



**In the Matter of:**

**MARK A. KUKUCKA,**

**ARB CASE NOS. 06-104  
06-120**

**COMPLAINANT,**

**ALJ CASE NOS. 2006-SOX-057  
2006-SOX-081**

**v.**

**BELFORT INSTRUMENT CO.,**

**DATE: April 30, 2008**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Mark A. Kukucka, *pro se*, Kingsville, Maryland**

***For the Respondent:***

**Richard L. Hackman, Esq., *Smith & Downey*, Baltimore, Maryland**

**FINAL DECISION AND ORDER**

Mark A. Kukucka filed complaints under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (West 2006)(SOX), alleging that Belfort Instrument Company retaliated against him for reporting that company officials were involved in offering unlawful gifts and entertainment to a federal official. A Department of Labor Administrative Law Judge (ALJ) concluded that Belfort was not subject to the SOX and dismissed both complaints. Kukucka appealed the decisions to the Administrative Review Board (ARB). We affirm the dismissals.<sup>1</sup>

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<sup>1</sup> In view of the substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy, Kukucka's appeals of the dismissals of his two complaints are hereby consolidated for the purpose of review and

## BACKGROUND

Kukucka was the national sales manager for Belfort from November 20, 2000, to October 20, 2005. On November 16, 2005, Kukucka sent a letter to the Occupational Safety and Health Administration (OSHA). He stated: “Based on civil and possibly criminal wrongdoing that I have personally observed/overheard firsthand on a repeated and on-going basis, I have been attempting to file a formal complaint against Mr. Todd Harter . . . who works . . . as an outside contractor (for Northrop Grumman) to the Federal Aviation Administration (FAA) in Washington, DC.”

Kukucka explained that he had sent a formal written complaint to Northrop on October 31, 2005, alleging that Harder had unlawfully accepted entertainment and gifts from Mark W. Decker, Belfort’s president since 2003, in return for expediting FAA’s approval of Belfort’s products. Kukucka asked Northrop to investigate the specific details he provided and take appropriate action. Kukucka later sent a copy of this complaint to the FAA.

Kukucka also related in his complaint that on November 10, 2005, he “became aware of retaliation being directed at me by my former employer,” which had retained a law firm “with the intent” to obtain a temporary restraining order to prevent him from making any more defamatory comments about the company and to pursue monetary damages against him for filing a whistleblower complaint. Kukucka stated that his former employer was “now waging war and retaliating” against him in the civil courts and asked OSHA to investigate the “willful, intentional and deliberate retaliation” of his former employer in attempting to shut him up.

On January 21, 2008, Kukucka filed a second complaint with OSHA, alleging that a Belfort vice president had been “cooking the books” for years in collaboration with other managers and Belfort’s president. Kukucka stated that during his employment, Belfort suffered through several cash-flow crises and situations where customers complained that they had received invoices for which they had no product. Kukucka alleged that while Belfort was “privately owned,” it was directly reliant on a publicly-traded company, SunTrust, which was also inherently reliant on Belfort.

OSHA dismissed both of Kukucka’s complaints on the grounds that Belfort was not a publicly-traded company subject to the SOX and that Kukucka was not a covered employee. OSHA also found Kukucka’s January 21, 2008 complaint untimely filed. Kukucka requested a hearing. The ALJ issued orders to show cause as to why the complaints should not be dismissed for lack of jurisdiction.

Kukucka responded on March 21 and May 19, 2006. He admitted that Belfort “would not appear to be a publicly-traded company,” but argued that it was covered by the SOX because its financial activities made it directly dependent on a publicly-traded

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decision. *See Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, 115; ALJ Nos. 2004-SOX-020, 36, slip op. at 8 (ARB June 2, 2006).

bank. Citing section 1107 of the SOX, Kukucka stated that his retaliation complaint filed with OSHA stemmed from the complaint he had sent to the FAA and Northrop that alleged that his former employer's managers had engaged in a pattern and practice of illegal entertainment and gifts to an FAA contractor. Kukucka stated that Belfort had then filed a civil complaint in the Circuit Court for Baltimore County, seeking damages for defamation because Kukucka had made "false and defamatory statements" about Belfort and its managers.

Belfort did not respond to the ALJ's show cause order to Kukucka. The ALJ recommended dismissal of Kukucka's complaints on April 17 and June 14, 2006. She concluded that Belfort was not a publicly-traded company and that Kukucka was not an employee covered by the SOX's whistleblower protections. Recommended Decision and Order at 2. Kukucka appealed to the ARB.

### **JURISDICTION**

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the SOX. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110. Pursuant to the SOX and its implementing regulations, the ARB reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1980.110(b). The ARB reviews an ALJ's conclusions of law de novo. *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-020, 36, slip op. at 8 (ARB June 2, 2006).

### **DISCUSSION**

The SOX's employee protection provision prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to listed categories of fraud or securities violations. That provision states:

(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)), 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—

(1) to provide information, cause information to be provided, or otherwise assist 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
- (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) to file, cause to be filed, testify, participate in, or otherwise assist 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.

18 U.S.C.A. § 1514A.

*Belfort is not subject to the SOX whistleblower provision*

Actions brought pursuant to the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (West Supp. 2006)(AIR 21), 18 U.S.C.A. § 1514A(b)(2)(C); *Brady v. Direct Mail Mgmt., Inc.*, ARB No. 06-044, ALJ No. 2006-SOX-016, slip op. at 2 (ARB Mar. 26, 2008). AIR 21 requires a complainant to allege and later prove by a preponderance of the evidence that he was an employee of an employer subject to the act. 49 U.S.C.A. § 42121(a); *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-081, slip op. at 5 (ARB Mar. 14, 2008). By its terms the SOX provides protection against retaliation only to **employees of companies with securities registered under section 12 or companies required to file reports under section 15(d) of the Exchange Act or their agents.** 18 U.S.C.A. § 1514A(a). See *Flake v. New World Pasta Co.*, ARB No. 03-126, ALJ No. 2003-SOX-018, slip op. at 4 (ARB Feb. 25, 2004) (finding that respondent was not covered under the reporting requirement of the SOX).

Thus, the initial burden of proof is on Kukucka to establish that Belfort, the company of which he was an employee, had either registered its securities under section 12 or had to file reports under section 15(d). In both of his complaints, Kukucka stated that he worked for Belfort from November 20, 2000, to October 20, 2005. He did not allege that the company had securities registered under section 12 of the Securities Exchange Act or that it was required to file reports under section 15(d). In his response to the ALJ's show cause orders, Kukucka proffered no evidence indicating that Belfort was subject to either the registration or the reporting requirements. Thus, Kukucka has failed to demonstrate that his former employer is subject to the SOX's whistleblower provision. Therefore, the ALJ properly dismissed Kukucka's complaints.

*Kukucka's arguments on appeal*

Kukucka repeats in his briefs to the ARB two of the arguments he made to the ALJ in support of his position that Belfort was covered by the SOX, namely, that Belfort's financial activities made the company directly reliant on a publicly-traded bank, SunTrust, and that Belfort had "public debt" because it accepted public money to develop products. Complainant's Brief at 4-5.

Contractors, subcontractors, and agents of companies that are subject to the SOX registration and filing requirements are also covered by the SOX whistleblower provision. However, Kukucka offered no evidence to the ALJ that Belfort's "public debt" or its "reliance" on SunTrust was equivalent to being a contractor, subcontractor or agent of Sun Trust. He also offered no evidence to demonstrate that SunTrust is subject to section 1514A's registration and filing requirements. 18 U.S.C.A. § 1514A(a). Therefore we reject this argument.

Further, Kukucka argues that "while gainfully employed, I ended up discovering that Belfort was receiving financial credit in the form of an advance from the bank [Sun Trust] in return for 'shipping so much product on the system' even though some of the product was still physically sitting unfinished in the Belfort workplace." Complainant's Brief at 3. This, Kukucka contends, "would appear to constitute a serious and illegal act" by Belfort "to defraud a publicly traded company unlawfully in return for receiving unrealized financial gain." Brief at 3-4.

Kukucka elaborates on this alleged fraud in his second brief to the ARB. He contends that Belfort should be considered a subsidiary of SunTrust because its favorable extension of credit and debt burden keeps Belfort in business and thus SunTrust, a publicly traded company, controls Belfort. Complainant's Brief II at 6-7.

Again, Kukucka offers no evidence to support his allegation that SunTrust's extension of credit amounts to control of Belfort or that such control, if it exists, makes Belfort SunTrust's contractor, subcontractor, or agent. Therefore we reject this argument also.

Finally, Kukucka argues that because Belfort sued him in civil court, it is covered under section 1107 of the SOX, which provides a criminal penalty for anyone who “with the intent to retaliate, takes any action harmful to any person” providing to a law enforcement officer information relating to the commission of a federal offense. 18 U.S.C.A. § 1513(e). Brief at 2-3, 6. Therefore, according to Kukucka, he should be allowed to proceed with his whistleblower complaints. But the Department of Labor has no authority to administer this SOX provision. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 3 (ARB May 30, 2007). Therefore, this argument is unavailing in this forum.

### CONCLUSION

In his response to the ALJ’s show cause order, Kukucka did not demonstrate that his former employer, Belfort, has a class of securities registered under section 12 of the Securities Exchange Act or that it is required to file reports under section 15(d) of that act. He also did not demonstrate that Belfort was a contractor, subcontractor, or agent of SunTrust or that SunTrust is a company subject to the SOX registration or filing requirements. Thus, he is not an employee of a company that is covered by the SOX whistleblower provision. Therefore, we **DISMISS** Kukucka’s complaint.

**SO ORDERED.**

**DAVID G. DYE**  
**Administrative Appeals Judge**

**OLIVER TRANSUE**  
**Administrative Appeals Judge**