

U.S. Department of Labor Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516



(415) 625-2200
(415) 625-2201 (FAX)

ISSUE DATE: 07 SEPTEMBER 2012

CASE NO.:2011-SOX-00024

In the Matter of

JOHN FERGUSON,
Complainant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver of **BANKUNITED, FSB, and BANKUNITED**
FINANCIAL CORPORATION,
Respondents.

**Order Granting FDIC Receiver's Motion for Summary Judgment and
Dismissal As to BankUnited Financial Corporation**

This matter arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (the "Sarbanes-Oxley Act") and the regulations at 29 C.F.R. Part 1980. The complaint John Ferguson filed with the Occupational Safety and Health Administration ("OSHA") against BankUnited Financial Corporation alleging the Bank violated the employee protection provisions of the Sarbanes-Oxley Act. The Secretary of Labor, through the Regional Administrator for OSHA, Region IX, found on December 14, 2010, that Ferguson worked for BankUnited FSB, a savings bank that was a wholly-owned subsidiary of BankUnited Financial Corporation. The Secretary also determined there was no reasonable cause to believe BankUnited Financial Corporation had violated the Sarbanes-Oxley Act when it ended Ferguson's employment. Ferguson objected to the determination and requested a hearing before an Administrative Law Judge.

On February 10, 2012, I ordered Ferguson to respond to the FDIC Receiver's Motion for Summary Decision. The motion alleges the Secretary cannot grant effective relief, because the FDIC Receiver has determined that all claims of a general creditor such as Ferguson are worthless —there are not and never will be

sufficient funds to pay any claim below the savings bank's depositor priority level. In other words, there is no money to pay Ferguson and there never will be, even if his claim is meritorious. The FDIC sold the savings bank that fired him free and clear of his claim.

Ferguson was ordered to respond to the FDIC Receiver's motion by March 1, 2012. I cautioned him that failure to respond might result in an order that dismissed his claim. Ferguson filed nothing. Ferguson also was ordered to address why the filing BankUnited Financial Corporation made seeking protection under Chapter 11 of the Bankruptcy Code, on May 22, 2009 in the U.S. Bankruptcy Court for the the Southern District of Florida (Miami Division), Case No. 09-19940-LMI, had not stayed this action under the automatic stay a bankruptcy petition invokes. This claim against BankUnited Financial Corporation also may be effectively discharged by the Bankruptcy Court through an Order Confirming a Plan of Liquidation that covers general unsecured claims against BankUnited Financial Corporation. That order was entered by the Bankruptcy Court on March 1, 2012 and filed on March 2, 2012.

Ferguson filed nothing. On July 18, 2012, Ferguson again was ordered to respond by August 17, 2012 to the FDIC Receiver's motion and to show cause why the claim should not be dismissed as to the FDIC Receiver and due to the discharge that has been granted in the bankruptcy proceedings against BankUnited Financial Corporation. I advised him that failure to respond might result in an order that dismissed his claim. Ferguson still filed nothing.

The FDIC's Motion for Summary Judgment is decided without considering Claimant's views.

There are a number of entities Ferguson might seek relief from if he prevailed on his whistleblower claim. I address each possibility in turn. He can get no relief from the FDIC or the entity that acquired the bank, and any claim that might still exist appears to have been extinguished by the bankruptcy of the entity that had employed him.

A. Ferguson's Direct Employer BankUnited, FSB

Ferguson was employed at BankUnited FSB, a wholly owned subsidiary of BankUnited Financial Corporation, when he alleges he suffered employment retaliation that violated the Act. BankUnited, FSB would be the natural entity to give Ferguson relief if his claim succeeds. But on May 21, 2009, the FDIC declared BankUnited, FSB insolvent and was appointed its Receiver.¹ This action resulted in the FDIC Receiver succeeding to the interest of BankUnited for all matters, including litigation.² Accordingly, Ferguson cannot pursue a claim against the old BankUnited, FSB. For all intents and purposes, that entity no longer exists.

¹ See Letter from Office of Thrift Supervision, attached as Exhibit 2 to Motion and Memorandum of Law in Support of Motion to Dismiss, and in the Alternative for Summary Judgment, by the Federal Deposit Insurance Corporation, as Receiver for BankUnited, FSB, Coral Gables, Florida [hereinafter "FDIC'S MSD"].

² See 12 U.S.C. § 1821(d)(2)(A).

B. The new BankUnited

On the same day the FDIC became Receiver, it contracted with a newly created entity called “BankUnited” to take over the old BankUnited, FSB’s operations.³ There is no evidence showing this new BankUnited assumed liability for claims against BankUnited, FSB, and therefore no indication it would be liable for BankUnited, FSB’s alleged retaliation against Ferguson. The new BankUnited is not named as a party to this litigation, and there is no reason to think Ferguson could obtain relief from it.

C. The FDIC as Receiver for BankUnited, FSB

The FDIC Receiver has asked me to dismiss it from the proceeding because Ferguson can obtain no meaningful relief from it.⁴ For the reasons described below, I agree and dismiss the claim as to the FDIC.

A presiding administrative law judge grants a motion for summary decision when the pleadings, affidavits, matters officially noticed, or materials obtained through discovery or otherwise frame no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁵ The rule is modeled on Rule 56 of the Federal Rules of Civil Procedure, where “the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial.”⁶

When the FDIC became Receiver, it succeeded to all assets and liabilities of BankUnited, FSB.⁷ Ferguson could attempt to hold it liable for BankUnited, FSB’s retaliation. But Ferguson could get no relief from the FDIC Receiver, for the following reasons.

When the FDIC Receiver succeeds to the assets and liabilities of a banking institution, any claim for compensation against the FDIC Receiver must come from the receivership estate, and payment is limited to “the amount such claimant would have received if the Corporation had liquidated the assets and liabilities of such institution”⁸ If Ferguson prevailed on the merits of his retaliation claim, he could only collect from the FDIC Receiver to the extent that there is any money in the receivership estate to pay his claim.

Under the relevant statutes, when the FDIC Receiver liquidates a federal savings bank, those with claims against the institution receive payment based on their relative priority.⁹ Administrative expenses and deposit liabilities must be paid in full before any payments are made on general unsecured claims of the sort

³ See 75 F.R. 68789 (November 9, 2010).

⁴ FDIC’S MSD at 7–9.

⁵ 29 C.F.R. § 18.40(d).

⁶ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985).

⁷ See 12 U.S.C. § 1821(d)(2)(A).

⁸ See 12 U.S.C. § 1821(i)(2).

⁹ See 12 U.S.C. § 1821(d)(11)(A).

Ferguson asserts in this proceeding.¹⁰ Ferguson can only receive compensation from the FDIC Receiver if the receivership estate has enough assets to satisfy all administrative expenses and depositor claims first.

The FDIC Receiver determined on November 9, 2010 that the total value of assets in BankUnited, FSB's receivership estate was less than the total administrative expenses and depositor claims, by an enormous amount: roughly \$3.8 billion.¹¹ The FDIC Receiver therefore determined that "insufficient assets exist to make any distribution on general unsecured creditor claims (and any lower priority claims) and therefore all such claims, asserted or unasserted, will recover nothing and have no value."¹² Ferguson has offered no reason to doubt the FDIC's computation.

Under the FDIC Receiver's "worthlessness" determination, Ferguson cannot recover any money from the FDIC Receiver and his claim, like all unsecured claims against the FDIC Receiver, has no value. Nor can the Receiver reinstate Ferguson as an employee at a bank that no longer exists. Accordingly, the Secretary of Labor could provide no relief under the Act against the FDIC Receiver, were Ferguson to prevail here.

I should grant the FDIC's Motion for Summary Decision when Ferguson can't obtain any relief from the FDIC Receiver. Assuming its merit for the sake of argument, a retaliation claim for which no meaningful relief can be granted shouldn't proceed to judgment.¹³

Because Ferguson can get no "meaningful relief" from the FDIC Receiver, I grant the Motion for Summary Decision and dismiss the FDIC Receiver from this case.

D. BankUnited Financial Corporation

BankUnited Financial Corporation is the parent company of BankUnited, FSB.¹⁴ Its assets therefore might be liable to pay for violations of the Act by its wholly owned subsidiary. Assuming any claim against BankUnited Financial Corporation survived the FDIC receivership of BankUnited, FSB, that claim appears to have been extinguished too.

¹⁰ *See id.*

¹¹ *See* 75 F. R. 68789 (Nov. 9, 2010).

¹² *Id.*

¹³ *See Lucia v. American Airlines, Inc.*, ARB Case Nos. 10-014, -015, -016, ALJ Case Nos. 2009-AIR-015, -016, -017, slip op. at 5 (Sept. 16 2011). In the Article III Court context, such a claim fails to meet the "case or controversy" requirement of Article III of the U.S. Constitution. *See Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 70 (1983); *Mills v. Green*, 159 U.S. 651, 653 (1895). As an administrative adjudicator in the executive branch, OALJ is not limited by the Article III "case or controversy" requirement, but similar considerations determine when a case should be dismissed because no meaningful relief can be granted. *See Lucia*, slip op. at 5. Courts that have analyzed the issue in other circumstances have agreed that a "worthlessness" determination by the FDIC justifies dismissing the case because no meaningful relief can be granted. *See, e.g., FDIC v. Kooyomjian*, 220 F.3d 10, 15 (1st Cir. 2000); *First Indiana Federal Savings Bank v. FDIC*, 964 F.2d 503, 507 (5th Cir. 1992); *Adams v. RTC*, 927 F.3d 348, 354 (8th Cir. 1991).

¹⁴ BankUnited Financial Corporation does not appear to be represented in this case.

The FDIC Receiver has brought to my attention that BankUnited Financial Corporation sought bankruptcy protection in Chapter 11 Bankruptcy proceedings in the Southern District of Florida, Case No. 09-19940-LMI.¹⁵ A Plan was recently approved that appears to enjoin in perpetuity all general unsecured claims against BankUnited Financial Corporation that were a part of the Bankruptcy proceedings.¹⁶

On July 18, 2012 Ferguson also was ordered to address why the filing BankUnited Financial Corporation made seeking protection under Chapter 11 of the Bankruptcy Code, on May 22, 2009 in the U.S. Bankruptcy Court for the the Southern District of Florida (Miami Division), Case No. 09-19940-LMI, had not stayed this action under the automatic stay a bankruptcy petition invokes. This claim against BankUnited Financial Corporation also may be effectively discharged by the Bankruptcy Court through an Order Confirming a Plan of Liquidation that covers general unsecured claims against BankUnited Financial Corporation. That order was entered by the Bankruptcy Court on March 1, 2012 and filed on March 2, 2012.

Ferguson failed to respond to my July 18, 2012 order. Accordingly, the claims against BankUnited Financial Corporation are dismissed based on the Plan approval which appears to perpetually enjoin his claim.

¹⁵ FDIC's MSD at 9.

¹⁶ See *In re BankUnited Financial Corporation, et al.*, Case No. 09-19940, Order Confirming the Official Committee of Unsecured Creditors' Fourth Amended Joint Plan of Liquidation under Chapter 11 of the Bankruptcy Code, at 15 (S.D. Florida March 1, 2012). This order is available through PACER at pacer.gov for a nominal fee, by searching based on the case number among the bankruptcy cases in the Southern District of Florida, and then browsing the docket based on the order date.

Order

1. The FDIC Receiver's Motion for Summary Judgment is granted because Ferguson can obtain no relief from it.
2. Ferguson's claim against BankUnited Financial Corporation is also dismissed, based on the bankruptcy Plan approval which appears to perpetually enjoin his claim.

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

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 issuance of the administrative law judge's decision. 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. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

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.

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

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. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).