



In the Matter of:

RENE A. BURNS,

ARB CASE NO. 2017-0041

COMPLAINANT,

ALJ CASE NO. 2017-SOX-00010

v.

DATE:

FEB 26 2019

THE UPSTATE NATIONAL BANK,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Rene A. Burns; *pro se*; Hilton, New York

For the Respondent:

Raymond W. Steinmetz, Jr.; *Upstate National Bank*; Rochester, New York

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*.

PER CURIAM

FINAL DECISION AND ORDER

This case arises under the whistleblower provision of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A (2010) and its implementing regulations at 29 C.F.R. Part 1980 (2018).

Rene Burns filed a complaint on November 22, 2016, with the Occupational Safety and Health Administration (OSHA) claiming that The Upstate National Bank (Upstate) retaliated against her in violation of the SOX when it terminated her employment for engaging in protected activities.

OSHA dismissed Burn's complaint as Burns was not an employee of a company covered by the SOX. Burns objected, and the case was assigned to a Department of Labor Administrative Law Judge (ALJ) for hearing. The ALJ issued an order to show cause directing Burns to explain why her complaint should not be dismissed for lack of jurisdiction. Both parties responded. Thereafter, the ALJ dismissed Burns' complaint for lack of subject matter jurisdiction on April 12, 2017.¹ Burns appealed to the Administrative Review Board (ARB or Board). We summarily affirm the ALJ's decision.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's SOX decision pursuant to Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. Part 1980. The ARB reviews the ALJ's conclusions of law de novo.²

DISCUSSION

The sole issue on appeal is whether Upstate is a covered company under the SOX's whistleblower provision, which is predicated on the employer meeting the following conditions:

- (1) having a class of securities registered under Section 12 of the Securities and Exchange Act of 1934 [hereinafter the Act], 15 U.S.C. § 78l (2017); or,
- (2) being required to file periodic reports under Section 15(d) of the Act, 15 U.S.C. 78o(d) (2017).³

¹ See 29 C.F.R. § 18.70(a) ("If the judge determines at any time that subject matter jurisdiction is lacking, the judge must dismiss the matter").

² *Blanchard v. Exelis Sys. Corp.*, ARB No. 15-031, ALJ No. 2014-SOX-020, slip op. at 4 (ARB Aug. 29, 2017).

³ The SOX's whistleblower provision provides in relevant part:

- (a) Whistleblower Protection for Employees of Publicly Traded Companies.—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 nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), . . . may

Coverage under the SOX's whistleblower provision is therefore limited to companies registered under Section 12 and those required to file reports under Section 15(d) of the Act.⁴ Section 12 of the Act provides that a company register its securities before trading on a national exchange. 15 U.S.C. § 78l(a) (it is unlawful for "any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange"). Section 15(d) of the Act requires that issuers registered prior to 1964 or registered under the Securities Act of 1933 file supplementary reports.⁵

We agree with the ALJ that Burns has failed to identify any evidence in the record that could support a factual finding that Upstate is covered under the SOX whistleblower provision.⁶ Burns did not offer registration statements, reports, or documentation showing that Upstate is registered under Section 12 or required to file reports under Section 15(d). On appeal, Burns reiterates her case but fails to identify any error the ALJ made in finding that her employer is not covered under the SOX. Citing a third-party website discussing the SOX and other financial laws, Burns incorrectly claims that SOX affects private companies as well as public companies.

In conclusion, Burns has failed to provide evidence to support her complaint or to show that the dismissal should be reversed. Accordingly, we **AFFIRM** the ALJ's Order Dismissing Complaint.

SO ORDERED.

discharge, demote suspend, threaten, harass, or in any other manner
discriminate against an employee. . . .

18 U.S.C. § 1514A(a).

⁴ *Nortell v. North Central Coll.*, ARB No. 16-071, ALJ No. 2016-SOX-013, slip op. at 2-3 (ARB Feb. 12, 2018); *Fleszar v. Am. Med. Ass'n*, ARB Nos. 07-091, 08-061; ALJ Nos. 2007-SOX-030, 2008-SOX-016; slip op. at 4 (ARB Mar. 31, 2009).

⁵ 15 U.S.C. § 78o(d)(1).

⁶ Order Dismissing Complaint at 2.