



Issue Date: 07 January 2011

Case No.: 2010-SOX-00054

In the Matter of:

A.K. GUPTA, *pro se*,

Complainant,

v.

JOHNSON & JOHNSON; and,
JOHNSON & JOHNSON, LTD.
(d/b/a Johnson & Johnson Medical India);
(d/b/a LifeScan),

Respondent.

ORDER AND SUMMARY DECISION DISMISSING COMPLAINT

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A¹, and its implementing regulations found at 29 CFR Part 1980. Section 806 provides “whistleblower” protection to individual employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain “protected activity” by the employee.

The Complainant filed this current complaint on or about February 15, 2010. The complaint was denied by the Regional Administrator, Occupational Safety and Health Administration, Atlanta, Georgia, on July 23, 2010. The Complainant filed a request for hearing before an Administrative Law Judge on August 30, 2010.

¹ VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio and television fraud), 1344 (bank fraud) or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

In his February 15, 2010, complaint the Complainant alleges that by letter dated November 17, 2009 from the Vice President of LifeScan², a division of Johnson & Johnson, Ltd., the July 30, 2008, distribution agreement between LifeScan and Agarwal Pharmaceuticals was terminated and that the termination of the distribution agreement was due to his December 2008 report of “unethical & unprofessional conduct in connivance” by two employees of LifeScan to the Director of Compliance of “JJMI”, the Managing Director of “JJMI”, the Chairman/Chief Executive Officer of Johnson & Johnson, as well as the Chief Compliance Officer, Vice President, General Counsel and the Executive Committee of Johnson & Johnson. He enclosed an e-mail that indicated he had reported the alleged improper actions of the employees to the U.S. Department of Justice, Criminal Division, Fraud Section as a potential violation of the Foreign Corrupt Practices Act, 15 USC §78dd-1, *et seq* (FCPA), on October 21, 2009, prior to the November 17, 2009 letter terminating the distribution agreement between LifeScan and Agarwal Pharmaceuticals. He closed his complaint with the words “as advised by U.S. Department of Justice we are lodging complaints to labor department for remedies, compensation and damages.” It is noted that the Complainant enclosed an e-mail from the FCPA Coordinator, U.S. Department of Justice which stated “If the company is retaliating against you for reporting the violation, you may also be able to file a complaint with the Department of Labor under the Sarbanes-Oxley Act.”

In his August 2010 appeal of the Administrator’s findings, the Complainant alleges that the underlying investigation was not “investigated in the proper perspective and the effort has been to dismiss it somehow on flimsy pre-conceived grounds.” He reports that Agarwal Pharmaceuticals “is a small proprietorship concern and I am the key person responsible and I have made the complaint in both capacities as an employee [and] also from firm side as [a] caretaker of the firm for all matters and my livelihood is at stake directly connected with its continued existence and action to terminate [the distribution] agreement was aimed to penalize us.” He lists his wife as the owner of Agarwal Pharmaceuticals.

By Order of September 28, 2010, the Complainant was ordered to submit a written response by November 15, 2010, with appropriate attachments and/or memoranda, demonstrating why the Request for Hearing Should Not be Dismissed for failure to demonstrate:

1. he is/was an individual employee of the named Respondents at the time of his alleged protective activity of reporting violations and alleged adverse actions upon his terms of employment;
2. he is/was an individual employee of Agarwal Pharmaceuticals at the time of his alleged protective activity of reporting violations and alleged adverse actions upon his terms of employment and Agarwal Pharmaceuticals is subject to the provisions of SOX and should be impleaded as a named Respondent to the case; and,
3. his protected activity involves a specific violation or ongoing violation of 18 USC §§ 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud] or 1348 [securities fraud], or a

² Referred to as “Johnson & Johnson Medical India” or “JJMI” in correspondence from Johnson & Johnson, Ltd.

rule or regulation of the Securities and Exchange Commission, or a Federal law relating to fraud against shareholders.

On November 10, 2010, Respondent's counsel filed a response to the September 28, 2010, Order. The Respondent submits that the complaint must be dismissed because his complaint does not "fall within the jurisdiction of Title 18, U.S. Code §1514A" since the Complainant was never employed by Respondent, the Complainant was employed by a private, non-publicly traded, company, and Complainant's "alleged protective activity does not involve conduct within the ambit of the Sarbanes-Oxley Act."

On November 12, 2010, Complainant filed a request for an extension in time to file his response. He requested an extension of six weeks. By Order of November 16, 2010, the Complainant's request for an extension in time was granted to January 6, 2011.

On January 5, 2011, Complainant filed another request for extension in time to file his response. He requested an additional six to eight weeks to file his response. For reason set forth below, the request for an additional extension in time is denied.

DISCUSSION

A summary decision may be entered when there is no genuine issue of fact. When determining the appropriateness of a summary decision, the material submitted for consideration, including the pleadings, discovery, affidavits and disclosure materials on file, is viewed in a light most favorable to the non-moving party. See generally, *Celotex Corp. v. Catrett*, 477 US 317, 106 S.Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 US 242 (1986). Here there are issues of whether the Complainant has standing to be covered by the provisions of SOX and, if so, whether he has established a prima facie case of discrimination under SOX.

a. The Complainant lacks standing under the Act.

The employee protection section of SOX at Title 18, U.S. Code, § 1514A provides that (underline added for emphasis):

“(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. 781), 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 discharge, suspend, threaten, harass, or in any manner discriminate against an employee in the terms and 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 [mail fraud], 1343 [wire

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 –

- (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 such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(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.

...

(b)(2)(D) Statute of Limitations – An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

...

(c)(2) Compensatory damages – Relief for any action under paragraph (1) shall include –

- (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
- (B) the amount of back pay, with interest; and,
- (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.”

Federal Regulations implementing SOX at 29 CFR §1980.101 define –

1. “Employee” as “an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.”
2. “Company” as “any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d).”
3. “Person” as “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons.”
4. “Named person” as “the employer and/or the company or company representative named in the complaint who is alleged to have violated the Act.”

A complaint filed under SOX need not be in any particular form but it “must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are

believed to constitute the violations,” 29 CFR § 1980.103(b). The complaint must be filed “within ninety (90) days after an alleged ... discriminatory decision has been made and communicated to the complainant,” 29 CFR § 1980.103(c). Where the complaint is not filed within ninety (90) days of the adverse personnel action, the complainant is barred from redress under the Act. 18 USC §1514A(b)(2)(D); *Johnson v. Stein Mart, Inc.*, 2007 WL 1796265 (USDC, M.D. FL, June 20, 2007) *unpub.*

The Administrative file indicates that the Complainant was an employee of Agarwal Pharmaceuticals, a proprietorship owned by his spouse. He was not an employee of Respondent. Agarwal Pharmaceuticals had a distribution contract with LifeScan (India)³, a medical business division company of Johnson & Johnson, Ltd, 30 Forjett Street, Mumbai, 400 036, India. Johnson & Johnson, Ltd, is also known as Johnson & Johnson India or Johnson & Johnson Medical India⁴, and claims to be a business segment of Johnson & Johnson, One Johnson & Johnson Plaza, New Brunswick, NJ.

An “employee” covered under the SOX is an individual and not a business entity. Agarwal Pharmaceuticals lacks standing to present a claim under SOX since it is not an individual. Here the Complainant indicates that he was an employee of Agarwal Pharmaceuticals when a business agreement involving distribution of product between Agarwal Pharmaceuticals and LifeScan was terminated. The initial complaint, written request for hearing, initial request for an extension in time and second request for extension in time fail to demonstrate how Respondent interfered with Complainant’s personal employment with Agarwal Pharmaceuticals beyond Agarwal Pharmaceuticals losing Respondent as a client.

The documents filed for consideration, when viewed in a light most favorable to Complainant, supports a finding that the Complainant suffered an adverse employment action, loss of employment with Agarwal Pharmaceuticals, following termination of a disbursement agreement between Agarwal Pharmaceuticals and LifeScan. The Complainant did not suffer an adverse employment action as an employee of the Respondent. The record most favorable to the Complainant also demonstrates that Agarwal Pharmaceuticals is not a publicly traded company subject to SOX.

b. The Complainant failed to set forth a prima facie case.

Federal Regulations at Title 29, Code of Federal Regulations, Chapter XVII, Part 1980, sets forth the implementing procedures for the handling of discrimination complaints under Section 806 of the Act. **The complaint must be dismissed unless the complainant makes a prima facie showing that:** (1) the complainant engaged in protected activity or conduct; (2) the respondent knew that the complainant engaged in the protected activity; (3) the complainant suffered an unfavorable action related to the complainant’s terms and/or conditions of employment; and (4) the circumstances were sufficient to raise the inference that the complainant’s protected activity was a contributing factor in the unfavorable employment action, 29 CFR § 1980.104(b).

³ See www.lifescan.com/india

⁴ See <http://www.jnjindia.com>

Neither the determination to dismiss a complaint without completing an investigation pursuant to 29 CFR § 1980.104(b) nor the determination to proceed with an investigation by the Occupational Safety and Health Administration is subject to review by the Administrative Law Judge and the complaint may not be remanded for completion of an investigation or for additional findings on the basis that a determination to dismiss at the Occupational Safety and Health Administration level was made in error, 29 CFR § 1980.109(a).

The initial complaint, written request for hearing, initial request for an extension in time and second request for extension in time fail to allege any violation of 18 USC §§ 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud] or 1348 [securities fraud]. They fail to allege any violation of any rule or regulation of the Securities and Exchange Commission. The documents do allege violations by employees of LifeScan of federal law related to the Foreign Corrupt Practices Act, 15 USC §78dd-1, *et seq.* However, a violation of the FPCA is not within the scope of SOX.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation on the material submitted for consideration in a light most favorable to the Complainant, this Administrative Law Judge finds, that -

1. The Complainant was not an individual employee of the named Respondents at the time of his alleged protective activity and alleged adverse action upon his employment with Agarwal Pharmaceuticals.
2. The Complainant was an individual employee of Agarwal Pharmaceuticals at the time of his alleged protective activity of reporting violations and alleged adverse actions upon his terms of employment.
3. Agarwal Pharmaceuticals was a company privately owned by Complainant's wife and was not a company engaged in the public trading of stock subject to rule and regulation of the Securities and Exchange Commission.
4. Agarwal Pharmaceuticals is not an individual subject to the provisions of SOX.
5. Agarwal Pharmaceuticals lacks standing to present a claim under SOX.
6. The Complainant has failed to establish a prima facie case under SOX that he reported any violation of 18 USC §§ 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], 1348 [securities fraud] or any violation of any rule or regulation of the Securities and Exchange Commission as part of his protected activity.
7. The Complainant has failed to establish a prima facie case under SOX that he engaged in protected activity while an employee of Respondent.
8. The Complainant is not entitled to any requested relief from Respondent under SOX.

ORDER

In view of all the foregoing, **Complainant's complaint filed on or about February 15, 2010, is DISMISSED.**

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ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
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, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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 1980.110(a) and (b).