



In the Matter of:

GLENN KELLY,

ARB CASE NO. 08-027

COMPLAINANT,

ALJ CASE NO. 2008-SOX-003

v.

DATE: December 17, 2008

**SONIC AUTOMOTIVE, INC. and
FRANK PARA AUTOPLEX,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Susan E. Hutchinson, Esq., *Foreman, Lewis & Hutchison P.C.*, Grapevine,
Texas**

For the Respondent:

**Alicia Sienne Voltmer, *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*,
Dallas, Texas**

FINAL DECISION AND ORDER DISMISSING APPEAL

This case arose when the Complainant, Glenn Kelly, filed a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX).¹ A Department of Labor Administrative Law Judge (ALJ) issued a [Recommended] Decision and Order of Dismissal and Order Cancelling Hearing (R. D. & O.) on the grounds that Kelly had decided to pursue his case in federal district court and dismissed

¹ 18 U.S.C.A. § 1514A (West 2008). The regulations implementing SOX are found at 29 C.F.R. Part 1980 (2007).

Kelly's complaint without prejudice.² Kelly argues on appeal to the Administrative Review Board that the ALJ should not have dismissed his complaint, but instead should have stayed the complaint "pending acknowledgement of jurisdiction by the federal court."³ We agree with the ALJ that once Kelly filed his SOX complaint in district court, he deprived the Department of Labor (DOL) of jurisdiction to act further on his complaint, and therefore, dismissal of that complaint was appropriate.

BACKGROUND

The Respondent, Sonic-Frank Parra, operates a Chevrolet dealership in Irving, Texas. It hired Kelly in June of 2006 and he served as the dealership's Acting General Manager until the Respondent terminated his employment on February 2, 2007. On February 27, 2007, Kelly filed a complaint with the DOL's Occupational Safety and Health Administration (OSHA) alleging that the Respondent terminated his employment in violation of the SOX's whistleblower protection provisions.⁴ On September 17, 2007, Kelly filed a notice of his intention to file a lawsuit in federal district court to resolve his SOX claims.⁵ It appears that this notice was served on the Office of Administrative Law Judges and the Administrative Review Board, but not OSHA or the Respondent.⁶ In any event, on September 26, 2008, the OSHA Regional Administrator issued the Secretary's Findings concluding that the Respondent did not violate the SOX.⁷

On October 10, 2007, Kelly filed a timely request for a hearing before a DOL administrative law judge.⁸ On November 9, 2007, Kelly filed his SOX lawsuit in the United States District Court for the Northern District of Texas.⁹ He filed an Unopposed

² See 29 C.F.R. § 1980.114(a). If the Board has not issued a final decision within 180 days of the date on which the complainant filed the complaint and there is no showing that the complainant has acted in bad faith to delay the proceedings, the complainant may bring an action at law or equity for de novo review in the appropriate United States district court, which will have jurisdiction over the action without regard to the amount in controversy. *Id.*

³ Petition for Review at 1.

⁴ Secretary's Findings at 1 (Sept. 26, 2007).

⁵ Respondent's Response to Petitioner's Motion and Brief in Support of Petition for Review (Resp. br.), Exhibit (Ex.) C.

⁶ *Id.*

⁷ Secretary's Findings at 3.

⁸ See 29 C.F.R. § 24.4(d)(3).

⁹ *Kelly v. Frank Parra Autoplex, Inc.*, No. 3-07CV1872-N.

Motion to Stay Proceedings with the ALJ on November 12, 2007, requesting a stay until the federal court “acknowledged jurisdiction” over the SOX claim. In response, the ALJ issued his R. D. & O. canceling the hearing and dismissing Kelly’s SOX complaint without prejudice.

Kelly filed a timely petition requesting the Board to review the ALJ’s R. D. & O.¹⁰ The Secretary of Labor has delegated to the Board her authority to issue final administrative decisions in cases arising under SOX.¹¹ The Board issued a Notice of Appeal and Order Establishing Briefing Schedule. Both parties filed briefs with the Board.

On January 16, 2008, the district court entered an order granting the parties’ agreed motion to stay and compel arbitration.¹²

STANDARD OF REVIEW

Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ’s fact findings under the substantial evidence standard.¹³ Substantial evidence is that which is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁴ In reviewing the ALJ’s conclusions of law, the Board, as the Secretary’s designee, acts with “all the powers [the Secretary] would have in making the initial decision”¹⁵ Therefore, the Board reviews an ALJ’s conclusions of law de novo.¹⁶

¹⁰ 29 C.F.R. § 1980.110(a).

¹¹ 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.

¹² Order Granting Agreed Motion to Say and Compel Arbitration, No. 3-07-CV-1782-N (N.D. Tex.).

¹³ See 29 C.F.R. § 1980.110(b).

¹⁴ *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

¹⁵ 5 U.S.C.A. § 557(b) (West 1996).

¹⁶ See *Getman v. Sw. Secs., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

DISCUSSION

The SOX provides a complainant with a choice of forums in which to litigate his or her complaint, depending on certain prerequisites:

(b) Enforcement action.--

(1) In general. A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by--

(A) filing a complaint with the Secretary of Labor;
or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.^[17]

Here, Kelly has chosen to proceed in district court after the Secretary failed to issue a decision within 180 days. As the statute provides, the “district court of the United States, . . . shall have jurisdiction over such an action.”¹⁸ Accordingly, the filing of Kelly’s complaint in district court deprived the Department of Labor of jurisdiction over his complaint.¹⁹

Kelly argues that a stay of a judicial proceeding pending an arbitration is specifically authorized by the Federal Arbitration Act (FAA), 9 U.S.C.A. § 3 (West 2008).²⁰ The Respondent counters that the FAA provides that it is applicable to “any suit

¹⁷ 18 U.S.C.A. § 1514A(b)(1)(emphasis added).

¹⁸ *Id.*

¹⁹ *Stone v. Duke Energy Corp.*, 432 F.3d 320, 322 (4th Cir. 2005)(“when [complainant] filed his first complaint in federal court . . . jurisdiction became lodged in the district court, depriving the ALJ of jurisdiction . . .”); *Powers v. Pinnacle Airlines*, ARB No. 05-138, ALJ No. 2005-SOX-065, slip op. at 5 (ARB Oct. 31, 2005)(the district court obtained jurisdiction of the complainant’s SOX complaint once she filed suit in district court and thus the ALJ no longer had jurisdiction to enter any order in the case other than one dismissing it on the ground that Powers had removed the case to district court).

²⁰ Brief in Support of Petition for Review at 2. The provision states:

or proceeding to be brought in any of the **courts of the United States . . .**” and thus it is not applicable to appeals before an administrative tribunal such as the Board.²¹

We need not decide here whether the FAA is applicable to our cases because Kelly never moved before the DOL for a stay pursuant to the FAA. Furthermore, even if he had applied for a stay under the FAA and it was granted, once Kelly invoked his right to de novo review in the district court, and the Department was deprived of jurisdiction, the stay would no longer have been effective. Instead, the proper procedure would be to request a stay of the district court with jurisdiction over the complaint. Kelly did so and the court granted the stay.²²

CONCLUSION

We agree with the ALJ that once Kelly filed his action in district court seeking de novo review of his SOX complaint, the Department of Labor was deprived of jurisdiction of Kelly’s complaint and thus could not stay the proceedings before the Department. Accordingly, Kelly’s appeal of the ALJ’s dismissal of his complaint is **DISMISSED**.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C.A. § 3.

²¹ Resp. br. at 4.

²² Order Granting Agreed Motion to Stay and Compel Arbitration, No. 3-07-CV-1782-N (N.D. Tex.).