



In the Matter of:

MICHAEL B. BROWN,

ARB CASE NO. 2019-0007

COMPLAINANT,

ALJ CASE NO. 2015-SOX-00018

v.

DATE:

**JUN 19 2019**

SYNOVUS FINANCIAL CORPORATION,

RESPONDENT.

Appearances:

*For the Complainant:*

Michael B. Brown; *pro se*; Columbus, Georgia

*For the Respondent:*

Margaret H. Campbell, Esq. and Amy E. Jensen, Esq.; *Olgetree, Deakins, Nash, Smoak & Stewart, P.C.*; Atlanta, Georgia

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

## 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 (2015). Brown brought his original complaint (*Brown I*) against Synovus Financial Corporation in 2014. The Occupational Safety and Health Administration (OSHA) dismissed the complaint. Brown objected and requested a hearing. The Administrative Law Judge (ALJ) subsequently assigned to the case granted Synovus's motion for summary decision on December 16, 2016 and provided Brown notice of his right to timely appeal the ALJ's decision. The SOX's

whistleblower provision gives parties fourteen days to appeal an ALJ's decision. 29 C.F.R. 1980.110(a). On April 6, 2017, over three months after the ALJ's decision, Brown filed a motion with the Administrative Review Board (ARB or Board) to set aside the ALJ's decision for alleged "fraud on the Court." The ARB treated Brown's motion as a petition for review and denied it as untimely filed. *Brown v. Synovus Financial Corp.*, ARB No.17-037, ALJ No. 2015-SOX-018 (ARB May 17, 2017). After the ARB denied Brown's subsequent motion for reconsideration, Brown appealed the ARB's final decision to the United States Court of Appeals for the 11th Circuit, which affirmed the ARB's decision. *Brown v. Sec'y of Labor*, No. 17-13151, 739 Fed. Appx. 978 (11th Cir., July 11, 2018)(unpub.). The court also denied Brown's subsequent motion for reconsideration.

Following the court's denial, Brown filed a motion with the ALJ for relief under Fed. R. Civ. P. 60(d), again asserting fraud on the court (*Brown II*). On October 30, 2018, the ALJ denied his motion, concluding specifically that Brown alleged no new information or discovery of fraud but rather moved for relief based on facts and content already known to him in December 2016 when the matter was before the ALJ the first time. The ALJ found that Brown's motion for relief was an attempt to reargue his case which the ARB and the court of appeals had already denied.

Brown has now petitioned the ARB for review of the ALJ's decision.<sup>1</sup> Upon review of the ALJ's Order, we conclude that the ALJ's Order is well-reasoned and based on the undisputed facts and the applicable law. The ALJ properly concluded that the motion failed to allege proper grounds of fraud on the court. The ALJ correctly concluded that Brown seeks to relitigate his case in the form of a motion for relief. Accordingly, we adopt and attach the ALJ's Order Denying Motion to Relieve Party from Judgment, Order, or Proceeding to Set Aside the Order due to Fraud on the Court. Brown's Motion at issue is thereby **DENIED**.

**SO ORDERED.**

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<sup>1</sup> The ARB has jurisdiction to review the ALJ's decision under Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019) and 29 C.F.R. Part 1980.110. The ARB reviews the ALJ's factual determinations for substantial evidence and conclusions of law de novo. *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, slip op. at 6 (ARB Mar. 30, 2016); see 29 C.F.R. 1980.110(b).

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Issue Date: 30 October 2018

CASE NO.: 2015-SOX-00018

*In the Matter of:*

MICHAEL B. BROWN,  
*Complainant,*

v.

SYNOVUS FINANCIAL CORP.,  
*Respondent.*

**ORDER DENYING MOTION TO RELIEVE PARTY FROM JUDGMENT, ORDER, OR  
PROCEEDING TO SET ASIDE THE ORDER DUE TO FRAUD ON THE COURT**

This matter was docketed in the Office of Administrative Law Judges on May 22, 2015, and assigned to Administrative Law Judge Alan L. Bergstrom. On December 16, 2016, Judge Bergstrom granted a motion for summary decision filed by Respondent Synovus Financial Corp.

On October 10, 2018, Complainant Michael B. Brown filed a motion entitled "Complainant Michael B. Brown's Rule 60(d)(1)(3) Motion, Brief, and Independent Action to Relieve a Party from a Judgment, Order, or Proceeding to Set Aside the Order Due to Fraud on the Court." Respondent Synovus Financial Corporation filed a timely response. For the reasons set forth below, Mr. Brown's motion will be denied.<sup>1</sup>

Background

Complainant filed a complaint under the employee-protection provisions of the Sarbanes-Oxley Act on July 3, 2014. He alleged that Synovus retaliated against him by reassigning him, placing him on a performance improvement program, and ultimately terminating him, after he raised concerns about the company's disregard of his audits and its blocking him from reporting his concerns to management. After the required investigation, OSHA determined that there was no reasonable cause to believe that Synovus violated Mr. Brown's rights under SOX. Mr. Brown objected to that determination and requested a hearing, and the matter was forwarded to the Office of Administrative Law Judges, where it was assigned to ALJ Alan L. Bergstrom.

On December 16, 2016, Judge Bergstrom issued a Decision and Order granting Synovus' motion for summary decision and dismissing the complaint. That Decision and Order informed

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<sup>1</sup> Mr. Brown has also filed a complaint of judicial misconduct against Judge Bergstrom. That matter has been referred to the Chief Administrative Law Judge, and will not be addressed in this Order.

Mr. Brown of his appeal rights, and instructed him that any appeal to the Administrative Review Board must be filed within 14 days of the date of Judge Bergstrom's decision. Complainant did not appeal to the ARB within 14 days. On April 6, 2017 – 79 days after Judge Bergstrom's Decision and Order – Mr. Brown filed a Motion and Brief to Set Aside the Order Due to Fraud Upon the Court. The ARB construed that motion as a petition for review of Judge Bergstrom's decision, and ultimately denied the petition as untimely. Complainant appealed the ARB's decision to the U.S. Court of Appeals for the 11<sup>th</sup> Circuit; that Court affirmed the ARB's dismissal of his appeal on July 11, 2018. By order dated September 10, 2018, the Court of Appeals denied Mr. Brown's motion for reconsideration of its decision affirming the ARB. Mr. Brown thereafter filed the motion that is before me now.

### Discussion

Mr. Brown brings his motion under Rule 60(d)(3)<sup>2</sup> of the Federal Rules of Civil Procedure. That rule provides that it “does not limit a court's power to ... set aside a judgment for fraud on the court.” He argues that Judge Bergstrom misrepresented and misconstrued the facts, and misapplied the law, in granting summary decision to Synovus.

The proper procedure to challenge a ruling of an administrative law judge in a SOX proceeding is to petition the ARB for a review of that ruling. As Judge Bergstrom advised Mr. Brown in the December 2016 Decision and Order:

To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within fourteen (14) days of the date of issuance of the administrative law judge's decision.

This Mr. Brown did not do. He filed nothing with the ARB for several months, and when he did, it was not a petition for review. The ARB nevertheless chose to construe it as a petition for review, and denied it as untimely, noting that not only did Mr. Brown fail to file it within 14 days of the Decision and Order, he failed to file it within 14 days of becoming aware that his previous attorney had not filed it either. By failing to file a timely petition for review, Mr. Brown forfeited his right to have Judge Bergstrom's Decision and Order examined for factual and legal correctness. Having chosen to sit on his rights, he cannot now re-litigate his case.

Mr. Brown points out that there is no time limit for bringing a Rule 60(d)(3) motion; and that is true.<sup>3</sup> Had he discovered for the first time, almost three years after the Decision and Order, that there had been fraud, he might be able to bring such a motion. But in this case, Mr. Brown bases his entire argument on evidence that was known to him before December of 2016, and on statements and analysis by Judge Bergstrom that became known to him in that month. This is clearly an attempt to re-argue his case, and not a demonstration of any type of fraud, and it is precisely the type of argument that should have been made on appeal to the ARB.

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<sup>2</sup> Complainant styles it as a motion under Rule 60(d)(1)(3), but there is no such rule. Given his focus on the notion of “fraud upon the court,” I conclude that the motion is brought under Rule 60(d)(3).

<sup>3</sup> I assume for the sake of this Order that Rule 60(d)(3) is applicable to administrative hearings in the Department of Labor, although that is far from clear.

Finally, I note that Mr. Brown has not alleged any fraud on the ALJ, but has alleged fraud by the ALJ. The case law he cites, as well as that cited by Respondent, establishes the proposition that Rule 60(d)(3) is implicated when there has been egregious misconduct by a party in the case, not by the court itself. For example, the Eleventh Circuit has held that "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court." *Gupta v. Walt Disney World Co.*, 482 F. App'x 458, 459 (11th Cir. 2012); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978). Even assuming that Judge Bergstrom improperly found the facts and misapplied the law, his actions (a) are not fraudulent, (b) even if deemed fraudulent, do not rise to the level of fraud required for Rule 60(d)(3) relief, and (c) clearly are not a fraud on the court.

### ORDER

For the foregoing reasons, IT IS ORDERED that Complainant Michael B. Brown's Rule 60(d)(3) motion is DENIED.

**SO ORDERED.**



Duly signed by Paul Johnson Jr.  
DN: CN=Paul Johnson Jr.,  
OU=Administrative Law Judge, O=US  
DOI, Office of Administrative Law  
Judge, L=Newport News, B=VA, C=US  
Location: Newport News VA

**PAUL C. JOHNSON, JR.**  
District Chief Administrative Law Judge

PCJ, Jr./ksw  
Newport News, Virginia

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be

had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of

Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1980.110(b).