



In the Matter of:

JIRI PIK,

ARB CASE NO. 11-034

COMPLAINANT,

ALJ CASE NO. 2011-SOX-006

v.

DATE: May 31, 2012

CREDIT SUISSE AG,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

*For the Complainant:*

Jiri Pik, *pro se*, Frankfurt, Germany

*For the Respondent:*

Jill L. Rosenberg, Esq., and Renee B. Phillips, Esq.; *Orrick, Herrington & Sutcliffe LLP*; New York, New York

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

### FINAL DECISION AND ORDER

This case arises under Section 806, the employee protection provision, of the Sarbanes-Oxley Act of 2002 (SOX)<sup>1</sup> and its implementing regulations.<sup>2</sup> Jiri Pik filed a complaint alleging

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<sup>1</sup> 18 U.S.C.A. § 1514A (Thomson/West Supp. 2011).

that Credit Suisse AG violated the SOX when he was constructively discharged from employment. An Administrative Law Judge (ALJ) issued a Decision and Order Dismissing Complaint (D. & O.), in which he recommended dismissal of the complaint. We affirm.

## BACKGROUND

Pik is a citizen of the Czech Republic.<sup>3</sup> The Tresag agency, his employer, placed him on a contract assignment with Credit Suisse, a foreign company, in Zurich, Switzerland, where he worked from August 2009 to August 2010.<sup>4</sup> On August 14, 2010, Pik filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that he “was hired by NYC based staff of Credit Suisse,” that his manager “for the majority” of his contract was from “the NYC office” and that he “spent at least 50% of my remaining time” after his “NYC” manager “stopped being my real manager working with the NYC based Gemfire team” at Credit Suisse.<sup>5</sup>

In his complaint, Pik alleges that he was subject to “mobbing and harassment,” “even by the NYC staff,” leading to his “constructive dismissal.”<sup>6</sup> Pik’s complaint states that it is based on “violations of Health & Safety rules at Credit Suisse, New York and Zurich.”<sup>7</sup> But the complaint contains no specific factual allegations as to whether Pik engaged in any SOX protected activity. Attached to Pik’s complaint is a copy of an August 9, 2010 e-mail that Pik sent to the Swiss police regarding an alleged violation of the Swiss Labour Law due to harassment by two of his managers in Switzerland, Andreas Luginbuehl and David Werlen, which he alleges escalated to his managers’ supervisors and the Human Resources Department at Credit Suisse.<sup>8</sup> Also, attached to Pik’s complaint are e-mails between Pik and Credit Suisse officials, including Luginbuehl and Werlen, which he states provide evidence of the harassment.<sup>9</sup>

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<sup>2</sup> 29 C.F.R. Part 1980 (2011).

<sup>3</sup> See *Pik v. Goldman Sachs Group, Inc.*, ARB No. 08-062, ALJ No. 2007-SOX-092, slip op. at 2 (ARB June 30, 2009).

<sup>4</sup> Aug. 14, 2010 Complaint – Aug. 9, 2010 e-mail attachment at p. 2.

<sup>5</sup> Aug. 14, 2010 Complaint.

<sup>6</sup> Aug. 14, 2010 Complaint – Aug. 9, 2010 e-mail attachment at p. 5.

<sup>7</sup> Aug. 14, 2010 Complaint.

<sup>8</sup> Aug. 14, 2010 Complaint – Aug. 9, 2010 e-mail attachment at p. 1-4.

<sup>9</sup> Aug. 14, 2010 Complaint – Aug. 9, 2010 e-mail attachment at p. 5-18.

OSHA dismissed his complaint. Pik appealed the dismissal to the Department of Labor's Office of Administrative Law Judges. On February 18, 2011, the ALJ issued an Order to Show Cause why Pik's complaint should not be dismissed as it appears that he is a resident of a foreign country employed by a foreign company operating in that country and as he failed to allege that he engaged in any SOX protected activity. In response, Pik stated, in relevant part, that his "forced resignation was in retaliation for reporting fraud by the Gemfire team of Credit Suisse," which provides Credit Suisse "with market data which is then used for producing reports," as he "uncovered substantial number of bugs/intentional mistakes" resulting in "intentionally false numbers reported to the investors of Credit Suisse."<sup>10</sup> He further alleged that when he "escalated this to management, I was in retaliation forced to resign" and that the "Gemfire team and other staff of Credit Suisse did engage in intentionally negligent and fraudulent behavior amounting to fraud upon shareholders and investors of Credit Suisse."<sup>11</sup>

The ALJ dismissed the complaint because Pik is a resident of a foreign country employed by a foreign company operating in that country and, therefore, held that Pik is not covered by the SOX. In addition, the ALJ noted that Pik did not show that he made any specific complaints to his superiors in either Switzerland or New York City which could be considered SOX protected activity. Thus, the ALJ held that Pik has not shown that he specifically engaged in SOX protected activity.<sup>12</sup> Pik appealed.

In his petition for review and brief to the Board, Pik alleges that he worked on the "market data system of Credit Suisse AG, called Gemfire, in which I found literally tens of substantial problems which lead the entire Credit Suisse to report false reports on risk numbers to regulators and investors of Credit Suisse" and that "the Gemfire team intentionally and/or negligently failed to take steps from reporting to 3rd parties fraudulent risk numbers." He further alleges that "[i]n retaliation for the reporting of these issues to the management of [sic] Gemfire Team and the IT department of Credit Suisse AG and for the insistence on getting the situation corrected, the management of the IT department took serious steps forcing me to resign which included inter alia encouraged harassment and mischievous acts."

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

The Secretary of Labor has delegated her authority to issue final agency decisions under SOX to the Administrative Review Board (ARB or Board).<sup>13</sup> Pursuant to SOX and its

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<sup>10</sup> Feb. 27, 2011 Response to the Order to Show Cause.

<sup>11</sup> *Id.*

<sup>12</sup> D. & O. at 2.

<sup>13</sup> See Secretary's Order 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). See also 29 C.F.R. § 1980.110.

implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.<sup>14</sup> 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 . . . ."<sup>15</sup> Therefore, the Board reviews an ALJ's conclusions of law de novo.<sup>16</sup>

## DISCUSSION

SOX Section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer or 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. Employees are also protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed relating to a violation of the aforesaid fraud statutes, SEC rules, or federal law.<sup>17</sup>

Section 806 complaints 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. 2011).<sup>18</sup> To prevail on his SOX complaint, Pik must prove by a preponderance of the evidence that: (1) he engaged in SOX protected activity; (2) he suffered an adverse action; and (3) the protected activity was a contributing factor in the adverse action.<sup>19</sup>

Initially, we note that adjudicators must accord a party appearing pro se fair and equal treatment, but a pro se litigant "cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert

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<sup>14</sup> See 29 C.F.R. § 1980.110(b).

<sup>15</sup> 5 U.S.C.A. § 557(b) (West 1996).

<sup>16</sup> See *Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

<sup>17</sup> 18 U.S.C.A. § 1514A(a). While this appeal was pending, in 2010 Congress amended Section 1514A. See the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act). Although Sections 922 and 929A of the Dodd-Frank Act amended SOX Section 806, the amendments did not affect the provisions relevant to our decision.

<sup>18</sup> See 18 U.S.C.A. § 1514A(b)(2)(C).

<sup>19</sup> See 18 U.S.C.A. § 1514A(b)(2).

assistance.”<sup>20</sup> Thus, although an ALJ has some duty to assist pro se litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the pro se litigant.<sup>21</sup> In the end, pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel.<sup>22</sup>

In this case, Pik’s original complaint filed with OSHA contains no factual allegations addressing whether Pik engaged in any SOX protected activity. Thus, the ALJ issued an Order to Show Cause why Pik’s complaint should not be dismissed because he failed to allege in his complaint that he engaged in any SOX protected activity. In effect, the ALJ provided Pik an opportunity to explain that he had additional information that could address whether he engaged in SOX protected activity, one of the requisite elements of his SOX complaint.

In response, Pik merely provided a general, conclusory statement that the Respondent retaliated against him for “reporting fraud” to Credit Suisse “management” regarding false market data produced by the Gemfire team.<sup>23</sup> We agree with the ALJ’s conclusion that neither Pik’s complaint nor his response sufficiently indicates what information Pik may have provided to some Credit Suisse management official regarding conduct that he reasonably believed constitutes a SOX violation and that might constitute SOX protected activity. Understandably, Pik appears pro se and is entitled to some leeway; however, even if done inartfully, a complainant must at least point to facts that fairly identify the activity protected by the SOX statute, particularly where the issue of extraterritoriality must be resolved. However, Pik’s allegation in this particular case is nothing more than a blanket assertion that he engaged in SOX protected activity. Thus, the ALJ dismissed Pik’s complaint.

Before the Board, Pik just reiterates that he reported “to the management of [sic] Gemfire Team and the IT department of Credit Suisse AG” regarding “fraudulent data.” Again, we are aware that pro se pleadings are held to less exacting standards than those prepared by counsel and are to be liberally construed, but the Board must be able to discern cogent arguments in any appellate brief, even one from a pro se litigant.<sup>24</sup> Because Pik has now had several opportunities

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<sup>20</sup> *Ray’s Lawn & Cleaning Svcs.*, ARB No. 06-112, slip op. at 7-8 (ARB Aug. 29, 2008), quoting *Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983).

<sup>21</sup> *See, e.g., United States v. Trapnell*, 512 F.2d 10, 12 (9th Cir. 1975)(per curiam)(“The trial judge is charged with the responsibility of conducting the trial as impartially and fairly as possible.”)

<sup>22</sup> *See Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075, ALJ No. 2000-STA-028, slip op. at 10 (ARB Feb. 28, 2003) citing Jessica Case, Note: Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?, 90 KY. L.J. 701 (2002); MODEL CODE OF JUDICIAL CONDUCT, Canon 3 (1990) (A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently).

<sup>23</sup> Feb. 27, 2011 Response to the Order to Show Cause.

<sup>24</sup> *United States ex rel. Verdone v. Circuit Court for Taylor Cnty.*, 73 F.3d 669, 673 (7th Cir. 1995) (per curiam) (“Even pro se litigants, particularly one so familiar with the legal system, must

to provide some indication that he engaged in SOX protected activity and has utterly failed to demonstrate that any such information is forthcoming, he has not sufficiently alleged one of the requisite elements of his SOX case, and his SOX complaint must fail.

#### CONCLUSION

The ALJ properly held that Pik failed to sufficiently allege that he engaged in SOX protected activity. Accordingly, we **AFFIRM** the ALJ's Decision and Order Dismissing Complaint.

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

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

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expect to file a legal argument and some supporting authority.”); *Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir.1990) (citations omitted) (“A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority . . . forfeits the point. We will not do his research for him.”).