



**In the Matter of:**

**STEVEN J. KEOUGH,**

**ARB CASE NO. 09-041**

**COMPLAINANT,**

**ALJ CASE NO. 2008-SOX-065**

**v.**

**DATE: August 27, 2009**

**SURMODICS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Steven J. Keough, Esq., St. Paul, Minnesota**

***For the Respondent:***

**Kathlyn E. Noecker, Esq., *Faegre & Benson, LLP*, Minneapolis, Minnesota**

**FINAL DECISION AND ORDER APPROVING SETTLEMENT  
AND DISMISSING CASE WITH PREJUDICE**

This case arose when the Complainant, Steven J. Keough, filed a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX or the Act).<sup>1</sup> On December 23, 2008, a Department of Labor Administrative Law Judge (ALJ) issued a Reconsideration, Amended Decision and Order Dismissing Complaint, which reconsidered and affirmed his December 5, 2008 Order Denying Motion to Reconsider

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<sup>1</sup> 18 U.S.C.A. § 1514A (West 2006). The regulations implementing SOX are found at 29 C.F.R. Part 1980 (2008).

and Decision and Order Dismissing Complaint. Both Orders dismissed the case on the grounds that Keough did not timely file his complaint and that he failed to establish that he was entitled to equitable tolling of the limitations period.

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under SOX to the Administrative Review Board (ARB or Board).<sup>2</sup> Keough filed a timely petition requesting the Board to review the ALJ's Orders.<sup>3</sup> In response, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule.

On August 4, 2009, the parties informed the Board that they had entered into a settlement agreement and jointly requested the Board to dismiss this action with prejudice. On August 18, 2009, the Board received a copy of the parties' settlement agreement dated July 29, 2009, for its review and approval. The parties may settle a case arising under SOX if the participating parties agree to a settlement, and they provide the Board with a copy of the settlement for its review and approval.<sup>4</sup>

Our review of the settlement agreement reveals that it is intended to settle matters under laws other than SOX.<sup>5</sup> Our authority to review settlement agreements is limited to the statutes within our jurisdiction and is defined by the applicable statutes.<sup>6</sup> Therefore, we have restricted our review of the settlement agreement to ascertaining whether its terms fairly, adequately, and reasonably settle this SOX case over which we have jurisdiction.

In addition, if the provisions in paragraph 9 of the settlement agreement were to preclude Keough from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore, constitute unacceptable "gag" provisions.<sup>7</sup> Furthermore, the Agreement provides that the

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<sup>2</sup> 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.

<sup>3</sup> 29 C.F.R. § 1980.110(a).

<sup>4</sup> 29 C.F.R. § 1980.111(d)(2).

<sup>5</sup> Confidential Settlement Agreement and Release, ¶¶ 9, 10, 14, 18, 20, F.

<sup>6</sup> *Barker v. Perma-Fix of Dayton.*, ARB No. 06-045, ALJ No. 2006-SOX-001, slip op. at 2 (ARB July 10, 2006) (SOX settlements must be filed with the ARB).

<sup>7</sup> *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 6 (ARB Nov. 10, 1997); *Connecticut Light & Power Co. v. Sec'y, U.S. Dep't of Labor*, 85 F.3d 89, 95-96 (2d Cir. 1996) (employer engaged in unlawful discrimination by restricting complainant's ability to provide regulatory agencies with information; improper "gag" provision constituted adverse employment action).

parties shall keep the terms of the settlement confidential.<sup>8</sup> The Board notes that the parties' submissions, including the settlement agreement, become part of the record of the case and are subject to the Freedom of Information Act (FOIA).<sup>9</sup> FOIA requires Federal agencies to disclose requested records unless they are exempt from disclosure under the Act.<sup>10</sup> Department of Labor regulations provide specific procedures for responding to FOIA requests and for appeals by requestors from denials of such requests.<sup>11</sup>

Finally, we construe paragraph 22, stating that the agreement and release "will be construed in accord with, and any dispute or controversy arising from any breach or asserted breach of this Agreement or the companion Release will be governed by, the laws of the State of Minnesota" as not limiting the authority of the Secretary of Labor and any Federal court, which shall be governed in all respects by the laws and regulations of the United States.<sup>12</sup>

The parties have certified that the agreement, release, and exhibits to the agreement constitute the entire settlement with respect to Keough's SOX claim.<sup>13</sup> The Board finds that the settlement is fair, adequate, and reasonable, and in the public interest. Accordingly, with the reservations noted above limiting our approval to the settlement of Keough's SOX claim, we **APPROVE** the agreement and **DISMISS** the complaint with prejudice.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Chief Administrative Appeals Judge**

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<sup>8</sup> Confidential Settlement Agreement and Release, ¶6.

<sup>9</sup> 5 U.S.C.A. § 552 (West 2007).

<sup>10</sup> *Coffman v. Alyeska Pipeline Serv. Co. & Arctic Slope Inspection Serv.*, ARB No. 96-141, ALJ Nos. 1996-TSC-005, -006, slip op. at 2 (ARB June 24, 1996).

<sup>11</sup> 29 C.F.R. § 70 *et seq.* (2007).

<sup>12</sup> *Phillips v. Citizens' Ass'n for Sound Energy*, 1991-ERA-025, slip op. at 2 (Sec'y Nov. 4, 1991).

<sup>13</sup> Confidential Settlement Agreement and Release, ¶20.