



Issue Date: 03 February 2011

Case No.: 2010-SOX-47

In the Matter of

**LEE LASITER,
Pro Se Complainant**

v.

**KELLOG BROWN & ROOT (KBR),
Respondent**

DECISION AND ORDER

BACKGROUND

This proceeding arises under the Sarbanes-Oxley Act of 2002, technically known as the Corporate and Criminal Fraud Accountability Act (herein SOX or the Act)¹ and the regulations promulgated thereto² that are employee protective provisions. The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees of publicly traded companies who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for providing information about fraud against company shareholders to supervisors, federal agencies or members of Congress.

Following a motion by Respondent to stay the case because the parties were engaging in arbitration, I conducted a conference call with Complainant and counsel for Respondent on 3 Nov 10. The parties agreed to hold the case in abeyance and I ordered them to arrange for a conference call after the arbitration was complete.

On 30 Dec 10, Respondent filed a motion to dismiss, arguing that the arbitration was complete and the final award had denied Complainant’s whistleblower claim. On 31 Jan 11, Complainant filed his opposition, arguing that while a stay in deference to arbitration was appropriate, a dismissal is not. He petitioned for either a remand to the arbitrator or *de novo* hearing. In his motion, Complainant did not suggest that he was not

¹ 18 U.S.C. § 1514A.

² 29 C.F.R. Part 1980.

subject to the mandatory arbitration clause of his employment contract or that the arbitration process itself was somehow flawed.

Instead, Complainant argued in general that the arbitrator was arbitrary, capricious, abused his discretion, failed to address material facts and arguments, and failed to meet the JAMS arbitration rules. He specifically argued that the arbitrator did not consider (1) whether Complainant may have reasonably believed his communication was protected activity, (2) the evidence in Respondent's own written reasons for discharge and Complainant's testimony determining whether a nexus existed between the protected activity and discharge, and (3) any of Complainant's arguments.³

LAW

Arbitration

The Federal Arbitration Act (FAA) enforces contractual waivers of the right to judicial resolution of disputes in favor of arbitration. It provides that “[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴ The FAA requires that any proceedings brought upon any issue referable to arbitration under the terms of such a contract shall be stayed pending arbitration upon application by a party who is not in default in the arbitration.⁵ Although the agreement to arbitrate must be written it need not be signed.⁶ The FAA allows a court to dismiss a case if all issues are subject to arbitration.⁷

The party arguing that a claim based upon a federal statute is not subject to the stay or dismissal has the burden of showing Congressional intent to exempt the claim from the FAA. “There is nothing in the text of the statute or the legislative history of the Sarbanes-Oxley act evincing intent to preempt arbitration of claims under the act.”⁸

In deference to a system of prompt, predictable, local settlement of day-to-day labor disputes, awards from arbitration may be vacated only if the award was procured by fraud, corruption, partiality, or prejudicial misbehavior by arbitrator.⁹ Courts are

³ Complainant did not include in his answer additional grounds that he included in his objections to the arbitrator's final award. They included the failure to state essential findings and conclusions, a mistaken belief that the communication had to be to a federal agency, and appropriately weigh the testimony of witnesses without firsthand knowledge.

⁴ 9 U.S.C. §2 (2011).

⁵ 9 U.S.C. §3 (2011).

⁶ *M & I Elec. Indus., Inc. v. Rapistan Demag Corp.*, 814 F.Supp. 545 (E.D.Tex.1993).

⁷ *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (C.A.5 Tex.1992).

⁸ *Boss v. Salomon Smith Barney Inc.*, 263 F.Supp.2d 684, 685 (S.D.N.Y.2003).

⁹ 9 U.S.C. §10 (2011); *Local Union 1160 v. Busy Beaver Bldg. Ctrs., Inc.*, W.D.Pa.1985, 616 F.Supp. 812.

precluded from interfering with arbitration awards for mere errors in assessing the credibility of witnesses.¹⁰ An award must be sustained as long as the evidentiary record shows a colorable basis assuring it cannot be said to be the result of the arbitrator's manifest disregard of the law.¹¹

Substantive Whistleblower

The applicable act states in relevant part:

No [publicly-traded company] . . . 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 . . . any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by— . . . (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)¹²

To prevail, an employee must prove by a preponderance of the evidence¹³ that (1) he engaged in protected activity; (2) the employer knew that 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.¹⁴ In order for a complainant to demonstrate that he engaged in protected activity, he must show that he had a reasonable belief that a violation occurred. Reasonableness is determined on the basis of knowledge available to a reasonable person in the circumstances with the employee's training and experience.¹⁵ The complainant must prove the protected activity was a contributing factor and affected the outcome of the decision to take the adverse action.¹⁶

¹⁰ *Int'l Bhd. of Firemen & Oilers, Local 261 v. Great N. Paper Co.*, C.A.1 (Me.) 1985, 765 F.2d 295.

¹¹ *Fairchild Corp. v. Alcoa, Inc.*, 510 F.Supp.2d 280 (S.D.N.Y.2007).

¹² 18 U.S.C. § 1514A(a)(1) (2011).

¹³ The employee is entitled to the relief provided by § 1514A(c) "only if the [employee] demonstrates that [her protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(iii). The term "demonstrates" means to prove by a preponderance of the evidence. *See Dysert v. Sec'y of Labor*, 105 F.3d 607, 610 (11th Cir. 1997) (addressing analogous statutory burden-shifting framework under the Energy Reorganization Act of 1974 ("ERA")).

¹⁴ 49 U.S.C. § 42121(b)(2)(B)(iii); *Stojicevic v. Ariz.-Am. Water*, ARB Case No. 05-081, 2007 WL 3286331, at *7 (ARB Oct. 30, 2007); *Welch v. Cardinal Bankshares Corp.*, ARB Case No. 05-064, 2007 WL 1578493, at *5 (ARB May 31, 2007); *see Reyna v. ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1380 (M.D. Ga. 2007); *see also* 29 C.F.R. § 1980.104(b)(1)(i)-(iv).

¹⁵ *Grant v. Dominion E. Ohio Gas*, 2004-SOX 63 (ALJ March 10, 2005).

¹⁶ *Allen v. Stewart Enterprises, Inc.*, 2004-SOX-60 to 62 (ARB July 27, 2006).

DISCUSSION

The only question is whether sufficient grounds exist to reject the award of the arbitrator as a result of fraud, corruption, partiality, his prejudicial misbehavior, or his manifest disregard of the law. The arbitrator correctly stated the requisite elements of a claim under the Act, albeit in very general terms. He identified the audit report as the relevant communication. The fact that he noted the report was only sent internally and never forwarded to any law enforcement and regulatory agency is at least circumstantial evidence that he may not have applied the correct law by including internal communications as protected activity. However, contrary to Complainant's assertion, the arbitrator specifically stated that the evidence did not support a finding that Complainant reasonably believed he was reporting covered activities. He went on to point out that even Complainant questioned whether Respondent could be liable for the reported environmental conditions.

In any event, a finding that the arbitrator had applied the incorrect law in terms of internal communications would be moot. The arbitrator correctly noted that Complainant had the burden to establish that his audit report was at least a contributing factor in the Complainant's firing. He found that the witnesses' accounts of Complainant's flawed people skills were compelling and any suggestion that he was fired because of his audit report would be revisionist history. Consequently, even if the audit report was a protected activity, the arbitrator found Complainant was not fired because of it and issued an award against Complainant. There is no evidence that the award is a product of fraud, corruption, partiality, prejudicial misbehavior, or manifest disregard of the law.

Pursuant to Complainant's employment contract with Respondent, his whistleblower claim under the Act was properly brought to arbitration, which was completed. Respondent's motion is granted and the claim is **dismissed**.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

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. In addition to filing your Petition for Review with the

Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 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).