UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Karen Hudes, Appellant,	)	
v.	)	
	)	Case No. 11-7109
Aetna Life Insurance Co., et al.,	)	
Appellees.	)	

REPLY TO APPELLANT'S CORRECTED RESPONSE TO IBRD'S MOTION FOR SUMMARY AFFIRMANCE

Appellee International Bank for Reconstruction and Development ("IBRD" or "World Bank") has demonstrated that Appellant's claims, however framed, relate to the Bank's internal relations with its employees and are foreclosed by its immunities. It is also beyond dispute that Appellant has no claim against the Bank under Sarbanes-Oxley or Dodd-Frank as a matter of law. Further briefing and oral argument are not necessary for the Court to conclude that this case was properly dismissed.

As she has done throughout this case, Appellant offers only obfuscation and irrelevant responses to the Bank's reliance upon well-established precedent from this Court and plain statutory text. In her Response, she principally asserts: (1) that her case involves a novel bondholder claim for accurate financial

information; and (2) that there is some supposed question of relevant fact as to whether the Securities and Exchange Commission ("SEC") has revoked the Bank's statutory exemption from the securities laws. As discussed in detail below, these arguments, as well as the other convoluted theories she offers, are unavailing.

1. Appellant Brings No Claim Within the Scope of the Bank's Narrow Waiver of Immunity.

As the district court correctly found, Appellant's suit is and always has been one for wrongful termination. *See* Op. at 8. It has nothing to do with her bond ownership, as the operative facts of her complaint and requested relief make clear. Specifically, Appellant's claim rests on her allegations that the Bank "terminated [her] illegally in retaliation for reporting corruption and securities law violations," Second Amended Compl. ¶ 13 ("2d Am. Compl."), and she seeks reinstatement to a position in the Bank's Legal Department and monetary damages to compensate for this alleged retaliation and damage to her career. 2d Am. Compl. ¶ 29. These allegations are typical of the kind of employment dispute to which the Bank is completely immune because they arise "out of the Bank's *internal* operations." *See Mendaro*, 717 F.2d at 618 (emphasis in original). This action thus falls squarely within the long-established rule of this Court that the Bank has preserved its immunity against "employees' suits arising out of internal administrative grievances." *Mendaro*, 717 F.2d at 615 ("One of the most important protections granted to international organizations is immunity from suits

by employees of the organization in actions arising out of the employment relationship.").

Appellant's bondholder status does not convert her employment complaint into a securities claim over which jurisdiction might be asserted. Whether or not she owns Bank bonds, her suit does not arise out of the Bank's issuance or guarantee of bonds. Indeed, she did not even purchase the bonds until May 27, 2010, two months after commencing this action against the Bank in district court and five months after bringing her initial Sarbanes-Oxley employment retaliation complaint with the Department of Labor.[1]

Appellant argues that her case involves a "bondholder" claim to improve the Bank's purportedly deficient control over financial reporting. *E.g.*, Resp. at 2. Even if this recharacterization of her complaint were valid, it is not the type of action permitted by this Court's rule regarding waiver for "bondholder" suits. *Mendaro*, 717 F.2d at 618 (suggesting a waiver for bondholder suits because "[p]otential investors would be much less likely to acquire the Bank's own securities if they could not sue the Bank to enforce its liabilities."). The Bank has not waived immunity to lawsuits by any individual holding its bonds who seeks to question its internal administrative policies and procedures for handling employee

[1] Appellant purchased her bonds within two weeks of the Bank's filing its original motion to dismiss, which clearly laid out the Bank's immunity from employment-related suits and explained the narrow exception that has been fashioned in some cases for suits by debtors, creditors, and bondholders—an exception that has no application here.

complaints. A waiver for that type of suit plainly would not further the Bank's objectives and would expose the Bank to just as much "disruptive interference" as an employment action by someone who did not happen to own Bank bonds. *Id.*; *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1338 (D.C. Cir. 1998).

Moreover, Appellant has never alleged in any of her three complaints any facts supporting her accusation that the Bank has "report[ed] misleading financial information to [its] oversight agencies and bondholders." Resp. at 5.[2] Her issue with the Bank boils down to a disagreement about an internal programmatic performance assessment and the Bank's subsequent handling of her allegations of employment discrimination stemming from that disagreement. Resp. at 5-6. Even if her purportedly "novel" bondholder claim were not foreclosed by this Court's precedent, Appellant has plead no facts even suggesting that the circumstances of her dispute with the Bank involves some financial risk to bondholders.

In short, Appellant's mid-stream purchase of the Bank's bonds has nothing to do with her claims and does not, in any event, bring her suit within the limited waiver of immunity in cases "arising out of the Bank's *external* relations

[2] In fact, in prior briefing, she expressly states that she "does not claim securities fraud." Opp'n to Mots. to Dismiss at 19. To the extent her claim as a "bondholder entitled to accurate financial statements" is premised upon alleged violations of specific securities law provisions she identifies later in her Opposition, these claims fail as a matter of law because they do not apply to the Bank. *See infra* Section 2.

with its debtors and creditors," designed to enable the Bank to function in lending markets and commercial transactions. *Mendaro*, 717 F.2d at 618 (emphasis in original).

Appellant nonetheless contends that her case somehow "furthers the purposes and operations" of the Bank by "providing access of the Board of Executive Directors, regulators, other oversight agencies and bondholders to accurate financial information on IBRD's operations." Resp. at 12. Additionally, she claims some unspecified "entitl[ment] to accurate certifications of control over financial reporting." Resp. at 10 (citing numerous cases).[3] None of the cited cases, which all involved shareholder derivative suits or class actions, supports Appellant's purported personal "bondholder right" to accurate financial control certifications here.

The precise nature of Appellant's action is revealed by the relief that she seeks; namely, reinstatement and damages associated with her termination. 2nd Am. Compl. ¶¶ 9, 29. Appellant's complaints have all ultimately centered on internal policy issues regarding the Bank's administrative procedures for dealing

[3] While Appellant has not clearly articulated the nature of her "certification" claim, it fails even if one were to hypothesize an actual statutory basis. Potential grounds might include either Section 404 of the Sarbanes-Oxley Act requiring management assessment (and auditor attestation) of internal controls, or Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, prohibiting false registration statements. Neither of these provisions apply to the Bank based on the same statutory exemptions making the Sarbanes-Oxley whistleblower provision inapplicable. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 404, 116 Stat. 745; 15 U.S.C. § 77k.

with employee conduct, including most prominently how the Bank handles internal reports of compliance or control problems.

Even if the claimed reason for the alleged retaliation—her purported whistleblowing activity—were relevant to an analysis of the Bank's immunities, this issue itself is also a matter of the Bank's "internal administration" and thus firmly within the scope of the Bank's immunity. A waiver of immunity for such a suit would not "further[] the purposes and operations of the Bank," but instead would "lay the Bank open to disruptive interference with its employment policies in each of the thirty-six countries in which it has resident missions, and the more than 140 nations in which it could be involved in its lending and financing activities." *Mendaro*, 717 F.2d at 618. This result "would create . . . devastating administrative consequences without materially advancing its chartered objectives." *Id.* at 619. From what it is possible to discern from her pleadings thus far, her suit would result in a substantial invasion into the Bank's administrative processes, its internal justice system, and its records. This is precisely the type of burdensome judicial process the Bank's immunities were designed to avoid. As this Court has explained, the immunity of international organizations is intended to prevent national courts from becoming "entangle[d] . . . in the internal administration" of international organizations. *Broadbent v. Org. of Am. States*, 628 F.2d 27, 35 (D.C. Cir. 1980) ("Denial of immunity opens the door to divided

decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of the international bodies.").

2. Appellant States No Federal Securities Law Claims.

Confronted with the Bank's statutory exemptions from the Sarbanes-Oxley whistleblower provision, s*ee* 18 U.S.C. § 1514A(a); 22 U.S.C. § 286k-1, Appellant seeks to manufacture some disputed issue of fact by claiming that the SEC may have revoked this statutory exemption.[4] As a threshold matter, the status of the Bank's exemption is hardly a disputed factual matter as revocation would be effected by an administrative action that would be publicly released by the SEC. There has been no public notice of such an action by the SEC, and Appellant has never offered any evidence that the SEC has actually withdrawn the Bank's exemption. Even if Appellant had offered evidence to raise this "factual question," it would be legally irrelevant because Sarbanes-Oxley's whistleblower provision is not retroactive. Appellant's response to this argument is incoherent.[5] Revocation of the Bank's exemptions would affect its substantive rights and obligations and thus could not apply retroactively.

[4] Indeed, much like the evolution of her original Sarbanes-Oxley complaint into an action to protect bondholders based on her mid-case purchase of bonds, Appellant began meeting with the SEC and asserting that the Bank's exemption might be revoked only *after* the Bank explained in its first motion to dismiss that it was statutorily exempt from Sarbanes-Oxley.

[5] The effective date of the whistleblower provision is irrelevant—the statute expressly excludes entities such as the Bank from its scope. Likewise, the concurring opinion cited from *Republic National Bank of Miami v. United States* is inapposite here, as it considered the implications of legislative enactments restricting or enlarging jurisdiction. 506 U.S. 80, 100 (1992).

Appellant also makes the bewildering claim that the Bank has been subject to Sarbanes-Oxley all along because that Act, contrary to its express language, somehow covertly "repealed in part IBRD's temporary exemption from the US securities laws." Resp. at 16. The plain text of the statute refutes this. It simply makes no sense to suggest that a statute that expressly excluded from its scope entities (such as the Bank) that are exempt from the registration and reporting requirements of the Exchange Act *at the same time and silently* rescinded an exemption from those requirements provided by another statute.

With respect to the Dodd-Frank Act, Appellant's only response to the district court's multi-factor dismissal of her claim is to point to an "interview" with an SEC investigator on August 10, 2010 in order to argue she met the Act's "original information" requirement. Resp. at 22. But Appellant began providing her "information" about the Bank to the SEC and others long before this meeting. *See, e.g.*, Resp., Ex. 3. The continuation of her quest after enactment of Dodd-Frank does not solve the retroactivity problem with her Dodd-Frank claim.

Appellant does not address numerous identified flaws that are independently sufficient to defeat her Dodd-Frank claim (to the extent she has even asserted a decipherable claim under that Act). If her claim is under the "bounty program," it fails because she has not sought an award and the district court lacks jurisdiction. Op. at 14-15. If her claim is under the whistleblower protection

provision, it fails because she is not a "whistleblower" under the Act as none of her claims regarding the Bank constitute even colorable allegations of securities law violations. Pub. L. No. 111-203, § 922, Sec. 21F(a)(6), 124 Stat. 1842 (2010). As already discussed, Section 1514A does not apply to the Bank, the "Lugar-Leahy Amendment" did not impose any legal requirement on the Bank to arbitrate,[6] and Appellant's Section 1519 claim is legally and factually baseless.[7] Moreover, just like the sister provisions of Sarbanes-Oxley, the Dodd-Frank Act whistleblower protection provisions apply to employees of public companies, with limited exceptions not applicable to the Bank. *See* SEC, Final Rule, *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545 (Aug. 12, 2011) ("the retaliation protections for internal reporting afforded by Section 21F(h)(1)(A) do not broadly apply to employees of entities other than public companies.").

[6] The so-called "Lugar-Leahy Amendment" does not require external arbitration. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act, § 599B, Pub. L. No. 109-102, 119 Stat. 2172, 2241 (2005) (codified at 22 U.S.C. § 262o-4(a)). Rather, that provision merely states a policy preference to be promoted by the U.S. Executive Director at each multilateral development bank. It is entirely precatory.

[7] Not only has Appellant provided no factual support for her destruction of evidence allegation, § 1519 could not possibly apply because there is not and has not been any federal investigation here—one of the required elements of the offense. 18 U.S.C. § 1519.

CONCLUSION

In sum, this case is neither novel nor complex. There is nothing more Appellant can write or say that will aid the Court's analysis of this case. The district court reached the correct outcome and this Court should summarily affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of December 2011, a copy of the foregoing *Reply to Appellant's Corrected Response to IBRD's Motion for Summary Affirmance* was filed electronically with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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