



**In the Matter of:**

**HUNTER R. LEVI,**

**ARB CASE NO. 13-047**

**COMPLAINANT,**

**ALJ CASE NO. 2012-SOX-039**

**v.**

**DATE: July 24, 2014**

**ANHEUSER BUSCH INBEV and  
ANHEUSER BUSCH, LLC,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Hunter R. Levi, *pro se*, Overland Park, Kansas**

***For the Respondent:***

**Joseph J. Torres, Esq.; *Winston & Strawn LLP*, Chicago, Illinois**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge* *Judge Edwards, concurring.***

**FINAL DECISION AND ORDER**

This case arose from a complaint Hunter R. Levi (Levi) filed alleging that his former employer, Anheuser Busch Inbev and Anheuser Busch LLC (collectively "ABI"), violated the employee protection provisions of Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (Thomson West 2013), and its implementing regulations at 29 C.F.R. Part 1980 (2013), when it allegedly changed his termination date from August 6, 2003, to March 4, 2003. Levi filed a complaint with the Occupational Safety and Health Administration (OSHA), which dismissed his claim. Levi objected to OSHA's determination. On March 18, 2013, a Department of Labor Administrative Law Judge (ALJ) assigned to the case issued a Decision and Order (D. & O.) dismissing the complaint on the grounds that Levi was precluded under the

doctrine of collateral estoppel from reasserting that he engaged in SOX-protected activity that had been rejected in prior litigation, and that Levi failed to provide evidence establishing an actionable adverse action. Levi petitioned the ARB for review. We affirm the ALJ's dismissal of Levi's complaint, although in part for reasons other than those relied upon by the ALJ.

## BACKGROUND

The facts in this case are fully set out in the ALJ's decision (D. & O. at 3-4) and prior orders entered in this case.<sup>1</sup> Around May 2011, Levi received a pension plan determination that credited his employment from January 1, 1979, to March 4, 2003, with a final pension service date of February 28, 2003. D. & O. at 2. On June 9, 2011, Levi filed a complaint with OSHA alleging that ABI's pension date determination constituted retaliation for his earlier whistleblower activity against the company. OSHA dismissed the complaint. Levi filed objections with the Office of Administrative Law Judges, and an ALJ set the case for hearing.

On or about January 2, 2013, Levi moved for summary decision, arguing that ABI "failed to offer a just cause defense against Levi's complaint after Levi filed his request for a SOX *de novo* hearing." D. & O. at 2. ABI responded, and moved for summary decision on the grounds that Levi's assertion of protected activity upon which Levi based his complaint was barred by collateral estoppel. In the alternative, ABI argued that Levi suffered no adverse action because the termination date was properly determined by the company for purposes of his pension. ABI Mem. for S. D., Vol. 2, Tab 2 at 4; see also ABI Mot. for S. D., Vol. 1, Tab 1A at 4; Ex. G at 1-2, Ex. P at 1-2; D. & O. at 9.

On March 18, 2013, the ALJ entered a decision dismissing Levi's complaint. The ALJ held, among other things, that Levi is barred by collateral estoppel from relitigating whether he engaged in SOX-protected activity, upon which his administrative complaint was based. D. & O. at 7-8. The ALJ further determined that even if collateral estoppel did not bar Levi's complaint, Levi "failed to offer evidence showing he suffered an adverse personnel action when he received his pension determination in 2011." *Id.* at 8.

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<sup>1</sup> On April 30, 2008, the ARB, on consolidating three of Levi's complaints, ruled against him. The ARB held that Levi's claim in *Levi I* was untimely as his timely letters did not allege that he suffered an adverse action in retaliation for protected activity. The ARB found in *Levi II* that Levi failed to generate a genuine issue of material fact to support his retaliation claim. The ARB found *Levi III* duplicative. *Levi v. Anheuser-Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006; ALJ Nos. 2006-SOX-037, -108, 2007-SOX-055 (ARB Apr. 30, 2008). In August 2007, Levi filed a fourth complaint. Levi alleged that ABI retaliated against him by failing to rehire him. The ALJ dismissed the complaint, and the ARB affirmed on the ground that Levi failed to allege a prima facie case. *Levi v. Anheuser-Busch Cos., Inc.*, ARB No. 08-086, ALJ No. 2008-SOX-028 (ARB Sept. 25, 2009).

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to issue final agency decisions under SOX. 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). The ARB reviews de novo an ALJ's grant of a motion for summary decision. The Board is guided in its consideration by 29 C.F.R. § 18.40, governing an ALJ's grant of summary decision. Pursuant to 29 C.F.R. § 18.40(d), the moving party is entitled to summary decision "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

Levi contends that as a result of the same pre-discharge protected activity that he alleged in his previous complaints, as well as SOX-protected activity in which he engaged after his discharge, ABI unlawfully retaliated against him by intentionally reducing the pension benefits to which he is entitled. The ALJ correctly determined that to the extent that Levi's present complaint is based on protected activity alleged to have occurred prior to his discharge from employment in 2003, collateral estoppel precludes him from again asserting, in this action, that the pre-discharge activity constituted SOX-protected whistleblower activity, as that issue has been previously litigated between the parties.

However, Levi also asserts that the SOX whistleblower complaints that he filed with OSHA *after* his discharge from employment were a contributing factor in the alleged reduction of his pension benefits. Levi's *post-discharge filings* with OSHA of the whistleblower complaints constitute SOX-protected activity that is not barred by collateral estoppel. The ALJ erred in limiting his consideration of whistleblower activity to only Levi's actions occurring prior to his discharge from employment.

While the ALJ erred on the collateral estoppel determination, that error does not dictate that we reject the ALJ's dismissal of Levi's present complaint. The uncontroverted evidence of record is, as the ALJ found, that the effective date of Levi's discharge from employment did not control the amount of his pension benefits. Rather, the amount of an employee's pension benefits under the pension plan governing Levi's employment is calculated based on the number of days he was actually paid as an employee. In Levi's case, his pension benefits were calculated based upon the date of his employment suspension, February 14, 2003, when his pay as an employee ended. Thus, the effective date of Levi's employment termination – whether March 4, 2003, or August 6, 2003, – is irrelevant in the calculation of the amount of Levi's pension benefits. Because a showing of an adverse action is a necessary component of a successful SOX claim, we affirm the ALJ's dismissal of Levi's complaint on this ground.<sup>2</sup>

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<sup>2</sup> Levi raises several grievances on appeal but most allege bias and error in procedure. Levi challenges the form and content of the ALJ's order. Pet. for Rev. at 1. Levi argues that the ALJ abused his discretion in failing to rule that ABI defaulted for not answering Levi's pleading within 30

## CONCLUSION

For the reasons explained, we **AFFIRM** the ALJ's dismissal of Levi's complaint.

**SO ORDERED.**

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

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

*Judge Edwards*, concurring.

I agree with the majority's decision to affirm the ALJ's order dismissing Levi's complaint. I write separately, however, because I think that Levi's claims are clearly barred by collateral estoppel and res judicata, and thus the majority need not address Levi's claim that he suffered an adverse action based on the Company's calculation of his termination date. See *supra* at 3.

The substantive protected activity that Levi alleges in his June 9, 2011, OSHA complaint and the September 13, 2012, amended complaint filed with the ALJ, stems from his complaints about the Company that relate to his pre-discharge activity. Levi states in his June 9, 2011, OSHA complaint:

I was illegally terminated by AB for blowing the whistle on AB securities fraud from 2001-2002 internally; and from 2002 on, to the SEC, members of Congress, the NLRB, USDOL, OSHA, the IBT and others, prior to my August 6, 2003 termination. AB's securities fraud began in 1997, and continues today, after the fraudulent 2008 INBev purchase of AB. . . . My whistleblower letters to outside entities, which began in September 2002, continue today.

Levi's OSHA Complaint to Labor Secretary Solis and Regional Administrator Kulick (dated June 9, 2011). Levi states in his September 13, 2012, amended complaint filed with the ALJ:

Levi is amending the complaint as is his right under SOX, to reflect new information OSHA did not address in its decision for the Secy. Levi is requesting the Chief Judge to adjudicate the Levi V proceedings himself under 29 C.F.R. 1980.115, and is seeking OALJ removal of all 12 OSHA, ALJ and ARB decisions in Levi's

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days. *Id.* at 1-2. Levi's grievances raised in his petition and brief do not change the outcome and are therefore moot.

prior four SOX cases which comprise Levi's SOX procedural history against Anheuser Busch Inbev (ABI).

Levi Letter to Chief Judge Purcell (dated Sept. 11, 2012).

The principles of res judicata (claim preclusion) and collateral estoppel (issue preclusion) clearly bar Levi's dispute before us. Justice Marshall, writing the opinion for the Court in *Montana v. United States*, 440 U.S. 147, 153 (1979), stated the following:

A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . ." *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49, 18 S. Ct. 18, 27, 42 L. Ed. 355 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Cromwell v. County of Sac.*, 94 U.S. 351, 352, 24 L. Ed. 195 (1877); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326, 75 S. Ct. 865, 867, 99 L. Ed. 1122 (1955); 1B J. Moore, Federal Practice ¶ 0.405[1], pp. 621-624 (2d ed. 1974) (hereinafter 1B Moore); Restatement (Second) of Judgments § 47 (Ten. Draft No. 1, Mar. 28, 1973) (merger); *id.*, § 48 (bar). Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649, 58 L. Ed.2d 552 (1979); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 2-3 (1942); Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion). Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. *Southern Pacific R. Co.*, *supra* 168 U.S., at 49, 18 S. Ct., at 27; *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S. Ct. 507, 507, 61 L. Ed. 1148 (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

These fundamental principles of res judicata and collateral estoppel apply equally in the context of the administrative adjudication before us. *Hasan v. Sargent & Lundy*, ARB No. 05-099, ALJ No. 2002-ERA-032, slip op. at 6-7 (ARB Aug. 31, 2007). Here, Levi raises the

identical substantive issues of protected activity, involving the identical parties, that have been fully litigated administratively before the Labor Department and entertained by the court of appeals. See *Levi v. Anheuser-Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006, ALJ Nos. 2006-SOX-037, -108, 2007-SOX-055 (ARB Apr. 30, 2008), *pet. for review denied*, *Levi v. Dep't of Labor*, 360 Fed. App'x 710, (8thCir. Jan. 14, 2010), *cert. denied*, 131 S. Ct. 122 (2010); *Levi v. Anheuser-Busch Cos., Inc.*, ARB No. 08-086, ALJ No. 2008-SOX-028 (ARB Sept. 25, 2009), *pet. for review denied*, *Levi v. Dep't of Labor*, 388 Fed. App'x 556 (8th Cir. Aug. 3, 2010), *cert. denied*, 131 S. Ct. 1575 (2010). See also Order Denying Motion For Reconsideration (ARB Dec. 2, 2011). Because Levi is estopped from bringing his SOX whistleblower complaint against the Company for resolution by the Department, I think that the majority need not rule on whether the Company properly calculated his termination date for purposes of determining whether Levi suffered an adverse action.

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