



Issue Date: 02 June 2010

CASE NO.: 2010-SOX-00029

In the Matter of

THOMAS SPINNER
Complainant

v.

DAVID LANDAU & ASSOCIATES, LLC
Respondent

Appearances:

Daniel Corey, Esq.
Complainant

Keith J. Rosenblatt, Esq.
Respondent

Before: Ralph A. Romano
Administrative Law Judge

RECOMMENDED
SUMMARY
DECISION DISMISSING
COMPLAINT

Before me is Respondent's motion for summary decision dismissing the complaint on the grounds that, as a matter of law, the statute under which this action is brought, 18 U.S.S. 1514A ("SOX"), applies only to publically traded companies and employees thereof; and that there is no dispute that Respondent, Complainant's employer, is not a publically traded company

Complainant has opposed the motion on the theory that, Respondent¹ was a "...contractor, subcontractor or agent of..." SL Green Realty Corp. (hereinafter "Green")², a publically traded client of Respondent, to which Complainant was assigned to perform auditing work, within the meaning of SOX.

¹ Which provides internal audit, forensics, advisory and management consultant services, including SOX audit and compliance services (Resp. Br. at 2).

² This publically traded company is not named a respondent in this proceeding.

The administrative, and other decisional law, including legislative history, advanced in support of Respondent's position uniformly and unequivocally confirms Respondent's position. *Fleszar v. American Med. Ass'n.*, ARB No. 07-091, 08-061 at 4 (March 31, 2009); *Paz v. Mary's Center for Maternal & Child Care*, ARB No. 06-031 at 2 (Nov. 30, 2007); *Flake v. New World Pasta Co.*, ARB No. 03-126 at 4 (Feb. 25, 2004); *Reno v. Westfield Corp., Inc.*, 2006-SOX-00030 at 3 (ALJ Feb. 23, 2006); *Goodman v. Decisive Analytics Corp.*, 2006-SOX-11 at 9-10 (ALJ Jan. 10, 2006); *Minkina v. Affiliated Physician's Group*, 2005-SOX-00019 at 5 (ALJ Feb. 22, 2005); *see also Brady V. Calyon Securities (USA)*, 406 F. Supp. 2d 307, 317-19 (S.D.N.Y. 2005) (“[t]he Act makes plain that neither publicly traded companies, nor anyone acting on their behalf, may retaliate against qualified whistleblower employees. Nothing in the Act suggests that it is intended to provide general whistleblower protection to the employees of any employer whose business involves acting in the interest of public companies.”). Also, as noted in Respondent's brief (at 8), SOX's sponsor, Senator Sarbanes, also unequivocally explained the purpose of the law:

let me make very clear that it applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to private companies, who make up the vast majority of the companies across the country.

148 Cong. Rec. 7351 (July 25, 2002) (emphasis added).

Complainant offers the decision reached in *Lawson v. FMR LLC*, (U.S.D.C. D. Mass. 3/30/10) Civ. Action Nos. 08-10466-DPW, 08-10758-DPW³, which suggests that where the purpose of SOX, i.e., to prevent and punish corporate fraud and protect victims thereof, is advanced, an employee of a privately held company is protected under SOX. And, Complainant alleges he was, in part, on a SOX mission while assigned at Green (Br. at 6).

DISCUSSION

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 Report (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

³ The decision reached in *Johnson v. Siemens*, AB Case # 08-032 (4/15/10), also offered by Complainant, deals with subsidiaries of publicly held companies, not here involved.

to make a showing sufficient to establish the existence for 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).

As noted in *Minkina*, supra, the plain language of SOX "...protects *employees of publicly traded companies* who provide information or participate in an investigation of violations related to corporate *fraud* under §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*, ALJ No. 2004-SOX-19 at 5 (ALJ May 27, 2004). The legislative history of [SOX] 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, 202 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).

Because these decisions and apparent legislative intent constitute the prevailing law on the issue here involved and given that *Lawson*, supra, to the writer's knowledge, has not been the subject of appeal, I am compelled to grant the subject motion.

If this matter were to proceed to trial, any adjudication would involve a determination of rights of an alleged victim (private employee-Complainant), not intended to be covered under SOX, as well as determination of the propriety of behavior of a party (private company-Respondent) also not intended to be covered under SOX.

I find that there exists no genuine issue of material fact for trial, and that Respondent is entitled to dismissal as a matter of law.⁴

Respondent's request for legal fees based upon a frivolous litigation sanction is denied, in light of the holding in *Lawson*, supra.

⁴ Respondent's motion for summary decision on the merits, need not be reached.

RECOMMENDED
ORDER

This matter is DISMISSED.

A

Ralph A. Romano
Administrative Law Judge

Cherry Hill, New Jersey

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).