



In the Matter of:

ANITA JOHNSON,

ARB CASE NO. 16-020

COMPLAINANT,

ALJ CASE NO. 2010-SOX-038

v.

DATE:

AUG 31 2017

THE WELLPOINT  
COMPANIES, INC.

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

*For the Complainant:*

Anita Johnson, pro se, Richmond Hill, Georgia

*For the Respondent:*

Steven J. Pearlman, Esq.; Kenneth D. Sulzer, Esq.; and Erin McPhail Wetty, Esq.;  
Seyfarth Shaw, L.L.P., Chicago, Illinois

Before: E Cooper Brown, *Administrative Appeals Judge*; Paul M. Igasaki, *Chief Administrative Appeals Judge*; and Leonard J. Howie, III, *Administrative Appeals Judge*

### FINAL DECISION AND ORDER

Anita Johnson filed a complaint under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX).<sup>1</sup> On February 25, 2011, a Department of Labor (DOL) Administrative Law Judge (ALJ) granted a motion for summary decision filed by The WellPoint Companies, Incorporated, and dismissed the complaint.<sup>2</sup> Johnson appealed to the Administrative Review

<sup>1</sup> 18 U.S.C.A. § 1514(A) (Thomson/West 2012). The SOX's implementing regulations are at 29 C.F.R. Part 1980 (2012).

<sup>2</sup> *Johnson v. WellPoint, Inc.*, ALJ No. 2010-SOX-038 (ALJ Feb. 25, 2011).

Board (ARB or Board). The Board vacated the ALJ's dismissal and remanded this case for an evidentiary hearing.<sup>3</sup> Following a two-day hearing, the ALJ denied Johnson's complaint,<sup>4</sup> and Johnson again appealed to the ARB. For the reasons that follow, the Board affirms the ALJ's dismissal of Johnson's complaint.<sup>5</sup>

## BACKGROUND

Johnson started at WellPoint as a field manager for human resources in April 2002, working with Jennifer Wade, vice president of consumer operations. WellPoint manages the provision of Medicaid benefits to more than 34 million clients under contract with 15 states.

In May 2007, Wade appointed Johnson to serve as director of customer care for WellPoint's call centers in Savannah, Georgia, and Camarillo, California, and made her responsible for handling the centers' correspondence processing, which included a backlog of inquiries and claims. Part of Johnson's function was to supervise center managers in the processing of correspondence, including complaints or inquiries about the receipts of benefits or the payments of fees made to health care providers who rendered medical services to the covered state-sponsored members.

A prior management team for the two centers had been fired because of the management team's inability to manage and report on the processing of correspondence and telephone inquiries. The problems stemmed chiefly from the limitations of the correspondence computer system, which contributed to the backlog, and the manual reporting process or lack of reporting. Because of this, Wade and Johnson met on a monthly basis to discuss problems and progress in reducing the backlog.

In June 2008, WellPoint's ethics and compliance department received a Hotline call alleging that Johnson and Carolyn Harper, the Savanna call center manager, were advising employees to close correspondence/contact logs before resolving the claims. The department

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<sup>3</sup> *Johnson v. WellPoint, Inc.*, ARB No. 11-035, ALJ No. 2010-SOX-038 (ARB Feb. 11, 2013).

<sup>4</sup> *Johnson v. WellPoint, Inc.*, ALJ No. 2010-SOX-038 (ALJ Jan. 20, 2011) (D & O).

<sup>5</sup> While the Board affirms the ALJ's dismissal of Johnson's complaint, we do not endorse every collateral issue in the ALJ's legal analysis. For example, the ALJ referred to the prima facie standard of proof and stated that Johnson "failed to establish a prima facie case, by a preponderance of the evidence, that protected activity contributed to her adverse employment action." Decision and Order (D & O) at 79. Under SOX, a complainant must prove by a preponderance of the evidence that protected activity was a contributing factor to the adverse employment action. *Heinrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 9 n.13 (ARB June 29, 2006). The prima facie analysis is unnecessary after a hearing on the merits. Compare 29 C.F.R. § 1980.104(b) (a complainant's prima facie showing is needed before OSHA will conduct a SOX investigation).

investigated the allegation in August and September 2008 and subsequently informed Wade that Johnson and Harper had instructed employees to close out claims prematurely.

Johnson denied that correspondence files were improperly closed and told Wade that, since WellPoint did not count open and pending correspondence in its inventory report, neither she nor Harper had any motive to instruct associates to close out claims inquiries before final resolution. Wade concluded otherwise after realizing that the previous inadequate reporting of claims had not been corrected and that improper correspondence reporting was still occurring. For that reason, Wade fired Johnson and two of the managers she supervised on October 21, 2008.

Johnson filed a complaint<sup>6</sup> with DOL's Occupational Safety and Health Administration (OSHA) on January 20, 2009.<sup>7</sup> OSHA denied the complaint on May 19, 2010. Johnson objected to OSHA's findings and requested a hearing before a Department of Labor ALJ. Prior to the hearing, scheduled for March 8, 2011, the ALJ granted WellPoint's motion for summary decision and dismissed Johnson's complaint. As previously noted, Johnson appealed the ALJ's dismissal to the ARB, which in turn reversed and remanded the case to the ALJ.

Following the ARB's remand, the ALJ conducted a hearing on April 28-29, 2014 in Savannah, Georgia. After reviewing the extensive record, which consisted of 26 joint stipulations about the company's operations, the hearing testimony, documentary exhibits, and several depositions, the ALJ concluded that Johnson had failed to establish that she engaged in any protected activity under the SOX.

#### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions arising under SOX.<sup>8</sup> The ARB reviews the ALJ's factual findings under the substantial evidence standard, and reviews conclusions of law de novo.<sup>9</sup>

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<sup>6</sup> Johnson's complaint alleged that she reasonably believed that the processing faults she disclosed to Wade "constituted violations of Section 10(b) of the Exchange Act; violations of the internal accounting controls and books and records provisions of Section 13 of the Exchange Act; and violations of Sections 13 and 33 of the Investment Company Act of 1940." ALJX 3, 6.

<sup>7</sup> WellPoint fired Johnson on October 21, 2008, and she filed a complaint on January 20, 2009, 91 days later. While the 2010 Dodd-Frank amendments changed the statute of limitations for complaints under the SOX from 90 to 180 days, Johnson's complaint was filed under the previous statute and was thus untimely. 8 U.S.C.A. § 1514A(b)(2)(D), 29 C.F.R. § 1980.103(d). See *Daryanani v. Royal & SunAlliance*, ARB No. 08-106, ALJ No. 2007-SOX-079, slip op. at 5 (ARB May 27, 2010). As neither party has raised this issue, we will not address it.

<sup>8</sup> See 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); see also 29 C.F.R. § 1980.110 (2015).

## DISCUSSION

18 U.S.C.A. § 1514A prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain fraudulent acts. That provision provides in relevant part that no covered employer 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 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission,<sup>10</sup> or any provision of Federal law relating to fraud against shareholders . . . .

To prevail on a complaint, a complainant must prove by a preponderance of the evidence that (1) he engaged in activity or conduct that section 1514A protects; (2) his employer took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the adverse personnel action. Failure to prove any one of these factors necessarily requires dismissal of Johnson's complaint.<sup>11</sup>

The Board summarily affirms the ALJ's decision that Johnson failed to establish that she engaged in any protected activity under SOX. To demonstrate that she engaged in SOX-protected activity, Johnson was required to prove that (1) she had a reasonable, subjective belief that the conduct she complained of constituted a violation of the laws listed at section 1514, and (2) a reasonable person of similar experience, training, and factual knowledge would objectively believe that a violation had occurred or was occurring.<sup>12</sup>

In affirming the ALJ's determination that Johnson failed to prove that she engaged in SOX-protected activity, the Board focuses on Johnson's failure to establish that her belief that WellPoint's activity of which she complained violated SOX was both subjectively and objectively reasonable. In reaching our conclusion, we limit our comments to the most critical

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<sup>9</sup> 29 C.F.R. § 1980.110(b). *Gunther v. Deltek, Inc.*, ARB Nos. 13-068, -069; ALJ No. 2010-SOX-049, slip op. at 2 (ARB Nov. 26, 2014).

<sup>10</sup> 18 U.S.C.A. § 1514A.

<sup>11</sup> *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Nos. 07-021, 07-022; ALJ No. 2004-SOX-011, slip op. at 3-4, 6 (ARB Aug. 31, 2009).

<sup>12</sup> *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003; ALJ No. 2007-SOX-005, slip op. at 12 (ARB Sept. 13, 2011); *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039; -042, slip op. at 14-15 (ARB May 25, 2011).

points and otherwise rely on the ALJ's rationale for his conclusion, which is consistent with applicable law and supported by the substantial evidence of record.<sup>13</sup>

Johnson's burden to prove that her concerns credibly involved a reasonable belief of a SOX violation implicates factual questions about her understanding of the financial impact of WellPoint's policy of not counting open claims as part of inventory. Johnson told Wade and Nathan Hunt, the ethics and compliance manager who investigated the Hotline complaint, that she had no motive to close out pending claims—the alleged reason for her discharge—because WellPoint did not count these cases as part of the internal and external reporting of its inventory. Yet, following her discharge Johnson alleged in her OSHA complaint that the very wrongdoing she denied happening in the call centers she supervised was the same activity that violated the SOX provisions.

Substantial evidence supports the ALJ's implicit crediting of Wade's testimony that she and Johnson discussed, at least once a month, the work load, issues and the centers' problems in processing correspondence, and telephonic inquiries from providers such as a doctor or hospital or health facility that WellPoint had engaged to offer medical services to members who had health insurance coverage. Wade stated in her December 9, 2010 deposition that she heard nothing from Johnson during their monthly meetings that the allegations of closing cases prematurely that Hunt was investigating concerned any violations of SEC regulations. Rather, Johnson's concerns, like hers, were operational in nature and related to policy and procedure. Any time the standard metrics, such as timeliness, inventory levels, average speed of answering telephone calls, and the volume and age of open inquiries, fell below target, Wade and her management team would remedy the problems. Wade added, however, that the inventory reports had no direct tie to WellPoint's financial systems because only the actual number of processed claims affected WellPoint's pricing and operating costs and the amount of penalty that WellPoint would pay out.<sup>14</sup>

Finally, the ALJ's finding of no evidence of any managerial manipulation of WellPoint's financial statements is supported by the substantial evidence of record. WellPoint took seriously Johnson's complaints about the inadequacies of the processing system, worked closely with

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<sup>13</sup> The Board nevertheless takes issue with the ALJ's statement that he "found no evidence of intent by WellPoint to defraud stockholders." D & O at 82 (The ALJ noted that Wade and Hunt both testified that Johnson never described management's activities as fraud on stockholders or SOX violations.). In *Sylvester v. Parexel*, the ARB explained the nature of the subjective-objective, reasonable-belief standard, stating that a reasonable belief about a violation of "any rule or regulation of the Securities and Exchange Commission" could encompass a situation in which the violation was completely devoid of any intent to fraud. Therefore, the Board held that an allegation of shareholder fraud is not a necessary component of protected activity under section 806. *Sylvester*, ARB No. 07-123, slip op. at 19-21 ("In examining the SOX's language, it is clear that a complainant may be afforded protection for complaining about infractions that do not relate to shareholder fraud.").

<sup>14</sup> Complainant's Exhibit (CX) 2.

representatives of the state contractors to resolve the issues, and paid performance guarantee penalties as necessary.<sup>15</sup>

**CONCLUSION**

The ALJ's conclusion that Johnson failed to demonstrate that she engaged in protected activity under the SOX is supported by substantial evidence of record and is in accord with applicable law. Accordingly, the ALJ's Decision and Order dismissing her complaint is **AFFIRMED**.

**SO ORDERED.**

[REDACTED]

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

[REDACTED]

[REDACTED]

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

[REDACTED]

**LEONARD J. HOWIE, III**  
**Administrative Appeals Judge**

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<sup>15</sup> D & O at 81-82.