



**Issue Date: 24 October 2019**

**CASE NO.: 2019-SOX-31**

*In the matter of*

**ROBERT L. MOODY, JR.**

Complainant

v.

**NATIONAL WESTERN LIFE INSURANCE COMPANY**

Respondent

**DECISION AND ORDER  
GRANTING RESPONDENT'S MOTION TO DISMISS**

This matter arises under the employee protection provisions of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A and the implementing regulations at 29 C.F.R. Part 1980. Pursuant to 29 C.F.R. §1980.107, such proceedings are held in a manner consistent with the procedural rules set forth in federal regulations at 29 C.F.R. Part 18, Subpart A (29 C.F.R. §18.10 to §18.95).

Robert L. Moody, Jr. ("Complainant") sells insurance for and on behalf of National Western Life Insurance Company ("Respondent") through his insurance marketing company, Moody Insurance Group. He alleges that National Western Life Insurance Company retaliated against him after he complained of unlawful insurance sales activities in foreign countries and demanded that the company remove his brother, Ross Moody, as its President and Chief Executive Officer for breach of fiduciary duty. After an investigation, OSHA dismissed his complaint, and Complainant filed objections and request for hearing with the Office of Administrative Law Judges ("OALJ") on March 14, 2019.

On June 28, 2019, Respondent filed a Motion to Dismiss pursuant to 29 C.F.R. § 18.70, arguing, among other things, that Complainant was not a covered employee under SOX because he is a contractor hired to procure insurance applications for Respondent and not Respondent's employee. Complainant responds that he is a covered employee because he is an employee of Moody Insurance Group, Respondent's contractor.

**STANDARD OF REVIEW**

Because both parties have submitted and relied upon evidence outside of the pleadings themselves, I will treat the motion as one for summary decision under 29 C.F.R. § 18.72. An ALJ may issue summary decision "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to a decision as a matter of law." A "material fact" is one whose existence

affects the outcome of the case. And a "genuine dispute" exists when the nonmoving party produces sufficient evidence of a material fact so that a factfinder is required to resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence. *See Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at 6 (Sept. 30, 2005) (applying the standard for a motion for summary decision where an ALJ considered evidence outside of the pleadings in deciding a motion to dismiss). Here, it does not appear that the material facts are in dispute, at least as to Complainant's status as a covered employee.

## DISCUSSION AND ANALYSIS

In addition to being the brother of Respondent's President and Chief Executive Officer, Complainant is the owner, President, and Chief Executive Officer of his own insurance marketing company, Moody Insurance Group. Moody Insurance Group sells insurance for and on behalf of Respondent. (Compl., p. 2; Resp. Mot. Dismiss, p. 8; Complainant's Sur-Reply, Ex. 1). On March 13, 2003, Moody Insurance Group entered into a marketing agreement with Respondent designated as a "National Marketing Organization Contract and Schedule of Commission" to sell insurance. (Compl., p. 2; Resp. Mot. Dismiss, p. 8, Ex. 2). Complainant, in his personal capacity, also entered into a marketing agreement with Respondent on December 17, 2012, as a managing general agent. (Compl., p. 2; Resp. Mot. Dismiss, p. 8, Ex. 9). In addition, Complainant identified himself as a "major" shareholder and Advisory Board Member of Respondent.<sup>1</sup> (Resp. Mot. Dismiss, Ex. 5).

Complainant alleges that, after he sent a shareholder letter to Respondent's Board regarding its foreign insurance sales, Respondent canceled a sales contract with one of Moody Insurance Group's insurance agents; canceled a contract with Moody Insurance Group to sell one of its major insurance products (Resp. Mot. Dismiss, Ex. 5); interfered with insurance sales of Moody Insurance Group agents by engaging in a "strategy of delay"; (Complaint, pp. 8-9; Resp. Mot. Dismiss, p. 25, Ex. 12); and caused Moody Insurance Group's office lease to be terminated. (Resp. Mot. Dismiss, Ex. 5).<sup>2</sup>

Citing *Lawson v. FMR LLC*, 571 U.S. 429 (2014), Complainant pleaded that he was a covered employee because he was "a contractor hired to procure insurance applications for life insurance" for Respondent. (Compl., p. 2). Complainant subsequently amended this characterization, "Complainant pleads that he was an insurance agent selling insurance for and on behalf of Respondent *as an employee of his insurance marketing company, Moody Insurance Group*, in accordance with a 'National Marketing Organization Contract.' Under these contracts, Complainant avers that he is either a direct agent for Respondent or an employee of a contractor retained by Respondent to sell insurance. Under either scenario, he argues, he is a 'covered employee.'" (Resp. Mot. Dismiss, p. 8) (emphasis added).

### *Covered Employee*

Section 806 prohibits retaliation against a covered "employee," stating as follows:

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<sup>1</sup> The record reflects that Complainant initiated a shareholder derivative lawsuit in state court on September 23, 2017, after Respondent rejected his demands. That suit was apparently dismissed on May 16, 2018. (Complaint, pp. 4-5). Court documents reflect that the state court ordered Complainant to pay roughly \$1.3 million in Respondent's legal fees and costs relating to the suit. (Mot. Dismiss, Ex. G). In his state court filings, Complainant represented that he owned shares with a market value in excess of \$2.5 million. (*Id.* at Ex. D).

<sup>2</sup> Some of these allegations are listed in the complaint to OSHA, but not in Complainant's pleadings. However, I have included them in an abundance of caution.

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) . . . or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an *employee* in the terms and conditions of employment because of any lawful act done by the employee . . . .

18 U.S.C. § 1514A(a) (emphasis added).

Department of Labor regulations define the term “employee” for purposes of SOX as “any individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person.” 29 C.F.R. § 1980.101(g). A “covered person,” (or covered employer) in turn, is defined as “any company, including any subsidiary or affiliate . . . or any officer, employee, contractor, subcontractor, or agent of such company . . . .” 29 C.F.R. § 1980.101(f).

In *Lawson*, the United States Supreme Court addressed the issue of whether the term “employee” in Section 806 “shield[s] only those employed by the public company itself, or does it shield as well employees of privately held contractors and subcontractors—for example, investment advisors, law firms, accounting enterprises—who perform work for the public company.” *Lawson*, 571 U.S. at 433. The Court held in the affirmative regarding the latter based on the ordinary meaning of the text of 1514A and its legislative history. The defendants in that case were privately-held companies that advised and managed mutual funds. The mutual funds themselves had no employees, but contracted with the defendant companies. The plaintiffs in that case were employees of the private companies and alleged that those private companies had retaliated against them for whistleblowing. The defendants argued that SOX’s reference to “employee[s]” should be read as limited to individuals employed directly by the public company. However, the Court rejected this interpretation because it would have required the Court to implicitly insert the phrase “of a public company” after the term “employee” and would have shrunk “to insignificance” the provision’s ban on retaliation by contractors. *Id.* at 440-441.

Complainant’s reliance on *Lawson* is misplaced because it did not address the question of whether the owner of a privately-held company can also be deemed his or her own “employee” under SOX. On that issue, the parties have not cited, nor have I found, a case on point.<sup>3</sup>

However, in an analogous situation under the Energy Reorganization Act (ERA), the ARB has concluded that whistleblower protections, at least under that statute, do not extend to corporate employers. There, the plaintiff alleged that her company’s contracts were terminated due to her raising safety concerns about a nuclear plant. The plaintiff provided contract labor to the power company via her company, of which she was the president and sole shareholder. Like SOX, the ERA does not define the term “employee” with any specificity. Nonetheless, the ARB concluded that, under the circumstances, the plaintiff was not a covered employee, reasoning that she “cannot be both master and servant simultaneously.” *Demski v. Indiana Michigan Power Co.*, ARB No. 02-084, ALJ No. 2001-ERA-36, Slip op. at 16 (Apr. 9, 2004). Further, the ARB determined that the twelve *Darden* factors, which federal courts and the ARB use to distinguish whether a hired individual is an independent

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<sup>3</sup> The issue has been raised before the ARB, but it declined to address it at that time. See *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, Slip op. at n.3 (Sept. 30, 2005).

contractor or an employee, were inapplicable. *Id.* at 13 (referring to *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992)). Because the plaintiff in that case was unable to establish that she was a covered employee, her claim was dismissed. *Id.* at 8.

I similarly conclude that Complainant is not a covered “employee” within the meaning of SOX. As pleaded by Complainant, he is the owner, President, and CEO of Moody Insurance Group. Complainant provided a copy of the marketing agreement between Respondent and Moody Insurance Group, which lists Complainant as the President of Moody Insurance Group and is signed by him on behalf of Moody Insurance Group. (Resp. Mot. Dismiss, Ex. 2). Complainant also provided the contract between Respondent and himself, titled “Managing General Agent Schedule of Commissions,” which states that Complainant is “an independent contractor, and nothing in this contract shall be construed to create the relationship of principal and agent or master and servant or employer and employee.” (*Id.*, Ex. 9, ¶ 2). That agreement appears to be signed by Complainant both on behalf of Moody Insurance Group and individually as managing general agent.

Underscoring this conclusion is the fact that all of the alleged adverse actions identified by Complainant before OALJ pertain to Moody Insurance Group. For example, Complainant alleges that Respondent canceled the sales contact of one of Moody Insurance Group’s insurance agents. (Resp. Mot. Dismiss, p. 25). He alleges that the office lease of Moody Insurance Group was canceled. (*Id.*, Ex. 5, Attach. 7).<sup>4</sup> He also alleges that Respondent canceled a contract to sell one of its major products, Signature Term and Living Guaranteed Option Universal Life, and interfered with his agents’ ability to sell its other insurance products. (*Id.*, Ex. 5, Attach. 6).<sup>5</sup>

Complainant’s mere characterization of himself as an “employee” of his own company is, by itself, insufficient to raise a genuine dispute of fact. Complainant initially pleaded that he was a contractor. (Compl., p. 2). In his response to Respondent’s argument that *Lawson* was inapplicable, however, he argued that he should be considered an employee of Moody Insurance Group or Respondent’s direct agent. In any event, and most importantly, he has not disputed that he is the owner and President of Moody Insurance Group.

In reaching this conclusion, I have also considered that the purpose of SOX is to combat potential fraud and corporate crime. Arguably, it could promote that purpose to extend the term “employee” to include owners of private companies and individual contractors working for publically traded companies. However, such a broad interpretation would deviate from the traditional and ordinary meaning of “employee” and would create a substantial risk of transforming whistleblower protections into creative alternative mechanisms for business disputes and corporate litigation, which does not appear to have been Congress’ intent. Accordingly, I decline Complainant’s invitation to read the term “employee” so creatively.

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<sup>4</sup> “Attachment 7” is actually labeled “Exhibit 7” and is part of Exhibit 5 of Complainant’s response to the motion to dismiss. I have labeled it as an attachment for ease of reference.

<sup>5</sup> Complainant alleges that Respondent canceled the contract, but the notice provided by Complainant as Ex. 6 reflects that the product was offered by American National Life Insurance Company of Texas (ANTEX) and that Respondent would be offering the same product as part of a consolidation of products across all its “families” of companies.

In light of the above, the remaining issues raised in Respondent's Motion are MOOT.<sup>6</sup>

### ORDER

For the above reasons, this matter is DISMISSED. The hearing scheduled for October 29, 2019, is CANCELED.

J. ALICK HENDERSON  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (e-File) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

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<sup>6</sup> I note that Respondent asserts that this is not even a good-faith business dispute, but a long-running family quarrel. (*See* Answer, Ex. 2; Resp. Mot. Dismiss, Ex. 4). I decline the parties' invitation to opine as to Complainant's motivations or whether he had a reasonable belief that he was engaging in protected activity.

When 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 on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. See 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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(e) and 1980.110(b). 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. § 1980.110(b).