In the Matter of:

JACQUELYN L. BROWN,	**ARB CASE NO. 13-008**
COMPLAINANT,	**ALJ CASE NO. 2012-SOX-031**
v.	**DATE: June 27, 2014**

TEAMSTAFF GOVERNMENT SOLUTION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jerry E. Farmer, Esq.; Murfreesboro, Tennessee

For the Respondent:
Douglas H. Duerr, Esq.; *Elarbee, Thompson, Sapp & Wilson, LLP*, Atlanta, Georgia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *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). *See also* Department of Labor (DOL) implementing regulations at 29 C.F.R. Part 1980 (2013). Jacquelyn Brown alleges, by way of amended complaint, that her former employer, TeamStaff Government Solutions (TeamStaff), discharged her from employment because she reported concerns protected under the SOX. In a Decision and Order issued October 12, 2012 (D. & O.), the Administrative Law Judge (ALJ) held that Brown's amended complaint was untimely filed. We affirm.

BACKGROUND

Complaint Filed 12/1/11

TeamStaff employed Brown until December 1, 2011, when it fired her. On the same day TeamStaff terminated Brown's employment, she filed a complaint of violation of subsection 11(c) of the Occupational Safety and Health Act, 29 U.S.C. § 660(c) ("OSH Act"). The Case Activity Worksheet OSHA prepared states Brown's allegation as follows:

> Allegation: Participation in safety and health activities.
>
> Allegation Summary: Complainant states that after raising concerns regarding workers' exposure to prescription drugs at the Consolidated Mail Outpatient Facility, Murfreesboro, TN, to both Respondent and the VA, she was terminated on December 1, 2011.[1]

OSHA Investigation

The ensuing OSHA investigation revealed additional background to the December 1, 2011 complaint. On three separate occasions in late November 2011, Brown allegedly complained to TeamStaff management officials about exposure to prescription drugs at the Consolidated Mail Outpatient Pharmacy (CMOP).[2] Brown informed management that her work environment has, and continues, to make her ill. The manager asked Brown to complete forms related to the illness. Brown refused. Brown was asked again, and again she refused. The manager asked that she take the forms home, fill them out, and fax them back.

The manager instructed the site manager to inform Brown that if she did not fill out the forms, she would be suspended. When the site manager approached Brown on December 1, 2011, an altercation ensued. Brown refused to fill out the paperwork. The site supervisor requested Brown's badge. According to the OSHA order, Brown exploded, vocalized several expletives, and threw her badge at the site supervisor. TeamStaff terminated Brown's employment on December 1, 2011.

Complaint filed 6/11/12

On June 11, 2012, Brown sent a 4-page letter to an OSHA Area Director and her OSH Act investigator, informing them that Brown was "amending" her OSH Act complaint to add a claim under SOX and substantially supplementing her allegations. In the amendment, Brown identified TeamStaff's corporate structure.[3] Brown explicitly identified TeamStaff Government

---

1 Complainant's Exhibit (Ex.) 2 at 1.

2 TeamStaff Brief (Br.), Ex. 1 (June 26 OSHA Order).

3 Brown Br. Ex. 4 at 1.

Solution management, her direct employer, as participating in the adverse action.[4] The June 11 letter individually names actors Gene Carlson, Amanda Collins, and Connie Thomas.[5] Brown's June 11 letter described new alleged protected activity under SOX:

> Complainant's protected activities included, but were not limited to communicating with appropriate enforcement authorities to report violations, refusing to engage in unlawful conduct, raising compliance concerns with others who might reasonably have been effective at commencing enforcement proceedings, and participating in enforcement proceedings by making a complaint. . . .
>
> Complainant alleges that Respondent employer has repeatedly under-reported or completely failed to report workplace injuries and illnesses in order to contain Worker's Compensation premiums and healthcare costs. This is in clear violation of the SOX Act of 2002, as it results in material misrepresentations of stock value and company strength to prospective investors.[6]

OSHA's Dismissals of the Complaints

Through two separate written decisions, OSHA dismissed both of Brown's complaints. On June 26, 2012, OSHA dismissed Brown's OSH Act complaint on the merits, focusing solely on the OSH Act claim. On June 27, 2012, OSHA dismissed Brown's attempt to amend to add the SOX complaint on the ground that Brown failed to timely file the SOX claim. Brown filed a hearing request with the Office of Administrative Law Judges (OALJ) on July 24, 2012.

On July 31, 2012, the ALJ assigned to the case issued a show cause order asking why the complaint should not be dismissed as untimely filed.[7] Before the ALJ, Brown raised "relation back" and "equitable modification" arguments. The ALJ rejected both arguments. On October 12, 2012, the ALJ dismissed the claim as untimely filed.

---

4 Brown Br. Ex. 4 at 1. TeamStaff GS is currently known as DLH Holdings.

5 Brown Br. Ex. 4 at 1.

6 *Id.*

7 D. & O. at 1.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to issue final agency decisions under SOX.[8] The ARB reviews de novo an ALJ's granting of a motion to dismiss a whistleblower case when the ALJ determines that the complaint is untimely.[9] The Board is guided in its consideration by 29 C.F.R. § 18.40, governing an ALJ's granting of summary decision as a matter of law.[10] Pursuant to 29 C.F.R. § 18.40(d), the moving party is entitled to summary decision on its behalf "if 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 that a party is entitled to summary decision."

DISCUSSION

In dismissing Brown's amended complaint, the ALJ relied on the requirements of both ALJ Rule 18.5(e) and Fed. R. Civ. P. 15, and noted the relationship between the ALJ rules and the FRCP. 29 C.F.R. § 18.5(e) reads:

> (e) Amendments and supplemental pleadings. If and whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings; provided, however, that a complaint may be amended once as a matter of right prior to the answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The administrative law judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have

---

[8] Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

[9] *Williams v. Nat'l R.R. Passenger Corp.*, ARB No. 12-068, ALJ No. 2012-FRS-016, slip op. at 2 (ARB Dec. 19, 2013).

[10] *Id.*

> happened since the date of the pleadings and which are relevant to any of the issues involved.

FRCP 15(c), entitled Relation Back of Amendments, reads:

> (1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:
>
> (A) the law that provides the applicable statute of limitations allows relation back;
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading; or
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

The ALJ distinguished the DOL case law that Brown cited and concluded that her amended complaint did not satisfy the relation back criteria.

Brown's appeal alleges that her SOX discrimination complaint contains the same facts as alleged in the OSH Act complaint to the extent that she states that her employer fired her in retaliation for filing a safety complaint. Brown claims that the ALJ erred in his interpretation that FRCP 15(c) was limited to the case in which the statute "expressly" permits relation back. Brown argues that the "or" in the FRCP language is disjunctive and that a statute expressly permitting relation back is only one of multiple means by which amendments relate back.

TeamStaff counters that Brown's amended SOX cause of action does not arise out of the same conduct, transaction, or occurrence as the OSH Act complaint but is an entirely new theory supported by new factual allegations.[11] It also alleges that the new parties, its parent company,

[11] TeamStaff Br. at 6.

and individually named employees, had no notice that they would be parties in the original complaint, and the claim against them should not relate back.[12]

The ALJ determined that Brown's amended complaint did not satisfy 29 C.F.R. § 18.5(e) (requiring that "the amendment is reasonably within the scope of the original complaint") or FRCP 15(c)(1)(B) (requiring that "the amendment asserts a claim . . . that arose out of the conduct . . . or occurrence set out – or attempted to be set out – in the original pleading"). While we do not agree with the ALJ's analysis of FRCP 15(c) in particular, we agree with the ALJ's ultimate conclusion that the SOX claim alleged in Brown's June 11, 2012 amended complaint did not reasonably fall within the scope of the facts asserted in the original complaint she filed with OSHA on December 1, 2011.

Before filing a complaint with OALJ, the SOX regulations require a complainant to file a complaint with OSHA and wait for OSHA to investigate the complaint if it meets the regulatory requirements to justify an investigation.[13] The facts asserted in the December 1, 2011 complaint did not alert OSHA of a SOX complaint because the first complaint focused exclusively on work safety issues, not on any misconduct connected to mail fraud; wire, radio, or TV fraud; bank fraud; fraud upon shareholders; or a violation of a securities law.[14] Brown did not present a timely SOX complaint to OSHA to investigate and neither 29 C.F.R. § 18.5 nor Fed. R. Civ. P. 15 permits her to file such a complaint with the OALJ in this case. We also agree with the ALJ that Brown failed to raise sufficient grounds to equitably toll the running of the 180-day statute of limitations.[15] Accordingly, the ALJ dismissal of Brown's complaint is affirmed.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

---

12 *Id.* at 10.

13 *See* 29 C.F.R. §§ 1980.103 - 105.

14 *See supra* at 2; *see also* 18 U.S.C.A. § 1514A(a)(1).

15 *See* 18 U.S.C.A. § 1514A(b)(2)(D).