



**In the Matter of:**

**BRUCE FIELD,**

**ARB CASE NO. 09-136**

**COMPLAINANT,**

**ALJ CASE NO. 2009-SOX-046**

**v.**

**DATE: May 27, 2011**

**BKD, LLP,**

**and**

**BKD CORPORATE FINANCE, LLC,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Bruce Field, *pro se*, Arvada, Colorado**

*For the Respondents:*

**Michaela M. Warden, Esq., *Warden Law Firm LLC*, Shawnee Mission, Kansas**

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

**FINAL DECISION AND ORDER**

Bruce Field filed two related complaints with the Department of Labor's Occupational Safety and Health Administration (OSHA) against, (1) Denver Water, his former employer, and (2) BKD, LLP, the outside accounting firm of Denver Water, and BKD Corporate Finance, LLC, a wholly-owned subsidiary of BKD, LLP. This appeal concerns the second complaint.<sup>1</sup> Field alleged that Denver Water wrongfully terminated his employment after he reported waste and fraud to Denver Water and that BKD, LLP ignored the waste and fraud and worked with corrupt Denver Water managers to suppress it. Field claimed that his activities were 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 (ALJ) dismissed the complaint because he found that the Respondents are not publicly-traded companies and consequently are not subject to the SOX's whistleblower protection provisions. Field appealed the dismissal of his complaint. For the following reasons, we summarily affirm the ALJ's dismissal of Field's complaint.

### BACKGROUND AND PROCEDURAL HISTORY

Field filed this complaint in January 2009. Following an investigation, OSHA dismissed the complaint based on a finding that neither Respondent is a "company" within the meaning of 18 U.S.C.A. § 1514A and, therefore, they are not subject to the SOX employee protection provisions. Field objected to OSHA's findings and requested a hearing.

Prior to a hearing, the ALJ granted the Respondents' motion for summary decision. The ALJ found that the Respondents are not publicly-traded companies, that is, companies 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)). See 18 U.S.C.A. § 1514A(a). Therefore, the ALJ concluded that the Respondents are not subject to the SOX's whistleblower protection provisions.<sup>2</sup> Accordingly, the ALJ granted summary decision and dismissed the complaint. Field timely appealed to the Administrative Review Board (ARB or Board).<sup>3</sup>

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<sup>1</sup> An Administrative Law Judge dismissed Field's first complaint against Denver Water based upon a finding that Denver Water is not a publicly-traded company subject to the SOX whistleblower protection provisions. We affirmed. *Field v. Denver Water*, ALJ No. 2009-SOX-022, ARB No. 09-100 (ARB May 26, 2011).

<sup>2</sup> The ALJ also found that BKD, LLP failed to show that Field was not a covered employee within the meaning of 29 C.F.R. § 1980.101. ALJ's August 7, 2009 Decision and Order Granting Summary Decision and Modifying Caption at 8, 9.

<sup>3</sup> Subsequent to the filing of this appeal, 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 of this appeal. See *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011).

## 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 threshold matter, to avail himself of the SOX whistleblower protections, Field must demonstrate that the Respondents are covered companies 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, the Respondents submitted documentary evidence demonstrating that BKD, LLP, and BKD Corporate Finance, LLC have no class of securities registered under

section 12 and are not required to file reports under section 15(d) of the Securities Exchange Act of 1934. Field offered no evidence to the contrary. Instead, Field argued that Section 806 *should* apply because: (1) BKD, LLP is a certified public accounting firm registered with the Public Company Accounting Oversight Board, which must follow accepted accounting procedures; (2) BKD, LLP has a contract with Denver Water and must work in the best interest of Denver residents; (3) BKD, LLP provides services to publicly-owned companies, and (4) BKD, LLP's failure to address the waste and fraud affected Field's employment at Denver Water. Based upon the Respondents' uncontroverted evidence, the ALJ found that the Respondents are not publicly-traded companies within the meaning of 18 U.S.C.A. § 1514A(a). Therefore, the ALJ concluded that the Respondents are not subject to Section 806. Accordingly, the ALJ dismissed Field's complaint.

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 (Feb. 25, 2004), *aff'd on other grounds*, *Flake v. U.S. Dept of Labor*, 248 Fed. Appx. 287 (3d Cir. 2007). Our review of the record finds nothing that would support a finding that either Respondent is a publicly-traded company or that BKD Corporate Finance, LLC is a subsidiary of a publicly-traded company, subject to the SOX whistleblower protection provisions. *See Johnson v. Siemens Bldg. Techs., Inc.*, ARB No 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011). We find that substantial evidence supports the ALJ's findings that the Respondents have no class of securities registered under section 12 of the Securities Exchange Act or that the Respondents are required to file reports under section 15(d) of that Act. The ALJ's conclusion that the Respondents are not covered employers 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 the Respondents' favor and we dismiss Field's complaint.

The Respondents additionally urge the Board to issue an order under 29 C.F.R. § 1980.110(e) to the effect that BKD Corporate Finance, LLC did not violate the terms of Section 806. Motion at 5. Given our decision to dismiss Field's complaint against both Respondents, we deny the motion as it is moot.<sup>4</sup>

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<sup>4</sup> Given our decision to affirm the ALJ's conclusion that BKD, LLP is not subject to the SOX whistleblower protection provisions, we do not reach the ALJ's finding that BKD, LLP failed to show that Field was not an employee within the meaning of 29 C.F.R. § 1980.101. Further, Field alleges that the ALJ demonstrated bias in dismissing Field's separate complaint in *Field v. Denver Water*, ALJ No. 2009-SOX-022 (May 8, 2009). We find no evidence that the ALJ had predetermined the outcome of this case.

Accordingly, the ALJ's decision and order granting summary decision in the above-captioned case is **AFFIRMED** and Field's complaint is **DENIED**. The Respondents' motion is also **DENIED**.

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**