U.S. Department of Labor

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Issue Date: 19 December 2007

CASE NO.: 2008-SOX-00009

IN THE MATTER OF

JACQUE BERGMAN,
Complainant

v.

CHESAPAKE ENERGY CORPORATION,
Respondent

ORDER STAYING PROCEEDING AND COMPELLING COMPLAINANT TO ARBITRATE SOX'S COMPLAINT

A. Background

This case arises under the Sarbanes-Oxley Act of 2002 (herein "SOX" or "the Act"), technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 U.S.C. § 1514A *et seq.*, and the corresponding employee protective provisions promulgated at 29 C.F.R. Part 1980. Under SOX, the Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of publicly traded companies who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for providing information about a violation of federal fraud provisions, including Sections 1341 (fraud and swindles), 1342 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (securities fraud), a violation of any rule or regulation of the Securities and Exchange Commission, or a violation of any provision of federal law relating to fraud against shareholders to supervisors, federal agencies or members of Congress. Here, Complainant alleges that Respondent constructively discharged her on April 15, 2007 in violation of the Act.

On July 13, 2007, Complainant filed a complaint with the Department of Labor Occupational Safety and Health Administration (herein "OSHA") under the employee protective provisions of SOX contending that she was constructively discharged after she expressed concerns about lack of training regarding Respondent's human resources policies and procedures. The Secretary of Labor through her agent, OSHA investigated the July 13, 2007 complaint and on September 24, 2007 issued a report dismissing the complaint, finding no evidence of a SOX violation. Complainant filed objections and a request for hearing regarding the OSHA determination. The matter was referred to the undersigned for hearing. On November 16, 2007, Respondent filed a Motion to Dismiss or, in the Alternative, to Compel

Arbitration arguing that Complainant's objections and request for hearing were not timely filed. According to Respondent, Complainant's objections should have been filed on or before October 27, 2007, thirty (30) days after which Respondent received OSHA's report. Respondent further argues, should Complainant's objections be deemed timely filed, that an order compelling arbitration should issue as Complainant's employment contract contained a mandatory arbitration clause regarding any disputes, claims, or controversies arising out of the employment contract or out of the parties' employment relationship.

On November 23, 2007, Complainant filed a Response to Motion to Dismiss or, in the Alternative, to Compel Arbitration contending that her objections and request for hearing were timely filed as her attorney did not receive OSHA's report until October 1, 2007. According to Complainant, 29 C.F.R. § 1980.105(c) allows each party thirty (30) days after receipt of the report to file objections and request a hearing. Since Complainant did not receive a copy of OSHA's report until October 1, 2007, she maintains that her October 30, 2006 request for hearing is timely. Complainant also maintains that an order compelling arbitration should not issue as an arbitration clause is unenforceable under the Act and as participating in arbitration is not required in an administrative tribunal. Complainant further maintains that the arbitration clause is unenforceable as it requires her to pay her own attorney's fees and costs, which conflicts with the "make whole" remedy provided for under the Act. On December 10, 2007, Respondent filed a Reply in Support of its Motion to Dismiss or, in the Alternative, to Compel Arbitration contending that Complainant's SOX claim is subject to binding arbitration, any waiver of a right to attorney's fees is a dispute for the arbitrator to decide, and if waiver is decided by the undersigned, arbitration should still be compelled as Complainant's employment agreement contains a severability clause.

B. Discussion

Under Section 2 of the Federal Arbitration Act ("FAA"), a "written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Section 3 of the FAA provides that any suit or proceeding brought in any of the courts of the U.S. upon any issue referable to arbitration under an agreement in writing for such arbitration shall be stayed until such arbitration has been had in accordance with the terms of the agreement. 9 U.S.C. § 3. The party arguing that a claim based upon a federal statute is not subject to stay has the burden of showing congressional intent to exempt the claim from the FAA. There is "nothing in the text of the statute or legislative history of [SOX] evincing intent to preempt arbitration of claims under the Act." ***Boss v. Salomon Smith Barney Inc.***, 263 F. Supp. 2d 684, 685 (S.D.N.Y. 2003).

In this case, Complainant's employment contract at paragraph 13 provides the following:

> Arbitration. Any disputes, claims or controversies between the Company and Employee including but not limited to those arising out of or related to this Agreement or out of the parties' relationship, shall be settled by arbitration as provided herein. This

> agreement shall survive the termination or rescission of this Agreement. All arbitration shall he in accordance with Rules of the American Arbitration Association, including discovery, and shall be undertaken pursuant to the Federal Arbitration Act. Arbitration will be held in Oklahoma City, Oklahoma unless the parties mutually agree to another location. The decision of the arbitrator will be enforceable in any court of competent jurisdiction. Each party shall bear heir own costs and attorney fees in connection with the arbitration. The parties, however, agree that the Company shall be entitled to obtain injunctive or other equitable relief to enforce the provisions of this Agreement in a court of competent jurisdiction.

As noted above, Complainant objects to arbitration contending the provision requiring her to pay here own attorney's fees conflicts with the "make whole" remedy in SOX. Employer correctly responds that attorney fees is a dispute that the arbitrator can decide and if found objectionable can be severed from the agreement in accord with paragraph 14.4 of Complainant's employment agreement which permits the enforcement of other non-objectionable provisions.

Having reviewed the entire matter I find pursuant to the FAA., 9 U.S.C. § 3 the instant proceeding should be stayed pending Complainant's pursuit of mandatory arbitration as directed by various courts in SOX related cases. ***See Guyden v. Aetna Inc.,*** Civil Action 1652 (D. Conn. Sept 25, 2006); ***Kimpson v. Fannie Mae Corp.***, Civil Action 00018 (D. D. C. March 31, 2007). Accordingly, Complainant is directed to invoke the arbitration process and to provide the undersigned with a progress report within 60 days indicating the steps she has taken to arbitrate her dispute. Failure to comply with this order may result in case dismissal.

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CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE