



In the Matter of:

CRISELL SEGUIN,

**ARB CASE NOS. 15-038
15-040**

COMPLAINANT,

ALJ CASE NO. 2012-SOX-037

v.

DATE: May 18, 2017

NORTHROP GRUMMAN SYSTEMS CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

E. Patrick McDermott, Esq.; *Law Office of E. Patrick McDermott*; Annapolis, Maryland

For the Respondent:

Lincoln O. Bisbee, Esq.; P. David Larson, Esq.; *Morgan Lewis & Bockius LLP*; Washington, District of Columbia and Sarah E. Bouchard, Esq.; *Morgan Lewis & Bockius LLP*; Philadelphia, Pennsylvania

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the employee whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX or Act), 18 U.S.C.A § 1514A (Thomson/West Supp. 2016), and the implementing provisions of 29 C.F.R. Part 1980 (2016). Complainant Crisell Seguin filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that her employer, Respondent Northrup Grumman Systems Corp., terminated her employment in

violation of the SOX. Following OSHA's dismissal of the complaint, Seguin requested a hearing before a Department of Labor Administrative Law Judge (ALJ). After hearing, the presiding ALJ issued a Decision and Order on February 27, 2015 (D. & O.) concluding that Northrup Grumman violated the SOX and awarding damages to Seguin. In a Supplemental Decision and Order issued October 16, 2015 (S. D. & O.), the ALJ awarded Seguin attorney's fees and costs. The parties filed separate appeals of the D. & O. (ARB Nos. 15-038 and 15-040), and Respondent appealed the S. D. & O (ARB No. 16-014). For the following reasons, the Board affirms the ALJ's D. & O. Respondent's appeal of the S. D. & O. in ARB No. 16-014 is addressed separately.

BACKGROUND

Northrup Grumman initially hired Seguin in 1989. In May 2007 Seguin filed a defamation complaint against Respondent in state court alleging that Respondent maliciously falsified her job performance evaluation and otherwise retaliated against her, in part, because she engaged in SOX-protected activity. At that time, Respondent employed Seguin in its Public Safety Systems division, where she worked on software related to emergency responder systems, such as 911 and emergency radio systems used by first responders. Seguin was responsible for software quality management, and for leading and directing testing. The state court complaint arose out of Northrup Grumman's deployment in 2005 of post-911 emergency responder software. Seguin reported, within the company, that Respondent prematurely released this software in violation of company quality policies. In February 2007, after Northrup-Grumman denied her a requested promotion, downgraded her 2006 performance evaluation from past evaluations, and placed her on a Performance Improvement Plan (PIP), Seguin filed a report alleging defamation and the creation of false records concerning her performance evaluation. After Seguin filed her May 2007 state court complaint, Northrup Grumman demoted her from her management position in June 2007.

The state defamation case required a finding as to whether Seguin was retaliated against due to alleged SOX-protected activities that occurred in 2005 and 2006. After Seguin filed her state court complaint, Northrup Grumman filed a motion seeking to compel arbitration pursuant to its mandatory arbitration policy. Following extensive litigation over the obligation to arbitrate pursuant to the company policy, Seguin's claim was submitted to arbitration. The arbitration requires that the arbitrator address, among other things, Seguin's underlying internal SOX complaints flowing from her opposition to the software release. As of the date of issuance of the ALJ's Decision and Order, the arbitration was pending.¹

By January of 2011, Seguin was employed by Northrup Grumman as a Test Engineer 4, responsible for testing and servicing various computer software programs. On several occasions in January and February of 2011, Seguin raised several concerns with Northrup Grumman

¹ Seguin's state court action preceded the Dodd-Frank amendments to SOX that in the present case raise the issue of whether Seguin's opposition to arbitration constitutes SOX-protected activity.

supervisors and managers about the company's Form 10-K and 14A SEC filings, which she contended contained misrepresentations about the scope of employee coverage under the company's Standards of Business Conduct.² She challenged Northrup Grumman's personnel training module that required employees to sign the company's Form C-196, an internal conflicts of interest document. According to Seguin, because Form C-196 referenced the company's mandatory arbitration provision, signing the conflicts of interest document "tricked" employees into agreeing to the company's mandatory arbitration policy.³ For this reason, Seguin also refused to sign the Form C-196. Northrup Grumman had initially exempted Seguin from signing Form C-196. However, by February 2011, Northrup Grumman insisted that she sign it. Seguin refused to sign because she believed that by signing the form she would be effectively agreeing to mandatory arbitration of any and all employment disputes, including any claim she might have or that might arise under the SOX's whistleblower protection provisions.

In January and February of 2011, at the same time that Seguin began raising her concerns with management, Seguin's first level supervisor downgraded her annual performance evaluation and initiated a Reduction-in-Force (RIF) process that Northrup Grumman ultimately relied upon as the basis for terminating Seguin's employment. On February 28, 2011, the supervisor suspended Seguin and personally escorted her off company premises for not completing personnel training and refusing to sign the C-196 form.⁴

The ALJ found that by February 28, 2011, Seguin had not only been suspended for failing to complete the company's Form C-196, but threatened as well with termination for refusing to sign the document.⁵ The ALJ also found that by February 28th, Seguin had communicated several concerns that gave fair notice of SOX violations to Northrup Grumman.⁶ Respondent made no accommodation for Seguin's refusal to sign the Form C-196, even though the state arbitration action was pending and the SOX anti-arbitration provision had been

² See, e.g., Jan. 14, 2011 e-mail (Respondent's Exhibit (RX) 27); Jan. 31, 2011 e-mail (RX 49); Feb. 14, 2011 e-mail (RX 37); Feb. 22, 2011 e-mail (RX 38); Mar. 24, 2011 memo (CX 40).

³ Form C-196 includes a reference to and incorporation of a company document entitled Corporate Procedure H-103-A, Employee Mediation Binding Arbitration Program, which was in effect as of September 15, 2006, the import of which is that if someone has a covered claim that they could otherwise bring in court that they were required to submit the claim to arbitration. D. & O. at 22. See RX 97.

⁴ Seguin's supervisor also generated a document, dated April 1, 2011, discharging Seguin for her refusal to sign Form C-196, Complainant's Exhibit (CX) 49, although this document was never sent to Seguin.

⁵ See D. & O. at 31.

⁶ *Id.*

enacted.⁷ Therefore, on March 31, 2011, Seguin signed and submitted, under protest, what she thought was an equivalent form to the C-196.⁸ She returned to work on April 4, 2011. The RIF process was by this time well underway, although Seguin was not informed of this at the time.

On May 3, 2011, Seguin sent an internal e-mail to several Northrup Grumman managers stating that she had notified senior executives “that I had initiated a SOX investigation due to finding substantial evidence that would reasonably affect an investor’s opinion of our company and could affect an investor’s decision regarding how much of any stock they may wish to have in our company.”⁹ That same day, May 3rd, Respondent informed Seguin that her employment was terminated pursuant to the RIF.

On May 16, 2011, Seguin filed a complaint with OSHA, in which she alleged that her discharge violated the SOX. OSHA’s dismissed the complaint, and Seguin’s requested a hearing before the Office of Administrative Law Judges. The presiding ALJ issued a D. & O. on February 27, 2015 finding that Seguin’s SOX-protected activity contributed to her discharge and that Northrup Grumman failed to prove by clear and convincing evidence that it would have discharged her in the absence of her protected activity.¹⁰ As a prevailing employee, Seguin was entitled to attorney’s fees and costs, which the ALJ awarded in a S. D. & O. on October 16, 2015. Northrup Grumman filed a Petition for Review of the D. & O., and Seguin filed a separate Cross-Petition for Review of the D. & O. on the grounds that the ALJ’s back pay award was inadequate. Respondent also appealed the S. D. & O., which is addressed separately in ARB Case No. 16-014.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under Section 806 of SOX, 18 U.S.C.A. § 1514A, and its implementing regulations.¹¹ The Board reviews the ALJ’s findings of fact under the substantial evidence standard, 29 C.F.R. § 1980.110(b),¹² and reviews questions of law de novo.¹³

⁷ 18 U.S.C.A. § 1514A(e)(2), which became effective on July 21, 2010, rendered pre-dispute arbitration agreements invalid and unenforceable as to claims arising under Section 806 of SOX.

⁸ *Id.*

⁹ CX 56.

¹⁰ D. & O. at 6-7, 35-36.

¹¹ 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); 29 C.F.R. § 1980.110(a).

¹² Substantial evidence is that which is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). An ALJ’s factual finding will be upheld where supported

DISCUSSION

The SOX employee protection provisions prohibit any publicly-traded company from discharging or otherwise retaliating against an employee in the terms and conditions of his or her employment because the employee provided to the employer or the federal government information relating to alleged violations of 18 U.S.C. § 1341 (mail fraud), § 1343 (fraud by wire, radio, or television), § 1344 (bank fraud), § 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.¹⁴

by substantial evidence even if there is also substantial evidence for the other party, and even if we “would justifiably have made a different choice had the matter been before us de novo.” *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera*, 340 U.S. at 488)).

¹³ See *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008).

¹⁴ 18 U.S.C.A. § 1514A, as amended by Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, 124 Stat 1376 (2010), provides in relevant part:

(a) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or

An action brought under SOX's whistleblower protection provisions is governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), at 49 U.S.C.A. § 42121(b).¹⁵ To prevail, a complainant must prove by a preponderance of the evidence that: "(1) he or she engaged in activity or conduct that the SOX protects; (2) the respondent took unfavorable personnel action against him or her; and (3) the protected activity was a contributing factor in the adverse personnel action."¹⁶ If the complainant proves that protected activity was a contributing factor in the personnel action, the respondent may nevertheless avoid liability if it proves by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity.¹⁷

Respondent does not dispute that Seguin suffered unfavorable personnel actions. It nevertheless argues that the ALJ erred by concluding that Seguin engaged in SOX-protected activity and that her activity contributed to the termination of her employment.¹⁸ On both points we disagree, and instead affirm the ALJ's conclusions.

The ALJ found that in the months leading up to her suspension and subsequent discharge, Seguin engaged in SOX-protected activity on several occasions. She complained about information in Respondent's Form 10-K and 14A SEC filings pertaining to the scope of employee coverage under the company's Standards of Business Conduct. Seguin also challenged Northrup Grumman's personnel training module because it required employees to sign the company's Form C-196. (She concluded that Northrup Grumman, by requiring employees to sign this Form, effectively secured an employee's agreement to the company's mandatory arbitration policy, which Seguin contended violated the SOX prohibition against pre-

1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

¹⁵ See 18 U.S.C.A. § 1514A(b)(2)(C).

¹⁶ *Sylvester v. Parexel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011); see 29 C.F.R. § 1980.109(a).

¹⁷ *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011); see 29 C.F.R. § 1980.109(b).

¹⁸ On appeal Northrup Grumman argues that the ALJ erred by considering matters beyond the scope of the stipulations agreed to by the parties when Seguin was represented by previous counsel. See Respondent's Petition for Review at 1; Respondent's Brief at 3. We concur with the ALJ's conclusion that "the stipulations do not bar other evidence including all of the testimony and exhibits that were entered at hearing, from amplifying and explaining the allegations made by Complainant, including internal Respondent evidence." D. & O. at 19.

dispute arbitration agreements.)¹⁹ Accordingly, the ALJ found that Seguin’s own refusal to sign the Form C-196 was also protected. The ALJ further concluded that in raising these concerns, Seguin had a reasonable belief, both subjectively and objectively, that Respondent’s actions violated the SOX’s whistleblower protection provisions. The ALJ found that Seguin’s decision to complain to management about these matters, charging “forgery and fraud,” was “driven, in part, by her concern that fellow employees have been defrauded as shareholders.”²⁰ In affirming the ALJ’s determination that Seguin engaged in SOX-protected activity, the Board finds that the ALJ’s factual findings in support of his conclusion are supported by substantial evidence of record. The Board further finds that the ALJ’s legal analysis is consistent with the Board’s *Sylvester* decision.²¹

Concerning the question of “contributing factor” causation, to prevail on her SOX claim Seguin is not required to disprove Respondent’s asserted reason for her discharge. Instead, as the ALJ recognized, Seguin is required to prove by a preponderance of the evidence that her SOX-protected activity was a contributing factor, whether alone or in conjunction with other factors, in her discharge.²²

The record supports the ALJ’s conclusion that Seguin’s protected activity contributed to the termination of her employment. We address, as but one example, the ALJ’s finding of contributing factor causation with respect to Seguin’s refusal to sign the C-196 form because of its reference to a second document containing a mandatory arbitration provision, which in turn led to a series of events that resulted in her discharge. As the ALJ explains, Laretta Shertzer, Seguin’s immediate supervisor, was the Northrup Grumman employee responsible for the creation of the RIF criteria that served as the purported basis for terminating Seguin’s employment. Shertzer downgraded Seguin’s 2010 performance rating at the same time that Northrup Grumman was pressuring Seguin to sign the C-196 form. As a supervisor, Shertzer was in a position to scrutinize Seguin’s performance as an employee, but the ALJ found that her explanation of her decisions surrounding the RIF was not credible because it was filled with inconsistencies and occasionally contradicted the record evidence.²³ The ALJ relied instead on the testimony of Dr. Caren Goldberg, an expert in Human Resource Management and reductions-in-force. It was Goldberg’s opinion, based on her analysis, that Northrup Grumman

¹⁹ As the ALJ noted, Section 922 of the Dodd-Frank Act of 2010 rendered predispute arbitration agreements invalid and unenforceable as to claims arising under Section 806 of SOX. *See* 18 U.S.C.A. § 1514A(e)(2); Pub. L. 111-203, 124 Stat. at 1848.

²⁰ D. & O. at 34.

²¹ ARB No. 07-123, slip op. at 13-15.

²² *See, e.g., Palmer v. Canadian Nat’l R.R./Illinois Central R.R. Co.*, ARB No. 16-035, ARB No. 2014-FRS-154, slip op. at 53-54 (ARB Jan. 4, 2017).

²³ D. & O. at 9.

“rigged” the RIF procedure to harm Seguin.²⁴ The ALJ concluded that Shertzler manipulated the RIF criteria to include Seguin in the layoff, and that “the C-196, which for years was not a discipline issue, ‘suddenly’ became a disciplinary issue and the sequence of events that followed led to Complainant’s removal from her position.”²⁵ The ALJ also held “to a reasonable degree of probability that the RIF was a pretext for discrimination.”²⁶

Having found that Seguin proved by a preponderance of the evidence that her SOX-protected activity contributed to her discharge, the ALJ concluded that Northrup Grumman failed to prove by clear and convincing evidence that it would have discharged her in the absence of her protected activity. The ALJ noted that Northrup Grumman’s burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard for proving causation. He considered Respondent’s asserted rationale for Seguin’s inclusion in the RIF and concluded that the evidence Respondent presented failed to prove that it would have included Seguin in the RIF in the absence of her SOX-protected activity.²⁷

For the foregoing reasons, the Board affirms the ALJ’s determination that Northrup Grumman violated the SOX whistleblower protection provisions.

DAMAGES

An employee who prevails on a SOX whistleblower claim is entitled to “all relief necessary to make the employee whole,” which may include reinstatement, back pay with interest, compensatory damages, and attorney’s fees.²⁸ The record supports the ALJ’s reasons for the relief granted in this case. The Board therefore agrees with and affirms the ALJ’s ruling that Seguin is entitled to an award of damages to include: (1) reinstatement of Seguin to her former position with Respondent at the same pay, terms, conditions, and privileges of employment that she would have received if she had continued working from May 7, 2011, through the date of the offer of reinstatement; (2) payment of back pay in the amount of \$59,800.00 with interest;²⁹ (3) payment of \$6,000.00 in compensatory damages; and (4) if it is

²⁴ *Id.* at 11.

²⁵ *Id.* at 35-36.

²⁶ *Id.* at 7.

²⁷ *Id.* (“Since the Respondent at that level of inquiry, must show by clear and convincing evidence that it did not discriminate against her, I still find the defense is not “clear” and I remain unconvinced.”).

²⁸ 18 U.S.C.A. § 1514A(c).

²⁹ The basis of Seguin’s cross-appeal is her assertion that the ALJ erred in calculating her back pay. The ALJ’s back pay award is consistent with Northrup Grumman’s argument that Seguin did not engage in a proper job search following her separation and, if she had done so, she would have

impossible to reinstate Seguin, Respondent is to provide front pay in the amount of \$303,047³⁰ and provide her with a neutral employment reference.³¹

CONCLUSION

Upon careful examination of the record, and having considered the parties' respective arguments on appeal, the Board finds that the substantial evidence of record supports the ALJ's factual findings that Seguin established that her SOX-protected activity was a contributing factor in her employment termination, and that Northrup Grumman failed to establish by clear and convincing evidence that it would have taken the same adverse action in the absence of Seguin's protected activities. The Board therefore **AFFIRMS** the ALJ's February 27, 2015 Decision and Order.³² Northrup Grumman is **ORDERED** to reinstate Seguin, if she has not already been reinstated, and provide back pay and compensatory damages as indicated above.

As a prevailing employee, Seguin is also entitled to reasonable attorney's fees and costs for legal representation incurred before the ARB. Seguin shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition with the Board, with simultaneous service on opposing counsel. Thereafter, counsel for Northrup Grumman shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

E. COOPER BROWN
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

been reemployed within six months of her separation. D. & O. at 17; *see also* Respondent Northrup Grumman Systems Corporation's Brief in Response to Complainant's Opening Brief (ARB Case No. 15-040) at 8. The ALJ's conclusions on this matter are supported by substantial evidence, and we therefore affirm his ruling.

³⁰ The \$303,047 front pay amount is based on the uncontested testimony of Seguin's economic expert, who calculated front pay from July 21, 2014 forward, based on retirement at age 69. *See* D. & O. at 37.

³¹ *See* D. & O. at 36-41.

³² All pending motions before the Board in this case, including a request for oral argument, are therefore moot.