U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 February 2010

Case No.: 2010-SOX-00012

In the Matter of:

KAREN HUDES,
Complainant,

v.

THE INTERNATIONAL BANK FOR
RECONSTRUCTION & DEVELOPMENT,

Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

Background

This proceeding arises under 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 ("Sarbanes-Oxley" or "SOX"), and the applicable regulations issued thereunder at 29 C.F.R. Part 1980. All papers filed in the future are required to bear the appropriate caption and docket number.

On October 13, 2009, Complainant Karen Hudes filed a SOX complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent engaged in retaliation against her in violation of Section 806 of the Sarbanes-Oxley Act. Specifically, Complainant alleged that Respondent illegally discharged her from employment, refused to reinstate her employment, and barred her from Respondent's premises. OSHA dismissed as untimely the allegation that Complainant's 2007 discharge was in violation of the Act, and dismissed the remainder of the Complaint on the basis that Respondent is not a "company" within the meaning of the Act because it is neither a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 nor required to file reports under Section 15(d) of the 1934 Act. On December 10, 2009, Complainant filed a timely notice of appeal objecting to the Secretary's findings and requested a *de novo* hearing before an Administrative Law Judge ("ALJ") pursuant to 29 C.F.R. § 1980.106. The matter was docketed in this Office on December 11, 2009.

On December 17, 2009, and in light of the OSHA determinations, I issued an Order to Show Cause why the Complaint should not be dismissed for untimeliness and/or for failure to

state a claim upon which relief can be granted. Complainant timely responded to the Order. Respondent filed a letter dated February 4, 2010 which I construe to be a limited appearance to assert the defense of immunity. Complainant filed a reply to the asserted defense.

Discussion

1. *Respondent Is Not a "Company" Under the Act*

In her Complaint, Complainant conceded that Respondent is exempt from the registration and reporting requirements of the Securities and Exchange Act of 1934 ("'34 Act"). *See* Complainant's objections of December 10, 2009 at pp. 5-6. In her response to the Order to Show Cause, Complainant argues that the employee-protection provisions of the Act should apply to her circumstances "[a]s a policy matter." [Response p. 4, ¶ 8.] She additionally argues that application of the Act is required because Respondent's exemption from the registration and reporting requirements of the '34 Act was for a purpose unrelated to SOX. Further, Complainant lists a number of factors for consideration in determining whether the Act applies to Respondent, but makes no argument concerning the relevance of those factors.

The Act and its implementing regulations define a "company" subject to the Act as "any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))."[1] Under 22 U.S.C. § 286k-1, codifying the Bretton Woods agreements of 1944, Respondent is exempt from registering its securities under Section 12 of the '34 Act and from filing reports under Section 15(d) of the '34 Act. Although 22 U.S.C. § 286k-1 requires Respondent to file certain annual and other reports, that requirement is separate from and does not arise under Section 15 of the '34 Act. Accordingly, because Respondent is statutorily exempt from the registration and reporting requirements of the '34 Act, it does not meet the SOX definition of a "company."[2] Accordingly, the complaint fails to state a claim on which relief can be granted and must be dismissed.

2. *Immunity*

In its response to Complainant's submission, Respondent asserts that it is immune from a claim brought under the employee-protection provisions of SOX. I agree.

Under 22 U.S.C. § 286h, the Article VII, sections 2-9 of the Articles of Agreement that created Respondent "shall have full force and effect in the United States." Under section 6 of the Articles, "all property and assets of [Respondent] shall be free from restrictions, regulations, controls and moratoria of any nature." Additionally, under Section 8(i), Respondent's governors, executive directors, alternates, officers, and employees are immune from legal process.[3]

[1] The Securities Exchange Act of 1934 will be referred to in this Decision and Order as the "'34 Act."

[2] Although 22 U.S.C. § 286k-1 requires Respondent to file certain annual and other reports, that requirement is separate from and does not arise under Section 15 of the '34 Act.

[3] *See* http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049696~pagePK:43912~piPK:36602,00.html#I3.

In addition, Respondent is afforded the benefits of an international organization under the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288 *et seq.* *Mendaro v. World Bank*, 717 F.2d 610, 613-614 (D.C. Cir. 1983); *Morgan v. International Bank for Reconstruction and Development*, 752 F. Supp. 492, 493 (D.D.C. 1990). Under the IOIA, Respondent enjoys "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b); *Mendaro*, 717 F.2d at 613.

It is undisputed that Respondent has not waived immunity for this particular claim. The issue, then, is whether it is subject to liability by virtue of the general waiver of immunity set forth in Article VII, Section 3 of the Articles of Agreement. That Article provides:

> Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

In *Mendaro*, *supra*, the Court held that when the Section 3 waiver of immunity was read in context with Respondent's functions and the underlying purposes of international immunities, it did not operate to waive Respondent's immunity with respect to an employment-related action brought by an employee. *Id.*, 717 F.2d at 615-618. Section 3, according to the *Mendaro* court, waives immunity only with respect to actions arising from Respondent's "*external* relations with its debtors and creditors….[A] suit[] arising out of [Respondent]'s *internal* operations, such as its relationship with its own employees, would contravene the express language of Article VII section 1." *Id.* at 618 (emphases in original).

The instant matter involves the internal employment relationship between Respondent and Complainant. Claims under the Act require an employee-employer relationship between the parties. The basis of this, as any complaint contemplated by the Act, is that an employer retaliated in the terms and conditions of an employee's employment. Here, the allegations are that Respondent terminated Complainant's employment, refused to reinstate her, and barred her from entering Respondent's premises, in retaliation for her having reported certain "corporate governance irregularities." [Complainant's reply to Respondent's immunity letter, p. 2, ¶ 2.] Accepting Complainant's assertions as true, it is arguable that her reports of irregularities involved matters outside Respondent's internal operations; however, the legal bases for Complainant's claim under the Act involves Respondent's treatment of her as an employee. Those allegations do not involve external relations with Respondent's debtors or creditors, and therefore Respondent remains immune to this claim.

3. *Timeliness*

Under the statute and applicable regulations, a SOX complaint must be filed not later than 90 days after the date that an alleged violation of the Act occurs. 18 U.S.C. § 1514A(b)(2); 29 C.F.R. § 1980.103(d). Complainant's complaint is based, in part, on her having been terminated from employment in 2007. As Complainant's SOX complaint was filed on October 13, 2009, long after the 90-day period lapsed, her complaint appears to be untimely insofar as it relates to her discharge from employment. Neither Complainant nor Respondent addressed this issue in their submissions, so there appears to be no reason to apply principles of equitable tolling or equitable estoppel. Insofar as the Complaint is based on Respondent's termination from employment, it must be dismissed on the additional basis that it is time-barred.

4. *Motion for Leave to Remove to United States District Court*

In her response to my Order to Show Cause, Complainant requested leave to remove this matter to United States District Court. In support, she argues that she has filed a lawsuit related to Respondent's actions against her in the U.S. District Court for the Southern District of Maryland,[4] and it would be in the interest of judicial economy to remove this matter to federal court for the prompt resolution of all related matters. Complainant also argued that exhaustion of administrative remedies in this SOX claim would be futile and would result in irreparable harm to her professional reputation.

The procedures for filing a SOX claim in a U.S. district court are found at 29 CFR § 1980.114. As Claimant has not followed those procedures, the claim is not ripe for doing so, and there appears to be no authority for an administrative law judge to grant leave to remove otherwise, her motion must be denied.

5. *Jurisdiction*

Complainant cites to the Administrative Procedure Act, 5 U.S.C. § 554(a)(4), and suggests that the APA adjudication procedures may not apply to this proceeding because it involves matters relating to foreign affairs. She makes no argument as to the significance of that suggestion: whether it deprives me of jurisdiction, or authorizes me to conduct an adjudicative proceeding of my own design. In light of the ultimate disposition of this case, I need not, and will not, address her ambiguous reference to the APA.

Conclusion

Respondent is not a "company" within the meaning of the Act, as it does not register securities under Section 12, or file reports under Section 15, of the '34 Act. For that reason, the Complaint must be dismissed. In addition, insofar as the Complaint is based on the termination of Complainant's employment in 2007, it must be dismissed as untimely.

[4] There is no such court; it is assumed that Complainant means that she has filed in the Greenbelt Division of the U.S. District Court for the District of Maryland.

ORDER

Based on the foregoing, IT IS ORDERED:

1. That the Complaint in the above-captioned matter is DISMISSED WITH PREJUDICE; and
2. That Complainant's motion for leave to remove this matter to U.S. District Court is DENIED.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
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. 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.

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).