In the Matter of:

JANICE FLESZAR,

COMPLAINANT,

v.

AMERICAN MEDICAL ASSOCIATION,

RESPONDENT.

ARB CASE NOS. 07-091
08-061

ALJ CASE NOS. 2007-SOX-030
2008-SOX-016

DATE: March 31, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Janice Fleszar, *pro se*, Chicago, Illinois

For the Respondent:
Scott E. Gross, Esq., *Sidley Austin LLP*, Chicago, Illinois

ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER

These appeals arise from complaints Janice Fleszar filed against her employer, the American Medical Association (AMA). Fleszar alleged that the AMA violated the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX or Act), 18 U.S.C.A. § 1514A (West Supp. 2005), and its implementing regulations at 29 C.F.R. Part 1980 (2006), when it denied her employee benefits and then terminated her. In separate recommended decisions, Administrative Law Judges (ALJs) dismissed Fleszar's complaints on the ground that

the AMA is not a publicly traded company subject to the whistleblower protection provisions of the SOX. For reasons we now explain, we affirm.

BACKGROUND AND PROCEDURAL HISTORY

On September 29, 2006, Fleszar wrote the Administrator of the AMA Retirement and Savings Plan complaining that she lost benefits and that the AMA retaliated against her when she began reporting "possible illegal practices" under the federal Employee Retirement Income Security Act (ERISA) and the Family and Medical Leave Act. She sent a copy of the letter to the Benefits Advisor for the United States Department of Labor (DOL), Benefits and Security Administration. The DOL construed the letter as a complaint under the whistleblower provisions of the SOX. On January 22, 2007, a DOL Regional Administrator dismissed the complaint based on the regional investigator's determination that the AMA was not a publicly held company subject to the SOX. On February 26, 2007, Fleszar requested a hearing before an ALJ.

On April 17, 2007, the ALJ ordered the parties to show cause why Fleszar's complaint should not be dismissed because the AMA was not subject to the SOX whistleblower protection provision. Following the parties' submissions, the ALJ determined that the AMA was a private organization that did not issue or register securities, and as such it was not subject to the whistleblower protection provisions of the SOX. June 13, 2007 Initial Decision and Order – Dismissal of Complaint (*Fleszar I*) at 3. Fleszar filed a timely appeal to this Board.

Then, on October 22, 2007, Fleszar filed a second complaint with the DOL against the AMA, this time alleging that the AMA wrongfully terminated her employment after she filed her first complaint. In a December 4, 2007 determination letter, the Occupational Safety and Health Administration (OSHA) informed Fleszar that her complaint would be dismissed; the AMA was not an employer and she was not an employee under Section 806, the SOX whistleblower protection provision. Accordingly, OSHA lacked jurisdiction under the Act and dismissed Fleszar's complaint. Fleszar objected to OSHA's findings on January 8, 2008, and her second complaint was referred to another ALJ.[1]

On January 22, 2008, the second ALJ also ordered the parties to show cause whether he should dismiss Fleszar's second complaint because the AMA is not subject to Section 806 of the SOX. Following review of the parties' submissions, he, too, concluded that the AMA was a non-profit, non-publicly-traded company; it neither issued nor registered securities under the relevant provision of the Act, and no claim could be brought against it under Section 806. March 4, 2008 Decision and Order Dismissing the Complaint (*Fleszar II*) at 4. Fleszar then filed a second timely appeal to this Board.

[1] The AMA initially argued before the ALJ that Fleszar's request for a hearing was untimely. Response to Order to Show Cause (*Fleszar II*) at 3. The AMA has not briefed that issue to the ARB, and we deem it to have been abandoned.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the SOX. Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a). Because 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, we consolidate Fleszar's appeals for the purpose of review and decision. *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006; ALJ Nos., 2006-SOX-037, -108, 2007-SOX-055 (ARB Apr. 30, 2008); *Harvey v. Home Depot*, ARB Nos. 04-114, -115, ALJ Nos. 2004-SOX-020, -036, slip op. at 8 (ARB June 2, 2006).

We review a grant of summary decision de novo, i.e., under the same standard that ALJs employ. Derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d) (2008). Because the ALJs' rulings on the show cause orders are in the nature of summary decisions, we review them de novo.

DISCUSSION

Section 806 of the SOX, entitled "Whistleblower Protection For Employees Of Publicly Traded Companies," prohibits a "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" from discharging, demoting, suspending, or in any other manner discriminating against an employee in the terms and conditions of employment because that employee engaged in protected activity under Section 806. 18 U.S.C.A. § 1514A(a). Protected activity includes providing information or assisting in an investigation regarding activity the employee reasonably believed constituted listed categories of fraud or securities violations. 18 U.S.C.A. § 1514A(a)(1)-(2).

To prevail on the merits of a Section 806 case, a covered employee must prove by a preponderance of the evidence that: (1) she engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the covered employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See, e.g., Kalkunte v. DVI Fin. Servs., Inc.*, ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-056, slip op. at 8-9 (ARB Feb. 27, 2009). If the complainant establishes by a preponderance of the evidence that her protected activity was a contributing factor in the adverse action, then the respondent can only avoid liability by providing by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Id.*

Thus, as a threshold matter, to avail herself of the SOX whistleblower protection provision, Fleszar must demonstrate that the AMA is a covered employer. In both of these

consolidated cases, the AMA filed affidavits describing its corporate status. The AMA avers that it is a not-for-profit corporation organized and existing under the Illinois Not for Profit Corporation Act. Declaration of Michael Katsuyama, dated February 8, 2008. The AMA is exempt from federal income taxes because it is a not-for-profit organization under Section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. § 501(c)(6). *Id.* The AMA has not issued any securities that are registered under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781 (SEA). *Id.* The AMA is not required to file and has not filed any reports under Section 15(d) of the SEA, 15 U.S.C. 78o(d). *Id.* Although the AMA has filed documents or reports with the Securities and Exchange Commission (SEC), the last occasion on which the AMA filed any documents with the SEC was in 2002. *Id.*

Confronted with this evidence, Fleszar created a murky pond of material, much related to the putative merits of her claim, and asked the ALJs and now asks us to fish for her legal theory on SOX coverage. We have pulled out her arguments relevant to that question and examine them in turn.

First, Fleszar asserts that Section 806 covers the AMA because the AMA has submitted documents to the SEC. While the AMA may have made SEC filings relating to its retirement plan, employer liability under Section 806 is limited to companies that issue securities that are registered under Section 12 or that file reports under Section 15(d), and their officers, employees, contractors, subcontractors, or agents. 18 U.S.C.A. § 1514A(a); 29 C.F.R. § 1801.102. *See Flake v. New World Pasta Co.*, ARB NO. 03-126, ALJ No. 2003-SOX-018 (ARB Feb. 25, 2004), *aff'd, Flake v. U.S. Dep't of Labor*, 248 Fed. Appx. 287 (3d. Cir. 2007); *see also Paz v. Mary's Ctr. for Maternal & Child Care,* ARB No. 06-031, ALJ No. 2006-SOX-007 (ARB Nov. 30, 2007) (non-profit organization is not subject to the SOX whistleblower protection provision). Because it is uncontroverted that the AMA is a not-for-profit company that does not issue securities that are registered under Section 12 or file reports under Section 15(d), it is not subject to the whistleblower protection provision of the SOX.

Next, Fleszar proposes that the AMA is a proper respondent because it does business with publicly held companies, holds government contracts, and owns real estate. We agree with the AMA's arguments and the ALJs' conclusions that a not-for-profit organization's engaging in commercial transactions does not convert it into a proper respondent for SOX whistleblower purposes. We concur in the ALJ's conclusions in *Fleszar I*:

> [T]he AMA's contractual relationships with publicly traded companies, standing alone, are insufficient to make the Respondent a covered employer under the whistleblower protection provisions. . . . Likewise, the Respondent's contractual relationships with governmental entities do not subject the AMA to § 806 prohibitions. . . . Finally, I find no basis for holding the AMA subject to § 806 provision [sic] due to real estate transaction or mutual fund activities.

Fleszar I, slip op at 3; *see also Fleszar II*, slip op. at 4.

Finally, and more specifically, Fleszar charges that ownership of "AMA Investment Advisors," which in turn had an affiliation with "Oppenheimer Capital," establishes SOX coverage. AMA's submission represents the following:

> "AMA Investment Advisors" was an entity that the AMA sold to Oppenheimer Capital in the 1990s. Before that sale, AMA Investment Advisors provided investment advice to AMA members, it did not issue any securities registered under SEA § 12, and it was not required to file any reports under SEA § 15(d). The AMA is not a partner in, or subsidiary of, Oppenheimer Capital, and the AMA does not own or control whatever entity remains of the former AMA Investment Advisors.

Declaration of Michael Katsuyama, dated February 8, 2008. Although Fleszar's contentions are unclear, she does not directly contradict AMA's factual averments. We conclude that: AMA Investment Advisors probably would not have been deemed a proper respondent under Section 806, but that is not dispositive because it ceased to be under the direction or control of the AMA prior to the enactment of the SOX; and it was never Fleszar's employer. Under those facts, the AMA is not subject to liability in these matters.

CONCLUSION

Fleszar has failed to demonstrate that the AMA is a covered employer subject to the whistleblower protection provision of the SOX. Accordingly, we **ACCEPT** the ALJs' recommended decisions and orders and **DISMISS** Fleszar's complaints.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge