



Issue Date: 25 August 2010

Case No.: 2010-SOX-00042

In the Matter of:

**BRIAN ELLIOTT,
Complainant**

v.

**MDU RESOURCES,
KNIFE RIVER CORPORATION,
And BILL THOMAS
Respondents**

**DECISION AND ORDER GRANTING
RESPONDENTS' MOTION TO DISMISS**

This matter arises under the employee protection provisions of the Sarbanes-Oxley Act of 2002, (the Act or SOX), 18 U.S.C. § 1514A, brought by Brian Elliott (Complainant) against MDU Resources, Knife River Corporation, and Bill Thomas (Respondents).

Complainant filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) on April 15, 2010, alleging he was fired by Respondents in retaliation for engaging in activities believed to be protected under the Act. After an investigation by OSHA, Complainant was notified by letter dated June 1, 2010, that there was no reasonable cause to believe that Respondents violated the Act. Complainant filed a letter requesting a formal hearing with the Office of Administrative Law Judges on July 1, 2010.

Respondents filed a Motion to Dismiss the complaint on July 30, 2010, arguing Complainant's activities did not relate to reasonably perceived violations of 18 U.S.C. §§ 1341, 1343 or of federal law relating to fraud against shareholders so as to establish "protected activity" necessary to invoke the subject matter jurisdiction under the Act. Respondents also argue that Complainant's employer was not a publicly traded company as is required for protection under the Act.¹ Complainant filed a Response on August 17, 2010.

¹ The Act was recently amended to expand the definition of employer to include "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company" Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010) Amending Section 1514A of the Sarbanes-Oxley Act. The status of the Respondents in relation to the consolidated financial statement of a publicly traded company is not discussed in the Motion or the Response. Accordingly, the Court finds that part of the Motion to Dismiss is not ripe for decision.

DISCUSSION

The Act prohibits discriminatory actions by publicly traded companies against their employees who provide information to their employer, a federal agency, or Congress that the employees reasonably believe constitutes a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission or any provisions of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A.

To state a claim under the employee-protection provisions of the Act, Complainant must allege that (1) he engaged in protected activity or conduct; (2) Respondent knew he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. Platone v. FLYi Inc., ARB No. 04-154, ALJ No. 2003-SOX-00027 (ARB Sept. 29, 2006); Halloum v. Intel Corp., ARB No. 04-068, ALJ No. 2003-SOX-00007 (ARB Jan. 31, 2006).

For the reasons discussed below, I find that Complainant's whistleblower claim does not allege any communication or action prior to his termination that would constitute protected activity under the Act. Specifically, Complainant's complaint provides:

1. Complainant raised complaints to the United States Attorney's Office and FBI alleging Respondents had committed fraud on its customers by sending through the mail, facsimile and/or e-mail false documents relating to the type of concrete being delivered to various projects and delivering out-of-specification concrete knowing that it was not within specification. Many of such documents that were transmitted were delivery documents for the concrete, as well as invoices for the concrete purchased on the particular jobs.
2. Complainant also alleged that MDU Resources sent via mail, facsimile and/or e-mail falsified test reports on concrete that was being delivered and used on numerous concrete pours.
3. Complainant previously made similar complaints to his boss and to Bill Thomas, the President of the South Division of Knife River.

The Administrative Review Board has held that to constitute protected activity under SOX, "the employee's communications must 'definitively and specifically' relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1)." Platone v. FLYi, Inc., ARB No. 04-154, p. 17, ALJ No. 2003-SOX-00027 (ARB Sept. 29, 2006). In Platone, the ARB held that when a SOX whistleblower complaint is grounded in Federal mail and wire fraud statutes, "the alleged fraudulent conduct must at least be of the type that would be adverse to investor's interest. The ARB cited in support of this holding the fact that the preamble to SOX states: "**To protect investors** by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." (emphasis added). As evidenced above, nothing in Complainant's complaint provides information about

conduct he reasonably believed constituted a violation of mail fraud, wire fraud, bank fraud, or securities fraud, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A. As Complainant has failed to allege that he engaged in protected activity under the Act, his complaint must be dismissed.

ORDER

Respondents' Motion to Dismiss is hereby **GRANTED** and the complaint of Brian Elliott is hereby **DISMISSED**.

So ORDERED.

A

**LARRY W. PRICE
ADMINISTRATIVE LAW JUDGE**