



In the Matter of:

HWALIN CHENG,

ARB CASE NO. 12-111

COMPLAINANT,

ALJ CASE NO. 2012-SOX-026

v.

DATE: May 13, 2014

**WORLDWIDE ENERGY &
MANUFACTURING USA, INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Hwalin Cheng, *pro se*, San Francisco, California

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 Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (Thomson/Reuters 2014); 29 C.F.R. § 1980 (2013). In May 2010, Hwalin Cheng filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that her termination by Respondent Worldwide Energy & Manufacturing USA, Inc. (Worldwide) violated the SOX employee protection provision. OSHA dismissed the complaint. Cheng requested a hearing with the Office of Administrative Law Judges. On September 6, 2012, an Administrative Law Judge (ALJ) entered an order dismissing the complaint with prejudice (ALJ Order). Cheng petitioned the Administrative Review Board (ARB) for review. We affirm.

BACKGROUND

A. Proceedings below

Cheng filed her OSHA complaint against Worldwide on May 7, 2010, alleging that her termination violated SOX. In May 2012, the parties informed OSHA that they had reached a settlement agreement. The settlement agreement was submitted to OSHA for approval. *See* 29 C.F.R. § 1980.111(d)(1). OSHA did not approve the terms of the settlement agreement. On June 6, 2012, OSHA dismissed the complaint for failure of the parties to include certain language in the agreement.

While the case was pending before OSHA, Cheng filed a complaint against Worldwide in California state court on March 26, 2012, alleging violations of state law and federal law, including her federal SOX claim under 18 U.S.C.A. § 1514A. On May 3, 2012, Worldwide filed a Notice of Removal of Action of Cheng's state court action to the United States District Court for the Northern District of California. On May 26, 2012, while the case was pending in federal district court, the parties jointly stipulated to a dismissal due to a settlement entered into by the parties. The federal district court dismissed the case on June 1, 2012.

B. ALJ Order Dismissing Complaint

On July 2, 2012, Cheng requested a hearing with the Office of Administrative Law Judges, and the case was assigned to an ALJ. Prior to the administrative hearing, the ALJ learned about Cheng's federal district court case. The ALJ issued an Order to Show Cause whether Cheng's administrative complaint should be dismissed. Following Cheng's response to this Order to Show Cause, on September 6, 2012, the ALJ entered an Order Dismissing Complaint With Prejudice (ALJ Order). The ALJ stated:

The undersigned discovered that Complainant has filed a civil action against her Employer on May 3, 2012, captioned "Hwalin Cheng v. Worldwide Energy and Manufacturing, Inc.; Littler Mendelson, PC; and Jeff Watson and Eugene Ryu, individually" Civil Action No. C-12-02233 in the U.S. District Court for the Northern District of California. Further court records show that this action was dismissed with prejudice by U.S. District Judge Charles R. Breyer on June 1, 2012, apparently on the basis of a joint stipulation by the parties requesting dismissal due to settlement.

ALJ Order at 1. The ALJ determined that under 29 C.F.R. § 1980.114(a), the federal district court proceeding resolving Cheng's SOX complaint foreclosed the ALJ's jurisdiction over the case. ALJ Order at 1-2 (ALJ stating "a dismissal of the claim [by] the undersigned appears to be in order as the undersigned no longer has jurisdiction over the matter.").

JURISDICTION

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under SOX. *See* Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). We review the ALJ's legal conclusions de novo. *Zinn v. American Commercial Lines*, ARB No. 13-021, ALJ No. 2009-SOX-025, slip op. at 4 (ARB Dec. 17, 2013).

DISCUSSION

The SOX permits a complainant to file a SOX whistleblower claim in federal district court seeking de novo review where the DOL has not issued a final agency decision within 180 days of the filing of a complaint with OSHA, provided there is no showing that the delay is due to complainant's bad faith. 18 U.S.C.A. § 1514(b)(1)(B); 29 C.F.R. § 1980.114(a). Where a complaint is filed in federal district court, DOL regulations state that the federal district court "will have jurisdiction over such an action." 29 C.F.R. § 1980.114; *see also Mozingo v. The South Fin. Grp.*, ARB No. 07-040, ALJ No. 2007-SOX-002 (ARB Feb. 8, 2007) (ARB dismissing appeal on filing of a complaint in federal district court).

Under the proceedings in this case, the ALJ acted within his authority in dismissing Cheng's SOX complaint. Cheng's civil suit filed in state court encompassed both state law claims and the federal SOX claim that had been pending before DOL. After the state court complaint was filed, Cheng's SOX claim, along with Cheng's other federal claim and her state claims, were removed to federal district court more than 180 days after its filing with OSHA, where the parties entered into a stipulation of settlement and the district court dismissed the case. Indeed, the proceedings that led to the DOL's loss of jurisdiction in this case (removal of Cheng's SOX whistleblower claim from state to federal court) is distinguishable from proceedings where a complainant pursues a *non-SOX claim* arising out of the same set of facts and involving the same parties in state court based on state law, or in federal court based on federal law. In *that* situation, SOX would not foreclose DOL's jurisdiction over a complainant's federal SOX administrative action.¹ On review, however, Cheng fails to present any legal basis for disturbing the ALJ's dismissal order for lack of jurisdiction.

¹ 18 U.S.C.A. § 1514A(d) ("Rights retained by employee") provides: "Nothing in this section [Section 1514A] shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement."

CONCLUSION

The ALJ's Order Dismissing Complaint With Prejudice is **AFFIRMED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge