

U.S. Department of Labor

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Issue Date: 14 January 2005

CASE NO: 2004-SOX-00068
2004-SOX-00069

In the Matter of

JOSEPH EDE

and

MATTHIEU PHANTHALA

Complainants

v.

**SWATCH GROUP;
SWATCH GROUP USA**

Respondent

DECISION AND ORDER
DISMISSING THE COMPLAINT

This proceeding arises from a complaint filed under § 806 of the Corporate and Criminal Fraud Accountability Act of 2002, title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (“the Act”). The Act forbids publicly traded companies from retaliating against employees who provide information to designated authorities indicating their belief that the employer has violated a rule or regulation of the Securities and Exchange Commission (“SEC”) or another federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1). The regulations promulgated under the Act are contained in 29 C.F.R. Part 1980 and became effective on August 24, 2004.

The instant complaint was filed on June 25, 2004 and dismissed by the Occupational Safety and Health Administration (OSHA) on August 4, 2004.¹ The complaint alleges that Swatch Group Ltd. and Swatch Group (U.S.) Inc. (“Respondent”) discharged Joseph Ede and Matthieu Phanthala (“Complainants”) in violation of the Act. More specifically, it was alleged that Complainants were terminated because they “objected to, opposed and resisted fraudulent activity while employed by Respondent and that their ‘whistle blowing activities’ resulted in the termination of Complainants’ employment.” (Administrator at 1). OSHA dismissed the complaint because it was determined that neither Complainant ever worked for Respondent

¹ This dismissal was signed by the Regional Administrator of OSHA and will thus be cited as “Administrator at --.”

within the United States and thus the Administrator determined that OSHA lacks jurisdiction to investigate the claim. (Administrator at 1).

Complainants appealed OSHA's decision on August 24, 2004 and the matter was referred to me on August 27, 2004. The hearing was to be held in New York, New York on November 24, 2004 but upon the agreement of the parties, I continued the hearing pending resolution of Respondent's Motion to Dismiss ("Motion").

In the brief accompanying its Motion,² Respondent makes several arguments for dismissal. Among these arguments is that the Act is inapplicable because both Complainants worked for Respondent exclusively outside of the United States. (RB at 10), which was the precise reason why OSHA dismissed the complaint after concluding that Complainant Ede worked for Respondent only in Switzerland, Hong Kong and Singapore and Complainant Phanthala was employed by Respondent only in Beijing and Hong Kong.

In support of its position, Respondent cites to *Carnero v. Boston Scientific Corp.*, No. Civ.A.04-10031-RWZ, 2004 WL 1922132 (D. Mass. Aug. 27, 2004). There, the court held that OSHA lacked jurisdiction to consider a similar claim brought under the Act because the complainant was an employee of Argentinean and Brazilian subsidiaries of the Respondent who never worked within the United States. The court reasoned that although Congress did not expressly limit the scope of the Act to include only employees working within the United States, the congressional intent is for legislation to apply only within the United States absent evidence to the contrary. *Id.* See also *Smith v. United States*, 507 U.S. 197, 204 (1993); *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).³

Complainants argue that *Carnero* is "wrong" and "unpersuasive" because, in Complainants' view, it ignores the purpose of the Act, which is to protect U.S. investors. (CB at 4). But *Carnero* does not ignore the overall purpose of the Act. Instead, it focuses on the more immediate purpose of the whistleblower provision of the Act; to protect employees. The district court explained that protecting employees is a local matter and that the Act could interfere with the laws of other nations if enforced abroad. *Id.* So while the overall purpose of the Act is to eliminate fraud against shareholders, the more specific purpose of the whistleblower provision of the Act is to protect employees who cooperate in enforcing the Act against their employers.

I, like the district court, find that as a matter of statutory construction, the whistleblower provision of the Act applies only to employees working within the United States. Had Congress intended for it to apply to employees in foreign nations, Congress would have made its intent clear.

² Respondent's brief will be cited as "RB at --." Complainants brief will be cited as "CB at --."

³ My colleague recently reached the same conclusion. In *Concone v. Capital One Financial Corp.*, 2005-SOX-6 (ALJ Dec. 3, 2004), the Administrative Law Judge ("ALJ") noted that Congress did not explicitly make the whistleblower provision of the Act apply extraterritorially but did explicitly make the criminal provision extraterritorial. Thus, the ALJ held that Congress intentionally failed to extend the whistleblower protections to those who are employed wholly abroad.

Because neither complainant ever worked for Respondent within the United States, they are not covered employees. The complaint is therefore dismissed and I need not address Respondent's other arguments for dismissal.

ORDER

It is **ORDERED** that the complaint herein is **DISMISSED**.

A

RALPH A. ROMANO
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).