



Issue Date: 17 September 2007

Case No.: 2007 SOX 55

In the Matter of

HUNTER R. LEVI

Complainant

v.

ANHEUSER BUSCH COMPANIES, INC.

Respondent

Appearances: Mr. Hunter R. Levi
Pro se

Ms. Sabrina M. Wrenn, Attorney
Mr. Joseph J. Torres, Attorney
For the Respondent¹

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**INITIAL DECISION AND ORDER –
DISMISSAL OF COMPLAINT**

On June 1, 2007, I was assigned to conduct a hearing and render a decision in this case based on the Complainant's May 23, 2007 objection to the Regional Administrator's April 27, 2007 dismissal of his third complaint under § 806 of the Sarbanes-Oxley Act of 2002 (Public Law 107-204), 18 U.S.C. § 1514A ("Act" or "SOX"), as implemented by 29 C.F.R. Part 1980. On June 13, 2007, based on the nature and content of the third complaint, and prior to setting a hearing date, I issued a Show Cause Order to provide the parties an opportunity to show cause whether Mr. Levi's third SOX complaint should be dismissed as untimely and duplicative.

Background

First SOX Complaint – 2006 SOX 37 ("*Levi I*")

From September 2002 through the spring of 2003, Mr. Levi sent letters to the Secretary, U.S. Department of Labor ("Secretary"), and several other federal agencies and congressional members claiming the Respondent retaliated against him due to numerous expressed concerns including financial mismanagement and executive compensation manipulation. On August 6,

¹On August 20, 2007, I received counsels' formal note of appearance in this case.

2003, following an arbitration proceeding, the Respondent terminated Mr. Levi's employment. On November 19, 2004, Mr. Levi sent a letter to the Secretary, asking her "if my complaints directed to your department were ever filed for whistleblower protection under Sarbanes-Oxley."

On December 16, 2005, upon investigation of Mr. Levi's correspondence to the Secretary, the Regional Administrator, Occupational Safety and Health Administration ("OSHA"), dismissed Mr. Levi's complaint as untimely since it was not filed within 90 days of the adverse personnel action.

Following Mr. Levi's objection, his complaint was forwarded to the Office of Administrative Law Judges ("OALJ") for a hearing. On May 3, 2006, I granted the Respondent's Motion to Dismiss Mr. Levi's complaint as untimely. A few days later, Mr. Levi requested reconsideration. Among the stated reasons for relief, Mr. Levi asserted that the Respondents lied in the proceeding before me. On May 17, 2006, I denied his reconsideration request. Concerning the purported misrepresentations, I noted that my resolution of the timeliness of his SOX complaint did not require any determinations of the parties' veracity.

On July 4, 2006, Mr. Levi appealed my adverse determination to the Administrative Review Board ("ARB"). The appeal is still pending.

Second SOX Complaint – 2006 SOX 108 ("Levi II")

On May 23, 2006, Mr. Levi filed a second SOX complaint asserting in part that the Respondent's lies and misrepresentations in the first SOX complaint proceeding constituted an additional SOX violation.

Eventually, the second SOX complaint was forwarded to OALJ and assigned to Administrative Law Judge Daniel Solomon. Following Respondent's August 25, 2006 Motion to Dismiss, Judge Solomon conducted a telephone conference call with the parties on September 8, 2006. During that conference, Mr. Levi explained that the actionable false statements submitted with the intention to stop further investigation and which serve as the basis for his second SOX complaint were contained in the Motion to Dismiss presented by Respondent's counsel in the first SOX proceeding. On October 11, 2006, in a supplemental pleading, Mr. Levi also alleged that Respondent's counsel made a false statement to Judge Solomon in the conference call. On October 18, 2006, Judge Solomon dismissed Mr. Levi's second SOX complaint in part because Mr. Levi failed to establish the alleged misrepresentations had been used as evidence in the first or second proceeding. He also observed that Mr. Levi's accusations in that regard were also part of the pending appeal in the first action.

Mr. Levi subsequently appealed Judge Solomon's decision to the ARB. The appeal is pending.

Third and Present Complaint – 2007 SOX 55 (“Levi III”)

In correspondence to the Secretary on December 1 and December 13, 2006, and January 18 and February 5, 2007, Mr. Levi presented numerous allegations. On April 27, 2007, in his dismissal of Mr. Levi’s third SOX complaint, the OSHA Regional Administrator identified three specific allegations. First, Mr. Levi asserted Respondent’s counsel made false statements to administrative law judges during the prior proceedings. Second, Respondent’s employment records for Mr. Levi incorrectly state that he was fired in 2003 for misconduct thereby resulting in blacklisting. Third, the Respondents caused Aerotek Company not to rehire Mr. Levi in October 2005.

On July 9, 2007, following my issuance of the Show Cause Order, I denied Mr. Levi’s request that I recuse myself from this complaint. In the same order, I also issued a revised schedule for the show cause submissions. On July 9, 2007, I received the Respondent’s response. On July 16, 2007, July 27, 2007 and August 9, 2007, I received Mr. Levi’s responses. On August 20, 2007, I received Respondent’s reply in support of its position. On August 27, 2007, I received Mr. Levi’s additional response.²

Parties’ Positions

Respondent

Mr. Levi’s third SOX complaint should be dismissed because it is untimely and without merit. Additionally, several matters in the third complaints are barred under res judicata and collateral estoppel because they are subsumed in Mr. Levi’s first two SOX complaints, *Levi I* and *Levi II*.

Mr. Levi’s present complaint that the Respondent falsely stated that he was terminated for misconduct in 2003 is both without merit and untimely. The Complainant is well aware that the Respondent’s discharge of his employment for just cause was upheld in an arbitration award. Additionally, since the circumstances surrounding his discharge and its characterization arose in excess of 90 days from the filing of his present complaint, this portion of the complaint is untimely. The Respondent’s decision not to contest Mr. Levi’s unemployment claim on appeal does not alter the arbitration award determination that Mr. Levi was discharged for cause. Further, contrary to Mr. Levi’s assertion, the state agency only concluded Mr. Levi was not disqualified for unemployment benefits and did not conclude the Respondent’s claim that Mr. Levi was fired for misconduct was false. Finally, state law prohibits the use of unemployment benefit hearing findings in other venues.

Mr. Levi’s complaint that the Respondent caused Aerotek not to rehire him in October 2005 is also untimely since more than 90 days has passed between October 2005 and the date he filed his third SOX complaint. To the extent Mr. Levi’s allegation may be considered as a charge of blacklisting, that type of complaint was already presented in *Levi II*.

²In an August 28, 2007 letter, Mr. Levi corrected one word in this response.

In his present complaint, Mr. Levi “recycles” allegations he made in the prior proceedings which are pending appeal that Respondent’s counsel made false statements to interfere with his SOX complaints. Additionally, in his response to the show cause order, by alleging the false statements in *Levi II* were made during the September 6, 2006 telephone hearing, Mr. Levi has effectively established the duplicative nature of his complaint regarding the false statements, which were addressed by Judge Solomon in his *Levi II* decision. Finally, as noted by Judge Solomon in *Levi II*, attorney statements are not evidence in SOX proceedings.

Complainant

The Respondent’s claim of repetitious litigation is not a sufficient basis to dismiss the present claim since an administrative law judge must provide a *de novo* hearing and is not bound by OSHA determinations and prior proceedings.

Although Respondent’s counsel claims attorney statement are not evidence, in *Levi II*, Respondent’s counsel made false statements on the record during an administrative law judge hearing. Specifically, during the September 8, 2006 telephone hearing, the administrative law judge indicated the parties’ statements were on the record and under oath. A significant difference exists between written pleadings and a “statement made on the record, under oath, and in-person.” As recent events demonstrate, a false statement which obstructs a federal investigation is a serious matter. False statements under oath are more than just vigorous pleadings and represent a serious, criminal, and federal offense. The four false statement made by Respondent’s counsel during the September 8, 2006 form the “core” of the present SOX complaint. Three of those false statements were “uncovered” in December 2006 when Mr. Levi received a copy of the September 8, 2006 hearing transcript.

Additionally, the false statement allegation in *Levi II* related to Respondent’s counsel’s false statements in the *Levi I* pleadings. Whereas, the present complaint, *Levi III*, relates to the four retaliatory false statements made by counsel in the September 8, 2006 telephone hearing. Only one of those false statements was “uncovered” before *Levi II* was dismissed by the administrative law judge and none of the false statements were addressed in *Levi II*.

Mr. Levi’s complaint about the characterization of his work record is not untimely since he only became aware of the issue during the September 8, 2006 telephone hearing. During that proceeding, when the 2003 characterization of Mr. Levi’s discharge was discussed, Mr. Levi noted that the during the unemployment appeal process the state agency determined the Respondent’s representation that Mr. Levi had been fired for misconduct was not credible since the company did not appear at the appeal hearing. In response, Respondent’s counsel, acting as the company’s agent, stated that the Respondent did not attend the state appeal hearing because it wanted Mr. Levi to get unemployment benefits. Yet, up to that point, the Respondent had contested his unemployment claim. If Respondent’s counsel’s statement to the administrative law judge is correct, then it represents: a) “spontaneous admission of guilt of falsifying my work record since 2003,” and b) blacklisting. If Respondent’s counsel statement is false, it should be reported as a violation since it was under oath. Additionally, federal SOX proceedings are not bound by state law that may preclude the use of unemployment benefit hearing findings.

Based on the following summarization, Mr. Levi believes that his complaint regarding Aerotek should not be dismissed as untimely. In February 2005, due to a change in a temporary labor provider, Mr. Levi began working for Aerotek. In June 2005, Mr. Levi informed his supervisor that he may be moving to Kansas City. The supervisor responded that Aerotek had multiple locations in that city and asked Mr. Levi to provide his resume before leaving so he could set things up. At the beginning of October 2005, Mr. Levi mailed his resume, which included his work at Anheuser Busch,³ to his supervisor and moved to Kansas on October 15, 2005. A few days later, in a telephone conversation, his former supervisor asked Mr. Levi if he had been contacted yet. Mr. Levi gave a negative response and the supervisor indicated that he would take care of it and contact Mr. Levi. Subsequently, when Mr. Levi heard nothing else from Aerotek, he filed for unemployment. Aerotek contested his unemployment claim on the basis that he quit. When the claim was denied, Mr. Levi appealed. During that process, Aerotek claimed his submission of the resume prior to leaving for Kansas City amounted to a two week notice of quitting. The state agency denied his unemployment claim and Mr. Levi was unsuccessful through two additional appeal levels. Under these circumstances, despite repeated efforts by Mr. Levi to obtain information from the company, Aerotek has not presented any “conveyance of an adverse action by the employer.” Consequently, his complaint regarding Aerotek is not untimely.

Mr. Levi also believes that if Aerotek contacted the Respondent about his work record, the contact person would have been under the direction of the human resource manager who led the retaliation efforts against Mr. Levi, committed perjury during the 2003 arbitration hearings, and did not attend his unemployment appeal hearing to present testimony under oath.

In summary, after an extensive review of the Respondent’s purported fraudulent intent and conduct for several years, and their personnel actions against him, Mr. Levi asks that I not ignore the Respondent’s “guilt in an over \$30 billion fraud on their shareholders, and their retaliation against him for bringing it to light.”

Discussion

As set out in the Show Cause Order, Mr. Levi’s present complaint essentially contains three complaints: 1) false statements by Respondent’s counsel in prior SOX proceedings to Mr. Levi’s detriment, 2) Respondent’s retaliatory interference with Mr. Levi’s re-employment by Aerotek, and 3) Respondent’s incorrect characterization of his personnel record by indicating he was discharged for misconduct resulting in blacklisting.

1. False Statements by Respondent’s Counsel

As presented by Mr. Levi in his response to the Show Cause Order, he alleges that four false statements were made by Respondent’s counsel under oath in the September 2006 telephone hearing, only one of which concerning the employment record was brought to Judge Solomon’s attention prior to the dismissal of *Levi II*. Upon consideration of the parties’ presentations and review of the September 8, 2006 telephone conference transcript and Judge

³According to Mr. Levi, no one at Aerotek knew he worked for Anheuser Busch for 24 years until he sent his Aerotek supervisor his resume in October 2005.

Solomon's October 18, 2006 dismissal order in *Levi II*, I find two basis for dismissal of these allegations in the present complaint.

As a preliminary matter, and a significant point, contrary to Mr. Levi's representation, none of the participants in the September 8, 2006 telephone conference call were placed under oath. Judge Solomon specifically advised Mr. Levi that his statements were not under oath.⁴ Additionally, Judge Solomon did not place either Mr. Torres or Ms. Wrenn under oath. Consequently, no sworn testimony was presented to Judge Solomon on September 8, 2006.

The first reason the present allegation should be dismissed is that it was already presented to Judge Solomon in *Levi II* and consequently is a duplicative complaint. In his October 18, 2006 dismissal of *Levi II*, Judge Solomon noted Mr. Levi's October 11, 2006 supplemental allegation that the Respondent's lawyers provided false information during the September 8, 2006 telephone conference. Although Mr. Levi indicates that he identified three false statements upon review of the transcript several months after the telephone conference, Mr. Levi was an active participant in the September 8, 2006 conference call and had ample opportunity to specify all the alleged falsehoods at that time. Additionally, Judge Solomon gave Mr. Levi 30 days after the telephone conference to provide information regarding his complaint and identify separate actions.⁵ Subsequently, absent any definitive specificity, Judge Solomon dismissed Mr. Levi's allegations of lying and perjury by Respondent's counsel. Judge Solomon's dismissal of that false attorney statement complaint is pending appeal with the ARB.

As raised by the Respondent in the Show Cause Order responses and heartedly contested by Mr. Levi in his response, a second basis exists for dismissing Mr. Levi's present complaint that Respondent's counsel made false statements during the September 8, 2006 telephone conference in *Levi II*.

It is well established that the statements of an attorney before a court are not evidence; they are argument. *See, e.g., Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 593 n.4 (9th Cir. 2002) (arguments and statements of counsel "are not evidence and do not create material issues of fact"); *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 252 (3d Cir. 1999) (statement of counsel in briefs or allegations are not evidence); *Powell v. COBE Labs., Inc.*, 208 F.3d 227 (10th Cir. 2000); *Peoples v. Brigadier Homes, Inc.*, 87 STA 30 (Sec'y June 16, 1988).⁶ In turn, since administrative law judge determinations are based on evidence not argument, counsel's statements during a SOX proceeding will not form the basis for a decision that may be adverse to a complainant. Accordingly, purportedly false statements by a respondent's counsel do not constitute a SOX cause of action and Mr. Levi's allegation to that effect is dismissed.

⁴September 8, 2006 telephone conference transcript ("TR"), p.6.

⁵TR, p.24 and 26.

⁶During the September 8, 2006 telephone conference, when Mr. Levi asserted Respondent's counsel's declaration in *Levi I* was actionable, Judge Solomon advised him that "whatever [Mr. Torres] says is just mere argument." TR, p.15 and 19-20.

2. Respondent's Retaliatory Interference with Re-employment

The principal issue regarding the second portion of Mr. Levi's complaint is whether his allegation of the Respondent's retaliatory interference with his re-employment with Aerotek is untimely.

Under 18 U.S.C. § 1514A(b)(2)(D), to invoke the SOX employee protection provisions, a complainant must file his allegation of a violation of the SOX whistleblower protections not later than 90 days on which the violations occurs. Title 29, C.F.R. § 1980.103(d) indicates the time filing requirement starts when the discriminatory decision is both made and communicated to the complainant. Absent any equitable relief, failure to meet the statutory filing deadline precludes consideration of the SOX complaint. *See Roberts v. Rivas Environmental Consultants, Inc.*, 96 CER 1 (ARB Sept. 17, 1997), slip op. at 3-4.

Turning to Mr. Levi's SOX complaint of the Respondent's retaliatory interference with his re-employment at Aerotek, the adverse effect on his employment condition occurred when Aerotek did not rehire Mr. Levi as he expected based on his former supervisor's assurances after he moved to Kansas City in mid October 2005. In response to that adverse change in his employment situation, Mr. Levi filed for unemployment benefits and was informed when Aerotek contested his entitlement that the company maintained he had quit.⁷ Those circumstances in later 2005 regarding the adverse change in his employment opportunity with Aerotek in which Mr. Levi became aware Aerotek did not rehire him and believed he quit form the foundation for his discriminatory retaliation complaint against the Respondent and serve as the initiation point for the 90 day statute of limitations period for filing a SOX discrimination complaint. However, since Mr. Levi did not allege the Respondent's interference with his re-employment with Aerotek until his correspondence in December 2006, this portion of his SOX complaint is untimely under the Act and 29 C.F.R. § 1980.103(d).

Since the time filing requirement in SOX, 18 U.S.C. § 1514A(b)(2)(D) is set out as a statute of limitations, the principle of equitable tolling applies. *See School District of City of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981); *Lastre v. Veterans Administration Lakeside Medical Center*, 87 ERA 42 (Sec'y Mar. 31, 1988), slip op. at 2-4. Generally, tolling of the statute of limitations filing requirement may be appropriate if: a) the respondent misled the complainant as to the cause of action, or b) the respondent prevented the complainant from presenting a timely complaint.⁸ *Lahoti v. Brown & Root*, 90 ERA 3 (Sec'y Oct 26, 1992). Considering a case where the complainant sought equitable tolling on the basis the respondent's unlawful motivation was withheld, the Administrative Review Board ("ARB") concluded in *Halpern v. XL Capital Ltd.*, ARB Case No. 04-120 (ARB Aug. 31, 2005) that equitable tolling was not warranted. According to the ARB, neither the Act nor the implementing regulations "indicate that a complainant must acquire evidence of retaliatory motive before proceeding with

⁷In a November 16, 2006 letter to the CEO of Aerotek, Mr. Levi characterized these circumstances as "my October 2005 termination from Aerotek."

⁸The third basis of equitable relief – complainant timely filed the exact type of claim in the wrong forum – is not applicable in this case.

a complaint.” *Halpern*, slip op. 5. Consequently, the complainant’s failure to acquire evidence of the Respondent’s retaliatory motivation for its discriminatory conduct did not affect the complainant’s “rights or responsibilities for initiating a complaint” pursuant to SOX. *Id.* See also *Oshiver v. Levin Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) (“[A] claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong.”).

Turning to an equitable waiver of the untimeliness of Mr. Levi’s complaint, I have considered Mr. Levi’s implicit representation that he was not aware in late 2005 of the Respondent’s alleged involvement in Aerotek’s decision not to rehire him.⁹ However, Mr. Levi’s awareness of whether any specific discriminatory motive by the Respondent contributed to Aerotek’s decision not to rehire him in October 2005 was not a prerequisite for the start of the SOX 90 day complaint filing timer. Accordingly, equitable waiver to the 90 day complaint filing requirement is not warranted in this case.

Incorrect Employment Record/Blacklisting

The third part of Mr. Levi’s present complaint is an allegation that the Respondent’s employment records incorrectly indicate that he was discharged for misconduct which caused blacklisting. For two reasons, dismissal of this portion of the Mr. Levi’s complaint is warranted.

First, the events, arbitration determination, and state unemployment proceedings associated with Respondent’s employment record characterization of Mr. Levi’s discharge from the company for misconduct occurred in 2003 – 2005. As a result, Mr. Levi’s use of that employment termination characterization as part of a SOX cause of action in late 2006 and 2007 is well outside the 90 day window that SOX provides for the filing of complaints. Accordingly, this allegation must be dismissed as untimely.

Second, review of the transcript for the September 8, 2006 telephone conference with Judge Solomon and Judge Solomon’s October 18, 2006 dismissal order establishes that this allegation is duplicative of the claim Mr. Levi raised before Judge Solomon in *Levi II*. During the September 8, 2006 telephone conference, following a discussion on whether a state agency’s determination affected the Respondent’s characterization of his employment termination, and in response to a specific question by Judge Solomon, Mr. Levi stated: “I’m alleging blacklisting.”¹⁰ In light of that allegation, as previously noted, Judge Solomon gave Mr. Levi 30 days to provide additional information concerning his complaint. Subsequently, in the absence of any sufficient evidence, Judge Solomon dismissed the blacklisting complaint in *Levi II*.¹¹ The dismissal of the

⁹In one of his responses to the Show Cause Order, Mr. Levi stated: “I have no idea if anyone from Aerotek or Allegis [Aerotek’s parent company] contacted AB [Anheuser Busch Companies, Inc.] in 2005, 2006, or 2007.”

¹⁰TR, p.16, 17, and 28.

¹¹In dismissing the blacklisting complaint, Judge Solomon observed that a complainant’s subjective belief toward an employer’s action are insufficient to establish that any actual blacklisting took place. See also *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056 and 02-059, 2001 CAA 18, slip op. at 8-9 (ARB Nov. 28, 2003).

blacklisting complaint is currently before the ARB on appeal, and therefore note properly before this office for review.

ORDER¹²

Accordingly, the present SOX complaint of Mr. HUNTER R. LEVI is **DISMISSED**.

SO ORDERED:

A
RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: September 17, 2007
Washington, D.C.

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, Room S-4309, 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).

¹²Since I dismissed Mr. Levi’s complaint, I have not addressed his requests to: a) add Aerotek and its parent company, Allegis Group, as respondents; b) send investigative referrals to the U.S. Department of Justice, Federal Bureau of Investigation, the Securities Exchange Commission, and other agencies; c) order his economic reinstatement; and d) compel answers to interrogatories Mr. Levi sent to numerous former and present executives and board members of Anheuser Busch Companies, Inc., former congressman Richard Gephardt, former SEC Chairman Harvey Pitt, Teamster President James Hoffa, Senator John McCain, and Senator Hillary Clinton.