U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ARLENE ROWLAND, **ARB CASE NO. 08-108**

COMPLAINANT, **ALJ CASE NO. 2008-SOX-004**

v. **DATE: January 13, 2010**

PRUDENTIAL EQUITY GROUP, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Arlene Rowland, *pro se*, Ventura, California

For the Respondent:
Deborah J. Broyles, Esq., *Reed Smith LLP*, San Francisco, California

FINAL DECISION AND ORDER

The Complainant, Arlene D. Rowland, filed a complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX).[1] She alleged that Prudential Equity Group, LLC (Prudential) retaliated against her because she filed an earlier SOX complaint. This, says Rowland, violated Section 806. A Department of Labor (DOL) Administrative Law Judge (ALJ) recommended that Rowland's

[1] 18 U.S.C.A. § 1514(A) (West Supp. 2008). Implementing regulations are found at 29 C.F.R. Part 1980 (2009).

complaint be dismissed because Prudential was immune under the *Noerr-Pennington* doctrine. We dismiss the complaint on alternative grounds.

BACKGROUND

Prudential Securities, Inc. (PSI) employed Rowland as a financial advisor in its Scottsdale, Arizona office until July 1, 2003.[2] Rowland filed a claim with the United States Equal Employment Opportunity Commission against PSI in December 2002, alleging violations of Title VII.[3] Under existing National Association of Securities Dealers (NASD) rules, the claim was subject to arbitration. In February 2003, Rowland filed with the NASD a statement of claim and demand for arbitration.[4] In March 2004, the parties participated in mediation.[5] Rowland tried to amend her NASD claim in May 2004 to allege violations of the SOX and the Americans with Disabilities Act (ADA),[6] but the arbitrators denied her motion.[7] Then, in October 2004, Rowland filed a federal court suit against PSI that raised essentially the same claims that were pending in the arbitration case.[8] At about this time, Prudential succeeded to and assumed the defense of Rowland's claims against PSI, which ceased to exist as a corporate entity.[9]

On June 7, 2005, because she wanted to consolidate her claims, Rowland filed a motion to dismiss the arbitration action without prejudice. Prudential objected.[10] NASD conditionally granted the motion to dismiss without prejudice on condition that Rowland agree to pay all of Prudential's costs, expenses, and attorneys' fees incurred since the commencement of the case on February 6, 2003, and all amounts owed the NASD since commencing the case.[11] In a letter to

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[2] Resp. Br. at 2.

[3] 42 U.S.C.A. § 2000e, *et seq*. (West 2003); Comp. Ex. KK at 346, 348.

[4] Resp. Mot. to Dismiss at 3-4; Comp. Responsive Opposition to Resp. Mot. to Dismiss at 3, 5, 11-12; Declar. of Deborah J. Broyles in Support of Prudential's Mot. to Dismiss at 2.

[5] Comp. Responsive Opposition to Resp. Mot. to Dismiss, at 11; Comp. Ex. N at 96.

[6] 42 U.S.C.A. § 12101, *et seq*.

[7] Comp. Br. at 11 (citing Complainant's Responsive Opposition to Prudential's Mot. to Dismiss, Ex. A-1, at 5, para. 1, and Ex. J, at 75, para. 2); Complaint at 5 (July 13, 2007).

[8] *Id.* at 4.

[9] Resp. Mot. to Dismiss at n.1.

[10] *Id.*; Comp. Ex. Q; Declar. of Deborah J. Broyles in Support of Prudential's Mot. to Dismiss at 2.

[11] *Id.*; Resp. Mot. to Dismiss, Ex. 2.

NASD, Rowland accepted the terms of the order "after considerable deliberation."[12] Thus, on April 21, 2006, the NASD dismissed the arbitration without prejudice and awarded Prudential $137,795.82 in fees and costs.[13] On July 19, 2006, Rowland filed a separate SOX complaint with the DOL.[14]

On April 16, 2007, Prudential filed an action in the United States District Court for the District of Arizona to confirm the arbitration award.[15] The court granted Prudential's application to confirm the arbitration award in the amount of $137,795.82 plus interest from April 21, 2006, until it was satisfied in full.[16] Rowland moved to dismiss, but the court found her arguments to be without merit.[17]

Rowland filed this action with the DOL on July 13, 2007. She alleged that Prudential violated the SOX when it filed the district court action to confirm the arbitration award in retaliation for her filing of previous SOX complaints.[18]

After investigating, the Occupational Safety and Health Administration (OSHA) dismissed Rowland's complaint.[19] Rowland filed objections to OSHA's ruling and requested a hearing before an ALJ.[20] Prudential filed a motion to dismiss with the ALJ, asserting that it was immune under the *Noerr-Pennington* doctrine because the alleged retaliatory act consisted of petitioning the government, in the form of filing an action in a court, and because its petition to confirm the award did not affect the terms and conditions of Rowland's employment.[21]

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[12] Resp. Mot. to Dismiss, Ex. 1.

[13] Prudential's Request for Judicial Notice in Support of Its Motion to Dismiss (RJN), Ex. 1 and 2 (Apr. 3, 2008).

[14] Comp. Br. at 11 (citing Complainant's Responsive Opposition to Prudential's Mot. to Dismiss, Ex. A-1, at 5, para. 1).

[15] Prudential's RJN, Ex. 3.

[16] Prudential's RJN, Ex. 6.

[17] *Id.* at 3.

[18] Prudential's RJN, Ex. 16 (Rowland's Complaint dated July 2, 2007, but received July 13, 2007).

[19] Prudential's RJN, Ex. 17. OSHA dismissed the complaint because it found that it was untimely filed. Prudential did not raise the timeliness issue with the ALJ and does not argue it to us.

[20] Prudential's RJN, Ex. 18.

[21] One of Rowland's objections was that Prudential did not raise the *Noerr-Pennington* doctrine until the case was "on appeal." Complainant's Petition for Review, Objection No. 2. However, as

The ALJ issued a Recommended Decision and Order (R. D. & O.) dismissing Rowland's claim. He found that her claim was based on Prudential's federal court action to confirm the arbitration award and that action was not a sham. Therefore, under the *Noerr-Pennington* doctrine, Prudential was immune. After Rowland's timely appeal to the Administrative Review Board (ARB or the Board), we issued an order setting a briefing schedule. Both parties submitted a brief. Rowland also submitted a rebuttal to Prudential's reply brief.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX.[22]

Because the parties submitted evidence outside the pleadings with regard to Prudential's Motion to Dismiss, we will treat Prudential's motion as one for summary decision under 29 C.F.R. Part 18.40.[23] The standard for granting summary decision is essentially the same as that found at Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. Accordingly, summary decision is appropriate if there is no genuine issue of material fact. We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact.[24] The determination of whether facts are material is based on the substantive law upon which each claim is based.[25] A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[26]

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the ALJ heard the case de novo, Prudential's use of the defense before the ALJ was proper. 29 C.F.R. § 1980.107(b).

[22] Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

[23] *See Erickson v. U.S. Envtl. Prot. Agency,* ARB No. 99-095, ALJ No. 1999-CAA-002, slip op. at 3 n.3 (ARB July 31, 2001).

[24] *Lee v. Schneider Nat'l, Inc.,* ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.,* ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

[25] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

[26] *Bobreski v. U.S. Envtl. Prot. Agency,* 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

DISCUSSION

The Legal Standard

To prevail on her SOX complaint, Rowland must prove by a preponderance of the evidence that: (1) she engaged in a protected activity or conduct; (2) Prudential knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[27] Thus, an unfavorable personnel action is a material element of Rowland's case. Prudential can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[28]

The Noerr-Pennington Doctrine

In two antitrust cases, *E.R.R. Presidents Conference v. Noerr Motor Freight* [29] and *United Mine Workers of Am. v. Pennington,*[30] the United States Supreme Court held that those who petition the government for redress are immune from antitrust liability unless the petition is a sham.[31] The right to petition is a liberty that the Bill of Rights protects and is closely tied to the First Amendment rights of freedom of speech and of the press.[32] That right to petition allows for access "to all departments of government, including the executive department, the legislature, the agencies, and the courts."[33]

This case arose in the Ninth Circuit. The Ninth Circuit Court of Appeals has extended the *Noerr-Pennington* doctrine to non-antitrust cases and has held that it applies in all contexts

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[27] *See* 18 U.S.C.A. § 1514(b)(2); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008 (ARB July 29, 2005).

[28] *Getman*, slip op. at 8. *Cf.* § 1980.104(c). *See* § 42121(a)-(b)(2)(B)(iv).

[29] 365 U.S. 127 (1961).

[30] 381 U.S. 657 (1965).

[31] *See also Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61n.5 (1993).

[32] *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

[33] *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

because "it is based on and implements the First Amendment right to petition."[34] The doctrine protects those who petition the government by granting them immunity from liability for statutory violations, regardless of whether "their activity might otherwise be proscribed by the statute involved."[35]

The Tenth Circuit, however, has found that *Noerr-Pennington* only applies in antitrust cases since it is partly based on the Sherman Act.[36] It explained that to the extent that the Supreme Court applied the doctrine outside of the antitrust context, it had done so on the basis of the right to petition, citing a National Labor Relations Board (NLRB) case.[37] Thus, it has found that while objectively reasonable lawsuits cannot be enjoined because of the First Amendment right to petition, a court is required to look at the underlying statute involved to determine whether the party bringing the suit could be held liable for doing so.[38] The Tenth Circuit therefore found that the right to petition is not an absolute protection from liability.[39]

In this case, Prudential filed a suit in the district court to confirm an arbitration award against Rowland. The ALJ found that *Noerr-Pennington* immunized Prudential from liability under SOX because its district court filing was not a sham and because Prudential was successful.[40]

Rowland argues that in finding that Prudential was immune under the *Noerr-Pennington* doctrine, the ALJ has allowed Prudential "to conduct its business free from the regulation and public policy that Congress expressly mandated by enacting the [SOX] whistleblower protections" and has contravened "the more specific whistleblower provision of the SOX."[41] She asserts that the ALJ was required to rule under the SOX framework and that the *Noerr-Pennington* doctrine is inapplicable.[42] She cites cases in which courts found that employer

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[34] *White v. Lee*, 227 F.3d 1214, 1231 (2000) (citing *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000)). The Ninth Circuit stated that there was one exception in the context of the National Labor Relations Act which is not implicated here.

[35] *Id.*, citing *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 56.

[36] *Cardtoons v. Major League Baseball Players Assoc.*, 208 F.3d 885, 888-89 (10th Cir. 2000).

[37] *Id.* at 889-90 (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742-43 (1983).

[38] *Id.* at 890 n.4.

[39] *Id.* at 891.

[40] R. D. & O. at 5.

[41] Comp. Br. at 8, 24.

[42] *Id.* at 19.

lawsuits and counterclaims filed against Title VII complainants constituted discrimination.[43] Furthermore, she argues, no authority exists for applying *Noerr-Pennington* to SOX cases.[44]

After analyzing the *Noerr-Pennington* doctrine and then considering principles relevant to the whistleblower statutes that the Secretary of Labor is authorized to adjudicate, we decline to apply *Noerr-Pennington* to SOX cases. That doctrine originated in antitrust litigation and also has guided the Supreme Court in some non-antitrust cases based on the right to petition. The Supreme Court, however, has not extended it further. While the Ninth Circuit has extended its application to everything except NLRB cases, the Tenth Circuit, we noted, has found that while reasonable suits cannot be enjoined, liability may still attach. Additionally, as Rowland points out, authority exists that lawsuits, counterclaims, and the like can be retaliatory under Title VII.[45] We have often relied upon Title VII jurisprudence in deciding whistleblower cases.[46] We have not found a case in which the Ninth Circuit has applied the doctrine under Title VII. Absent any precedent that petitioning the government provides immunity in Title VII or whistleblower cases under our jurisdiction, we will not apply the *Noerr-Pennington* doctrine.

Adverse Action

Section 806, the employee protection provisions of the SOX, prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to listed categories of fraud or securities violations.[47] That provision states:

> (a) Whistleblower Protection For Employees Of Publicly Traded Companies.–No 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. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner

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43 *Id.* at 20-21.

44 *Id.* at 24.

45 Comp. Brief at 20-21. *See also Durham Life Ins. Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999) (finding that filing lawsuit for breach of a non-competition agreement can be retaliatory under Title VII).

46 *See, e.g., Luckie v. United Parcel Serv.*, ARB Nos. 05-026, -054, ALJ No. 2003-STA-039, slip op. at 17 (ARB June 29, 2007); *Shelton v. Oak Ridge Nat'l Labs.*, ARB No. 98-100, ALJ No. 1995-CAA-019, slip op. at 10 (ARB Mar. 30, 2001).

47 18 U.S.C.A. § 1514A.

> discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee–
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> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by–
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> (A) a Federal regulatory or law enforcement agency;
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> (B) any Member of Congress or any committee of Congress; or
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> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
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> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

The regulations implementing the SOX state that "[n]o company or company representative may discharge, demote, suspend, threaten, harass or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee [engaged in protected activity]."[48]

To successfully defend against summary decision, Rowland must adduce evidence that Prudential took an unfavorable personnel action (adverse action) against her. Rowland argues that Prudential's filing of the district court action to enforce the arbitration award constitutes an adverse action under the SOX. The ALJ, having held that *Noerr-Pennington* immunized Prudential, did not address whether Rowland adduced evidence of an adverse action other than to

[48] 29 C.F.R. § 1980.102.

say that Rowland had offered considerable evidence that "could conceivably be useful if the present action were to be tried . . . ."[49]

Rowland appears before us pro se. Citing *Burlington Northern & Santa Fe Railway Co. v. White*[50] and *Allen v. Stewart Ent., Inc.*[51] as authority, Rowland appears to argue that a retaliatory adverse action under the SOX does not have to relate to employment or the workplace, and that Prudential's district court filing was a materially adverse action.[52] *Burlington Northern* held that the scope of Title VII's anti-retaliation provision[53] was not limited to adverse actions pertaining to employment or the workplace because, unlike Title VII's anti-discrimination provision,[54] it was not limited to adverse actions respecting the "compensation, terms, conditions, or privileges of employment."[55] Therefore, Rowland apparently argues, since Title VII's anti-retaliation section extends beyond workplace or employment related retaliatory acts, so must SOX's anti-retaliation protection. But her argument fails because, unlike Title VII's retaliation provision, the employee protection section of the SOX specifically limits adverse actions to those that affect the employee's "terms and conditions of employment." Similarly, the relevant regulation limits SOX adverse actions to those affecting the "compensation, terms, conditions, or privileges of employment."[56]

Alternatively, Rowland argues that Prudential's district court action did relate to the terms, conditions, and privileges of her employment. Rowland cites to *Hishon v. King & Spaulding*, in which the Supreme Court held that a benefit that is part "'of the employment relationship may not be doled out in a discriminatory fashion even if the employer would be free . . . not to provide the benefit at all.'"[57] Rowland asserts, and the record contains evidence, that Prudential offered to pay the costs of mediation and arbitration.[58] Each side, however, was

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49 R. D. & O. at 3.

50 548 U.S. 53 (2006).

51 ARB No. 06-081, ALJ Nos. 2004-SOX-060, -062 (ARB July 27, 2006).

52 Comp. Br. at 6-7, 13-14.

53 42 U.S.C.A. § 2000e-3(a).

54 42 U.S.C.A. § 2000e-2(a).

55 548 U.S. 61-67.

56 18 U.S.C.A. § 1514(A); 29 C.F.R. § 1980.

57 467 U.S. 69, 75 (1984).

58 Comp. Br. at 15, Comp. Ex. A at 17-18, 22, 24.

required to pay for its attorney in a mediation or arbitration.[59] Rowland argues that, unlike with other employees, Prudential discriminated against her when it filed the district court action because it resulted in her having to pay not only for the mediation and arbitration proceedings, but also for Prudential's attorneys' fees.[60]

Viewing the evidence in the light most favorable to Rowland, Prudential did in fact offer an employment benefit wherein it would pay for mediation and arbitration expenses and its own attorneys' fees. Furthermore, the record indicates that the parties engaged in mediation and arbitration. Moreover, we will take as true that Rowland was the only Prudential employee who ever had to pay for mediation and arbitration and related attorneys' fees.

Nevertheless, we still must reject Rowland's argument that Prudential's filing of the district court action adversely affected an employment benefit to which she was entitled, that is, her right not to pay for the mediation, arbitration, and attorneys' fees. The record is clear that when Rowland voluntarily agreed to pay for that benefit in return for Prudential's agreement to dismiss the arbitration action, she, in effect, forfeited her right to claim that benefit. Simply put, Rowland wanted a dismissal, agreed to pay costs and fees to get it, and Prudential sought to make her live up to it. Thus, it cannot be said that Prudential treated Rowland differently, i.e., discriminated against her with respect to that particular privilege of her employment.[61]

CONCLUSION

To conclude, we decline to apply the *Noerr-Pennington* doctrine that would immunize Prudential from Rowland's claim. Even so, Rowland did not adduce evidence, as she must, that Prudential's district court suit to confirm the arbitration award constitutes an adverse action under the SOX. Since no genuine issue of fact exists as to that material element of Rowland's claim, we **DISMISS** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

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[59] Comp. Br. at 24.

[60] Comp. Br. at 15-16.

[61] Having found that Rowland did not adduce sufficient evidence that the district court action affected the terms and conditions of her employment, we need not address whether that action was materially adverse.

Wayne C. Beyer, Administrative Appeals Judge, concurring:

I agree with my colleague that this case should not be resolved on the basis of the *Noerr-Pennington* doctrine. For reasons that I explained in *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 9-12 (ARB Sept. 30, 2008), I disagree with the application of the *Burlington Northern* test to the whistleblower protection cases over which the ARB has jurisdiction. However, insofar as Rowland has failed to demonstrate actual or threatened tangible employment consequences from the action to confirm the arbitration award, I concur in the outcome of his decision.

WAYNE C. BEYER
Administrative Appeals Judge