



Issue Date: 01 March 2010

CASE NO.: 2010-SOX-00014

In the Matter of:

BASIL HYLTON,
Complainant,

v.

THE SEMINOLE TRIBE OF FLORIDA,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This case arises out of a complaint of discrimination filed pursuant to 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”), and the applicable regulations issued thereunder at 29 C.F.R. Part 1980. The provision prohibits retaliation by publicly traded companies against their employees who provide information to a supervisory employee, a federal agency, or Congress, alleging violation of any federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a), 29 C.F.R. § 1980.102(b). At issue in the present matter is whether there is jurisdiction under the Act to allow Complainant’s claim to proceed against Respondent.

Background and Procedural History

On October 30, 2009, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, the Seminole Tribe of Florida (Respondent), retaliated against him for reporting possible fraudulent activities by the Assistant Director of Housing Department in violation of Section 806 of Sarbanes-Oxley. Complainant was employed by the Seminole Tribe of Florida in the Construction Department.

On December 2, 2009, after investigation of the complaint, the Secretary of Labor, through the Regional Administrator for OSHA, issued Findings and ordered that the complaint be dismissed for lack of jurisdiction. The Regional Administrator dismissed the complainant based on the finding that Respondent is not a company within the meaning of 18 U.S.C. § 1514A because it neither has a class of securities registered under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 781, nor is it required to file reports under Section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(d).

On December 23, 2009, Complainant filed a timely notice of appeal objecting to the Secretary's findings and requested a *de novo* hearing before an Administrative Law Judge ("ALJ") pursuant to 29 C.F.R. § 1980.106. This matter was docketed in this Office on December 23, 2009, and on January 7, 2010, I issued an Order to Show Cause instructing the parties to show cause why the complaint should not be dismissed for lack of jurisdiction.

On February 12, 2010, Complainant filed a Response to the Show Cause Order asserting that a business that Respondent purchased was a publicly traded company, and therefore this Office had jurisdiction over the matter. Complainant submitted several articles regarding the Respondent's purchase of the Hard Rock Café and a press release regarding the appearance of the CEO of Gaming Operations for the Seminole Tribe of Florida as the keynote speaker at the Florida Gaming Summit.

The first article submitted by Complainant is an article that appeared in The San Diego Union-Tribune on December 8, 2006 entitled "Seminoles buy Hard Rock Brand," noting that the Seminole Tribe purchased the Hard Rock Café business for \$965 million from Rank Group, a British company. The article also referenced the estimate of one casino consulting firm that "the Seminole Tribe of Florida will earn record earnings of \$800 to \$900 million this year, which would rank the tribe third among publicly traded casino companies. The Seminoles do not disclose revenue figures."

The second document submitted by Complainant is a press release from the Florida Gaming Summit dated September 15, 2009 announcing that the CEO of Gaming Operations for the Seminole Tribe of Florida would be one of the keynote speakers at the 2009 Florida Gaming Summit. The press release noted that the CEO of Gaming Operations had "built the Seminole gaming enterprise into one of the world's most profitable and respected casino companies. Among other duties, [the CEO] oversees the Seminoles' seven casinos in Florida, including the flagship Seminole Hard Rock gaming resorts in Hollywood and Tampa." The press release also announced that another keynote speaker, not affiliated with the Seminole Tribe of Florida, is the only female president among the top ten publicly traded gaming companies.

The third document Complainant submitted is an article posted on Bloomberg on December 7, 2006 entitled "Indian tribe buys Hard Rock." The article described the Seminole Tribe's success in gambling operations, noting that the Seminole Tribe owns seven casinos. The article also stated that the price of Rank Group's stock has dropped in recent years.

The final document Complainant submitted is an article entitled, "Casinos Putting Tribes at Odds." The article examined the business relationships between many tribes and gaming companies, and stated that "[t]here is also a growing tension over who will reap the bulk of profits from Indian gaming: the tribes themselves or publicly traded gaming companies and others that are increasingly circling reservations eager to cash in on the bonanza."

On February 23, 2010, Respondent filed a Response to the Show Cause Order. Respondent argues that it is a sovereign tribal government pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. § 476, and therefore not an entity covered by applicable provisions of the Sarbanes-Oxley Act. In addition, Respondent asserts that as a

sovereign Indian tribe, it is immune from claims in any federal or state court or administrative tribunal unless it can be shown that the Tribe clearly, expressly, and unmistakably waived its immunity by the deliberative act of its constitutionally constituted governing body or unless it can alternatively be shown that an abrogation of tribal sovereign immunity is clearly, expressly, and unmistakably set forth in an Act of Congress with respect to the type of claim asserted. Respondent asserts that it has not waived sovereign immunity nor has its immunity with respect to the instant lawsuit been abrogated by Congress.

Discussion

Section 806 of the Sarbanes-Oxley Act and the implementing regulations at 29 C.F.R. Part 1980 prohibit retaliation by publicly traded companies against their employees who provide information to a supervisory employee, a federal agency, or Congress, alleging violation of any federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a), 29 C.F.R. § 1980.102(b). A publicly traded company is a “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.” 18 U.S.C. § 1514A(a).

In response to the Show Cause Order, Respondent asserts that it is immune from a claim brought under Section 806 of SOX because it is a sovereign entity and has not waived this immunity, nor has its immunity been abrogated by an express Act of Congress. I agree.

“As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Oklahoma Tax Commission v. Citizen Ban Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). A tribe’s waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). “Congress may abrogate a sovereign’s immunity only by using statutory language that makes its intention unmistakably clear.” *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1289 (11th Cir. 2001) (quoting *State of Florida v. Seminole Tribe*, 181 F.3d 1237, 1242 (11th Cir. 1999)).

Respondent is a sovereign tribal government under Section 16 of the Indian Reorganization Act of 1934. As such, Respondent is immune from any claim in federal, state, or administrative tribunals absent a showing that it has unequivocally waived its immunity or unless Congress has expressly abrogated its immunity with respect to the type of claim asserted. Section 806 of SOX does not contain any express abrogation of Respondent’s sovereign immunity with respect to the whistleblower provisions in SOX. Furthermore, there is nothing in the allegations presented by Complainant to demonstrate that Respondent unequivocally waived its sovereign immunity with respect to Section 806 of SOX. Therefore, this Office lacks jurisdiction over Complainant’s October 30, 2009 SOX complaint because Respondent is a sovereign Indian tribe and is immune from claims such as the one presented here by Complainant.

In addition, it is clear that Respondent does not possess a class of securities registered under section 12 of the Securities Exchange Act of 1934 nor is it required to file reports under section 15(d) of the Securities Exchange Act of 1934. The documents that Complainant has submitted in response to the Show Cause Order clearly do not show that Respondent is a publicly traded company within the meaning of SOX. All of these articles reference Respondent's purchase of the Hard Rock Café; however, there is nothing demonstrating that the Seminole Tribe of Florida, Complainant's employer, is a publicly traded company. Based on the foregoing, I find that Respondent is not a publicly traded company and that it is not subject to the whistleblower provisions in the Sarbanes-Oxley Act.

Conclusion

Complainant has failed to present any evidence that his employer, the Seminole Tribe of Florida, is an entity covered by the whistleblower provisions of the Sarbanes-Oxley statute. This Office thus lacks jurisdiction to consider his claim.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the SOX whistleblower complaint filed by Basil Hylton be DISMISSED WITH PREJUDICE.

A

STEPHEN L. PURCELL
Associate Chief Administrative Law Judge

Washington, D.C.

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. 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 1980.110(a) and (b).