



In the Matter of:

JOSEPH EDE

ARB CASE NO. 05-053

and

**ALJ CASE NOS. 04-SOX-68
04-SOX-69**

MATTHIEU PHANTHALA,

DATE: June 27, 2007

COMPLAINANTS,

v.

THE SWATCH GROUP LTD. AND SWATCH USA,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

Daniel J. Kaiser, Esq., *Kaiser Sauborn & Mair, P.C.*, New York, New York

For the Respondents:

Michael A. Paskin, Esq., *Cravath, Swaine & Moore LLP*, New York, New York

For the Acting Assistant Secretary of Labor for Occupational Safety and Health, as Amicus Curiae:

Mark E. Papadopoulos, Esq., Ellen R. Edmond, Esq., Steven J. Mandel, Esq.,
Howard M. Radzely, Esq., *United States Department of Labor*, Washington, D.C.

FINAL DECISION AND ORDER

Joseph Ede and Matthieu Phanthala filed a complaint alleging that when their employer, the Swatch Group, terminated Ede's employment and forced Phanthala to resign, it violated section 806 of the Corporate and Criminal Fraud Accountability Act of

2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), the employee protection provision.¹ Swatch Group moved to dismiss the complaint. A United States Department of Labor Administrative Law Judge (ALJ) granted the motion. Ede and Phanthala appealed.

BACKGROUND

The Swatch Group is a Swiss corporation that manufactures, distributes, and sells watches and other products.² Its subsidiaries around the world distribute its products.³ Ede was hired on June 15, 1998, to work for a Swatch Group subsidiary.⁴ Ede began work in Switzerland, where he received six months of training, then worked in Hong Kong.⁵ He transferred to Singapore, effective on March 3, 2003.⁶ Ede was terminated from his employment with the Swatch Group subsidiary, effective on July 31, 2004.⁷

Phanthala was hired in 2001 to work for a Swatch Group subsidiary.⁸ He worked in Hong Kong. Phanthala submitted a letter of resignation on June 2, 2004.⁹ Neither Ede nor Phanthala worked for Swatch USA or for any other Swatch Group subsidiary in the United States.

On June 25, 2004, Ede and Phanthala filed this SOX complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA). Ede and Phanthala claimed that they were fired and forced to resign, respectively, for

¹ 18 U.S.C.A. § 1514A (West Supp. 2005). The SOX implementing regulations are found at 29 C.F.R. Part 1980 (2006).

² Declaration of Dr. Hanspeter Rentsch, General Counsel of the Swatch Group, para. 3; Exhibit 1.

³ *Id.* at para. 3-4.

⁴ Declaration of Edgar Geiser, Senior Vice President and Chief Financial Officer of the Swatch Group, para. 4; Exhibit 3. Ede's employment contract indicates that he resided in Azerbaijan when he was hired. Exhibit 3.

⁵ *Id.* at para. 4-5; Exhibits 3-4.

⁶ *Id.* at para. 6; Exhibit 5.

⁷ *Id.* at para. 13; Exhibit 8.

⁸ *Id.* at para. 17-18; Exhibit 11. Phanthala's employment contract indicates that he lived in Beijing, China when he was assigned to work in Hong Kong. Exhibit 11.

⁹ *Id.* at para. 18, 21; Exhibits 11-12.

complaining about fraud committed by the Swatch Group.¹⁰ OSHA dismissed their complaints. Ede and Phanthala appealed the dismissal and their complaint was referred to the Department of Labor's Office of Administrative Law Judges for a hearing.

SOX's section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV 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. Employees are also protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed relating to a violation of the aforesaid fraud statutes, SEC rules, or federal law.¹¹

As noted earlier, the Swatch Group filed a Motion to Dismiss, arguing, in part, that the SOX section 806 does not protect Ede and Phanthala because they both worked exclusively outside of the United States. Consistent with the holding of the United States District Court in *Carnero v. Boston Scientific Corp.*,¹² the ALJ concluded that the section 806 employee protections apply only to employees working within the United States. Thus, because the ALJ found that Ede and Phanthala never worked within the United States for the Swatch Group or one of its subsidiaries, he held that they are not covered employees and dismissed the complaint.¹³ Ede and Phanthala appeal.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the SOX.¹⁴ Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's findings of fact under the substantial evidence standard.¹⁵ Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate

¹⁰ *Id.*

¹¹ 18 U.S.C.A. § 1514A(a).

¹² No. 04-10031-RWZ, 2004 WL 1922132 (D. Mass. Aug. 27, 2004).

¹³ Decision and Order at 2-3.

¹⁴ Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); 29 C.F.R. § 1980.110.

¹⁵ 29 C.F.R. § 1980.110(b).

to support a conclusion.”¹⁶ But the Board reviews an ALJ’s conclusions of law de novo.¹⁷

DISCUSSION

After the ALJ’s decision and while this appeal was pending, the First Circuit Court of Appeals reviewed the district court’s *Carnero* decision. The First Circuit considered whether section 806 has extraterritorial effect and, therefore, protects foreign employees who are working outside of the United States for foreign subsidiaries of covered companies.¹⁸ Because it found that Congress “made no reference to application [of the employee protection provisions under Section 806] abroad, [but] tailored [it] to purely domestic application,” the First Circuit held that section 806 “does not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation’s borders.”¹⁹ Therefore, the court found that the district court properly dismissed Carnero’s complaint since he was a resident of foreign countries “directly employed by foreign companies operating in those countries.”²⁰

The record indicates that Ede and Phanthala worked for foreign subsidiaries of the Swatch Group in Switzerland, Hong Kong and Singapore and that they never worked for Swatch Group within the United States.²¹ They complain that they were subject to adverse actions that occurred outside the United States. The ALJ found that neither Ede nor Phanthala worked within the United States for Swatch or a subsidiary.²² Substantial evidence supports this finding, and Ede and Phanthala do not challenge it.

¹⁶ *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

¹⁷ *Cf. Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) (analogous provision of Surface Transportation Assistance Act); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991) (same).

¹⁸ *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 4, 6-7 (1st Cir. 2006), *cert. denied*, ___ U.S. ___, 126 S.Ct. 2973 (June 26, 2006).

¹⁹ 433 F. 3d at 18.

²⁰ *Id.* at 18 n.17. The court noted that it decided the case “necessarily on its own facts” and did not decide “whether Congress intended to cover an employee based in the United States who is retaliated against for whistleblowing while on a temporary assignment overseas.” *Id.*

²¹ Geiser Declaration, para. 3-6, 13, 17-18, 21; Exhibits 3-5, 8, 11, 12.

²² Decision and Order at 3.

CONCLUSION

Finding no reason to depart from the First Circuit's *Carnero* decision that SOX section 806 does not protect employees such as Ede and Phanthala who work exclusively outside the United States, we affirm the ALJ's recommendation and **DISMISS** this complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge