



**In the Matter of:**

**SAMUEL J. BUCALO,**

**ARB CASE NO. 10-107**

**COMPLAINANT,**

**ALJ CASE NO. 2008-SOX-053  
2008-STA-059**

**v.**

**DATE: March 21, 2012**

**UNITED PARCEL SERVICE, INC.,**

**and**

**TEAMSTERS LOCAL 100,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Samuel J. Bucalo, *pro se*, Cincinnati, Ohio**

*For Respondent United Parcel Service, Inc:*

**David L. Hoskins, Esq., *Frost Brown Todd LLC*, Louisville, Kentucky**

*For Respondent Teamsters Local 100:*

**Julie C. Ford, Esq., *Doll, Jansen & Ford*, Dayton, Ohio**

**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**

This case arises under the whistleblower protection provisions and implementing regulations of Title VIII of the Sarbanes-Oxley Act, 18 U.S.C.A. § 1514(A) (West 2007), 29

C.F.R. Part 1980 (2007) (SOX); the Surface Transportation Assistance Act of 1982, 49 U.S.C.A. § 31105 (West 2008), 29 C.F.R. Part 1978 (2007) (STAA); and the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 2008), 29 C.F.R. Part 24 (2007) (TSCA).<sup>1</sup>

On March 1, 2008, Samuel J. Bucalo filed a complaint alleging that Respondents United Parcel Service, Inc. (UPS) and Teamsters Local 100 (Local 100) retaliated against him in violation of the SOX, STAA, and TSCA. For the reasons that follow, the Administrative Review Board (ARB or Board) affirms the Administrative Law Judge's (ALJ's) order dismissing Bucalo's complaint.

### **BACKGROUND AND PROCEEDINGS BELOW**

Bucalo is a UPS employee who also serves as a union steward for Local 100. On March 1, 2008, Bucalo filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that UPS and Local 100 colluded to withdraw grievances he had filed against UPS, and that Local 100 refused to allow him to represent himself at some of his grievance hearings. According to Bucalo, UPS and Local 100 retaliated against him for complaining to various authorities about safety violations UPS committed between 2000 and 2008.

Following an investigation, OSHA issued a determination letter rejecting Bucalo's complaint, whereupon he filed objections and requested a hearing before an ALJ. UPS and Local 100 filed Motions to Dismiss Bucalo's complaint on June 18, and July 7, 2009, respectively. The ALJ issued a Decision and Order on September 2, 2009, denying Local 100's motion, and granting in part UPS's motion. The Respondents next filed Motions for Summary Decision on October 23, and November 13, 2009.

After reviewing Bucalo's response to the latter motions, the ALJ issued a "Decision and Order Granting Respondents' Motions for Summary Decision on TSCA and SOX Complaints, and Recommended Decision and Order Granting Respondents' Motions for Summary Decision on STAA Complaint" (D. & O.) on May 3, 2010, granting the Respondents' respective motions and dismissing Bucalo's complaint. Bucalo timely appealed the ALJ's D. & O. to the ARB.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX, STAA, and TSCA. Secretary's Order No. 1-2010 (Delegation of

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<sup>1</sup> Congress amended the SOX after Bucalo filed his complaint. *See* the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Also, the Department of Labor amended the regulations governing SOX, STAA, and TSCA claims. *See* 29 C.F.R. Part 1980 (2011) (SOX); 29 C.F.R. Part 1978 (2011) (STAA); 29 C.F.R. Part 24 (2011) (TSCA). These amendments do not affect the outcome of this case.

Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

The Board reviews an ALJ's grant of summary decision de novo. *Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 3 (ARB July 21, 2011). The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 3 (ARB Dec. 30, 2005). Accordingly, consistent with 29 C.F.R. § 18.40(d) (2011), an ALJ's grant of summary decision will be affirmed where it is determined upon de novo review that the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *See generally Flor v. United States Dep't of Energy*, No. 1993-TSC-001, slip op. at 10 (Sec'y Dec. 9, 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

## DISCUSSION

To prevail on a whistleblower claim under the SOX, STAA, or TSCA, a complainant must prove by a preponderance of the evidence that: (1) he engaged in activity or conduct those statutes protect; (2) the respondent took an unfavorable action against him; and (3) the protected activity was either a contributing factor (under the SOX and STAA) or the reason for (under the TSCA) the adverse personnel action. *Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, ALJ No. 2010-SOX-003, slip op. at 5 (ARB Nov. 9, 2011); *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011); *Bucalo v. UPS*, ARB No. 08-087, ALJ No. 2006-TSC-002, slip op. at 6 (ARB July 30, 2010). Failure to prove any one of these essential elements means that a complainant cannot prevail on his retaliation claim.

Bucalo alleged in his complaint that UPS violated the whistleblower protection provisions of SOX, STAA, and the TSCA by colluding with or inducing Local 100 to withdraw grievances he filed through the union against UPS. Bucalo further alleged that Local 100 violated the SOX, STAA, and TSCA by refusing to allow him to present his own grievances at hearings and by withdrawing some of those grievances without his authorization. The ALJ found that, for purposes of summary decision, there was conflicting evidence as to whether Bucalo engaged in protected activity or was subjected to adverse employment actions by the Respondents. But the ALJ granted UPS's Motion for Summary Decision because Bucalo failed to present sufficient evidence that UPS colluded with Local 100 in taking adverse action against him. Additionally, the ALJ granted Local 100's Motion for Summary Decision because Bucalo failed to present any evidence demonstrating a causal relationship between Bucalo's alleged protected activity and the alleged adverse actions.

The ALJ concluded that Bucalo's response to the Respondents' motions did not set forth specific facts showing that there is a genuine issue of material fact in dispute with respect to either motion that contradicted the evidence presented by UPS and Local 100. D. & O. at 9, 11. Accordingly, the ALJ dismissed Bucalo's complaint in its entirety. Based on our review of the evidentiary record, we agree with the ALJ's ruling. The record also supports the ALJ's conclusion that Local 100's treatment of Bucalo was based upon Bucalo's refusal to cooperate with the union in an attempt to handle his backlog of grievances and that, to the extent that Bucalo engaged in whistleblower protected activity, Bucalo failed to present any evidence demonstrating that such activity was a contributing or motivating factor in the adverse action that was taken. Accordingly, we agree that Bucalo failed to proffer sufficient evidence to create a genuine issue of material fact regarding the necessary nexus between his alleged protected activity and the alleged adverse actions.

Bucalo also argues before the Board that, "[t]here is not enough evidence to support the Complainant's case because the Respondents simply refused to submit any evidence that was requested by the Complainant." Petition for Review at 12. But a party may not postpone a ruling on a motion for summary decision "in order to engage in further discovery when that party has offered no more than speculation as to what facts might be uncovered." *Moore v. U.S. Dep't of Energy*, ARB No. 99-047, ALJ No. 1998-CAA-016, slip op at 4 (ARB June 25, 2001). Instead, a party seeking further discovery "is required to state with some precision the materials he hopes to obtain with further discovery, and exactly how he expects those materials would help him in opposing summary judgment." *Id.* Before the ALJ, as well as before the Board, Bucalo fails to explain how further discovery will provide him with evidence supporting his claim of retaliation.

#### CONCLUSION

Bucalo has failed to present evidence that would raise an issue of material fact regarding whether UPS colluded with Local 100, or whether his protected activity was a factor in the adverse actions he alleges Local 100 took against him. UPS and Local 100 are thus entitled to summary decision as a matter of law. Accordingly, the Board **AFFIRMS** the ALJ's D. & O. for the reasons set forth therein, and **DISMISSES** Bucalo's complaint.

**SO ORDERED.**

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

**JOANNE ROYCE**  
Administrative Appeals Judge

**LISA WILSON EDWARDS**  
Administrative Appeals Judge