



In the Matter of:

HARIDAS JANARDHAN SALIAN,

ARB CASE NO. 07-080

COMPLAINANT,

ALJ CASE NO. 2007-SOX-020

v.

DATE: December 31, 2008

**REEDHYCALOG UK, an indirect, wholly-
owned subsidiary of GRANT-PRIDECO, INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Haridas Janardhan Salian, *pro se*, Karnataka, India

For the Respondent:

R. Michael Moore, Esq., Houston, Texas

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Sarbanes-Oxley Act of 2002 (SOX)¹ and its implementing regulations.² Haridas Janardhan Salian filed a complaint alleging that his former employer, ReedHycalog UK, violated the SOX by discharging him from employment in retaliation for complaining about violations of various foreign and domestic laws. On May 11, 2007, an Administrative Law Judge (ALJ) issued an Order Dismissing Complaint on Summary Decision (R. D. & O.), in

¹ 18 U.S.C.A. § 1514A (West 2006).

² 29 C.F.R. Part 1980 (2007).

which he recommended dismissal of the complaint. We affirm.

BACKGROUND

Salian was a citizen of India whom ReedHycalog UK hired in August 2004 as a Finance Manager for its Middle East Region. Salian was based in Dubai, U.A.E., where he performed various finance, tax, and legal functions.³

ReedHycalog UK is a corporation organized under the laws of the United Kingdom. Its headquarters is in Stonehouse in the United Kingdom. ReedHycalog UK is a wholly-owned foreign subsidiary of Grant Prideco, Inc., a publicly-traded company based in the United States.⁴

On May 23, 2006, Mike Critchley, ReedHycalog UK's Middle East Regional Manager, met with Salian and gave him a letter indicating that his position within the company had "become redundant." The letter indicated that he was being given thirty days notice of the termination of his employment with the company, and that the termination date would be June 30, 2006.⁵ This is the only letter in the record regarding the termination of Salian's employment, and he acknowledged receipt of such a letter in an e-mail message he sent to Philip A. Choyce, Corporate Secretary for Grant Prideco.⁶

Critchley told Salian that he would not be required to work during the thirty-day notice period, and Salian was escorted to his desk to remove his personal belongings from the premises.⁷ Critchley notified other employees in the Middle East Region about Salian's discharge.⁸ Salian's employment with ReedHycalog UK ended on June 30, 2006.⁹

³ Complainant's Brief at 2; ReedHycalog UK's Motion for Summary Judgment (Motion), Affidavit of Mark Tooley.

⁴ Complaint at 1, Complainant's Brief at 28.

⁵ Motion, Affidavit of Mike Critchley; ReedHycalog UK's Reply to Complainant's Response to ReedHycalog UK's Motion for Summary Judgment (Reply to Response to the Motion), Exhibit (Ex.) 2 (Declaration of Mike Critchley).

⁶ Reply to Response to the Motion, Ex. 1 (Affidavit of Philip A. Choyce).

⁷ Reply to Response to the Motion, Ex. 3 (Declaration of Chris Starkie), 3A (Salian Haridas Redundancy Meeting Minutes).

⁸ Reply to Response to the Motion, Ex. 2D.

⁹ Motion, Affidavit of Mike Critchley.

Salian filed a SOX complaint with the Occupational Safety and Health Administration (OSHA) on September 27, 2006. In his complaint, Salian alleged that he was “asked to leave” ReedHycalog UK because of “violations ... which [he] tried to update and rectify.”¹⁰ OSHA concluded that Salian’s complaint did not “allege facts and evidence to meet the jurisdictional requirements of SOX,” and it denied his complaint because “Section 806 of the SOX does not apply extraterritorially.”¹¹

Salian requested a hearing before an ALJ. On April 2, 2007, prior to a hearing, ReedHycalog UK filed a Motion for Summary Judgment, which the ALJ construed as a motion for summary decision pursuant to 29 C.F.R. § 18.40.¹² ReedHycalog UK argued that Salian’s complaint should be dismissed because his employment was not covered by Section 806 of the SOX, and because his complaint was not timely. Salian responded to the Motion by arguing that he was covered by the SOX and his complaint was timely.¹³

On August 31, 2006, the ALJ issued an Order Granting Respondent’s Motion to Dismiss (R. D. & O.). The ALJ held that the complaint was untimely.¹⁴ The ALJ also noted that Salian “failed to bring forth evidence that an issue of material fact exists as to whether he is a covered employee” pursuant to the SOX.¹⁵ Salian appealed the ALJ’s decision to this Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (Board) her authority to issue final agency decisions under the SOX.¹⁶

We review a decision granting summary decision de novo. That is, the standard

¹⁰ Complaint at 3.

¹¹ Secretary’s Findings at 1.

¹² R. D. & O. at 2.

¹³ Complainant’s Response Showing Causes and Evidences on Why Respondent’s Motion for Summary Judgment Should Not Be Granted (Response to the Motion) at 5-9.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ Secretary’s Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

the ALJ applies, also governs our review.¹⁷ The standard for granting summary decision under the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges is similar to that found in Federal Rule of Civil Procedure 56, which governs summary judgment in the federal courts. Accordingly, summary decision is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.¹⁸

The determination of whether facts are material is based on the substantive law upon which each claim is based.¹⁹ A genuine issue of a material fact is one, the resolution of which “could establish an element of a claim or defense and, therefore, affect the outcome of the action.”²⁰

We view the evidence in the light most favorable to the non-moving party, and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.²¹ Furthermore, a party opposing a motion for summary decision may not rest upon the mere allegations or denials of its pleadings but must set forth specific facts that could support a finding that there is a genuine issue of fact for hearing.²²

DISCUSSION

A. Governing Law

The SOX’s employee protection provision, Section 806, protects employees who provide information to a covered employer or a federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission (*see, e.g.*, 17 C.F.R. Part 210 (2007)), Form and Content of the Requirements for Financial Statements), or any provision of federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified

¹⁷ 29 C.F.R. § 18.40 (2006).

¹⁸ Fed. R. Civ. P. 56(c); 29 C.F.R. § 18.40(d); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

¹⁹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

²⁰ *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

²¹ *Anderson*, 477 U.S. at 255.

²² 29 C.F.R. § 18.40(c); *see Anderson*, 477 U.S. at 252.

in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such alleged violation.²³

An employee alleging retaliation in violation of the SOX must file his complaint within 90 days after the alleged violation occurred.²⁴ In whistleblower cases, statutes of limitation run from the date an employee receives “final, definitive, and unequivocal notice” of an adverse employment decision.²⁵ “Final” and “definitive” notice is a communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. “Unequivocal” notice means communication that is not ambiguous, i.e., free of misleading possibilities.²⁶

B. Salian Failed to Raise a Genuine Issue of Material Fact Supporting his Claim that He Timely Filed his Complaint

In its Motion, ReedHycalog UK states that it informed Salian of his discharge on May 23, 2006, and he did not file his SOX complaint until September 27, 2006, which is more than 90 days later.²⁷ In support of its Motion, the company submitted an affidavit and declaration from Critchley, a copy of Salian’s discharge letter, and copies of e-mail messages discussing Salian’s discharge.²⁸ It also submitted Choyce’s affidavit quoting an e-mail from Salian, in which Salian acknowledged receiving the discharge letter.²⁹ These

²³ 18 U.S.C.A. § 1514A(a); 68 Fed. Reg. 31,864 (May 28, 2003).

²⁴ 18 U.S.C.A. § 1514A(b)(2)(D) (“An action ... shall be commenced not later than 90 days after the date on which the violation occurs.”); 29 C.F.R. § 1980.103(d) (“Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee’s behalf, a complaint alleging such discrimination.”).

²⁵ See, e.g., *Rollins, v. American Airlines*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 2 (ARB Apr. 3, 2007 (re-issued)); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005); *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 14 (ARB Feb. 28, 2003).

²⁶ *Larry v. The Detroit Edison Co.*, 1986-ERA-032, slip op. at 14 (Sec’y June 28, 1991). Cf. *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994) (three letters warning of further discipline did not constitute final notice of employer’s intent to discharge complainant).

²⁷ Motion at 3-4.

²⁸ Motion, Affidavit of Mike Critchley; Reply to Response to the Motion, Ex. 2.

²⁹ Reply to Response to the Motion, Ex. 1.

documents support ReedHycalog UK's statement that it informed Salian of his discharge on May 23, 2006.

Salian's Response to the Motion does not deny that he attended a meeting to discuss his discharge, was given a letter confirming the same, and was escorted out of the building. Instead, Salian states that he did not receive "unequivocal" notice of his discharge until June 30, 2006.³⁰ But that argument is a statement of Salian's legal position. As indicated above, Salian's burden on summary decision is to set forth specific facts in response to ReedHycalog UK's grounds for dismissal of his complaint.

Salian states in his Response that "all facts stated in this filing are within my personal knowledge and are made conscientiously believing it to be true and correct to the best of my knowledge."³¹ But he also presents statements that contradict his admissions to Choyce, without challenging those admissions. For example, although he states in his Response that he never received unequivocal notice of his discharge, he told Choyce that he received a redundancy letter and was escorted from the premises.³² In contradicting his own admissions, Salian's Response could be construed as a false or fraudulent affidavit, and as such, it would be insufficient to defeat ReedHycalog UK's motion for summary decision.³³

Salian also argues that he is entitled to equitable tolling of the filing period. The Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. Accordingly, the Board has recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or

³⁰ Response to the Motion at 7-8.

³¹ *Id.* at 1.

³² *Id.* at 7-8; Reply to Response to the Motion, Ex. 1.

³³ *Cf. Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806-807 (1999) ("[A] party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement ... without explaining the contradiction or attempting to resolve the disparity."); *see, e.g., Iko v. Shreve*, 535 F.3d 225, 230 (4th Cir. 2008) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

(3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.^[34]

Salian states that ReedHycalog UK misled him with respect to the filing deadline for his SOX complaint.³⁵ In support of this statement, he submitted a copy of an e-mail message from Choyce, dated September 20, 2006, in which Choyce discusses the filing requirements of the SOX.³⁶ But, because he was informed of his discharge on May 23, 2006, Salian was required to file his SOX complaint by August 22, 2006. It was therefore impossible for the September 20, 2006 e-mail to have misled him about the deadline during the 90-day filing period.

Because ReedHycalog UK informed him of his discharge on May 23, 2006, and he did not file his complaint until September 27, 2006, Salian failed to file within the 90-day period required by the SOX. We therefore conclude that ReedHycalog UK is entitled to summary decision on Salian's SOX complaint.

C. Salian Failed to Raise a Genuine Issue of Material Fact Supporting his Claim that Section 806 Applies to his Employment with ReedHycalog UK

ReedHycalog UK also states that Salian's complaint should be dismissed because the SOX "does not cover Salian, a foreign national employed by a foreign subsidiary of Grant Prideco, Inc., outside the United States."³⁷ In support of this argument, it cites the First Circuit's ruling in *Carnero v. Boston Scientific Corp.*³⁸ In that case, Carnero, a citizen of Argentina residing in Brazil, appealed a district court's ruling dismissing his SOX complaint. The district court had concluded that SOX Section 806 did not have extraterritorial effect and, therefore, did not protect Carnero, who was working outside of the United States for an Argentinian company that was a subsidiary of a publicly traded, SOX-covered company.³⁹

The First Circuit concluded that Section 806 did not "reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders," but

³⁴ See, e.g., *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-023, slip op. at 6-7 (ARB Sept. 29, 2006), citing *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981).

³⁵ Response to the Motion at 8-9.

³⁶ *Id.*, Ex. F1.

³⁷ Motion at 4.

³⁸ 433 F.3d 1 (1st Cir. 2006).

³⁹ *Carnero v. Boston Scientific Corp.*, No. CIV.A.04-10031-RWZ, 2004 WL 1922132, Fed. Sec. L. Rep. P 92,910 (D. Mass. Aug. 27, 2004).

instead was tailored for “purely domestic application.”⁴⁰ It held that the district court below had properly dismissed Carnero’s complaint because he was a resident of a foreign country directly employed by a foreign company operating in that country.⁴¹

ReedHycalog UK argues in its Motion that, pursuant to *Carnero*, Salian is not covered by the SOX.⁴² In support of this statement, the company submitted sworn affidavits from Choyce and Mark Tooley, Manager-Eastern Hemisphere for ReedHycalog UK, stating that Salian was: (1) a resident of India; (2) directly employed by a United Kingdom-based company (i.e., ReedHycalog UK); (3) operating out of Dubai, U.A.E.; (4) who performed no work in the United States.⁴³

Salian admits in his Response to the Motion that he was a citizen of India and that ReedHycalog UK “is a wholly owned foreign subsidiary of Grant Prideco, Inc., organized under the laws of [the] United Kingdom.”⁴⁴ But he also states that “for all practical purposes [he] was a Grant Prideco employee,”⁴⁵ and he is therefore covered by the SOX. In support of this conclusory statement, Salian submitted several documents that mention both him and Grant Prideco.⁴⁶ But none of those documents provides factual support for his contention that he was actually employed by Grant Prideco.

In *Carnero*, the First Circuit court noted that it decided the case “necessarily on its own facts.” Similarly, we restrict our ruling to Salian’s failure to demonstrate the existence of a genuine issue of material fact that Section 806 of the SOX applies to his employment with ReedHycalog UK, and therefore ReedHycalog UK is entitled to summary decision.

Salian presented additional statements in his Response to the Motion related to the duties of various ReedHycalog UK employees and the company’s failure to use its employees’ full names in their affidavits and declarations.⁴⁷ But none of the information he provides in support of these statements relates to ReedHycalog UK’s two grounds for

⁴⁰ 433 F.3d at 18.

⁴¹ *Id.*

⁴² Motion at 3.

⁴³ Affidavit of Mark Tooley; Motion, Affidavit of Philip A. Choyce.

⁴⁴ Response to the Motion at 3.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.*, Ex. A-C, E.

⁴⁷ Response to the Motion at 10-13.

summary decision. Salian has raised no genuine issue of material fact regarding either the timeliness of his complaint or the application of the SOX to his employment as a foreign national employed by a foreign company. Therefore, all other facts alleged by Salian are immaterial, and ReedHycalog UK is entitled to summary decision.

CONCLUSION

Salian's complaint is time-barred. He has not created a genuine issue of material fact as to whether, as a foreign national employed by a foreign company, the SOX's whistleblower protection provision covers his employment. We therefore concur with the ALJ's conclusion that ReedHycalog UK is entitled to summary decision. Accordingly, we **AFFIRM** the ALJ's R. D. & O. and **DENY** Salian's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge