



Issue Date: 23 February 2016

CASE NO.: 2014-CFP-00002
2014-AIR-00003 [related case]
2014-SOX-00016 [related case]¹

In the Matter of:

PAUL SIMKUS
Complainant,

v.

UNITED AIRLINES, INC.,
Respondent.

FINAL ORDER OF DISMISSAL

An Order to Show Cause was issued in the instant case, which was brought under the employee protection provisions of the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“CFP”), 12 U.S.C. § 5567. (“Dodd-Frank Complaint”). That Show Cause Order, which allowed the parties 30 days to respond, was issued as part of the “Decision and Order Granting Respondent’s Motion for Summary Judgment and Dismissing Case No. 2012-SOX-00016 and Order to Show Cause” (“Decision and Order”) of January 11, 2016, which is incorporated by reference herein. As the only response submitted was by the Respondent (“United”) in support of the dismissal of the complaint, and as dismissal is mandated under the undisputed facts, based upon the reasoning set forth in the Decision and Order, this case is being dismissed.

Procedural Background

The Dodd-Frank matter was docketed on November 18, 2013. On January 27, 2014, this case, along with Case Nos. 2012-SOX-00016 and 2014-AIR-00003 were consolidated for hearing purposes. On January 11, 2016, the undersigned issued a Decision and Order Granting Respondent’s Motion for Summary Judgment and Dismissing Complaint in Case No. 2012-SOX-00016 and an Order to Show Cause. In the Decision and Order, I found that the Complainant failed to establish that he engaged in any SOX-protected activity or that any

¹ These three cases were consolidated for hearing purposes. The complaint in Case No. 2012-SOX-00016 was previously dismissed and Case No. 2014-AIR-00003 is being dismissed contemporaneously with this dismissal. Inasmuch as Case No. 2012-SOX-00016 has been dismissed, the dismissals in the two remaining cases are being issued separately, even though they are based on the same evidentiary record.

adverse action was taken against him. The Show Cause Order ordered, inter alia, that within thirty (30) days of the date of the Order, the parties show cause, if there is any, or otherwise address the issue of whether Case No. 2014-CFP-00002 should be dismissed, as it involves the same alleged protected activities that were found to lack merit in Case. No. 2012-SOX-00016.

Respondent timely submitted its Memorandum Supporting Dismissal of Complainant's Dodd-Frank Complaint on February 10, 2016. The Complainant did not file a response and the period of time for filing a response has elapsed.

Facts

Case No. 2014-CFP-00002, which arises out of SOX, as well as CFPA, involves a February 12, 2013 email complaint, entitled "Dodd-Frank Complaint" (following up on January 25, 2013 telephone conversation), that was found to lack merit by OSHA on October 22, 2013. A different claimed retaliatory action than that in Case No. 2012-SOX-00016 is involved (in addition to reiteration of previous actions), specifically the treatment of Complainant's LTD (long term disability claim) in December 2011 and subsequently, his being placed on EIS [Extended Illness Status] on September 13, 2013. OSHA found the adverse actions that occurred more than 180 days prior to the filing of the complaint to be time barred and, with respect to the September 13, 2013 placement on EIS, to have resulted from Complainant's own actions. Complainant alleged essentially the same protected activity as in the OSHA case (e.g., reporting of asbestos and infrastructure defects), expanding on his SOX violation allegations, along with an allegation relating to retaliation for participation in the prior SOX cases similar to that alleged in his prior case.

Discussion

As discussed in my Decision and Order, I found, in relevant part, that Complainant failed to establish that he engaged in any SOX-protected activity when he: (1) reported asbestos in 2007, 2008, and 2009, but failed to present any evidence that at the time of these reports he actually believed that United was violating one of the laws listed in Section 1514 or the SEC rules, or that such belief was objectively reasonable; (2) allegedly made complaints about vendor procurement fraud, network outages, falsification of documents, and embezzlement, but failed to set forth specific facts that he engaged in such protected activity; (3) reported inaccurate stock distributions, but failed to put forth any evidence indicating the basis for his belief that the stock distribution was inaccurate or how the receipt of the distribution constituted any type of fraud under SOX; and (4) filed two SEC complaints, but failed to allege any type of fraud or violations of SEC rules and/or federal laws relating to fraud against shareholders in those complaints. (Decision and Order at 16-22). Additionally, I found that Complainant's placement on EIS [Extended Illness Status] on January 17, 2011 and delayed receipt of 72 hours of vacation pay did not constitute an adverse action as those actions were trivial (as any errors were promptly corrected when reported) and a result of the neutral application of Respondent's usual procedures regarding the accrual of more than sixteen (16) consecutive un-approved absences, coupled with Complainant's own admitted un-approved absences. *Id.* at 22-24.

In Respondent's Memorandum Supporting Dismissal of Complainant's Paul Simkus's Dodd-Frank Complaint ("Resp. Dodd-Frank Memo."), Respondent argued that the actions which Simkus claims were protected in this matter are indistinguishable from those that were at issue in the SOX claim. (Resp. Dodd-Frank Memo. at 3). Thus, Respondent contends that the outcome can be no different in the Dodd-Frank claim, particularly as to the SOX-related component. *Id.* Respondent further asserts that nothing in Simkus' alleged complaints implicate mail, wire, bank, securities or other shareholder fraud covered by SOX, nor can Simkus establish that he had a subjective or objectively reasonable belief that he was engaging in any SOX-protected activity. *Id.* Accordingly, Respondent asserts that there is no utility in re-hashing discovery over the same allegations of protected activity which plainly do not implicate SOX or the CFPA as a matter of law and therefore this tribunal should dismiss Simkus's complaints. (Resp. Dodd-Frank Memo. at 4). I agree.

In view of the above, I find that Complainant's Case No. 2014-CFP-00002 should be dismissed as it involves essentially the same alleged protected activities as were found to lack merit in Case No. 2012-SOX-00016.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 2014-CFP-00002 be, and hereby is **DISMISSED WITH PREJUDICE**.

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

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 (eFile) 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).

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).