



Issue Date: 30 March 2012

Case No.: 2011-SOX-00041

In the Matter of

ANIRUDDHA BANERJEE
Complainant

v.

BNP PARIBAS
Respondent

DECISION AND ORDER
GRANTING RESPONDENT'S SUPPLEMENTAL
MOTION FOR SUMMARY DECISION

Introduction

The above-captioned matter arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, 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 (“SOX” or “the Act”) enacted on July 30, 2002. The Act provides the right to bring a civil action under Section 806 to employees who “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 [of Title 18, U.S. Code], 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)[.] ” 18 U.S.C. § 1514A(a)(1). The Act extends such protection to employees of companies “with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) [SEA of 1934] or that are required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)).” 18 U.S.C. § 1514A(a).

The Act was recently amended by Sections 922(c) and 929A of the “Dodd-Frank Wall Street Reform and Consumer Protection Act,” (“Dodd-Frank”) Pub. L. 111-203 (July 21, 2010), 124 Stat. 1848 and 124 Stat. 1852. Among other things, these provisions expanded the limitations period for complaints, established the availability for jury trials in District Court proceedings, and clarified coverage under the Act for employees of subsidiaries of publicly traded companies.

Factual and Procedural Background

By reference, I incorporate into this Decision and Order the factual and procedural backgrounds previously outlined in my Order Denying Respondent's Motion For Summary Decision And Sanctions issued on January 6, 2012. In that January 6, 2012 Order Denying Respondent's Motion For Summary Decision, I concluded that the complaint filed with U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) was timely because I deemed the parties' private agreement to toll the SOX statute of limitations to be valid. I also issued a Notice Of Rescheduled Hearing And Pre-Hearing Order to the parties on January 6, 2012.

Pursuant to the January 6, 2012 Notice of Rescheduled Hearing And Pre-Hearing Order, the Complainant, through his counsel, filed his initial submissions by letter dated February 9, 2012 to which he attached his administrative complaint filed with OSHA as Exhibit C.

The Respondent filed a Supplemental Motion For Summary Decision On The Pleadings, For Lack Of Subject Matter Jurisdiction, And As A Matter Of Law (Supplemental Motion) dated February 10, 2012, with a supporting sworn affidavit of Hugo Seiro, Director and Senior Counsel for the Respondent. In its Supplement Motion, the Respondent contends that the instant matter should be dismissed for lack of subject matter jurisdiction because it (1) does not have a class of securities registered under Section 12 of the Securities Exchange Act, 15 U.S.C. § 78l (Exchange Act) or (2) is not required to file reports under Section 15(d) of the Exchange Act.

Although granted his request for an extension of time to do so, the Claimant did not submit a response to the Respondent's Supplemental Motion.

Issue

Whether the Respondent is a company with a class of securities registered under Section 12 of the Exchange Act, 15 U.S.C. § 78l, or that is required to file reports under Section 15(d) of the Exchange Act 15,18 U.S.C. § 78o, thereby subjecting it to jurisdiction under Section 806 of SOX.

Discussion, Findings of Fact and Conclusions of Law

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). To demonstrate that it is entitled to summary decision, "the moving party must either...produce affirmative evidence which negates an essential element of the nonmovant's complaint...or show...that the nonmovant has no evidence to support an element of the complaint." Eash v. Roadway Express, Inc., ARB No. 00-061, slip op. at 4, 2002 WL 31932545 (December 31, 2002), citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-158 (1970); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

In ruling on 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...In making this determination, the [administrative law judge] is to view all the evidence

and factual inferences in the light most favorable to the non-moving party.” Stauffer v. Wal-Mart Stores, Inc., USDOL/OALJ Reporter (HTML), ARB No. 99-107, OALJ No. 1999-STA-00021 slip op. at 6 (ARB November 30, 1999), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party “produces enough evidence to create a genuine issue of material fact,” it defeats the motion for summary decision. Eash v. Roadway Express, Inc., ARB No. 00-061, slip op. at 4, 2002 WL 31932545 (December 31, 2002), citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). However, 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 decision. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986).

Section 806 of the Sarbanes-Oxley Act states in relevant part:

(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, 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. § 1514A.

Section 806 of the Act offers protection for employees of publicly traded companies who provide information or participate in an investigation of violations including frauds and swindles (18 U.S.C. § 1341), fraud by wire, radio, or television (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344), securities fraud (18 U.S.C. § 1348), 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 slip op. at 5 (May 27, 2004). The Congressional Record states that the purpose of Section 806 of the Act is to “provide whistleblower protection to employees of publicly traded companies . . . when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent,” and to “protect those who report fraudulent activity that can damage innocent investors in publicly traded companies.” 148 Cong. Rec. S7420, 2002 WL 1731002 (daily ed. July 26, 2002).

The Respondent seeks summary disposition dismissing this matter for lack of jurisdiction. It has presented the sworn and notarized statement of Hugo Sueiro, its Director and Senior Counsel, who averred that the Respondent “is a non-U.S. company organized under the laws of France” which has “never registered a class of securities under Section 12 of the [Exchange Act].” See Supplemental Motion, Sueiro Affidavit. Mr. Sueiro also averred that neither the Respondent “nor any of its subsidiaries [has] been subject to the reporting requirements under Section 15(d) of the Exchange Act at any time since the Complainant was first employed by the [Respondent].” Id.

The Complainant did not respond to the Respondent’s Supplemental Motion. He has not produced any evidence which would create a genuine issue of material fact. The complaint filed with OSHA does not make any specific allegations regarding whether the Respondent has registered a class of securities under Section 12 of the Exchange Act or has been subject to reporting requirements under Section 15(d) of the Exchange Act. See Complainant’s initial submissions dated February 9, 2012, Exhibit C.¹ Even construing all evidence in the light most favorable to the Claimant as the nonmoving party, I find the Claimant has failed to make a showing sufficient to establish the existence of an element essential to his case, i.e., that the Respondent is a covered employer under SOX.

In consideration of the factual assertions of the parties and their arguments, I find that the Respondent is a company that neither registers securities under Section 12 nor files reports under Section 15(d) of the Exchange Act. Accordingly, the Respondent is not subject to the provisions of Section 806 of SOX, and the Complainant may not bring an action for relief thereunder.

The Respondent’s Supplemental Motion is hereby GRANTED.

¹ In the initial submissions, the Complainant’s counsel states the Complainant “believes that Respondent is a company that registers securities under Section 12 or files reports under Section 15(d) of the SEA of 1934,” but the Complainant has cited no evidence in support of his belief.

ORDER

IT IS HEREBY ORDERED that this case be dismissed for lack of jurisdiction. The prehearing conference, scheduled for April 12, 2012, and the hearing, scheduled for April 26, 2012, are canceled.

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LYSTRA A. HARRIS
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. 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).