

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

**Issue Date: 18 September 2012**

OALJ NO.: 2010-SOX-00003

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**KEITH PRIOLEAU,**  
*Complainant,*

v.

**SIKORSKY AIRCRAFT CORPORATION,**  
*Respondent.*

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*Before:* Daniel F. Sutton, Senior Administrative Law Judge

*Appearances:*

Kieth Priolieu, Stratford, Connecticut, *pro se*

Jeffrey A. Fritz, Esq. and Albert Zakarian, Esq., Day Pitney, LLP,  
Hartford, Connecticut, for the Respondent

**DECISION AND ORDER DISMISSING COMPLAINT**

This proceeding, which arises from a complaint of discrimination filed under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, as amended (“Sarbanes-Oxley”), 18 U.S.C.A. § 1514A (West Supp. 2011),<sup>1</sup> is before the senior administrative law judge (“ALJ”) on remand from the Department of Labor’s Administrative Review Board (“ARB”). *Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, ALJ No. 2010-SOX-00003 (Nov. 9, 2011). Since the Complainant has failed to comply with ALJ orders by failing to attend two telephone status conferences and by failing to respond to an order to show cause why his complaint should not be dismissed for failure to comply with the ALJ’s orders, his complaint is **DISMISSED**.

**I. Background and Procedural History**

The Complainant Keith Prioleau (“Complainant” or “Prioleau”) originally filed a complaint with Department of Labor on September 14, 2008, alleging that the Respondent

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<sup>1</sup> The Sarbanes-Oxley Act was amended by sections 922 and 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

Sikorsky Aircraft Corporation (“Respondent” or “Sikorsky”) violated the employee protection provisions of the Sarbanes-Oxley Act by terminating his employment because he had engaged in protected activity by reporting to his superiors at Sikorsky that there was an apparent conflict between Sikorsky’s “legal hold” policy and its policy of automatically deleting electronically stored information (“ESI”) after a certain number of days. By letter dated September 25, 2009, the Secretary of Labor, acting through her agent, the Regional Administrator of the Occupational Safety and Health Administration, dismissed the complaint, based on a finding that the Complainant has not engaged in activity protected by Sarbanes-Oxley. In a letter dated October 24, 2009, the Complainant filed a notice of objection and request for a *de novo* review of his complaint by an ALJ pursuant to the Sarbanes-Oxley implementing regulations. 29 C.F.R. § 1980.106 (2011). The Respondent then moved for summary decision which the ALJ granted in a decision and order issued on February 3, 2010. In granting summary decision, the ALJ found that the Complainant had not engaged in protected activity and, accordingly, dismissed his Sarbanes-Oxley complaint. On appeal, the ARB reversed the ALJ’s finding that the Complainant had not engaged in protected activity and remanded the case for further proceedings. *Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, ALJ No. 2010-SOX-00003 (Nov. 9, 2011). Thereafter, the ARB returned the case file to the Office of Administrative Law Judges on June 5, 2012.

On remand, District Chief Judge Geraghty issued a notice of assignment and hearing and pre-hearing order on June 26, 2012 which established a pre-hearing disclosure and discovery schedule and set an evidentiary hearing for October 16, 2012.<sup>2</sup> On July 3, 2012, the Complainant filed a motion for preliminary reinstatement, and the Respondent filed its objection to the motion on July 10, 2012. Also on July 10, 2012, the Complainant filed a supplemental motion for preliminary reinstatement in which he responded to the Respondent’s objection.

By order issued on August 2, 2012, the ALJ denied the Complainant’s motion for preliminary reinstatement on the ground that an ALJ lacked authority to grant such relief prior to issuing a decision and order at the conclusion of a *de novo* evidentiary hearing which has not as yet been held. Thereafter, the Complainant filed a notice of interlocutory appeal of the August 2, 2012 order with the ARB, stating therein that it is his belief that his notice of appeal “invokes a stay of the ALJ proceeding until further notification from the ARB, but if not, Complainant requests a stay while seeking review by the ARB.” Compl. Not. of Interloc. App. at 1-2.

On August 9, 2012, the ALJ issued an order declining to certify the matter for interlocutory review and denying the Complainant’s request to stay the ALJ proceeding. The ARB denied the Complainant’s interlocutory petition in an order issued on August 30, 2012, in which it noted that that the Complainant’s petition was “a premature request for reinstatement based on a misunderstanding of the significance of the ARB’s Final Decision and Order of Remand (November 9, 2011) in this matter.” *Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 12-098, ALJ No. 2010-SOX-00003, slip op. at 2 (Aug. 30, 2012). The ALJ’s August 9, 2012 order also set a telephone status conference for 9:00 a.m. on Tuesday, August 14, 2012 following several unsuccessful attempts to reach the Complainant by telephone to arrange a date and time for the status conference. The August 9, 2012 order was sent to the parties by regular mail, and a

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<sup>2</sup> The matter was subsequently reassigned to the ALJ who retired on December 31, 2010 and returned in senior status on July 30, 2012.

message was left on the Complainant's voicemail regarding the date and time of the status conference. On August 14, 2012, the ALJ initiated the scheduled telephone status conference. The attorney for the Respondent was available for the status conference along with the court reporter. However, the Complainant did not answer his phone, and the status conference was terminated.

By order issued on August 14, 2012, the status conference was rescheduled to 9:00 a.m. on August 23, 2012. This order was sent to the parties by regular and overnight mail and by email. The order explained the purpose of the status conference, emphasized the importance of all parties' cooperation, and also pointed out that failure to comply with an order can result in sanctions including dismissal of a complaint. Specifically, the August 14, 2012 order stated,

It is important that the Complainant, who is *pro se*, understand that his complaint is before the Senior ALJ for a *de novo* evidentiary hearing pursuant to the ARB's decision and order remanding the case and that hearings under Sarbanes-Oxley are to commence "expeditiously," except upon a showing of good cause or unless otherwise agreed by the parties. 29 C.F.R. § 1980.107(b). The purpose of a status conference is to ensure that the case is properly moving toward hearing and to allow the presiding judge to intervene where necessary to address and resolve issues that could affect the timely completion of the hearing. Therefore, it is essential that all parties cooperate and make themselves available for conferences scheduled by an ALJ who has a responsibility to manage litigation and may impose sanctions including dismissal of a complaint may be imposed on a party who fails to comply with an ALJ's orders.

ALJ Ord. Resched. Status Conf. (Aug. 14, 2012) (Internal quotations marks in original). The August 14, 2012 order concluded with the following warning: "**FAILURE TO PARTICIPATE IN THE RESCHEDULED STATUS CONFERENCE WILL RESULT IN THE ISSUANCE OF AN ORDER TO SHOW CAUSE WHY SANCTIONS, INCLUDING DISMISSAL OF THE COMPLAINT, SHOULD NOT BE IMPOSED.**" *Id.* at 2-3 (boldface in original).

On August 23, 2012, the ALJ initiated the rescheduled telephone status conference, but the Complainant again did not answer his telephone. After two unsuccessful attempts to reach the Complainant, the conference was terminated.<sup>3</sup> Because of the Complainant's failure to appear for the status conferences or otherwise contact the ALJ, an order to show cause was issued on August 23, 2012. The order explained that it was being issued because "[t]he Complainant has not answered or returned multiple calls from this office, and he has now failed to appear for two status conferences." ALJ Ord. to Show Cause (Aug. 23, 2012) at 1. The order went on to note that in an August 14, 2012 motion for extension, the Respondent's attorney represented that during a telephone conversation on July 30, 2012, the Complainant had canceled his deposition that had been scheduled for August 13, 2012 and indicated that he intended to file a motion to extend all prehearing deadlines due to a medical issue. *Id.* The order further stated that no such motion has been filed by the Complainant and that it did not appear that he was incapacitated or otherwise unavailable because subsequent to July 30, 2012, he had filed papers including an August 5, 2012 motion to compel and the August 9, 2012 petition with the ARB for

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<sup>3</sup> Again, the attorney for the respondent and court reporter were available.

interlocutory review of the denial of his motion for preliminary reinstatement. *Id.* Consequently, the order stated that “the Complainant shall have until **September 5, 2012** to file a written response showing cause why his complaint should not be dismissed.” *Id.* (emphasis in original). The order concluded that “**FAILURE TO TIMELY RESPOND TO THIS ORDER WILL RESULT IN THE ISSUANCE OF A DECISION AND ORDER DISMISSING COMPLAINT WITHOUT FURTHER NOTICE.**” *Id.* (boldface in original). The Complainant did not respond to the August 23, 2012 order to show cause, and he has not otherwise contacted the ALJ.

## II. Discussion

As the foregoing case history shows, the Complainant terminated his participation in the ALJ proceeding on remand after his motion for preliminary reinstatement was denied, apparently based on his mistaken belief that his petition for interlocutory review stayed the ALJ proceeding. Although the ALJ in an August 9, 2012 order denied the Complainant’s request for a stay, and the ARB denied his petition for interlocutory review on August 30, 2012, the Complainant has consistently ignored the ALJ’s orders, failed to appear for two scheduled status conferences, and now failed to respond to the order to show cause why his complaint should not be dismissed. Moreover, the Complainant never informed the ALJ of any medical circumstance that might affect his ability to participate in the proceeding, and he failed to provide any alternative contact information in the event that he would not be available at his usual postal address, telephone number or email address. In short, he has effectively disappeared.

The ARB has repeatedly held that ALJs have authority to dismiss a case, including complaints arising under the Sarbanes-Oxley Act, on their own initiative for failure to comply with ALJ orders or lack of prosecution, an authority that is grounded in the ALJ’s interest in managing dockets to achieve the orderly and expeditious disposition of cases. *Matthews v. Ametek, Inc.*, ARB No. 11-036, ALJ No. 2009-SOX-00026, slip op. at 5 (ARB May 31, 2012); *Rowland v. National Assn. of Securities Dealers*, ARB Case No. 07-098, ALJ Case No. 2007-SOX-00006, slip op. at 6-7 (ARB Sept. 25, 2009). This authority includes “the discretion to dismiss a case in the event a party does not respond to an order and also in the event that a party responds in an untimely manner.” *Rowland*, slip op. at 7. The ALJ’s dismissal authority derives from Rule 18.6(d)(2)(v) of the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges which permits an ALJ to dismiss a case when a party fails to comply with an ALJ’s order, 29 C.F.R. §18.6(d)(2)(v), and Rule 41(b) of the Federal Rules of Civil Procedure which provides a district court with dismissal authority in cases where a plaintiff fails to prosecute or comply with a court order. Fed.R.Civ.P. 41(b).<sup>4</sup> *See also LeSane v. Hall’s Sec. Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962)).

The ALJ is mindful that dismissal of a complaint is a severe sanction to be reserved for extreme situations and that careful consideration must be given to whether lesser sanctions could

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<sup>4</sup> The Federal Rules of Civil Procedure are applicable in administrative proceedings before ALJs in any situation not provided for or controlled by the OALJ Rules of Practice and Procedure, or by any statute, executive order or regulation. 29 C.F.R. 18.1(a). *See Rowland*, slip op. at 6-7 (citing Fed.R.Civ.P. 41(b) as the source of an ALJ’s authority to dismiss for failure to comply with an order)

remedy the problem. *Matthews*, slip op. at 7-8 (Corchado, Admin. Appeals Judge, concurring); *LeSane*, 239 F.3d at 209. *See also* *Agiwal v. Mid Island Mortgage Corp.*, 555 F.3d 298, 302-303 (2d Cir. 2009) (discussing dismissal for failure to comply with discovery orders under Fed.R.Civ.P. 37(b)(2)(A)(v)). The case law is clear that dismissal is a remedy of last resort to be used only when the court is “sure of the impotence of lesser sanctions.” *Martens v. Thomann*, 273 F.3d 159, 179 (2d Cir. 2001) (quoting *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 665 (2d Cir. 1980)). However, where, as here, a complainant, who is an indispensable moving party, refuses to participate in status conferences and fails to respond to repeated calls and orders and / or provide alternate contact information, the case cannot proceed, and dismissal is the only viable sanction. *See Dumpson v. Goord*, No. 00 Civ. 6039, 2004 WL 1638183, at \*3 (W.D.N.Y. Jul. 22, 2004) (requirement that a plaintiff provide contact information is “no esoteric rule of civil procedure, but rather the obvious minimal requirement for pursuing a lawsuit.”). Indeed, failure to dismiss in the circumstances of this case would be tantamount to ceding the ALJ’s responsibility for managing the docket and assuring the orderly and expeditious disposition of cases to the whims of a private party.

The ALJ is also mindful of the Complainant’s status as a *pro se* litigant who may not be well-versed in the rules governing administrative proceedings. *LeSane*, 239 F.3d at 209 (citing *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996)) (Rule 41(b) dismissal to be used with caution because “*pro se* plaintiffs should be granted special leniency regarding procedural matters.”). On the other hand, the ARB has held that while a *pro se* party is entitled to “fair and equal treatment . . . a *pro se* litigant ‘cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.’” *Pik v. Credit Suisse AG*, ARB No. 11-034, ALJ No. 2011-SOX-6, slip op. at 4-5 (ARB May 31, 2012) (citing *Rays Lawn & Cleaning SVCS.*, ARB No. 06-112, ALJ No. ALJ No. 2005-SCA-7, slip op. at 7-8 (ARB Aug. 29, 2008) (quoting *Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983)). And, “although an ALJ has some duty to assist *pro se* litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the *pro se* litigant.” *Pik* at 8 (footnote omitted). The ALJ in this case has attempted to strike the appropriate balance between assisting the Complainant and not becoming his advocate by carefully explaining the bases for rulings and clearly identifying the consequences for failure to respond to and comply with orders. Specifically, the Complainant was warned in the August 23, 2012 order rescheduling status conference that failure to comply with an ALJ’s order *could* result in sanctions including dismissal of his complaint, and he was warned in the August 23, 2012 order to show cause that failure to respond *would* result in dismissal of his complaint without further notice. It is inconceivable that the Complainant, who has an employment history in sophisticated scientific and engineering positions, and who has received training in Sarbanes-Oxley compliance, could not understand the ALJ’s orders and the consequences of his failure to comply.<sup>5</sup>

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<sup>5</sup> The ARB summarized the Complainant’s relevant employment background as follows:

Prioleau worked for Sikorsky as a systems engineer assigned to the CH-53K Marine Heavy Lift Replacement (HLR) Helicopter System Development Design Program. On the program, Prioleau's duties included Information Assurance, Certification and Accreditation, Statement of Work assistance, requirements decomposition and analysis, and verification and validation that federal requirements were integrated into the HLR CH-53K Helicopter's overall design. On April 1, 2008, Prioleau received a certificate of recognition for ten years of dedicated service to Sikorsky.

Based on the foregoing, the ALJ concludes that dismissal is warranted given that lesser sanctions would be ineffective and since the Complainant was duly warned that his failure to comply with orders and failure to respond to the order to show cause could result in dismissal. *See Agiwal*, 555 F.3d at 301.

### **III. Order**

The Complainant's complaint under section 806 of the Sarbanes-Oxley Act is **DISMISSED**.

**SO ORDERED.**

**DANIEL F. SUTTON**  
Senior Administrative Law Judge

Boston, Massachusetts

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Additionally, Prioleau completed a course on Sarbanes-Oxley on July 16, 2008. Prioleau's job duties and responsibilities were numerous and included various concerns about technology and security. Prior to his employment with Sikorsky, Prioleau served as a computer scientist for Computer Sciences Corporation (CSC) where he was part of a team that helped design United Technologies Corporation's (UTC) computer infrastructure. Sikorsky is a subsidiary of UTC.

*Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, ALJ No. 2010-SOX-00003, slip op. at 2 (Nov. 9, 2011). (citations to the record omitted). It is also noted that the Complainant is not unfamiliar with representing himself in litigation. *See e.g., Prioleau v. Commission on Human Rights and Opportunities*, 116 Conn.App. 776, 977 A.2d 267 (Conn. App. 2009); *Prioleau v. Commission on Human Rights and Opportunities*, 284 Conn. 922, 933 A.2d 723 (2007).

**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).