In the Matter of:

TAMMY A. STROUD,

COMPLAINANT,

v.

MOHEGAN TRIBAL GAMING AUTHORITY,

RESPONDENT.

ARB CASE NOS. 13-079
14-013

ALJ CASE NOS. 2013-CFP-003
2013-ACA-003

DATE: November 26, 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Tammy A. Stroud, *pro se*, Waterford, Connecticut

For the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae:
M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Megan E. Guenther, Esq.; Roger W. Wilkinson, Esq., *U.S. Department of Labor*, Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge;* E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

These cases arise under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, as amended (SOX),[1] the Consumer Financial Protection Act (CFPA),[2] and the

[1] 18 U.S.C.A § 1514A (Thomson/West Supp. 2014) (SOX), and its implementing regulations, 29 C.F.R. Part 1980 (2013).

Affordable Care Act (ACA).[3] On August 21, 2012, Tammy A. Stroud filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that her employer, Respondent Mohegan Tribal Gaming Authority (MTGA), retaliated against her in violation of SOX and CFPA. On June 14, 2013, the presiding Administrative Law Judge issued a Decision and Order dismissing Stroud's complaint.[4] On June 18, 2013, Stroud filed a second complaint alleging that MTGA retaliated against her under the ACA. The Administrative Law Judge assigned to Stroud's second complaint issued Decision and Order Dismissing the Claim on December 3, 2013.[5] Stroud petitioned the Administrative Review Board (ARB) for review of the June 14, 2013 Decision and Order in ARB Case No. 13-079. She petitioned the ARB for review of the December 3, 2013 Decision and Order in ARB Case No. 14-013. The Board has consolidated the two petitions on appeal for purposes of issuing one final decision. For the following reasons, we affirm the ALJ's rulings in both matters.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions for the Department in cases brought under the ACA, CFPA, and SOX.[6] The ARB reviews de novo the ALJ's December 3, 2013 Order dismissing Stroud's complaint for untimeliness.[7] The ARB reviews the ALJ's June 14, 2013 Order granting summary decision de novo, the same standard that ALJs apply. Summary judgment is permitted where "there is no genuine issue as to any material fact and [the] party is entitled to summary decision."[8] The ARB views the record on the whole in the light most favorable to Stroud, the non-moving party.[9]

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2 12 U.S.C.A. § 5567(a) (Thomson/Reuter 2014).

3 29 U.S.C.A. § 218c (Thomson/Reuters 2014).

4 *Stroud v. Mohegan Tribal Gaming Auth.*, No. 2013-CFP-003 (June 14, 2013) (*Stroud I).*

5 *Stroud v. Mohegan Tribal Gaming Auth.*, No. 2013-ACA-003 (Dec. 3, 2013) (*Stroud II*).

6 See Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. § 1980.110, 29 C.F.R. § 1984.110; 29 C.F.R. § 1985.110.

7 *Brown* v. *Teamstaff Gov't Solutions,* ARB No. 13-008, ALJ No. 2012-SOX-031, slip op. at 2 (ARB June 27, 2014).

8 29 C.F.R. § 18.40(d)(2013).

9 *Gonzalez v. J.C. Penney Corp.*, ARB No. 10-148, ALJ No. 2010-SOX-045, slip op. at 7 (ARB Sept. 28, 2012).

DISCUSSION

In the June 14, 2013 ALJ Decision and Order (*Stroud I*) on appeal, the ALJ dismissed Stroud's complaint for lack of jurisdiction, and because MTGA is an instrumentality of the Mohegan Tribe and enjoys tribal sovereign immunity from suit (see Constitution of the Mohegan Tribe, Art XIII, Sec. 1). In the December 3, 2013 ALJ Decision and Order (*Stroud II*), the presiding ALJ dismissed Stroud's ACA complaint as untimely filed. Complainant Stroud challenges the ALJ decisions in the two cases and discusses the merits of her claims but fails to address the jurisdictional issues that control our disposition of the cases.

Section 806 of the Sarbanes-Oxley Act, invoked in *Stroud I*, protects from retaliation employees of covered companies who engage in SOX-protected activity. Section 806 reads, in relevant part:

> (a) *Whistleblower protection for employees of publicly traded companies*. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such 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 — . . . .

18 U.S.C.A. § 1514A(a).

The MTGA does not fall within any of the covered categories described in Section 806(a). There is no evidence in the record showing that MTGA is a company with a class of securities registered under section 12 of the Securities Exchange Act, nor one required to file reports under section 15(d) of that act, nor a subsidiary of either. Moreover, there is no evidence that MTGA acted as a contractor, subcontractor, or agent of such a company. Thus, the ALJ in *Stroud I* correctly held as a matter of law that MTGA is not subject to the prohibitions against whistleblower retaliation under SOX Section 806. *Stroud I* at 3.

It is undisputed in this case that the MTGA is an instrumentality of the Mohegan Tribe of Indians of Connecticut, a federally-recognized sovereign Indian tribe. 25 U.S.C. § 1775. With regard to Stroud's CFPA claim, the ALJ determined that MTGA enjoyed immunity from suit

under tribal sovereign immunity. *Stroud I* at 4. The Supreme Court has held that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."[10] A tribe's waiver of sovereign immunity "cannot be implied but must be unequivocally expressed."[11] "Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear."[12] As the ALJ in *Stroud I* correctly noted, there is no claim that the Mohegan tribe, owner of MTGA, is not a tribal sovereign nation. Moreover, Stroud has not argued that Congress abrogated tribal sovereign immunity under the CFPA, or that the Mohegan Tribe waived immunity from suit. Thus, the Board affirms the ALJ's dismissal in *Stroud I* of the CFPA claim on tribal sovereign immunity grounds.

In challenging the ALJ's decision in *Stroud II*, Stroud contends that the ALJ erred in finding that her claim under the ACA was untimely. MTGA terminated Stroud's employment on March 29, 2012.[13] Section 1558 of the ACA, 29 U.S.C.A. § 218c, provides protection for covered employees who receive a credit under Section 36 B of the Internal Revenue Code of 1986 or a subsidy under Section 1402 of the ACA, or who report any violation of the ACA or object to or refuse to participate in an action reasonably believed to be a violation of the ACA.[14] Under the ACA, aggrieved employees may file a complaint with OSHA no later than 180 days after an alleged violation. 29 U.S.C.A. § 218c(b)(1), referencing 15 U.S.C. § 2087(b)(1).

Stroud argues in support of her argument that her ACA claim was timely filed, in effect, that her June 18, 2013 complaint filed with OSHA related back to her first complaint filed on August 21, 2012. However, as the presiding ALJ in *Stroud II* determined, Stroud's complaint filed on August 21, 2012, construed in the light most favorable to Stroud, did not contain any allegations that could be construed as an allegation of retaliation that would be covered by the ACA. We also agree with the ALJ that any documents referencing violations of the Comprehensive Omnibus Budget Reconciliation Act of 1985 (COBRA) are not sufficient to raise a claim under the ACA as it is a separate and independent statute. Consequently, given that the only claim asserting a violation of the ACA is that contained in Stroud's complaint filed on June

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[10] *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

[11] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

[12] *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1289 (11th Cir. 2001) (quoting *Florida v. Seminole Tribe*, 181 F.3d 1237, 1242 (11th Cir. 1999)); *see also Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) ("[U]nless and until Congress acts, the tribes retain their historic sovereign immunity.").

[13] *Stroud II* at 2.

[14] 29 U.S.C.A. § 218c.

18, 2013, well over the 180 days allowed by the Act, we affirm the dismissal of Stroud's ACA complaint as untimely filed.

CONCLUSION

The ALJ's December 3, 2013 Decision and Order Dismissing Claim is **AFFIRMED**. The ALJ's June 14, 2013 Decision and Order Granting Respondent's Motion for Summary Decision and Dismissing Complaint is **AFFIRMED.**

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge