U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

ROBERT MOODY, JR.,

COMPLAINANT,

v.

NATIONAL WESTERN LIFE INSURANCE COMPANY,

RESPONDENT.

ARB CASE NO. 2020-0014

ALJ CASE NO. 2019-SOX-00031

DATE: March 31, 2021

Appearances:

For the Complainant:
Michael B. Martin, Esq.; *Martin Walton Law Firm*, Houston, Texas; Richard A. Schwartz, Esq.; *Munsch Hardt Kopf & Harr, P.C.*; Houston, Texas

For the Respondent:
Thomas H. Wilson, Esq. and E. Philadelphia Tennant, Esq.; *Vinson & Elkins L.L.P.*; Houston, Texas; Tara Porterfield, Esq.; *Vinson & Elkins L.L.P.*; Austin, Texas

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. Robert L. Moody, Jr. (Complainant) filed a complaint under the Sarbanes-Oxley Act of 2002[1] (SOX), as amended, and its implementing regulations,[2]

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[1] 18 U.S.C. § 1514A.

[2] 29 C.F.R. Part 1980.

alleging that a public company, National Western Life Insurance Company (Respondent), retaliated against him in violation of the SOX after he complained of unlawful foreign sales activities. After an investigation, the Occupational Safety and Health Administration (OSHA) dismissed his complaint. Complainant filed objections and requested a hearing with the Office of Administrative Law Judges (OALJ). Respondent filed a Motion to Dismiss, which the ALJ converted to a Motion for Summary Judgment and then granted. We affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board his authority to act on appeal from ALJ decisions arising under the SOX and issue agency decisions in those matters.[3] In SOX cases the Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.[4]

BACKGROUND

Complainant is the owner, president, and CEO of Moody Insurance Group (MIG).[5] MIG sells insurance for and on behalf of Respondent. MIG and Respondent had entered into a marketing agreement called a "National Marketing Organization Contract and Schedule of Commission" (Marketing Contract) to sell insurance.[6] Complainant, in his personal capacity, had also entered into a contract (Agent Contract) with Respondent, as a managing general agent.[7] Complainant is a major shareholder in Respondent.[8]

In early 2017, Complainant became concerned after reading a 10-Q SEC quarterly filing indicating that Respondent had been assessed a significant administrative penalty in Brazil.[9] Obtaining the documents, Complainant informed

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[3] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[4] 29 C.F.R. §1980.110(b); *Burns v. The Upstate Nat'l Bank*, ARB No. 2017-0041, ALJ No. 2017-SOX-00010, slip op. at 2 (ARB Feb. 26, 2019) (citation omitted).

[5] Decision and Order (D. & O.) at 2

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] OALJ Complaint at 3.

Respondent's general counsel that conduct had not been fully disclosed in the 10-Q.[10] On April 17, 2017, Complainant sent a shareholder demand letter expressing his concerns.[11] On July 26, Respondent replied and disagreed with Complainant's concerns.[12]

On September 23, 2017, Complainant filed a shareholder derivative lawsuit relating to his demands, which was later dismissed.[13] After his actions, Complainant claims that Respondent retaliated against him by: (1) "cancel[ling] a major contract of [MIG]: Agent Nestor Torres, a top selling agent for" MIG (2) causing MIG "agents [to] experience difficulty in communicating with [Respondent] about the sale of its products, causing a delay and cancellation of certain sales," and (3) causing Complainant "to file a shareholder derivative suit in an attempt to secure corrective action."[14] Complainant's Agent Contract and MIG's Marketing Contract, however, were unaffected and remained "in full force and effect."[15]

On December 12, 2018, Complainant filed a complaint with OSHA, alleging that Respondent had retaliated against him for raising his concerns about the SEC filings in violation of the SOX.[16] After an investigation, OSHA dismissed the complaint, and Complainant filed objections and a request for a hearing with the OALJ on March 14, 2019.[17] On April 25, 2019, Complainant filed a formal complaint with the OALJ, in which he sought $3 million in loss of revenue from the cancellation of the Torres contract and $292,915.28 in legal fees incurred for the shareholder derivative lawsuit.[18]

On June 28, 2019, Respondent filed a Motion to Dismiss, arguing that Complainant was not a covered employee under SOX.[19] Respondent attached exhibits to the motion including a copy of the complaints filed by Complainant, the

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10 *Id.* at 4-7.
11 OALJ Complaint at Exhibit 1.
12 *Id.* at Exhibit 3.
13 D. & O. at 2.
14 OALJ Complaint at 8-9.
15 *Id.* at 8-9.
16 Secretary's Findings at 1.
17 D. & O. at 1.
18 OALJ Complaint at 1, 10.
19 D. & O. at 1.

10-Q filings, and the public filings for the derivative suit.[20] Complainant filed a response brief that included seventeen exhibits, including the contracts with Respondent and information his counsel had provided to OSHA.[21]

Because the parties both submitted and relied upon evidence outside of the pleadings, the ALJ treated the motion as one for summary decision under 29 C.F.R. § 18.72.[22] The ALJ explained that he 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.[23] The ALJ noted that it did not appear that any material facts were in dispute, at least in regards to Complainant's status as a covered employee.[24]

The ALJ noted that Complainant initially pleaded that he was a covered employee because he was a contractor hired to procure insurance applications for life insurance.[25] In the response to the motion to dismiss, however, Complainant amended the characterization to say that he was an insurance agent selling insurance on behalf of Respondent as an employee of MIG and that he is either a direct agent for Respondent or an employee of MIG retained by Respondent.[26]

The ALJ considered whether Complainant was a covered employee under the SOX.[27] The SOX prohibits retaliation against employees covered by the Act.[28] The SOX regulations define an employee 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," with a covered person, among others, being any company or agent of such company.[29] The ALJ described *Lawson v. v. FMR LLC*, 571 U.S. 429 (2014), in which the Court held that the SOX covers both employees of public companies and employees of contractors for the public companies. The ALJ held that Complainant's reliance on

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20 Respondent's Motion to Dismiss.
21 Complainant's Response to Motion to Dismiss.
22 D. & O. at 1.
23 *Id.* at 1-2.
24 *Id.* at 2.
25 *Id.*
26 *Id.*
27 *Id.* at 2-3.
28 18 U.S.C. § 1514A(a).
29 29 C.F.R. 1980.101(g).

Lawson was misplaced because it did not address whether the owner of a contractor can be his own employee under the SOX and noted that neither party found a case on point.[30]

The ALJ then discussed an analogous case under the Energy Reorganization Act (ERA), *Demski v. Indiana Michigan Power Co.*, in which the Board concluded that whistleblower protections did not extend to the owner of a company whose contracts with a power company were terminated after raising safety concerns about a nuclear plant, noting that she could not "be both master and servant simultaneously."[31] Like the SOX, the ALJ noted that the ERA does not define "employee" with any specificity.[32]

The ALJ concluded that Complainant as the owner of MIG was not a covered employee under the SOX.[33] The ALJ cited the Marketing Contract, which lists Complainant at the President of MIG and is signed by him on behalf of MIG, and the contract between himself and Respondent, which states that he is an independent contractor and establishes that he is not an employee of Respondent.[34] The ALJ underscored that all alleged adverse actions concerned MIG, not Complainant individually.[35] Further, Complainant's characterization of himself as an "employee" of his own company does not raise a genuine dispute of material fact, as he has not disputed that he is MIG's owner.[36] The ALJ therefore dismissed Complainant's complaint. Complainant filed its timely petition for review of the ALJ's decision thereafter.

DISCUSSION

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30 D. & O. at 3.

31 *Demski v. Indiana Michigan Power Co.*, ARB No. 2002-0084, ALJ No. 2001-ERA-00036, slip op. at 16 (ARB Apr. 9, 2004). The Board has held that in enacting SOX "Congress modeled the legislation on the ERA" and that "these statutes share similar statutory language, legislative intent, and broad remedial purpose" and "should be interpreted consistently." *Spinner v. Landau*, ARB No. 2010-0111, -0115, ALJ 2010-SOX-00029, slip op. at 15-16 (ARB May 31, 2012).

32 *See Spinner*, ARB No. 2010-0111, -0115, slip op. at 5.

33 D. & O. at 4.

34 *Id.*

35 *Id.*

36 *Id.*

The SOX is "a major piece of legislation" that Congress "designed to improve the quality of and transparency in financial reporting and auditing of public companies."[37] In furtherance of its objective, the SOX includes a whistleblower statute that protects employees who report violations of securities laws from retaliation.[38] Section 806 of the SOX states that no public 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 in the terms and conditions of employment because of any lawful act done by the employee."[39] To prevail on a SOX whistleblower claim, a complainant must, by a preponderance of the evidence, aver that (1) they engaged in a protected activity, (2) the respondent discriminated against the complainant in the terms and conditions of their employment, and (3) the protected activity was a contributing factor in the discrimination.[40]

Complainant must also establish that he is an employee that is covered by Section 806. SOX regulations define an employee to include an "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,"[41] with a covered person meaning any "company, including any subsidiary or affiliate . . . , or any officer, employee, contractor, subcontractor, or agent of such company."[42] The Board has interpreted these regulations to identify two bases for an employee to be covered: "coverage based simply upon being an employee (or former employee) of a named publicly traded company, or a 'contractor, subcontractor or agent' of such company" or "coverage based upon the more conventional master-servant relationship expressed as 'an individual whose employment could be affected by' a named employer."[43]

Complainant contests the ALJ's conclusion that he is not a covered employee under the SOX and argues that he could bring a whistleblower complaint against

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37 *Carnero v. Bos. Sci. Corp.*, 433 F.3d 1, 9 (1st Cir. 2006).

38 *Genberg v. Porter*, 882 F.3d 1249, 1253-54 (10th Cir. 2018).

39 18 U.S.C. § 1514A(a).

40 *See Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 9-10 (ARB May 25, 2011).

41 29 C.F.R. § 1980.101(g).

42 § 1980.101(f).

43 *Spinner v. Landau*, ARB No. 2010-0111, -0115, ALJ 2010-SOX-00029, slip op. at 16 (ARB May 31, 2012).

Respondent for its actions toward MIG. Complainant contends that he is a covered employee as an "agent" of Respondent under the regulation's broad definition of employee, as Respondent has the authority to affect his employment as an insurance agent under the Agent Contract. In support of this contention, Complainant cites the Supreme Court's decision in *Lawson v. FMR LLC*[44] and the Board's decision in *Spinner v. Landau*,[45] in which both held that employees of contractors, subcontractors, or agents of publicly traded companies are protected under the SOX, as outside contractors to public companies often facilitate the fraud the legislation intends to combat and "bear significant responsibility for reporting fraud by the public companies with whom they contract."[46]

Under these principles, Complainant argues that an agent for a public company is protected against discrimination by the public company if is functionally acting as an employee of the public company. Complainant contends that he is a "functional employee" of Respondent because he sold insurance on behalf of Respondent and acted on behalf of Respondent when he reported the alleged misconduct. Complaint cites three federal district court cases[47] in which he alleges that the "functional employee" concept is used to permit a contractor employee to bring a whistleblower claim against a public company.[48]

A critical difference between Complainant's claim and the actions in the three cases he cites, however, is that all the plaintiffs in the district court cases

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[44] *Lawson v. FMR LLC*, 571 U.S. 429, 459 (2014).

[45] *Spinner*, ARB No. 2010-0111, slip op. at 5.

[46] *Lawson*, 571 U.S. at 447-48.

[47] *Anthony v. Nw. Mut. Life Ins. Co.*, 130 F.Supp.3d 644, 652 (N.D.N.Y. 2015); *Grimm v. Best Buy Co., Inc.*, 16-CV-1258 (DWF/HB), 2017 WL 9274874, at *3 (D. Minn. Apr. 19, 2017*); Smith v. Chicago Bridge & Iron Co., N.V.*, 4:16-CV-1089, 2017 WL 2619342, at *1 (S.D. Tex. June 16, 2017).

[48] For reasons discussed *infra*, we need not to decide the validity of Complainant's alleged "functional employee" principle or whether Section 806 protects an employee of a contractor from a public company's retaliation. *See Lawson*, 571 U.S. at 441 n.7.

alleged retaliatory measures, mainly termination,[49] that "discriminated against [the plaintiff] in the terms and conditions of [their] employment," as prohibited by Section 806.[50] Here, Complaint does not allege Respondent affected the terms or conditions of his employment. Rather, Complainant alleges that Respondent cancelled the contract of an agent that works for Complainant, delayed communications with MIG agents, and caused him to file a shareholder derivative lawsuit. In fact, Complainant affirms that his employment remains unaffected, pleading that his contracts with Respondent are still "in full force and effect."

The lack of actionable retaliatory measures under the SOX is evinced in the remedies requested in the complaint. Section 806 provides that a covered employee is entitled to relief necessary to make them whole, including "reinstatement with the same seniority status that the employee would have had, but for the discrimination" and "back pay, with interest."[51] These remedies may be employed to remedy against an act that affects the terms and conditions of the complainant's employment, such as termination, demotion, or suspension. In his complaint, however, Complainant seeks compensation for what appears to be loss of revenue for his business, rather than his own employment. Relief under Section 806 also includes litigation costs,[52] but such relief may be awarded only if the litigation related to the terms and conditions of the employment.[53] Complainant's derivative lawsuit largely concerns his status as a shareholder in Respondent, not his employment as an insurance agent.

Accordingly, Complainant has failed to establish that SOX covers his claim under these unique set of facts. In order for a claim to be within the scope of the

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[49] *See Anthony*, 130 F.Supp.3d at 648 ("Plaintiff alleges that her termination was retaliatory under 18 U.S.C. § 1514A for reporting violations of SEC rules and regulations."); *Grimm*, 2017 WL 9274874, at *3 (Plaintiff lists seventeen acts allegedly committed by Defendant in retaliation for his whistleblowing activities, such as . . . withdrawal of an offer of full-time employment . . . [and] termination from employment."); *Smith*, 2017 WL 2619342, at *5 ("There is no dispute that Smith suffered an unfavorable employment action when he was terminated from his position at GSR.").

[50] 18 U.S.C. § 1514A(a). Such prohibited measures include discharge, demotion, suspension, threats, and harassment. *Id.*

[51] § 1514A(c)(2).

[52] § 1514A(c)(2)(C).

[53] *See Farnham v. Int'l Mfg. Sols.*, ARB No. 2007-0095, ALJ No. 2006-SOX-00111, slip op. at 10 (ARB Feb. 6, 2009).

SOX whistleblower statute, a complainant must allege that a covered employer discriminated against them in the terms and conditions of their employment because they engaged in activity protected by the SOX. Here, Complainant's claim is not within the scope of the SOX because he in effect brought this claim on behalf of his company, rather than on behalf of himself as an employee. As noted by the ALJ, Congress did not intend for Section 806 to be used as "creative alternative mechanisms for business disputes and corporate litigation."[54] We therefore affirm the ALJ's conclusion that Complainant is not a covered employee under the SOX.[55]

Complainant further contests the ALJ's decision by arguing that Respondent's Motion to Dismiss was improperly converted to one for Summary Decision after the parties attached additional evidence to their briefings. An ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed," viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."[56]

Complainant first claims that an ALJ commits error when it converts a motion to dismiss to a summary decision by considering evidence outside the pleadings. The case Complainant cites in support of this contention, however, states the opposite: "the district court erred when it considered evidence outside the pleadings—and not referred to therein—without converting the motion to dismiss into a motion for summary judgment."[57] Indeed, the Board regularly affirms ALJ

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[54] D. & O. at 4.

[55] In the alternative, Complainant claims that he is an employee of a contractor and therefore a covered employee. Complainant also argues that the ALJ nonetheless improperly relied on *Demski v. Indiana Michigan Power Co.* to hold that an owner cannot be a covered employee. We need not address these arguments, however, because regardless of Complainant's status, either as agent of Respondent, employee of MIG, or owner of MIG, Complainant still has not brought a claim regarding actions that discriminated against the terms and conditions of his employment.

[56] We review decisions to grant summary decision de novo. *Reddy v. Medquist, Inc.*, ARB No. 2004-0123, ALJ No. 2004-SOX-00035, slip op. at 4 (ARB Sept. 30, 2005).

[57] *Brand Coupon Network, LLC v. Catalina Mktg. Corp.*, 748 F.3d 631, 635 (5th Cir. 2014).

decisions that treat motions to dismiss as motions for summary decision when the ALJ considers evidence outside of the pleadings.[58]

Complainant next argues that dismissal of the complaint was not appropriate because SOX claims "are rarely suited for Rule 12 dismissals" and "ALJs should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint."[59] The Board has held in *Sylvester v. Parexel* that an ALJ should not apply the heightened pleading standards used in federal court because "SOX complainants would have to be mindful of these pleading requirements when they file a written statement with OSHA, knowing that their original complaint will be forwarded to an ALJ if a hearing is requested."[60]

The Board's concern in *Sylvester*, holding an informal complaint made by the complainant to begin an OSHA investigation to the same standard as a formal complaint made during litigation, however, does not apply in this case.[61] Here, the ALJ considered the complaint filed by counsel before the ALJ, not the complaint filed with OSHA to initiate an investigation. Complainant's counsel amended the original complaint to OSHA and then supplemented it with several exhibits through

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[58] *See Rowland v. Prudential Equity Grp., LLC*, ARB No. 2008-0108, ALJ No. 2008-SOX-00004, slip op. at 4 (ARB Jan. 13, 2010) ("Because the parties submitted evidence outside the pleadings with regard to Prudential's Motion to Dismiss, we will treat Prudential's motion as one for summary decision under 29 C.F.R. Part 18.40."); *Reddy*, ARB No. 2004-0123, slip op. at 4 ("Because the ALJ considered evidence outside the pleadings in deciding [the] Motion to Dismiss, the Board treats the motion as one for summary decision under 29 C.F.R. §18.40.").

[59] *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042 (ARB May 25, 2011).

[60] *Id.* at 13; *see also Evans v. US EPA*, ARB No. 2008-0059, ALJ No. 2008-CAA-00003 (ARB July 31, 2012) ("We observed that the *Twombly* and *Iqbal* decisions involved cases in which the filing requirements were different from the procedures governing SOX claims, and that applying those cases would require a complainant to submit the equivalent of a federal court complaint when he initiates contact with OSHA.").

[61] In *Sylvester*, the complainants filed retaliation claims with OSHA and sought review of OSHA's dismissal of their complaints, which the ALJ dismissed upon the respondent's motion. ARB No. 2007-0123, slip op. at 6-7. The Board also said dismissals were rarely inappropriate for SOX claims because "they involve inherently factual issues such as 'reasonable belief' and issues of 'motive.'" *Id.* at 13. Such factual issues are not present here.

the briefing on the Motion to Dismiss.[62] "An expanded complaint" that is "filed by counsel directly with the" ALJ "should be able to state a claim upon which relief can be granted without unwarranted presumptions and pass muster when subjected to the scrutiny applied to any other complaint."[63]

Moreover, Complainant fails to articulate how he would have avoided dismissal or summary decision of his complaint if the ALJ had not converted the motion or gave him an opportunity to amend his complaint. Complainant had already submitted additional evidence to support his contentions, which the ALJ explicitly considered in the decision.[64] Complainant claims he would have offered even more evidence or presented his arguments differently if he knew that he was being held to a summary decision standard but fails to articulate what evidence or how he would have argued otherwise.[65]

Complainant, however, clearly demonstrates in his briefings and complaint that his employment has not been affected by Respondent. Complainant had pled that the contracts between Respondent and himself, which he attached to the briefings, remain in effect,[66] and Respondent does not dispute any material facts presented by Complainant concerning the alleged adverse actions. It is difficult to imagine how Complainant could have avoided the result below. Thus, the ALJ did not commit any reversible error when dismissing the complaint.

CONCLUSION

For the above reasons, we **AFFIRM** the ALJ's order granting Respondent's Motion to Dismiss.

SO ORDERED.

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[62] D. & O. at 2, 4.

[63] *Solomon v. Cigna*, ALJ No. 2019-SOX-00055, slip op. at 3 (OALJ Nov. 26, 2019).

[64] D. & O. at 4.

[65] *See Lewandowski v. Viacom Inc.*, ARB No. 2008-0026, ALJ No. 2007-SOX-00088, slip op. at 11 (ARB Oct. 30, 2009).

[66] In considering a motion to dismiss for failure to state a claim, a complainant's factual allegations are accepted as true and all reasonable inferences are drawn in their favor. *Gallas v. The Med. Ctr. of Aurora*, ARB Nos. 2015-0076, 2016-0012, ALJ Nos. 2015-ACA-00005, 2015-SOX-00013, slip op. at 2 (ARB Apr. 28, 2017).