



In the Matter of:

BRUCE FIELD,

ARB CASE NO. 09-100

COMPLAINANT,

ALJ CASE NO. 2009-SOX-022

v.

DENVER WATER,

RESPONDENT,

and

JAMES E. PHILLIPS, JR.,

ARB CASE NO. 09-099

COMPLAINANT

ALJ CASE NO. 2009-SOX-024

v.

DATE: May 26, 2011

DENVER WATER,

RESPONDENT.

Appearances:

For the Complainant Bruce Field:

Bruce Field, *pro se*, Arvada, Colorado

For the Complainant James E. Phillips, Jr.:

James E. Phillips, Jr., *pro se*, Denver, Colorado

For the Respondent:

Patricia L. Wells, Esq.; Gail J. Rosenschein, Esq.; Kristine Bates, Esq., Denver, Colorado

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.

ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER

These appeals arise from separate complaints filed by Bruce Field and James E. Phillips with the Department of Labor's Occupational Safety and Health Administration (OSHA) against their former employer, Denver Water. Field and Phillips alleged that Denver Water wrongfully terminated their employment after they reported waste and fraud to Denver Water. Field and Phillips claimed that such whistleblowing activity is protected by Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204 (SOX), 18 U.S.C.A. § 1514A (West Supp. 2010), and its implementing regulations at 29 C.F.R. Part 1980 (2010). A Labor Department Administrative Law Judge, in separate opinions,¹ dismissed the complaints because Denver Water is not a publicly-traded company and thus is not subject to the SOX's whistleblower protection provisions. Field and Phillips appealed the dismissal of their complaints. For the following reasons, we summarily affirm the ALJ's dismissal of both complaints.

CONSOLIDATION

In view of the substantial identity of the legal issues, parties, and the commonality of the evidence, and in the interest of judicial and administrative economy, we consolidate these two appeals of the dismissal of Field's and Phillips's respective complaints for the purpose of review and decision. *See Saporito v. Florida Power & Light Co.*, ARB Nos. 09-072, -128, -129, -141,; ALJ Nos. 2009-ERA-001, -009, -006, -012, slip op. at 3 (ARB Apr. 29, 2011); *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, -115; ALJ Nos. 2004-SOX-020,-036, slip op. at 7 (ARB June 2, 2006).

BACKGROUND AND PROCEDURAL HISTORY

In separate December 2008 complaints filed with OSHA, Field and Phillips alleged that Denver Water illegally terminated their employment because they complained about waste and fraud on three construction projects. Following an investigation, OSHA dismissed each complaint based on a finding that Denver Water is not a "company" within the meaning of 18 U.S.C.A. § 1514A and, therefore, is not subject to the SOX employee protection provisions. Field and Phillips objected to OSHA's findings and requested a hearing.

Prior to a hearing, the ALJ, in Field's case (2009-SOX-022) and in Phillips's case (2009-SOX-024), granted Denver Water's motion for summary decision. In both of these cases, the ALJ found that Denver Water is not a publicly-traded company, that is, a company with a class of securities registered under section 12 of the Securities and 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)). *See* 18 U.S.C.A. § 1514A(a). Therefore, the ALJ concluded that Denver

¹ *Field v. Denver Water*, 2009-SOX-022 (May 8, 2009), and *Phillips v. Denver Water*, 2009-SOX-024 (May 8, 2009).

Water is not subject to the SOX's whistleblower protection provisions. Accordingly, the ALJ granted summary decision and dismissed the complaints. Field and Phillips timely appealed to the Administrative Review Board (ARB or Board).²

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the SOX, 18 U.S.C.A. § 1514A(b). The Secretary has delegated that authority to the Administrative Review Board. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). *See* 29 C.F.R. § 1980.110(a).

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) (2010).

DISCUSSION

SOX Section 806,, 18 U.S.C.A. § 1514A(a), as amended, reads in relevant part:

(a) *Whistleblower protection for employees of publicly traded companies.* No 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)), . . . including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, . . . or any officer, employee, contractor, subcontractor, or agent of such company, . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee

To prevail on the merits of a Section 806 case, a covered employee must prove by a preponderance of the evidence that he or she, *inter alia*, suffered an unfavorable personnel action by a covered company. 49 U.S.C.A. § 42121; 18 U.S.C.A. § 1514A(b)(2)(C). Therefore, as a

² Subsequent to the filing of these two appeals, Congress enacted and the President signed into law on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), which amends Section 806. The amendments are not determinative of the outcome herein. *See Johnson v. Siemens Bldg. Techs., Inc.*, ARB No 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011).

threshold matter, to avail themselves of the SOX whistleblower protections, Field and Phillips must demonstrate that Denver Water is a covered company under Section 806, i.e., a company “with a class of securities registered” under the Securities Exchange Act, or that is “required to file reports” under the Act. 18 U.S.C.A. 1514A(a).

Before the ALJ, Denver Water submitted documentary evidence, including the Charter of the City and County of Denver and various affidavits, establishing that it has no class of securities registered under section 12 and is not required to file reports under section 15(d) of the Securities Exchange Act of 1934. Field and Phillips offered no evidence to the contrary. Instead they argued that Denver Water is subject to the SOX whistleblower protections because, in theory, there *should* be legal protection for workers claiming fraud by a government agency, such as Denver Water. Based upon Denver Water’s uncontroverted evidence, the ALJ found that Denver Water was not a publicly-traded company within the meaning of 18 U.S.C.A. § 1514A(a), and accordingly dismissed Field’s and Phillips’s respective complaints.

As this Board has previously noted, “the whistleblower protection provisions of Sarbanes-Oxley cover only companies with securities registered under § 12 or companies required to file reports under § 15(d) of the Exchange Act.” *Flake v. New World Pasta Co.*, ARB No. 03-126, ALJ No. 2003-SOX-018, slip op. at 4 (ARB Feb. 25, 2004), *aff’d on other grounds*, *Flake v. U.S. Dep’t of Labor*, 248 Fed. Appx. 287 (3d Cir. 2007) Our review of the record finds nothing that would support a finding that Denver Water is such a publicly-traded company subject to the SOX whistleblower protection provisions. We find that substantial evidence supports the ALJ’s findings that Respondent Denver Water has no class of securities registered under section 12 of the Securities Exchange Act or that the Respondent is required to file reports under section 15(d) of the Securities Exchange Act of 1934. The ALJ’s conclusion that the Respondent is not a covered employer under 18 U.S.C.A. § 1514A(a) is correct as a matter of law. Therefore, we agree with the ALJ’s decision to grant summary decision in Denver Water’s favor, and we dismiss the complaints.

Accordingly, the ALJ’s decisions and orders granting summary decision in the above-captioned cases are **AFFIRMED**. The complaints are **DISMISSED**.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge