCLUSION

Because Ahluwalia was a foreign national who worked exclusively outside the United States for a foreign company, we affirm the ALJ’s recommendation and **DISMISS** this complaint.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Chief Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

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<sup>21</sup> *Id.* at 29.

<sup>22</sup> *Andrews v. ING N. Am. Ins. Corp.*, ARB No. 06-071, ALJ Nos. 2005-SOX-050, -051, slip op. at 4 (ARB Aug. 29, 2008).

<sup>23</sup> Complainant’s Brief at 36.