

U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building – Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)



Issue Date: 22 February 2005

CASE NO.: 2005-SOX-00019

In the Matter of

NATALY MINKINA, M.D.

Complainant

v.

AFFILIATED PHYSICIAN'S GROUP

Respondent

Appearances:

Nataly Minkina, M.D., Chestnut Hill,
Massachusetts, *pro se*

Tracey E. Spruce (Ciampa & Associates),
Boston, Massachusetts, for the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

**DECISION AND ORDER GRANTING SUMMARY DECISION, DISMISSING
COMPLAINT AND DENYING REQUEST FOR ATTORNEY'S FEES**

This case arises out of a complaint of discrimination filed by Doctor Nataly Minkina ("Complainant") against her employer, Affiliated Physician's Group ("APG"), pursuant to the employee protection (whistleblower) provisions of Section 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 ("Sarbanes-Oxley" or "Act"). The Complainant claims that she was discriminated against for reports she made to the Occupational Safety and Health Administration ("OSHA") and APG regarding a ventilation problem in her workplace, which she believed to be a dangerous situation and a violation of the Occupational Safety and Health Act ("OSH Act").¹

¹ The Complainant also filed a complaint with OSHA alleging retaliation for her report of ventilation problems under Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C.A. § 660(c). This claim was dismissed as untimely. OSHA No. 1-0765-04-009 (Feb. 9, 2004). Employee complaints of discrimination under Section 11(c) are filed with the Secretary of Labor who may then bring an action in a United States district court. *See* 29 U.S.C.A. § 660(c)(2); *Reich v Cambridgeport Air Sys.*, 26 F.3d 1187 (1st Cir. 1994). The OSH Act does not create any

OSHA conducted an investigation into the Sarbanes-Oxley complaint and found that there was no merit to the claim. OSHA No. 1-0765-05-003, Dec. 8, 2004. On December 22, 2004, the Complainant appealed OSHA's determination to the Office of Administrative Law Judges ("OALJ"), requesting a formal hearing. The matter is before me on APG's motion for summary decision and an award of attorney's fees and the Complainant's response in opposition. Upon consideration of the matter, I have concluded for the reasons set forth below that there is no genuine issue as to any material fact and that APG is entitled to summary decision in its favor but not to an award of attorney's fees.

I. Background

The Complainant worked as a physician for APG until her termination in November 2004. APG Mot. Sum. Dec. at 2. Sometime during the spring or summer of 2003, the Complainant reported her concerns about the air quality of APG's building to APG management, OSHA and the Environmental Protection Agency. 11(c) appeal (Feb. 22, 2004) at 2. In August 2003, the Complainant agreed to try working at another location. *Id.* at 3. In September 2003, she informed APG that she did not want to work in the new location, but it seems that she continued working at the new location despite her reservations. *Id.* In January 2004, the Complainant realized that she had not been assigned a medical student, as she should have, in order to fulfill her teaching responsibilities as a Harvard Medical School clinical instructor, because of the relocation. *Id.* at 4. On September 30, 2004, the Complainant received a termination letter from the Employer. Cmpl. (Nov. 30, 2004) at 2. The Complainant was terminated as of November 2004. *Id.* On November 30, 2004, the Complainant filed a complaint with OSHA, alleging that she was terminated in violation of Sarbanes-Oxley. OSHA dismissed her complaint, finding that APG was not a covered employer and that the Complainant was not able to present a *prima facie* case. OSHA No. 1-0765-05-003 (Dec. 8, 2004). The Complainant appealed the decision and the case was referred to the OALJ. On January 20, 2005, APG filed a Motion for Summary Decision, and the Complainant has responded in opposition.

II. APG's Motion for Summary Decision

APG supports its Motion for Summary Decision with two claims: (1) APG is not covered by the Act; and (2) The Complainant cannot establish a *prima facie* case because her reports of alleged ventilation and air quality problems at her workplace were not protected activity under the Act, and because there is no connection between the Complainant's activity and APG's decision to terminate her employment. APG Mot. Sum. Dec. at 1. APG asserts that it is not an employer subject to the provisions of Sarbanes-Oxley which defines an employer as "any company with a class of securities registered under section 12 of the Securities Exchange Act of

private right of action, and there is no provision in the OSH Act or its implementing regulations for a hearing on a Section 11(c) complaint before an administrative law judge. *See Taylor v. Brighton Corporation*, 616 F.2d 256, 260-264 (6th Cir.1980) (noting that the Senate abandoned an earlier version of the OSH Act, which would have provided a Section 11(c) complainant with a right to an administrative hearing similar to that provided under Sarbanes-Oxley, in favor of the final version which vests the Secretary of Labor with exclusive authority to determine whether to prosecute a complaint of discrimination prohibited by the OSH Act). Since alleged violation of the OSH Act's anti-discrimination provisions are not subject to an administrative hearing, the parties' arguments regarding the Section 11(c) claim are not addressed in this opinion.

1934 (15 U.S.C. 78l) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).” 29 C.F.R. § 1980.101, 18 U.S.C. § 1514A(a). APG Mot. Sum. Dec. at 2-3. APG contends that the Complainant has not established a *prima facie* case of discrimination under Sarbanes-Oxley because her reports to OSHA concerned ventilation problems and did not involve fraud or the protection of investors, as required by 18 U.S.C. § 1514A(a)(1). *Id.* at 3-5. APG also asserts that is no causal connection between the Complainant’s reports and the adverse employment action, and it alleges that even without her reports, the Complainant would have been terminated because the office in which she was employed was having financial difficulty, and the Employer had decided to close it for economic reasons unrelated to any claimed protected activity. *Id.* at 5-6.

III. The Complainant’s Opposition

The Complainant responds to APG’s motion for summary decision by claiming that APG is in fact an employer within the meaning of the Act, and that she can establish a *prima facie* case of discrimination under the Act. Cl. Resp. Mot. Sum. Dec. at 1. The Complainant suggests that APG is an employer within the meaning of the Act, even though it is not a publicly traded company, because it is a subcontractor of a publicly traded company. *Id.* at 2-4. *See* 18 U.S.C. § 1514A(a) (“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. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may . . . discriminate against an employee”). The Complainant also claims that she can establish a *prima facie* case of discrimination under the Act. Cl. Resp. Mot. Sum. Dec. at 4-9. She first claims that her reports to OSHA regarding the air quality of the building “threatens not just health of the APG employees and the PUBLIC, but shareholders’ investments in the insurance companies and even indirectly national security as well.” *Id.* at 5 (emphasis in original). The Complainant thus appears to argue that since the air quality could affect the health of various populations, it could reflect badly on APG and those with whom APG contracts, and would therefore affect the financial health and shareholders of those companies. *Id.* The Complainant alleges that APG was fully aware of her reports to OSHA and that “the fact that [she] suffered an unfavorable personnel action is indisputable.” *Id.* at 5-6. She also argues that there is a causal connection between her termination and her reports. *Id.* at 7. Thus, the Complainant contends, she has established a *prima facie* case and her case should be heard on the merits. *Id.* at 9.

IV. Discussion, Findings of Fact and Conclusions of Law

The issues presented in the motion for summary decision are whether APG is a covered employer under Sarbanes-Oxley and whether the Complainant engaged in protected activity under the Act by reporting health and safety violations to her employer and OSHA. If APG can show that the answer to either of these questions is negative, the Employer is entitled to summary decision in its favor.

Under the Rules for Practice and Procedure for Administrative Hearings, any party may “move with or without supporting affidavits for a summary decision on all or any part of the proceeding.” 29 C.F.R. §18.40(a). An administrative law judge “may enter summary judgment

for either party if . . . there is no genuine issue as to any material fact and [the] party is entitled to summary decision.” 29 C.F.R. §18.40(d). In evaluating a motion for summary decision, “the judge does not weigh the evidence or determine the truth of the matters asserted, but only determines whether there is a genuine issue for trial . . . If the slightest doubt remains as to the facts, the ALJ must deny the motion for summary decision.” *Stauffer v. Wal-Mart Stores, Inc.*, USDOL/OALJ Reporter (HTML), ARB No. 99-107, OALJ No. 1999-STA-21 (ARB November 30, 1999) at 6, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Adickes v. Kress & Co.*, 398 U.S. 144, 158-9 (1970); Miller and Kane § 2725 at 425-28. Moreover, in determining whether a genuine issue of material fact exists, the evidence and factual inferences must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). On the other hand, if the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” there is no genuine issue of material fact and the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

Section 806 of the Sarbanes-Oxley Act provides protection to whistleblowers with the following language:

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES -- No *company with a class of securities registered under section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms or conditions of employment because of any lawful act done by the employee--*

(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, 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, when the information or assistance is provided to or the investigation is conducted by--*

(A) a Federal regulatory or law enforcement agency;
(B) any Member of Congress or any committee of Congress; or
(C) a person with supervisory authority over the employee...; or

(2) to file, cause to be filed...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.*

18 U.S.C. § 1541A (italics added). Section 806 thus protects *employees of publicly traded companies* who provide information or participate in an investigation of violations related to corporate *fraud* under 18 U.S.C. § 1341 (frauds and swindles), 18 U.S.C. § 1343 (fraud by wire, radio, or television), 18 U.S.C. § 1344 (bank fraud), 18 U.S.C. § 1348 (securities fraud), rules and regulations of the Securities and Exchange Commission; and any other provision of Federal law relating to fraud against shareholders. *Hopkins v. ATK Tactical Systems*, USDOL/OALJ Reporter (HTML), ALJ No. 2004-SOX-19 at 5 (ALJ May 27, 2004). The legislative history of the Section 806 confirms that the purpose of the employee protection provisions is to “provide whistleblower protection to employees of *publicly traded companies* who report acts of *fraud* . . . U.S. laws need to encourage and protect those who report *fraudulent* activity that can damage *investors in publicly traded companies*.” S. Rep. No. 107-146, 2002 WL 863249, at *18-19 (May 6, 2002) (italics added). The report explains in great detail the concerns the legislation was intended to address: corporate accounting scandals and fraud in the wake of the Enron debacle. *Id.* at *2-11. In explaining the whistleblower protection contained in 18 U.S.C. 1514A, the report states that “[t]his section would provide whistleblower protection to employees of *publicly traded companies*. It specifically protects them when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people *within a corporation*), or parties in a judicial proceeding in detecting or stopping *fraud*.” *Id.* at *13 (italics added).

The first question presented by APG’s motion for summary decision is whether APG is an employer covered by the Act. The answer to this question must be in the negative. It is undisputed that APG is not a company that has “a class of securities registered under section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 78o(d)).” 18 U.S.C. 1514A(a). The Administrative Review Board (“ARB”) has held that even when an employer is a publicly traded company, if it is not registered under section 12 or required to file reports under section 15(d) of the Securities and Exchange Act, the employer is not covered under Sarbanes-Oxley and the complaint must be dismissed. *Flake v. New World Pasta Co.*, ARB Case No. 03-126, 2004 WL 384738 (February 25, 2004). The ARB in that case dismissed the complainant’s argument that the Act should cover all publicly traded companies, regardless of size, saying “[t]his argument assumes the untenable proposition that Congress did not know what it was doing when it limited coverage under § 1514A.” *Id.* at *5. Furthermore, other Administrative Law Judges have held that even the subsidiaries of publicly traded companies are not covered employers under the Act. *See, e.g., Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, USDOL/OALJ Reporter (HTML), ALJ No. 2004-SOX-11 (ALJ July 6, 2004) (dismissing a complaint that was brought against a non-publicly traded subsidiary of a publicly traded company because the complainant did not name the parent company in the complaint); *Powers v. Pinnacle Airlines Inc.*, USDOL/OALJ Reporter (HTML), ALJ No. 2003-SOX-18 (ALJ March 5, 2003) (dismissing a complaint because the named respondent was not a publicly traded company, even though the respondent’s parent company was publicly traded).² In this case, it is

² Cf. *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 20, 2004) (denying summary decision when the employee of a non-publicly traded subsidiary had named both the publicly traded parent company and the non-publicly traded subsidiary in the complaint, holding that the remedial purposes of Sarbanes-Oxley called for a broad interpretation of what constitutes a covered employer).

conceded that APG Employer is neither a publicly traded company nor a subsidiary of a publicly traded company.

The Complainant argues that APG, as a contractor or subcontractor of various publicly traded companies, should be considered a covered employee based upon the inclusion in Section 806 of the language referring to “any officer, employee, contractor, subcontractor, or agent of such company.” 18 U.S.C. 1514A(a). However, this language simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer. It does not bridge the gap in this case which is created by the fact that the Complainant is not an employee of a publicly traded company. That is, while it is at least theoretically possible that a privately held entity such as APG could engage in discrimination prohibited by Section 806 when acting in the capacity as an agent of a publicly traded company in regard to an employee of that company, there is nothing in the language of Sarbanes-Oxley or its legislative history that suggests that Congress intended to bring the employees of non-public contractors, subcontractors and agents under the protective aegis of Section 806.

Moreover, even if APG were considered a covered employer under Sarbanes-Oxley despite the fact that it is neither publicly traded nor a subsidiary of a publicly traded company, summary dismissal of the complaint is still warranted because the Complainant cannot show that she engaged in protected activity under Section 806. To survive summary decision, the Complainant must make a *prima facie* showing that: “(1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action.” *Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1365, 1376 (N.D.Ga. 2004). To show that she engaged in protected activity under the Act, an employee must show that she provided information, or otherwise assisted “in an investigation regarding any conduct which the employee reasonably believes constitutes a *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,*” or that she filed or otherwise assisted “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.*” 18 U.S.C. 1541A(a)(1) - (2) (italics added).³ It is undeniable that the Complainant’s reports concerned air quality and had nothing to do with fraud or the protection of investors. In this respect, the instant case is similar to *Hopkins v. ATK Tactical Systems*, USDOL/OALJ Reporter (HTML), ALJ No. 2004-SOX-00019 (ALJ May 27, 2004) in which the Complainant was allegedly retaliated against for reporting the illegal release of thousands of gallons of sludge water to his employer and OSHA. The ALJ dismissed the complaint in *Hopkins*, because “Complainant’s alleged protected activity falls outside of the purview of the Act.” *Id.* at 5. Likewise, in this case, though the Complainant did report an air pollution problem which may or may not have violated the OSH Act, she is unable to allege facts that would qualify as protected activity under Sarbanes-Oxley because her reports were not in any way related to fraud. Quite

³ Although the Complainant seems to believe that the Act covers all violations of Federal law, Cl. Resp. Mot. Sum. Dec. at 5, it is clear that the Act only covers violations of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A. It is a “fundamental axiom of statutory interpretation that a statute is to be construed so as to give effect to all its language.” *Lowe v. S.E.C.*, 472 U.S. 181, 219 (1985).

simply, while the Complainant may have had a valid claim of poor air quality, Sarbanes-Oxley, as discussed above, was enacted to address the specific problem of fraud in the realm of publicly traded companies and not the resolution of air quality issues, even if there is a possibility that poor air quality might ultimately result in financial loss. *See Johnson v. Oak Ridge Operations Office*, USDOL/OALJ Reporter (HTML), ARB No. 97-057, OALJ Nos. 1995-CAA-20, 21 and 22 (ARB Sept. 30, 1999) (employees' raising of concerns about security clearances being issued to persons with questionable backgrounds based on argument that people who have something questionable in their background are, for that reason, likely to engage in behavior at work which will endanger the environment amounted to "rank speculation of the sort that cannot support a claim of protected activity" under environmental protection statutes). Consequently, I find that APG is entitled to summary decision in its favor because the Complainant cannot establish the *prima facie* element that she engaged in activity protected by Section 806.⁴

V. Attorney's Fees

APG requests attorney's fees pursuant to 29 C.F.R. § 1980.105(b) and 29 C.F.R. § 1980.106(a). An ALJ may award attorney's fees when a complaint is "frivolous or brought in bad faith." 29 C.F.R. § 1980.105(b). *See also Hopkins v. ATK Tactical Systems*, USDOL/OALJ Reporter (HTML), ALJ No. 2004-SOX-00019 (ALJ May 27, 2004). APG alleges that the complaint and appeal were frivolous because Complainant knew that the Employer was not a publicly traded company. I do not agree. First, the Complainant has proceeded *pro se* in this matter, and she is a medical doctor, not an expert in employment law. Secondly, her complaint would clearly not be frivolous under the OSH Act or environmental protection statutes. Third, I do not find any evidence of bad faith or improper motives, such as delay or harassment. Finally, given the relative newness of the Act and the limited body of interpretive case law, I find that it was not unreasonable for the Complainant to try to expand the boundaries of the law, which she did most creatively. Therefore, although I find that there is no merit to her complaint under Sarbanes-Oxley, I conclude that her complaint was not frivolous or made in bad faith. Accordingly, an award of attorney's fees is not justified on this record.

VI. Order

The Respondent's motion for summary decision is GRANTED, and the complaint is DISMISSED in its entirety. The Respondent's request for attorney's fees is DENIED.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

⁴ Since the Complainant cannot show engage in protected activity under Sarbanes-Oxley, I will not address whether her termination was related to her reports or air quality problems.

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, D.C. 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, D.C. 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).