



Issue Date: 29 October 2010

CASE NO.: 2010 SOX 60

In the Matter of
VICTOR M. CROWN
Complainant

v.

**CITY OF CHICAGO, et al., and
COOK COUNTY, et al.,¹**
Respondents

Appearances: Mr. Victor M. Crown
Pro Se (representing himself)

Mr. Joseph M. Gagliardo, Attorney
For the City of Chicago, et al

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**INITIAL DECISION AND ORDER –
DISMISSAL OF COMPLAINT**

On September 23, 2010, I was assigned to conduct a hearing and render a decision in this case, based on the Complainant's September 16, 2010 objection² to the Regional Administrator's August 19, 2010 dismissal of his June 18, 2010 complaint, under Section 806 of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C. § 1514A, ("Act" or "SOX") as implemented by 29 C.F.R. Part 1980. On October 1, 2010, based on the nature and content of the complaint, and prior to setting a hearing date, I issued a Show Cause Order to provide the parties an opportunity within 20 calendar days to show cause whether Mr. Crown's SOX complaint should be dismissed for failure to state a cause of action.

¹Although the Regional Administrator, Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor, only considered the City of Chicago and its named employees as respondents, Mr. Crown's complaint also included Cook County and its employees.

²The date of postmark is considered the date of filing. 29 C.F.R. § 1980.106(a).

Background

On June 18, 2010, Mr. Crown filed a complaint on behalf of himself and others with OSHA against the City of Chicago, persons within the Department of Law of the City of Chicago, the County of Cook, the Cook County States Attorney, and the Cook County Sheriff under the Act. In his complaint, filed within days of his receipt of a Freedom of Information Act (“FOIA”) response from the City of Chicago, Mr. Crown alleged that the named Respondents engaged in intentional violations of SOX due to his protected activity. The alleged protected activity was Mr. Crown’s role as a “prevailing” party in a state FOIA action that compelled release of material withheld from a defendant tried in a criminal proceeding in retaliation for SOX activity associated with a Cook County pension fund and the failure of banks and institutions to comply with regulatory requirements “affecting lobbyist registration and remittance of overdue fines.” As retaliation for his protected activity, Mr. Crown claims he has suffered blacklisting, interference with his litigation and administrative proceedings associated with the Respondents’ failure to comply with federal court orders, denial of employment, denial of benefits under the City of Chicago’s pension fund and Social Security Act, intimidation, and illegal eviction. Mr. Crown seeks an administrative order “affecting remittance of FICA taxes and allocation of earning credits from 1991 to 2010” associated with his work as a retained expert witness in a voting rights case and his work performed in fulfillment of a federal court order in a criminal case.

On August 19, 2010, the Regional Administrator, OSHA, concluded that the City of Chicago is not a company within the meaning of 18 U.S.C. § 1514A because it did not have a class of securities registered under section 12 of the Securities Exchange Act of 1934 (“SEA”), 15 U.S.C. § 781, and was not required to file reports under section 15(d) of the SEA, 15 U.S.C. § 78o(d). Consequently, since the Complainant was not an employee of any entity covered under SOX, the Regional Administrator dismissed his complaint.

On September 16, 2010, Complainant filed a notice of appeal with the Office of Administrative Law Judges, objecting to the Regional Administrator’s findings and requesting a *de novo* hearing before an administrative law judge (“ALJ”).³

In his appeal, Complainant asserted that the OSHA response letter was “legally and **factually incorrect**” in stating that the City of Chicago had discriminated against him in retaliation **for reporting remittance** of FICA and Social Security taxes,” when, in fact, “the City of Chicago discriminated against me in retaliation **for its NOT REPORTING remittance** of FICA and Social Security taxes.” Complainant further alleged that this error affects his “Shakman Award” of \$1,500.00, as well as his legal rights with respect to a default judgment. Mr. Crown also objected to the OSHA findings because he believed the determination was “based on a **mistake** in a letter from the Office of Shakman Monitor Noelle Brennan, which

³Subsequently, Mr. Crown has filed at least four other requests: Motion Requesting Ministerial Order (Writ of Mandamus, County of Cook), Motion Requesting Ministerial Order (Social Security Administration), Motion Requesting Ministerial Order (Writ of Mandamus, Illinois State Comptroller), and Motion Requesting Judicial Notice (Internal Revenue Service and Social Security Administration). Additionally, in his response to the Show Cause Order, Mr. Crown seeks a Writ of Prohibition “to preclude any un-constitutional activity” with respect to a state case affecting his mother’s estate.

falsely reported that my Shakman 2 claim was *untimely* filed on November 4, 2008 – when it was actually **timely filed** on May 12, 2008 – as affirmed by the Chicago Commission on Human Relations.” Complainant requested that the ALJ affirm his claim was timely filed. He also invoked the doctrine of collateral estoppels/res judicata to preclude the defendants from presenting any objection to his request for the allocation of earnings credits “affecting the Social Security Act and IRS Publication 957.” He further requested the ALJ issue an order on the allocation of earnings credits for himself and “related co-plaintiffs” as well as legal fees, taking judicial notice of Internal Revenue Bulletin 2009-52.⁴

Parties’ Positions⁵

Respondent – City of Chicago, et al

In an October 20, 2010 response, counsel for the City of Chicago, et al., asserted Mr. Crown’s SOX complaint should be dismissed on two grounds. First, although the City of Chicago is a municipal corporation which owns and manages a portfolio of publically traded securities, the city itself does not issue securities under section 12 of the SEA and is not required to file reports under section 15(d). Consequently, the City of Chicago is not a covered entity under SOX. Second, Mr. Crown was never an employee of the City of Chicago. Mr. Crown’s complaint makes no such allegation and an affidavit from the City of Chicago’s Department of Human Resources establishes Mr. Crown was never employed by the City of Chicago.⁶

Complainant

On October 26, 2010, I received Mr. Crown’s response and objection to the dismissal of his SOX complaint. Initially, Mr. Crown maintains that he is a covered employee under the Act in two ways. First, Mr. Crown is the court-appointed legal representative for the estate of his mother, who was an employee of the Continental Illinois National Bank from 1962 to 1989 and “covered under the False Claims Act of 1863, the amended False Claims Act of 1986, and the revised Sarbanes-Oxley Act of 2002.” As a covered employee of CINB and its successor Bank of America under SOX, Mr. Crown’s mother had a legal right to vested pension contributions and as legal representative of her estate, Mr. Crown has vested legal rights. Second, Mr. Crown has served as an election judge for the City of Chicago Board of Elections Commissioners and engaged in qui tam cases.

⁴On September 17, 2010, Complainant submitted a letter accompanied by supplemental documentation. In addition to his prior requests, Complainant explained that OSHA’s factually incorrect finding also affected his legal rights to his “BILL OF COSTS” with regards to “Shakman 2.” Mr. Crown also included documentation regarding his “*illegal eviction*” by a Cook County employee despite three protective orders. On September 20, 2010, Complainant filed another letter and further documentation. In addition to his previous requests, Mr. Crown requested an administrative order on allocation of “earnings credits” for his work as an “independent administrator” in two estates, “retained expert witness” in a civil case, and a *prevailing party* on Shakman 1 [2000-2002] and Shakman 2 [2003-2007 – by default].”

⁵To date, Cook County, et al., has not responded to the show cause order.

⁶Counsel also refutes Mr. Crown’s assertion that the City of Chicago has been barred from filing paperwork against him. To the contrary, according to counsel, on October 6, 2009, the U.S. District Court, Northern District of Illinois, barred Mr. Crown from filing any further documents in the case before the court.

The City of Chicago is covered by SOX since its employees do more than just own and manage portfolio securities. According to Mr. Crown, the chief fund manager, fund manager, projects administrator, senior operations research analyst and portfolio manager are “involved in ALL of the activities under the SOX Act.”⁷

Discussion

Procedurally, in determining whether a complaint states a cognizable cause of action, the Federal Rules of Civil Procedure are applicable because neither 29 C.F.R. Part 1980 (SOX whistleblower proceedings) nor 29 C.F.R. Part 18 (proceedings before the Office of Administrative Law Judges) addresses this issue. *See* 29 C.F.R. § 18.1(a) and *Freels v. Lockheed Martin Energy Sys.* 1995 CAA 92 and 1994 ERA 6 (ARB Dec. 4, 1996). In turn, FED. R. CIV. P. 12(b)(6) provides that a defense to an action may be that it fails to state a claim upon which relief can be granted. Under this rule, dismissal of a claim is appropriate if the complaint fails to allege “a set of facts, which if proven, could support [Complainant’s] claim of entitlement to relief.” *Freels*, at p. 10-11. Closely related, FED R. CIV. P. 12(b)(1) provides for dismissal for lack of subject matter jurisdiction.

Substantively, Section 806 of the Act, 18 U.S.C. § 1514A(a), and 29 C.F.R. § 1980.102 prohibit a company with either a class of securities registered under § 12 of the SEA, 15 U.S.C. § 78l, or that is required to file reports under § 15(d) of the SEA, 15 U.S.C. § 78o(d),⁸ its subsidiaries and affiliates,⁹ and such company’s representative,¹⁰ from discharging, demoting, suspending, threatening, harassing, or in any manner discriminating against an employee in the terms and conditions of employment because an employee engaged in any lawful act to provide information, caused information to be provided, or otherwise assisted in an investigation, regarding any conduct the employee reasonably believed constitutes a violation of 18 U.S.C. §§ 1341 (fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud), or any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders, when the information is provided to a federal regulatory or law enforcement agency, any member of Congress, or a person with supervisory authority over the employee.

By reference, SOX incorporates the procedural provisions and rules of the employee protection provisions of the Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121(b). Consequently, according to 49 U.S.C. § 42121(b)(2)(B)(iii) and 29 C.F.R. § 1980.109(a), a violation of the SOX employee protection provision is established if the complainant proves through the preponderance of the evidence that his protected activity was a contributing factor in the alleged unfavorable personnel action. That is, the complainant must prove that:

⁷Mr. Crown also asserts that due to the Respondents’ failure to respond to his additional motions, they have “waived/defaulted” on his SOX claim as it affects “the estate tax appeals and the related qui tam and pension claims.”

⁸Section 15(d) relates solely to reports of registered issuers of securities.

⁹ Added by Section 929A of the Dodd-Frank Wall Street Reform Act (“Dodd-Frank”), Public Law 111-203, July 2010.

¹⁰A company representative may be an officer, employee, contractor, subcontractor, or agent of a company. 29 C.F.R. § 1980.101.

1. He engaged in a protected activity or conduct under the Act;
2. The respondent knew the complainant engaged in the protected activity;
3. He suffered an unfavorable personnel action; and
4. The protected activity was a contributing factor in the respondents' decision to take the unfavorable personnel action.

However, in addition to the four elements of entitlement, threshold criteria must be met. Specifically, the complainant must prove that the respondent is a company subject to the Act and that he was an employee of that company such that a cognizable cause of action and subject matter jurisdiction are established.

Finally, the remedies under Section 806, 18 U.S.C. § 1514A(c) and 29 C.F.R. § 1980.109(b) that an administrative law judge may order for a successful action include reinstatement, back pay with interest, and compensation for special damages, such as litigation costs, expert witness fees, and reasonable attorney fees.

With these principles in mind, I will assess whether Mr. Crown's SOX complaint against the respective Respondents states a cause of action or establishes subject matter jurisdiction.

City of Chicago

The City of Chicago acknowledges that it owns and manages a portfolio of securities. The language of first paragraph of Section 806 of the Act, 18 U.S.C. § 1514A(a), describes a covered employer as a "company with a class of securities" registered under the SEA. Standing alone, that phrase might lead to a possible interpretation that the SOX employee protection provisions apply to any entity with (that is, owning and managing) a portfolio of registered securities.

However, that provision does not stand alone. Right above the paragraph containing that phrase is the caption for Section 806, which reads "PROTECTION FOR EMPLOYEES OF PUBLICALLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD," clearly demonstrating that the phrase in the next paragraph, 18 U.S.C. § 1514A(a), means a publically traded company with a class of its own securities registered under Section 12 of the SEA. Further, according to the Administrative Review Board ("ARB"), employer liability under Section 806 "is limited to companies that issue securities that are registered under Section 12 or that file reports under Section 15(d)." *Fleszar v. American Medical Ass'n*, ARB Nos. 07-091 and 08-061, ALJ Nos. 2008-SOX-030 and 2008-SOX-016, slip op. p.4. (ARB Mar. 31, 2009), *pet. den. Fleszar v. U.S. Dep't of Labor*, No. 09-2423 (7th Cir. Mar. 23, 2010).¹¹ *See also Flake v. New World Pasta Co.*, ARB No. 03-126, ALJ No. 2003-SOX-018 (ARB Feb. 25, 2004), *aff'd*,

¹¹Mr. Crown asserts that *Fleszar* has been "super-ceded" by the Dodd-Frank. However, as noted in footnote 9, in regards to Section 806, Dodd-Frank simply added subsidiaries and affiliates of publically traded companies as covered employers, which does not alter the viability of ARB's *Fleszar* decision in Mr. Crown's case.

Flake v. U.S. Dep't of Labor, 248 Fed. Appx. 287 (3d. Cir. 2007); *see also Paz v. Mary's Ctr. for Maternal & Child Care*, ARB No. 06-031, ALJ No. 2006-SOX-007 (ARB Nov. 30, 2007).

While the city may own and manage other companies' securities, the named respondent "City of Chicago" is not a publically traded company, does not issue its own class of securities under section 12 of the Act or file reports under section 15(d), and, consequently, is not a covered employer under Section 806. In turn, since the City of Chicago is not subject to the employee protection provisions of Section 806 of the Act, Mr. Crown's SOX complaint fails to state a cause of action upon which he might obtain relief under the Act, even if he proved all four elements of entitlement.¹² Consequently, his SOX complaint against the City of Chicago and persons within its Law Department must be dismissed.

Cook County

Although Cook County did not respond to the show cause order, the same analysis essentially applies while the basis for dismissal is slightly different. On the face of Mr. Crown's SOX complaint, absent any other allegations relating to registered securities or SEA filings, as a named respondent, Cook County clearly appears to be a government entity, rather than a publically traded company that issues its own class of securities registered under section 12 or has a requirement to file reports under section 15(d) of the SEA. Consequently, Mr. Crown's SOX complaint against Cook County is facially deficient since I only have subject matter jurisdiction to adjudicate employment discrimination complaints against employers who are subject to the employee protection provisions of Section 806. Additionally, my jurisdiction in SOX cases is established solely by specific statutory and regulatory authority, 18 U.S.C. § 1514A(b)(2)(A) and 49 U.S.C. §§ 42121(b)(2)(A) and (3)(C), and 29 C.F.R. § 1980.107(b), and can not be conferred upon me by the parties' stipulations, actions, or inactions, such as failure to respond to a show cause order. Accordingly, since Cook County is not an employer covered by Section 806 of the Act, I lack subject matter jurisdiction and authority to address Mr. Crown's claimed grievances. As a result, Mr. Crown's SOX complaint against Cook County, Cook County States Attorney, and the Cook County Sheriff must be dismissed.

CONCLUSION

Since the City of Chicago does not issue securities registered under section 12 and is not required to file reports under section 15(d) of SEA, the city is not subject to the employee protection provisions of Section 806 of the Act. As a result, Mr. Crown's SOX complaint against the City of Chicago, et al., must be dismissed for failure to state a claim upon which SOX relief may be granted.

¹²Mr. Crown also asserts that Dodd-Frank amended SOX to include mandamus relief upon which I should act. Section 10579(c)(5)(D) of Public Law 111-203 added a mandamus procedure under the new employee protection provisions for employees involved in consumer financial products and services. However, as previously discussed the only amendment in Dodd-Frank to Section 806 of SOX involved an expansion of covered employers. Additionally, as indicated in Dodd-Frank, mandamus actions are brought under 28 U.S.C. § 1361 which gives original jurisdiction to federal district courts rather than administrative law judges.

Similarly, since on the face of the complaint, Cook County is a government entity that does not does not issue securities registered under section 12, and is not required to file reports under section 15(d) of SEA, the county is not subject to the employee protection provisions of Section 806 of the Act. As a result, Mr. Crown's SOX complaint against Cook County, et al., must be dismissed for failure to establish subject matter jurisdiction.

ORDER

Accordingly, the August 19, 2010 SOX complaint of Mr. Victor M. Crown against City of Chicago, et al., and Cook County, et al., is **DISMISSED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: October 28, 2010
Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within **ten (10) business days** of the date of the administrative law judge's decision. See 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

At the time 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. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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(c). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).