In the Matter of:

HUNTER R. LEVI, **ARB CASE NO. 08-086**

COMPLAINANT, **ALJ CASE NO. 2008-SOX-028**

v. **DATE: September 25, 2009**

ANHEUSER BUSCH COMPANIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Hunter R. Levi, *pro se*, Overland Park, Kansas

For the Respondent:
Joseph J. Torres, Esq., *Winston & Strawn LLP*, Chicago, Illinois; Sabrina M. Wrenn, Esq., *Anheuser Busch, Inc.*, St. Louis, Missouri

FINAL DECISION AND ORDER

This case arose from a complaint Hunter R. Levi (Levi) filed alleging that his former employer, Anheuser Busch Companies, Inc. (ABI), violated the employee protection (i.e., whistleblower) provisions of Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (West Supp. 2005), and its implementing regulations at 29 C.F.R. Part 1980 (2006), when it refused to rehire him. Levi filed a complaint with the Department of Labor Occupational Safety and Health Administration (OSHA). OSHA dismissed his claim for failing to allege facts entitling him to relief. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.), dismissing the complaint because Levi failed to proffer evidence establishing an actionable adverse action. We affirm.

BACKGROUND

Prior to February 2003, Levi worked as a coal unloader at the Anheuser Busch Brewery headquartered in St. Louis, Missouri. In 1997, Levi began an extensive letter writing campaign against ABI. Levi wrote to members of ABI management and its Board of Directors, members of the United States Congress, various government and private institutions, and high-profile individuals. Levi's initial letters offered suggestions, and ABI welcomed Levi's contributions.[1] But as Levi continued, ABI found his efforts were disruptive. Toward the end of 2001, ABI warned Levi of his disruptive behavior. Levi failed to heed ABI's warning, and after additional confrontations, ABI suspended Levi indefinitely for cause in February of 2003.[2]

After learning of SOX's whistleblower protection in November of 2004, Levi requested that an earlier letter to the Department of Labor be considered a SOX complaint.[3] Levi subsequently filed two additional whistleblower claims against ABI with OSHA. On April 30, 2008, the Administrative Review Board consolidated Levi's three pending complaints against ABI and issued a final decision and order.[4] In that opinion, the Board held that Levi's first complaint was not timely filed and therefore dismissed it. We also ruled that Levi's second complaint failed to offer proof that he was not hired because of earlier instances of protected activity. Finally, we dismissed Levi's third complaint as untimely and duplicative.

On August 9, 2007, while Levi's existing complaints were pending before ALJs or before the Board, Levi mailed a request for rehire and reinstatement to ABI's audit committee. Specifically, Levi requested reinstatement and rehire, "temporarily assigning [him] to a position aiding the AB Board in its investigation of this securities fraud."[5] Levi's request for rehire warned that if ABI did not respond to his request by September 11, 2007, he would file another SOX complaint.[6] Levi's letter requesting rehire repeated his earlier allegations of ABI fraud and his previous whistleblower complaints.[7]

---

[1] See discussion in *Levi v. Anheuser Busch Co., Inc.*, ARB Nos. 06-102, 07-020, 08-006, ALJ Nos. 2006-SOX-037, -108, 2007-SOX-055 (ARB Apr. 30, 2008) (*Levi I-III*).

[2] *Levi I-III* at 3.

[3] Previously, Levi had written to the Secretary of Labor complaining of safety, wage and hour disputes, and alleged racism. *Levi I-III* at 3.

[4] *Levi I-III*.

[5] Aug 9, 2007 letter for rehire, att. A-4, Nov. 30, 2007 Complaint filed with OSHA.

[6] Levi stated that he would consider an extension of his deadline if ABI met one of several conditions: removal of the CEO, removal of the CFO, removal of other specified individuals, or

ABI did not respond to Levi's request for employment. On November 30, 2007, Levi filed this case, his fourth SOX whistleblower complaint against ABI. OSHA dismissed the case. Levi requested a hearing. The ALJ assigned to the case issued a show cause order requesting that the parties show cause why Levi's complaint should not be dismissed for failing to allege facts entitling him to relief. Both parties replied. ABI responded with a brief and exhibits arguing that Levi could not demonstrate that ABI subjected him to an adverse action; specifically he did not proffer facts which, if true, showed that ABI was seeking applicants for a position for which Levi was qualified.[8] Levi responded with a brief and exhibits, including his August 9, 2007 letter, arguing that ABI's failure to a rehire him was in retaliation for Levi's protected activity.[9] The ALJ dismissed Levi's case, finding Levi's proffer failed to establish a prima facie case, i.e., actionable retaliation. Levi appealed the ALJ's ruling.

JURISDICTION AND STANDARD OF REVIEW

The ARB's jurisdiction to review the ALJ's decision is set out in Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), which delegated to the ARB the Secretary's authority to review ALJ decisions issued under the SOX.[10] Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's fact findings under the substantial evidence standard.[11] 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 . . . ."[12] Therefore, the Board reviews an ALJ's conclusions of law de novo.[13] The ALJ's ruling that Levi has failed to offer sufficient facts to sustain his evidentiary burden is a legal conclusion that we will review de novo.

---

confiscation of ABI distributorships from named individuals. Aug 9, 2007 letter for rehire, att. A-3, Nov. 30, 2007 complaint.

7 Aug 9, 2007 letter for rehire, att. A-3, Nov. 30, 2007 complaint.

8 Apr. 9, 2008 ABI Resp. to Sh. Cause Order at 3-5.

9 Apr. 16, 2008 Levi Resp. to Sh. Cause Order at 1-4.

10 18 U.S.C.A. § 1514A.

11 *See* 29 C.F.R. § 1980.110(b).

12 5 U.S.C.A. § 557(b) (West 1996).

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

DISCUSSION

Section 806 of the SOX protects employees[14] who provide information to a covered employer[15] or to 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, or any provision of Federal law relating to fraud against shareholders.[16] A covered employer is prohibited from discharging, demoting, suspending, threatening, or in any matter discriminating against an employee in the terms and conditions of employment because of any of the employee's protected activity.[17] Employees are also protected against retaliation when they have filed, testified 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.[18]

SOX actions 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, (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005).[19] Accordingly, a SOX complainant must allege and then prove by a preponderance of the evidence that: (1) he engaged in protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent

---

[14] Pursuant to 29 C.F.R. § 1980.101, an "[e]mployee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative."

[15] A covered employer company is a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company. 18 U.S.C.A. § 1514A. ABI is a company registered under section 12 or required to file under 15(d) of the Exchange Act and thus is a covered employer under Section 806. OSHA Order at 1.

[16] 18 U.S.C.A. § 1514A(a).

[17] *Id.*; 29 C.F.R. § 1980.102.

[18] *Id.*

[19] 18 U.S.C.A. § 1514A(b)(2)(C).

knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[20]

Where a complainant like Levi alleges that the adverse action was the prospective employer's refusal to hire him, he must also establish: 1) that he applied and was qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected; and 3) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[21]

Levi was not successful in his previous whistleblower complaints, *Levi I-III*. In this case, *Levi IV*, we will not reconsider our prior rulings; in particular that Levi is not entitled to reinstatement based upon alleged prior whistleblowing complaints. *Levi IV* constitutes a new request for employment with ABI. We assume for the purpose of his complaint that Levi's act of filing three previous whistleblower complaints is protected activity.[22] ABI officials who received Levi's letter for rehire were aware of Levi's previous complaints as he referred to them in the letter.[23] Accordingly, we proceed to the third element of a successful complaint, that he was subjected to an unfavorable personnel action. As we explain, ABI did not subject him to an adverse action because Levi's response to the show cause order failed to provide evidence that shows a job vacancy existed for which Levi was qualified and for which he properly applied.

In his August 9, 2007 letter to the audit committee, Levi claimed he wanted ABI to rehire and or reinstate him.[24] The letter did not clearly state whether Levi wanted a position on the audit committee or the board of directors or wanted his old job back.[25] Concerning his request for employment on the audit committee or the board of directors, Levi presented no evidence that ABI was hiring for a position in that capacity. Indisputably, if the employer is not hiring for a position to which an applicant sends an unsolicited letter offering his services, the employee does not suffer an adverse action, if he is not hired. As the ALJ noted, "[a] simple wish to be rehired

---

[20] *Levi I-III*, slip op. at 8; *Harvey v. Home Depot*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-020, -036, slip op. at 10 (ARB June 2, 2006).

[21] *Hasan v. U.S. Dep't of Labor*, 298 F.3d 914, 916-917 (10th Cir. 2002); *see also Hasan v. Sargent & Lundy*, ARB No. 03-030, ALJ No. 2000-ERA-007, slip op. at 3 (ARB July 30, 2004); *Samodurov v. Gen. Physics Corp.*, No. 1989-ERA-020, slip op. at 9-10 (Sec'y Nov. 16, 1993) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

[22] 18 U.S.C.A. § 1514A(a)(2).

[23] Aug 9, 2007 letter for rehire, att. A-3, Nov. 30, 2007 complaint.

[24] *Id.* at A-3, 4.

[25] *Id.*; *see also* Pet. for Rev. at 1; Levi Br. 2 (indicating letter asked for a position on the Board of Directors).

is not an adverse employment action under the Act as related to a former employee."[26] Even if ABI were soliciting a job on the audit committee, Levi's former position was a coal unloader,[27] and he did not provide any evidence concerning his qualifications for a position on the audit committee.

Concerning Levi's request for rehire or reinstatement to his former job, Levi claims that the ALJ erred in finding that ABI was not soliciting applications.[28] Levi attached a copy of an Internet job posting for "Utilities Process Operator" to his OSHA complaint.[29] Levi claims he worked this job for twenty four years, but offers no evidence showing his qualifications for the job. The job posting lists several "Requirements and Competencies" and "Primary Responsibilities" for a successful applicant, e.g., "[w]orking knowledge of utilities system," "Stationary Engineers License or current enrollment in related program is preferred," and ability to work "Utilities Rotating Shift Schedule." Other than Levi's bare claim that he worked this job before, he presents no evidence that he satisfies the requirements and competencies or has job experience matching the listed primary responsibilities. Levi does not show, for example, that he has a working knowledge of utilities systems, a Stationary Engineers License or current enrollment in a related program, or that he is able to work a rotating shift schedule.

Finally, Levi does not provide evidence that he ever properly applied to any of these positions. Levi's August 9, 2007 letter was addressed to the ABI audit committee. Levi asserts that if he failed to follow the proper application channel, ABI could have notified him that he sent his letter requesting rehire to the wrong recipient and directed him to a proper method of applying.[30] While this may be true, ABI is not obligated to convert Levi's request for employment into a proper job application or to reply to Levi with a proper method of applying.

As noted above, a successful SOX whistleblower complainant must show that he engaged in protected activity and that his protected activity contributed to an adverse action. Further, in a case dealing with an applicant and prospective employer, the successful complainant must show that he properly applied to an open position for which the company was seeking applicants and that he was qualified. In response to the show cause order, Levi failed to offer evidence that he properly applied for a job for which ABI was seeking applicants and that he was qualified. Thus, Levi has failed to offer evidence showing that he was not hired because of his protected activity. Because he is unable to establish an essential element of his whistleblowing complaint, Levi's entire claim must fail.

---

26 R. D. & O. at 5.

27 ABI Resp. Br. at 3.

28 Pet. for Rev. at 2; R. D. & O. at 5.

29 See job announcement for utility process operator, app. F-1-2, Nov. 30, 2007 complaint.

30 Pet. for Rev. 2-3.

CONCLUSION

For the reasons stated above, we **AFFIRM** the ALJ's recommendation and **DISMISS** Levi's complaint against ABI.[31]

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

[31] Consistent with the disposition of the case, Levi's motions for emergency economic reinstatement, motion to strike illegal discharge, motion for sanctions against Winston & Strawn, and for referral to other government agencies are denied.