



**Issue Date: 24 April 2012**

**CASE NO: 2012-SOX-14**

**IN THE MATTER OF**

**MARY SEGUIN**

**Complainant**

**v.**

**ERNST & YOUNG, LLP**

**Respondent**

**DECISION AND ORDER ON  
MOTION FOR SUMMARY DECISION**

This matter arises from a Complaint filed with OSHA by Mary Seguin (Complainant) against Ernst & Young, LLP (Respondent). OSHA dismissed the complaint on January 12, 2012, finding Complainant had not engaged in activity protected by §806 of the Sarbanes-Oxley Act of 2002 (the “Act”). The Complainant appealed OSHA’s decision to the Office of Administrative Law Judges seeking a formal hearing, and Respondent filed a Motion for Summary Decision asserting the Complainant cannot meet the threshold hurdle of establishing coverage under the Act. A show cause order was issued, and Claimant responded in detail objecting to the motion.

**ISSUE**

The issue in this matter is whether the Complainant, as an employee of a private company, is afforded whistleblower protection under §806 of the Act based on the facts she has alleged. I find she is not.

## **ALLEGED FACTS UPON WHICH CLAIMANT BASES HER CLAIM**

In her initial complaint to OSHA, her appeal to the Office of Administrative Law Judges and her response to Respondent's Motion for Summary Decision, Complainant, in pertinent part, alleges the following:

1. Complainant was hired by Respondent, an accounting company, in July 2007 as an Engagement Manager.
2. On or about February 2008, Complainant was assigned to work on the Carlson Company project. Her supervisor was Alicia Lohman, and the project included cost-cutting advice.
3. Prior to her employment with Respondent, Ms. Lohman was employed at A.T. Kearney, a consulting firm and a competitor of Respondent.
4. In instructing Complainant how to perform the cost-cutting analysis for the Carlson Company project, Ms. Lohman provided Complainant "hundreds of un-redacted electronic documents belonging to A. T. Kearney...."
5. The documents contained what Complainant "regarded" as proprietary and trade secret information containing A.T. Kearney's methodology for performing cost-cutting analysis.
6. The documents were provided to other Respondent's employees, and Ms. Lohman instructed those subordinates, as well as Complainant, to duplicate A.T. Kearney's methods and analysis and apply them to the Carlson Company project.
7. Complainant expressed her concerns about use of the proprietary documents, and Ms. Lohman told her not to tell anyone about their existence. However, Complainant reported her concerns to others in management including Mumford, Kleinguetl and Barri Benson in Quality Risk Management, but alleges in some instances they too were using the cost-cutting methodologies belonging to other companies such as McKinsey & Company, The Boston Consulting Group, Cap Gemini and El Paso Corporation, all competitors of Respondent.

8. In March 2008 Complainant was removed by the Respondent from the Carlson Company project and later given a KBR project in Houston, Texas.

9. In the months that followed, Complainant continued to raise concerns about use of these confidential documents and information, and in October of 2008, Complainant reported to the United States Department of Justice the use of confidential competitor information and documents.

10. Shortly after expressing her concerns to the Justice Department, Complainant was terminated on October 21, 2008, for other alleged reasons.

11. Complainant maintains her protected conduct was the reporting of Respondent's use of confidential, secret and proprietary information belonging to Respondent's competitors in order to gain an advantage in servicing the Carlson Company account and "cover up its [Respondent's] lack of experience and competence."

12. Based upon Complainant's "reasonable belief" the reporting to both the Justice Department and Respondent's internal management of wire fraud violations against A.T. Kearney amounted to protected activity under §806 of the Act.

## **DISCUSSION AND FINDINGS**

Simply put, Complainant maintains that committing wire fraud or any other enumerated violation under §806 by any company or entity regardless of the facts is prohibited pursuant to §806 of the Act. I do not agree that §806 is that far reaching or did Congress express it to be.

Section 806 of the Act is titled "Whistleblower Protection For Employees of Publicly Traded Companies." The Act itself provides that no publicly traded company, "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" for (1) providing information the employee reasonably believes constitutes a violation of section 1341 (mail fraud), 1343 (wire 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 or for (2) participating in a proceeding alleging such violations.<sup>1</sup> 18 U.S.C.A. §1514A(a).

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<sup>1</sup> In 2010, Congress amended Section 806 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. See 18 U.S.C. §11514A as amended by 124 Stat. 1376, 1848, 1852 (2010). These amendments extended whistleblower coverage to employees of the subsidiaries of public companies and employees of ratings agencies.

The pleadings and affidavit attached to Respondent's motion state that Respondent, Carlson Company and A.T. Kearney were all privately held companies.

While, I find relevant that Respondent was a private company, whether Carlson Company, A.T. Kearney or others mentioned were public or private really does not affect the outcome of this decision. Respondent here was a private company who allegedly stole proprietary information from A.T. Kearney and others for its personal gain, not at the direction or gain of any other companies, be them private or public . In other words no other companies are alleged to have any role in Respondent's conduct, be it theft of documents or termination of Complainant.

Merely having a contract with a publicly traded or private company does not place a privately held company under §806 of the Act. Granted, a private company can violate §806 if it acts on behalf of the public company, if vested with the authority to retaliate against the public company's employees or act as the public company's agent, but those are simply not the facts here plead. No common ownership, management or control is alleged to have existed between Respondent and any of the other companies.

Nothing in the Act suggests its purpose to be to provide general whistleblower protection to all employees of any employer whose business happens to involve dealings with a public company. Reference to "any officer, employee, contractor, subcontractor or agent" of a public company simply lists potential parties who are prohibited from engaging in discrimination on behalf of the covered employer.

In this instance, Respondent was engaged by Carlson Company, and supposedly others, simply to provide a cost-cutting analysis. In doing so, Respondent allegedly used methods stolen from A.T. Kearney by a Respondent employee who had once worked for A.T. Kearney. There is no hint of any conspiracies between any of the companies or for that matter knowledge on their part of what Respondent had allegedly done. In sum Complainant's "reasonable belief" that her allegations might amount to a §806 violation is not sufficient to breathe life into her claim. If she was retaliated against as plead, it was solely the action of her privately held employer, the Respondent, and not at the behest or with knowledge, direction or authority of any other company, be it public or private.

## ORDER

In viewing all of the evidence and factual allegations in light most favorable to Complainant, I find Complainant has failed to make a showing sufficient to establish she is a covered employee under the whistleblower protection provisions of §806 of the Act. Respondent's Motion for Summary Decision is **GRANTED** and Complainant's claim is **DISMISSED**.

So **ORDERED** this 24<sup>th</sup> day of April, 2012, at Covington, Louisiana.

**A**

**C. RICHARD AVERY**  
**Administrative Law Judge**

**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).