

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 September 2006

Case Nos.: **2005-SOX-00101, 00102, 00103**

In the Matter of:

PRISCILLA CATHERINE TEUTSCH

Complainant,

v.

**ING GROEP, N. V. / NATHAN ESHELMAN / JEREMY EAVES /
SECURITY LIFE OF DENVER INSURANCE /
ING AMERICA INSURANCE HOLDINGS /
ING NORTH AMERICAN INSURANCE /
LION CONNECTICUT HOLDINGS, INC.,**

Respondents.

**RECOMEMENDED DECISION AND ORDER GRANTING
RESPONDENTS MOTION FOR SUMMARY DECISION**

Complainant, Priscilla Catherine Teutsch, filed a complaint with the Occupational Safety and Health Administration (OSHA) of the United States Department of Labor on April 29, 2005 alleging that Respondent ING and its employees, Respondents Nathan Eshelman and Jeremy Eaves, discriminated against her in violation of Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (2003) (hereinafter "the Act" or "SOX").

The Act provides protection from discrimination or retaliation to whistleblower employees of publicly traded companies when those employees provide information to their employer, a federal agency, or a member of Congress regarding what the employee reasonably believes are violations of U.S. Security and Exchange Commission rules and regulations and other laws relating to preventing fraud against sharebrokers.

Factual History

Complainant began working at Security Life of Denver (hereinafter "Security Life") on April 14, 2003. Complainant's business cards, earnings statements, retirement statements, and performance reviews all bore the name "ING" with the company logo. Respondents terminated her employment on February 3, 2005.

Procedural History

Complainant filed her SOX complaint on April 29, 2005. Complainant alleged that her employer, ING, and ING employees Nathan Eshelman, Head of Life Specialty Markets, and Jeremy Eaves, Lead Human Resources Consultant, retaliated against her for whistleblowing activities protected under the Act. Complainant claimed her employment was terminated when she “opposed a directive given to one of her employees to change language to cover up illegal rebating and destroy documents.” SOX Complaint, Apr. 29, 2005 at 1.

The Occupational Safety and Health Administration (OSHA) completed its investigation of this complaint against ING and issued its findings on July 18, 2005. “The investigation revealed that there is no legal entity known as ING.” Secretary’s Findings, Jul. 18, 2005 at 1. Rather, according to the Secretary’s findings, “Complainant was an employee of ING Security Life of Denver Insurance Company, a subsidiary of ING Groep N.V.” Id. The Secretary dismissed the claim based on the Complainant’s failure to “provide evidence to support an employment relationship between her employer and ING Groep, N.V. nor has investigation revealed evidence sufficient to establish that ING Groep, N.V. and ING Security Life of Denver are a single employer subject to the provisions of 18 U.S.C. §1514A.” Id.

In an order issued on February 1, 2006, the undersigned allowed the Complainant to amend her complaint to name additional respondents and to serve those parties.

The complainant filed a motion to join additional parties. Thereafter, the Respondent filed a motion to dismiss on the basis that ING Groep, N.V. had not been properly served, and as there was no jurisdiction over a publicly traded company.

On May 9, 2006, the undersigned issued an order directing the Complainant to serve ING Groep N.V. by July 1, 2006.

On July 7, 2006, Complainant stated that she had attempted service in good faith. However, the Respondent has not conceded that service has been made. In the June 30, 2006 submission, the Complainant stated that the Netherlands Central Authority has confirmed acceptance and processing of Claimant’s request for service pursuant to Art. 5 of the Hague Convention. However, as this one particular Hague Convention method of service is of indefinite duration and out of Complainant’s control the Complainant sought a deferment for the third party Netherlands Central Authority to act within sixty (60) days.

On July 24, 2006, an order was issued which left the record open until August 14, 2006. On August 18, 2006, the Complainant was directed to respond to the Respondent’s first set of interrogatories and first request for production of documents. The undersigned assumed that the Respondent was not pressing the motion to dismiss at that time.

The parties requested a conference call and this was held on September 15, 2006. The Complainant requested more time to attempt service on ING Groep, N.V. The Respondent requested consideration of the motion to dismiss.

The undersigned acknowledges that the Complainant has made a good faith effort to serve ING Groep, N.V., which is the only publicly traded corporation in this case. However, at this point it is uncertain as to whether or not proper service will be obtained.

In the motions to dismiss, the Respondent has stated

ING Groep is a corporation organized pursuant to the laws of The Netherlands and has its corporate headquarters located in The Netherlands. ING Groep has subsidiary companies that conduct business in the United States. One such indirect subsidiary is Security Life, a company based in Denver, Colorado. ING Groep, however, has no contacts with the State of Colorado where the events giving rise to this action took place.

ING Groep also had no involvement in Complainant's employment with Security Life. ING Groep did not employ Complainant, nor did it have any involvement in hiring Complainant, or have any control over Complainant's day-to-day activities during her employment with Security Life. ING Groep did not take part in disciplining and counseling Complainant for her poor job performance, nor was ING Groep involved in the elimination of Complainant's position at Security Life. Simply put, ING Groep was not involved in any way in the events giving rise to this action.

DISCUSSION OF LAW AND FACTS

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds "the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. *Id.* Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. Lincoln v. Reksten Mgmt., 354 F.3d 262 (4th Cir. 2003); Green v. Inqalls Shipbuilding, Inc., 29 BRBS 81(1995) (stating the purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact). However, granting a summary decision is not appropriate where the information submitted is insufficient to determine if material facts are at issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

The legislative history of the Act indicates that Congress did not intend for the Act to view subsidiaries and parent companies as one entity. In fact, while discussing the bill before the Senate, Senator Sarbanes specifically addressed the limited scope of the Act. Senator Sarbanes stated that he wished to “make very clear that [the Act] applies exclusively to public companies — that is, to companies registered with the Securities and Exchange Commission. 148 Cong. Rec. S7351 (daily ed. July 25, 2002) (statement of Sen. Sarbanes). Therefore, I disagree with Complainant’s interpretation of the Act. To include non-publicly traded subsidiaries as a “company” merely because it has a publicly traded parent, would widen the scope of the Act beyond the intentions of Congress. If Congress had wanted to include non-publicly traded subsidiaries of publicly-traded parent companies as covered employers, it could have done so in drafting the statute. See Getman v. Southwest, Inc., ARB No. 04-059 (7/29/05).

At this point, this forum does not have jurisdiction over ING Groep, N.V., the only publicly traded firm in this case. The record does not reveal that ING Groep, N.V. and its officers had control over the management of the subsidiaries, or Nathan Eshelman or Jeremy Eaves.

RECOMMENDED ORDER

ING Groep, N.V.’s Motion for Summary Decision is hereby GRANTED, on the basis that it has not been properly served in this case and the claim shall be DISMISSED. The other named Respondents are dismissed as not being subject to the Act.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. See 29 C.F.R. § 1980.110(a). The Board’s address is Administrative Review Board, U S Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1980.109(c) and 1980.111(a) and (b).