

**U.S. Department of Labor**

Office of Administrative Law Judges  
2 Executive Campus, Suite 450  
Cherry Hill, NJ 08002

(856) 486-3800  
(856) 486-3806 (FAX)



**Issue Date: 20 April 2011**

Case No.: 2010-SOX-00046

In the Matter of

**RANDY SANTORO**

Complainant

v.

**TEKNI-PLEX, INC.**

**COLORITE POLYMERS a/k/a**

**COLORITE PLASTICS & POLYMERS**

**a/k/a COLORITE PLASTICS COMPANY**

**a division of TEKNI-PLEX, INC.**

**PURETECH INTERNATIONAL, and**

**MIGUEL A. NISTAL III,**

**an individual and officer,**

Respondents

Appearances:

Anna Aguilar, Esq.  
For Complainant

Ernest Badway, Esq.  
Christina Stoneburner, Esq.  
Jonathan Meyers, Esq.  
For Respondent

Before: **RALPH A. ROMANO**  
Administrative Law Judge

**RECOMMENDED**  
**DECISION AND ORDER**

This is a proceeding brought under the employee protection provisions of the Sarbanes-Oxley Act (hereinafter "the Act"), 18 U.S.C. § 1514A.

This matter originally went to trial in New York, New York on October 14, 2010.<sup>1</sup> The matter was reconvened on December 6, 2010.<sup>2</sup> Due to the departure of Judge Bullard, I was assigned the case on December 13, 2010. A hearing was held before me in Philadelphia, Pennsylvania on February 7, 2011.<sup>3</sup> Complainant's exhibits are marked CX-1 through CX-50

<sup>1</sup> The transcript of this hearing contains pages 1 through 415 and will be cited as "Tr. at --."

<sup>2</sup> The transcript of this hearing contains pages 1 through 50 and will be cited as "Tr. 2 at --."

<sup>3</sup> The transcript of this hearing contains pages 416 through 476 and will be cited as "Tr. at --."

and CX-A through CX-K. Respondent's exhibits are marked RX-1 through RX-2, RX-4 through RX-89, and RX-93. A joint exhibit is marked JX-94. I admitted 29 Administrative Law Judge Exhibits at the hearing.<sup>4</sup> My office received the final briefs of both parties on March 9, 2011.<sup>5</sup>

## **I. FACTUAL & PROCEDURAL HISTORY**

Randy Santoro (hereinafter "Complainant") was hired as the Manager of Accounting in the Colorite Plastics division of Tekni-Plex on December 13, 1999. (Tr. at 88-9). In 2006, he was given additional responsibilities and his title was changed to Manager of Financial Analysis and Special Projects. (Tr. at 89-90). Around June 2008, Complainant informed the Controller at Colorite Plastics of suspected false accounting entries that he had uncovered. (Tr. at 99, 106). Subsequently, forensic accountants and attorneys from Paul Weiss investigated the suspected accounting malpractices. (Tr. at 109-12).

Sometime in October of 2009, Mr. Nistal informed Complainant that he was going to be transferred out of accounting and into a data support role for sales and marketing. (JX-94 (11/3/10) at 110). Prior to his actual transfer, Complainant was fired on November 19, 2009. (Tr. at 385).

On January 18, 2010, Complainant filed a claim against Respondents alleging that they retaliated against him in violation of the Act. On June 17, 2010, following an investigation, the Occupational Safety and Health Administration dismissed the complaint on the grounds that jurisdiction had not been established under the Act. Complainant objected to the findings and requested a hearing before the Office of Administrative Law Judges.

## **II. ISSUES**

The following issues are presented for adjudication:

1. Whether jurisdiction lies under the Act;
2. Whether Complainant engaged in protected activity;
3. Whether Respondents were aware of such protected activity;
4. Whether Complainant suffered any adverse employment action; and
5. Whether Complainant's protected activity was a contributing factor in any unfavorable action.

---

<sup>4</sup> Tab 4 of ALJ-4 was stricken at the hearing.

<sup>5</sup> Complainant's closing argument will be cited as "CB at --." Respondent's closing argument will be cited as "RB at --."

### **III. JURISDICTION & ADVERSE EMPLOYMENT ACTION**

I must first address whether jurisdiction has been properly established. In doing so, I will need to determine whether Claimant suffered any adverse employment actions in order to establish the time frame for jurisdiction under the Act.

Broadly speaking, the Act protects employees of publicly traded companies who report securities fraud. The whistleblower protections apply to two classes of publicly traded companies – companies required to register their securities under § 12, and companies required to file reports under § 15(d) of the Securities Exchange Act of 1934. Specifically, the Act provides the following:

**(a) Whistleblower protection for employees of publicly traded companies.** – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such 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 [certain securities statutes, rules, and regulations] relating to fraud against shareholders . . .  
or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed . . . relating to an alleged violation of [certain securities statutes, rules and regulations] relating to fraud against shareholders.

18 U.S.C.A. § 1514A.

In deciding whether jurisdiction has been established by any of the two methods quoted above, the relevant time frame is when Complainant experienced an adverse employment action. *See Roulett v. American Capital Access*, 2004-SOX-00078, \*8-10 (ALJ Dec. 22, 2004) (employee could not bring a claim for relief when his employer was not subject to the requirements of sections 12 or 15(d) of the Securities and Exchange Act on the date he was terminated); *Lerbs v. Bucca di Beppo Inc.*, 2004-SOX-00008, \*10 (ALJ June 15, 2004) (the date

of the employer's retaliatory act determines whether the Act applies). In the present matter, Complainant alleges the following adverse employment actions: 1) termination from employment on November 19, 2009;<sup>6</sup> 2) position change in autumn of 2009;<sup>7</sup> and 3) daily intimidation and harassment by Miguel Nistal from February 2009 through November 2009. (CB at 12-20). Therefore, I must make a threshold determination of the contested adverse employment actions in order to determine the relevant time period for establishing jurisdiction under the Act.

### **1. Adverse Employment Actions**

The Administrative Review Board (hereinafter the "Board") has stated that the standard for adverse employment action under the Act is laid out in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 US 53 (2006). *Melton v. Yellow Transp. Inc.*, ARB Case No. 06-052 (ARB Sept. 30, 2008). The standard in *Burlington Northern* requires the complainant to show that a "reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." 548 US at 68. The Court emphasized that "reasonable employee" is an objective standard that is judicially administrable. *Id.* Applying the *Burlington Northern* standard, the Board requires employees to show "tangible employment action" resulting in "a significant change in employment status." *Hirst v. Southeast Airlines, Inc.*, ARB Case No. 04-116, slip op. at 9 (ARB Jan. 31, 2007). Examples of tangible employment action include firing, failure to promote, reassignment that significantly changes responsibilities, or significant change in benefits. *Id.*

Clearly, Complainant's termination on November 19, 2009 constitutes an adverse employment action. I also find that Complainant's proposed change of position in October of 2009 constitutes an adverse employment action. Notwithstanding the fact that Complainant's pay and benefits would stay the same (JX-94 (11/3/10) at 322), it is clear that he was being transferred out of his accounting role to a data miner position in support of sales and marketing. (JX-94 (11/3/10) at 110; JX-94 (11/9/10) at 77). Complainant had held his accounting position for nearly 10 years and was now being placed into a job that Mr. Nistal referred to as "data dumping." (JX-94 (11/9/10) at 77). I find that this falls under a reassignment that significantly changes responsibilities, as discussed by the Board in *Hirst*. Moreover, given Complainant's report of accounting fraud to his co-workers, I find that a reasonable employee in his situation might have been dissuaded from making a charge of discrimination.

I find that Mr. Nistal's alleged ongoing and continuing intimidation and harassment do not constitute adverse employment actions. While Mr. Nistal may have been abusive to the Complainant at times (*See* Tr. at 119-20), this type of conduct was also directed to other employees of the company. (*See* JX-94 (11/2/10) at 241-42, 321-22). Complainant testified that Mr. Nistal was extremely frustrated when budget numbers were not met and would often take his anger out on members of accounting. (Tr. at 121-22). In fact, Complainant specifically stated

---

<sup>6</sup> Complainant's brief states that he was fired on November 19, 2010. (CB at 12). The record is clear in establishing that Complainant was terminated on November 19, 2009. (Tr. at 385; JX-94 (11/3/10) at 370-374).

<sup>7</sup> Complainant never assumed his new position within Tekni-Plex because he was let go prior to the company finding a replacement for his old job. (*See* JX-94 (11/9/10) at 140, 150).

that Mr. Nistal was unprofessional and intimidating to other employees. (Tr. at 123). While Mr. Nistal does not seem like an ideal employer to work for, under the totality of facts presented herein, I do not find persuasive Complainant's argument that he was singled out for intimidation and harassment.

In summary, Complainant has established adverse employment actions in October and November of 2009. Accordingly, I will use that time period in establishing whether jurisdiction lies under the Act.

**2. Jurisdiction under § 12 of the Securities Exchange Act of 1934**

The evidence reflects that Tekni-Plex did not, at any time relevant to this matter, have securities registered under § 12 of the Securities Exchange Act of 1934. (Tr. at 444-45). In fact, Complainant does not appear to argue that jurisdiction is established pursuant to § 12. (See CB at 4-7). Accordingly, I find that jurisdiction does not lie pursuant to this method.

**3. Jurisdiction under § 15(d) of the Securities Exchange Act of 1934**

In order for jurisdiction to lie, it must be established that Tekni-Plex was statutorily required to file reports under § 15(d) of the Securities Exchange Act of 1934. See 18 U.S.C.A. § 1514A. § 15(d) states the following:

Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to August 20, 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933 as amended . . . shall file with the [Securities & Exchange] Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security registered pursuant to section 78l of this title. . . . The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than three hundred persons. . . .

15 U.S.C.A. § 78o(d).

In relevant part, the statute indicates that a company does not have to make filings with the Securities & Exchange Commission (hereinafter “SEC”) pursuant to § 15(d) if there is less than 300 holders of securities. Complainant and Respondents disagree over whether Tekni-Plex was statutorily required to make filings with the SEC pursuant to §15(d).

A. Whether Tekni-Plex has 300 Holders of Securities

Complainant argues that Tekni-Plex made public representations to the SEC from mid June 2008 through November 2009 that it was statutorily required to make filings pursuant to §§15(d) or 13. (CB at 2, 4). In support of this argument, Complainant points to several of Tekni-Plex’s reports to the SEC. Tekni-Plex did state that it was required to make public filings with the SEC on its 10-k report for fiscal year ending June 29, 2007 and its 10-q report for quarterly period ending March 28, 2008. (CX-36).<sup>8</sup> Furthermore, Complainant states that Tekni-Plex’s correspondence to the SEC regarding the ongoing investigation of accounting fraud demonstrates that the Company truly thought they had to continue to make filings in accordance with SEC rules and regulations. However, Complainant acknowledges that Tekni-Plex stated on its 8-k form of December 8, 2009 that the only reason it had previously made SEC filings was because of a private contractual agreement. In relevant part, the 8-k form states the following:

The Indentures previously required the Company to file reports with the SEC. The Company does not have an obligation to file SEC reports other than pursuant to the Indentures. As a result, the Company will not file reports with the SEC unless and until it is required by law or regulation to do so. As required by the Indentures, as amended, the Company will make the information called for by the Indentures available through the Trustee under the Indentures and the Company’s website.

(CX-27). Complainant argues that Tekni-Plex only tried to clarify its earlier representations to the SEC because it had been put on notice of the SOX claim here. (CB at 6). Finally, Complainant believes that Respondents have not clearly demonstrated that Tekni-Plex had less than 300 holders of securities during all relevant time frames. (CB at 7).

Respondents counter Complainant’s argument by stating that Tekni-Plex had less than 300 shareholders throughout 2009 and had only made previous filings with the SEC pursuant to a private loan agreement. (RB at 34). In doing so, Respondents rely on the testimony of Sujal Mehta, Assistant General Counsel at Tekni-Plex for the past 2.5 years. (Tr. at 439). Mr. Mehta testified that Tekni-Plex has had less than 300 holders of securities since he began working there in December of 2008. (Tr. at 471). While Mr. Mehta could not give exact numbers, he estimated that there have been 10 common stockholders since 2008. (Tr. at 442). He also testified that the number of bondholders since 2008 has been less than 50. (Tr. at 443). In fact,

---

<sup>8</sup> Tekni-Plex checked “yes” for the question whether they had “filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange of 1934 during the preceding 12 months . . . and . . . has been subject to such filing requirements for the past 90 days.” (CX-36). Tekni-Plex also checked “no” for the question whether they were “not required to file reports pursuant to Section 13 or 15(d) of the Act.” (CX-36).

he believed the number of bondholders at November 19, 2009 to be no more than 25. (Tr. at 445-46).

Mr. Mehta testified that Tekni-Plex filed reports with the SEC pursuant to a private indenture agreement, not because they were statutorily mandated to. (Tr. at 445). Mr. Mehta further testified that Sarbanes-Oxley is widely respected as a best practice in corporate America and that Tekni-Plex used it as a guideline for their internal audit procedures. (Tr. at 471).

In support of Mr. Mehta's testimony, Respondents submitted several security position reports and stockholder lists indicating the holders of Tekni-Plex's bonds and stock. (RX-4-9). These records support Mr. Mehta's conclusions that there have been less than 300 holders of Tekni-Plex securities since 2008. Complainant argues that these records are insufficient because they "did not identify the number of bondholders with respect to one significant tranche of public debt." (CB at 7). It is true that the security position reports and stockholder lists do not identify the Senior Subordinates Notes that were 12  $\frac{3}{4}$  percent. (See Tr. at 462-68). However, Mr. Mehta speculated that the exact amount of bondholders with the 12  $\frac{3}{4}$  notes was under 10. (Tr. at 472).

I find that Respondents have established that Tekni-Plex had less than 300 holders of securities during the relevant time period. The fact that the security position reports and stockholder lists did not address the 12  $\frac{3}{4}$  notes is not dispositive of the issue; rather, Mr. Mehta testified that he believed it was less than 10. The fact that Mr. Mehta could not give exact numbers of shareholders at the hearing does not detract from his reliability; rather, I find that his testimony is dispositive because as Assistant General Counsel at Tekni-Plex he performed various corporate work and was familiar with their capital structure. (See Tr. at 440, 472). Therefore, I accept Mr. Mehta's testimony that Tekni-Plex has had less than 300 holders of securities since he began working there in 2008.

Since Tekni-Plex did not have 300 holders of securities, it was not statutorily required to make any SEC filings under § 15(d). Complainant argues that the reports filed with the SEC indicate that Tekni-Plex was statutorily required to make filings under § (15)(d); however, just because Tekni-Plex checked that they were required to file under § (15)(d) does not exclude the possibility that they were required to file those reports pursuant to an indenture agreement. I find that the December 8, 2009 8-k and Mr. Mehta's testimony clearly establish that Tekni-Plex made the previous filings with SEC because of a private indenture agreement.

I do not find persuasive Complainant's argument that Tekni-Plex sought to avoid jurisdiction under the Act by informing the SEC that they only filed reports with them previously due to an indenture agreement. The fact that Tekni-Plex restructured its indenture agreement on December 8, 2009 so as not to have to file reports with the SEC only supports Respondents' argument that the company was not statutorily required to file reports under § (15)(d). Furthermore, the fact that Tekn-Plex kept the SEC informed of its investigation into the accounting fraud is not unusual since Mr. Mehta testified that Sarbanes-Oxley was widely respected and used as a guideline by the company.

### B. The Indenture Agreement

The fact that Tekni-Plex filed reports with the SEC pursuant to a private indenture agreement does not establish jurisdiction under § 15(d). Rather, the Act indicates the company must be statutorily obligated to file reports to the SEC under § 15(d) in order for jurisdiction to be established. 18 U.S.C. A. § 1514A. Since Tekni-Plex did not have 300 holders of securities, they were not statutorily obligated to file reports with the SEC.

While not binding here, a similar decision was reached in *Flake v. New World Pasta Co.*, Case No. 2003-SOX-00018 (ALJ July 7, 2003). In reaching its conclusion that the company was not an issuer under § 15(d), the Court stated that filing reports with the SEC pursuant to a contract does not make the company an issuer. *Id.* at \* 5. The ALJ's decision was upheld by the Board in *Flake v. New World Pasta Co.*, Case No. 03-126 (ARB February 25, 2004). In *Flake*, the Board cited to an SEC interpretative statement that stated companies that file reports with the SEC pursuant to a private indenture agreement are not issues under the Exchange Act if they have less than 300 holders of securities. *Id.* at \* 5.

Complainant correctly notes that the ALJ decision in *Flake* is not binding here. (CB at 6). Complainant cites to *Flake v. U.S. Dep't. of Labor, Admin. Review Bd.*, 248 Fed. Appx. 287, 290 (3d Cir. 2007), for the proposition that *Flake* is inapposite here.<sup>9</sup> (CB at 7). Complainant's reasoning is misguided. The Third Circuit did not address whether an indenture agreement is sufficient to show that a company is required to make a filing under § 15(d) because *Flake*'s claim there was discharged in bankruptcy. *Id.* at 290. However, the fact that the Third Circuit declined in addressing the argument does not mean that the Board's logic was rejected. In fact, the Court spoke in the alternative when it stated the following:

[E]ven if *Flake*'s claim was not discharged in bankruptcy, our independent review of the record reveals that the Administrative Review Board was not clearly erroneous in finding that the whistleblower provision under Section 806 of the Sarbanes-Oxley Act does not apply to New World Pasta. . . . Because there have been fewer than 300 holders of New World Pasta registered securities since its inception, the company's duty to file reports under Section 15(d). . . was automatically suspended. . .

*Id.* at 291. I am not persuaded by Complainant's argument that the Board's decision in *Flake* is inapposite here. Rather, the Board's citation to an SEC interpretive statement helps provide guidance on how filing reports with the SEC under a private indenture agreement does not make one an issuer under the Act. Therefore, taking all of the evidence and arguments of law into consideration, I find that the fact that Tekni-Plex filed reports with the SEC pursuant to a private indenture agreement does not establish jurisdiction under § 15(d).

---

<sup>9</sup> Complainant states that the block quote on page 7 of her brief was written by the ARB; however, that quote is actually taken from the Third Circuit's opinion in *Flake*.

In summary, Respondents have established that there were less than 300 holders of Tekni-Plex's securities at the relevant time periods. Thus, Respondents were not statutorily required to file reports with the SEC. Rather, Respondents established that Tekni-Plex filed reports with the SEC under § (15)(d) pursuant to a private indenture agreement. Accordingly, I find that jurisdiction does not lie under § 15(d) of the Securities Exchange Act of 1934.

#### **IV. CONCLUSION**

Complainant has established that his job transfer and termination were both adverse employment actions under the Act. However, jurisdiction does not lie in this matter. Tekni-Plex did not have securities registered under § 12 of the Securities Exchange Act of 1934. Moreover, Tekni-Plex was not statutorily obligated to file reports to the SEC under § (15)(d) because they had less than 300 holders of securities; rather, Tekni-Plex only made such filings pursuant to a private indenture agreement. Accordingly, Complainant may not bring an action for relief under the Act.

#### **RECOMMENDED ORDER**

The complaint of Randy Santoro is DISMISSED.

**A**

RALPH A. ROMANO  
Administrative Law Judge

Cherry Hill, New Jersey

**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](mailto: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).