



Issue Date: 29 April 2008

Case No.: 2008-SOX-00028

In the Matter of:

LEVI R. HUNTER, *pro se*,

Complainant,

v.

ANHEUSER-BUSCH COMPANIES, INC.,

Respondent.

ORDER OF DISMISSAL

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (Act), 18 U.S.C.A. § 1514A¹, and its implementing regulations found at 29 CFR Part 190. Section 806 provides “whistleblower” protection to employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain “protected activity” by the employee. The Complainant filed this current complaint on November 30, 2007². The complaint was denied by the Regional Administrator, Occupational Safety and Health Administration, Kansas City, Missouri, on February 13, 2008. The Regional Administrator corrected an administrative error in the denial findings by letter dated March 3,

¹ VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio and television fraud), 1344 (bank fraud) or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

² The actual complaint is dated as November 30, 2007, carries a “received” date of December 12, 2007, and contains a notary affidavit dated November 29, 2007. No envelope is attached that would indicate an actual mailing date; however, by letter dated March 3, 2008, the Regional Supervisory Investigator, Office of Safety and Health Administration, indicates that the administrative filing date was November 30, 2007.

2008. The Claimant filed a request for hearing before an Administrative Law Judge on March 10, 2008.

It is specifically noted that the Complainant filed an initial complaint under the Act on November 19, 2004, which involved adverse employment actions on February 14, 2003 (involving an indefinite suspension with intent to discharge from employment), on March 5, 2003 (discharge from employment subject to arbitration) and August 6, 2003 (final discharge from employment). Administrative Law Judge R.T. Stansell-Gamm issued an “Initial Decision and Order – Dismissal of Untimely SOX Whistleblower Complaint” on May 3, 2006, for this initial complaint which was identified by OALJ case number 2006-SOX-00037.³ On May 18, 2006, the Complainant filed an appeal of this decision with the Administrative Review Board, which classified the appeal as ARB case number 06-102.

The Complainant filed a second complaint under the Act on or about May 23, 2006. On October 18, 2006, Administrative Law Judge D.F. Solomon issued a “Recommended Decision and Order” dismissing the second complaint which was identified by OALJ case number 2006-SOX-00108. On October 31, 2006, the Complainant filed an appeal of this decision with the Administrative Review Board, which classified the appeal as ARB case number 07-20.

The Complainant filed a third complaint under the Act on or about May 23, 2007. On September 17, 2007, Administrative Law Judge R.T. Stansell-Gamm issued an “Initial Decision and Order – Dismissal of Complaint” dismissing the third complaint which was identified by OALJ case number 2007-SOX-00055. On October 3, 2007, the Complainant filed an appeal of this decision with the Administrative Review Board, which classified the appeal as ARB case number 08-06.

Complainant’s three appeals⁴ are still pending before the Administrative Review Board and are expected to be addressed in one consolidated decision.

In his current complaint the Complainant alleges that on August 11, 2007, he submitted written correspondence to “AB’s [Anheuser-Busch Companies, Inc.] Audit Committee” and “requested that AB rehire me ahead of a certain determination that all my SOX cases would eventually prevail.” He states that “AB did not respond.” The Complainant seeks reinstatement to his past employment with Anheuser-Busch Companies, Inc., along with back pay and damages. On April 4, 2008, this Administrative Law Judge issued an “Order To Show Cause Why Case Should Not Be Dismissed”. The Complainant acknowledged receipt of the Order on April 7, 2008, and filed his response thereto on April 16, 2008. The Respondent filed its response on April 29, 2008.

In his current complaint the Complainant also requests that a finding be entered “that my previous SOX complaints are also timely, and inform the ARB, so they can properly rule on my

³ In his September 17, 2007, decision on the third complaint filed by Complainant, Judge Stansell-Gamm notes that he had denied the Complainant’s request for reconsideration of his decision on May 17, 2006, because his initial determination involved the “resolution of timeliness of his SOX complaint [and] did not require any determinations of the parties’ veracity.”

⁴ ARB Case No. 06-102, ARB Case No. 07-20, and ARB Case No. 08-06

previous SOX complaints pending before them, after previous ALJs ruled them untimely.” In that the previous complaints have been accepted by, and are currently pending before, the Administrative Review Board, there is no jurisdiction over those complaints at this Administrative Law Judge level. See 29 CFR § 1981.110. Accordingly, this requested relief involving Complainant’s prior complaints may not be considered herein. The Complainant also requested that that the Chief Judge of the Office of Administrative Law Judges (OALJ) “compel answers from AB to my SOX interrogatories, send investigative referrals to OSHA, the SEC, Justice Department and FBI.” These requested actions are not now within the scope of the current case and are not considered herein.

Federal Regulations at Title 29, Code of Federal Regulations, Chapter XVII, Part 1980, sets for the procedures for the handling of discrimination complaints under Section 806 of the Act. A complaint must be dismissed unless the complainant makes a prima facie showing that: (1) the complainant engaged in protected activity or conduct; (2) the respondent knew that he engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. 29 CFR § 1980.104(b). *Livingston v. Wyeth*, 520 F.3d 344 (4th Cir. 2008); *Allen v. Administrative Review Board, DOL*, 514 F.3d 468 (5th Cir. 2008). Neither the determination to dismiss a complaint without completing an investigation pursuant to 29 CFR § 1980.104(b) nor the determination to proceed with an investigation by the Occupational Safety and Health Administration is subject to review by the Administrative Law Judge and the complaint may not be remanded for completion of an investigation or for additional findings on the basis that a determination to dismiss at the Occupational Safety and Health Administration level was made in error. 29 CFR § 1980.109(a).

“Where a complainant alleges that the adverse action was the prospective employer’s refusal to hire him, the complainant must also establish: (1) that he applied and was qualified for a job for which the employer was seeking applicants; (2) that, despite his qualifications, he was rejected; and (3) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” *Hasan v. Sargent & Lundy*, ARB No. 03-030, ALJ No. 2000-ERA-7 (ARB July 30, 2004).

Under the Act⁵, “protected activity” involves the actions of an “employee” in:

1. providing information, causing information to be provided, or otherwise assisting in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344 or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

- (A) a Federal regulatory or law enforcement agency;
- (B) any Member of Congress or any committee of Congress; or

⁵ Title 18, U.S. Code, § 1514A; 29 CFR §1980.102(b)

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or,

2. filing, causing to be filed, testifying, participating in, or otherwise assisting in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

Under Federal Regulations at 29 CFR §1980.101, an “Employee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.” Under Federal Regulations at 29 CFR §1980.102(a), the prohibited activities of a company or company representative include “discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee’s request, has engaged in any of the activities specified in [29 CFR §1980.102(b)].” For individuals who formerly worked for an offending company, prohibited activities include blacklisting, interference with subsequent employment, and failure to reinstate the individual upon a proper order issued under the Act. The remaining adverse employment actions apply only to individuals who file a complaint under the Act in a timely manner after the adverse employment action occurred while they were working for the offending company. See *Pittman v. Siemens*, 2007-SOX-15 (ALJ July 26, 2007); *Harvey v. Home Depot, Inc.*, 2004-SOX-36 (ALJ May 28, 2004).

“A black list is defined as a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate.” *Pickett v. Tennessee Valley Authority*, ARB No. 02-056, 02-059 (December 11, 2003), citing *Leveille v. New York Air National Guard*, Case No. 94-TSC-3, slip op. at 18-19 (Sec’y Dec. 11, 1995). Blacklisting requires objective evidence that a specific action was taken by the company to identify the former employee for avoidance, antagonism, or subsequent employment interference. Subjective feelings on the part of a complainant towards an employer’s actions, or inactions, are insufficient to establish the actions were the result of prohibited activity by the company. See *Howard v. Tennessee Valley Authority*, Case No. 90-ERA-24 (Sec’y July 3, 1991), *aff’d sub nom.*, *Howard v. U.S. Department of Labor*, 959 F.2d 234 (6th Cir. 1992)(table); *Bausemer v. Texas Utilities Electric*, Case No. 91-ERA-20, slip op. at 8 (Sec’y Oct. 31, 1995); *McDonald v Mead Corp.*, 622 F. Supp. 351 (W.D. Va. 1985), *aff’d* 818 F.2d 861 (4th Cir. 1987)(table). There must be both a subjective belief and an objectively reasonable belief that the company’s conduct constituted a violation of the Act. This requires not only that the Complainant believed the company conduct constituted a violation of the Act but also that a reasonable person would have believed the company conduct constituted a violation of the Act. See *Walton v. NOVA Information Systems*, 2008WL1751525 (E.D. Tenn. Apr. 11, 2008), citing *Livingston*, *infra*.

In considering the evidence in the light most favorable to the Complainant, this Administrative Law Judge finds that there is no controversy that the Complainant has not worked for the Respondent since August 6, 2003 and has not received an order of reinstatement under the Act. As an individual who formerly worked for the Respondent company, the Complainant alleges that failure of the company to respond to his August 11, 2007, request to “rehire me and assign me to a temporary position with the [Respondent’s] board, in order to assist [Respondent] with an internal investigation into an over \$30 billion securities fraud on shareholders” made to Respondent’s Audit Committee is an adverse employment action amounting to prohibited actions under the Act. Assuming that the Complainant did engage in protected activity prior to August 6, 2003, the Complainant has failed to establish any adverse employment action in the current case. The Complainant has failed to provide any reasonably objective evidence that a job vacancy existed with Respondent for which the Complainant was both qualified and had applied to the proper authority. The Complainant failed to provide any reasonably objective evidence that the Respondent solicited his August 11, 2007, request to be rehired. Such objective evidence is required to establish that an adverse employment action was taken on August 11, 2007, against the Complainant as a former employee of the Respondent. A simple wish to be rehired is not an adverse employment action under the Act as related to a former employee.

As an individual previously employed by Respondent, the objective evidence must demonstrate that the Complainant, as a former employee, applied to be hired into an existing job vacancy that the Respondent was actively trying to fill, or was solicited by the company to apply for rehiring, and that the Complainant was not hired for the particular position. If the Complainant could have established such an adverse “employment action”, then the Complainant would still have to establish the fourth element under the Act, that the decision not to hire him was causally connected to his previous protected activity. Since the Complainant has failed to produce any objective evidence of an adverse employment action related to the August 11, 2007, “request to rehire” him, the Complainant has failed to establish a prima facie case and the complaint must be dismissed.

ORDER

After deliberation on all the documentary materials submitted for consideration, **IT IS ORDERED that the Complaint is in the above captioned matter DISMISSED.**

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

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).