



Issue Date: 19 January 2011

Case No.: 2011-SOX-00002

In the Matter of:

STEPHEN SVENDSEN,
Complainant,

v.

**U.S. SECURITY ASSOCIATES, INC.,
THOMAS RICHARDSON, and
ROBERT COLLINS,**

Respondents.

ORDER DISMISSING COMPLAINT

This matter arises out of a complaint filed by Stephen Svendsen (“Complainant”) against U.S. Security Associates, Inc., Thomas Richardson, and Robert Collins (“Respondents”) under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (“SOX” or the “Act”). The statute and implementing regulations, appearing at 29 C.F.R. Part 1980, prohibit retaliatory or discriminatory actions by publicly-traded companies against employees who (1) provide information to their supervisors, federal regulatory or law enforcement agencies, or Congress, relating to activities that they reasonably believe to constitute violations of certain specified federal criminal statutes, any Securities and Exchange Commission regulations, or federal laws relating to fraud against shareholders, or (2) assist in investigations or proceedings relating to such activities.

Background and Procedural History

On June 22, 2010, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent discriminated against him in violation of SOX. Complainant alleged that Respondents issued him a Disciplinary Action Report (DAR) on October 8, 2009, in retaliation for his efforts to identify and correct security deficiencies at Unisys Corporation. In his complaint, Mr. Svendsen complains that he was “made into a scapegoat by the very people responsible for lax security conditions at [Unisys in Roseville] over the years [that were] within the scope of an October 9, 2009 SOX IT Security Area Access audit.” (Complaint p.1.) He asserts that a “patently false” DAR was placed in his employment

file that includes “malicious misrepresentations” and that there has been a “written refusal to conduct an investigation.” (Complaint p.1-2)

On September 2, 2010, OSHA issued a final determination letter. In the Secretary’s Findings, OSHA determined, among other findings, that the Complainant did not file a timely complaint under the Act. Both SOX and its implementing regulations require that a complaint be filed within 90 days after an alleged violation of the Act occurs. 18 U.S.C. § 1514A(b)(2)(d); 29 C.F.R. § 1980.103(d). OSHA’s Regional Administrator found that Complainant received disciplinary action on October 8, 2009, and filed his complaint with the Secretary of Labor on June 22, 2010, more than eight months later.

On October 15, 2010, Complainant filed an objection to the Secretary’s Findings and requested a hearing before an Administrative Law Judge (“ALJ”) pursuant to 29 C.F.R. § 1980.106. In his objection, Complainant asserts that there was an ongoing act of discrimination being practiced against him since the DAR was placed in his permanent personnel file at the USSA Branch Office rather than being held at UNISYS Eagan for one year. He further complains that the DAR should not be included in his file in light of the response, which Respondents have held since November 2, 2009 and their national office has had since April 16, 2010. The Complainant argues that he filed his OSHA complaint fifty days after discovering that the Counseling DAR was in his file and the response to the DAR had disappeared.

On October 20, 2010, I issued an Order to Show Cause as to why Mr. Svendsen’s complaint should not be dismissed (a) for failure to allege sufficient facts to show that he engaged in protected activities under SOX, or (b) for failure to file a timely complaint, or for both reasons.

On November 18, 2010, Complainant filed a response to my Show Cause Order, arguing that his activities were protected because they were specified in auditing standards adopted by SOX for measuring Data Center compliance. He asserts that these standards adopted by SOX include SAS [Statement on Auditing Standards] 70 type 2 audit standards, one category of which is fire inspections. Regarding fire inspections, Complainant alleged that on September 3, 2009, he submitted a list of fire inspection violations, which are still evidence fourteen months later. He also states that SAS 70 type 2 audit standards include access control and that he was he was discouraged from making needed changes to the area owner records and castigated by a high level official. Regarding the Disciplinary Action Report, Complainant states that since it contained false charges that were adopted by Respondent without further investigation, Respondent created a hostile work environment which he has endured for thirteen months.

Concerning the issue of timeliness, Complainant argues that equitable tolling should apply because due to representations made to him, he did not believe that the DAR involving the initial action which occurred on October 8, 2009, was placed in his personnel file. He asserts that Respondent informed him that DARs were not placed into one’s permanent personnel file unless other infractions occurred within one year, and this DAR was not placed in his file until April 3, 2010.

On December 28, 2010,¹ Respondents filed their response to my Order to Show Cause asserting that the DAR it issued to Complainant involved Complainant's granting access clearance to employees and contractor without following the proper pre-authorization required, and it in no way involved any SOX-related issue. Respondent further asserts that the alleged failure to include Complainant's response to the DAR in his personnel file is not a violation SOX. On the issue of timeliness, Respondent alleges that Complainant acknowledged he was disciplined and that he understood the DAR by signing it on October 8, 2009. (Respondent's Exhibit 1.) Regarding the claim itself, Respondent asserts:

At no time did Complainant provide any information to his employer, the Company, any federal agency or Congress, regarding mail fraud, wire fraud, bank fraud, securities fraud or fraud against shareholders. While Complainant has provided numerous documents, none reflect that he was engaged in any protected activity.

(Respondent's Brief at 3.) Respondent further argued that while Claimant alleges there was a "SOX IT" audit the day after he was issued the DAR, even if there was such an audit, his duties as a security officer would not involve him, and even if it had, the DAR could not have been in retaliation for the audit since the audit occurred after Complainant received the DAR.

For the reasons stated below, I find Complainant has failed to establish a *prima facie* case of retaliation under SOX and that his complaint must therefore be dismissed. Because I am denying the complaint on this ground, I do not reach the issue of whether the Complaint was timely filed.

Discussion

Section 806 of the Sarbanes-Oxley Act and the implementing regulations at 29 C.F.R. Part 1980 prohibit retaliation by publicly traded companies against employees who provide information to a supervisory employee, a federal agency, or Congress, alleging violation of federal laws relating to certain types of fraud, including fraud against shareholders. 18 U.S.C. § 1514A(a), 29 C.F.R. § 1980.102(b). Because neither the rules governing hearings in SOX whistleblower cases, nor the rules governing hearings before ALJs, provide for dismissal of a complaint for failure to state a claim upon which relief can be granted, an ALJ must apply Federal Rule of Civil Procedure 12(b)(6) in determining whether to dismiss a complaint for failure to state a claim. *See* 29 C.F.R. 18.1(a) (Federal Rules of Civil Procedure "shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation."). Under Rule 12(b)(6), all reasonable inferences are made in the non-moving party's favor. *Fullington v. AVSEC Servs, L.L.C.*, ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 5 (ARB Oct. 26, 2005). The burden is on the complainant to frame a complaint with "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2006).

¹ Respondent indicated that he originally sent his response via U.S. Mail to all parties on the Service List on November 29, 2010.

To prevail on his SOX complaint, Complainant must establish that: (1) he engaged in a protected activity or conduct (*i.e.*, provided information or participated in a proceeding); (2) the Respondent 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. *See* 18 U.S.C.A. § 1514(b)(2); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008 (ARB July 29, 2005).

“Protected activity” under the statute includes providing information to federal regulatory or law enforcement authorities, Congress, or a person with supervisory authority over the employee which the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1); 29 C.F.R. § 1980.102(b)(1). The protected activity must “definitively and specifically” relate to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1). *See Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006). Additionally, the employee’s belief that the employer’s conduct constitutes a violation of one of these categories of fraud must be both subjectively and objectively reasonable in order for the activity to be protected. *See Harp v. Charter Communications, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Day v. Staples*, 555 F.3d 42, 54 (1st Cir. 2009).

Therefore, in order to state the first element of a *prima facie* case, Complainant must allege sufficient facts to show that the activity he engaged in is protected under the whistleblower provisions of SOX. Unless Complainant blew the whistle by providing information related to his reasonable belief that Respondent engaged in mail fraud, wire fraud, bank fraud, securities fraud, or violated a rule or regulation of the SEC or a provision of federal law relating to fraud against shareholders, Complainant’s activity is not protected by SOX’s whistleblower provision. 18 U.S.C. § 1514A(a)(1).

The facts alleged in Complainant’s SOX complaint and his Response to the Show Cause Order do not “definitively and specifically” relate Respondent’s conduct to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1). Mr. Svendsen alleges that his efforts to identify and correct security deficiencies at Unisys Corporation qualify as protected activities. According to his complaint and his Response to the Show Cause Order, these efforts include:

- Reporting fire safety violations involving the presence of cardboard in Respondent’s data center;
 - Enforcing access controls to Respondent’s restricted data center by changing and auditing access levels, instituting procedures for verifying ownership of secured area access authorization, and requesting audits of access controls;
 - Reporting violations of auditing standards for fire safety and access to electronic data;
 - Reporting a payroll discrepancy to Respondent’s branch manager;
 - Raising general concerns about lax security conditions at Respondent’s data center;
- and

- Reporting the expiration of first-aid and CPR certifications by certain of Respondent's employees.

I am required to construe Complainant's pleadings liberally in deference to his *pro se* status and lack of training in the law. *See, e.g., Ubinger v. CAE Int'l*, ARB No. 07-083, ALJ No. 2007-SOX-036, slip op. at 6 (ARB Aug. 27, 2008) (*quoting Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-003, slip op. at 6 (ARB Apr. 25, 2003)). Despite this, throughout Complainant's initial complaint and Response to my Order to Show Cause, he does not offer any facts that are sufficient to state a claim that he engaged in protected activities under the Act. It is clear that Complainant's allegations do not relate to any of the listed categories of fraud under Sarbanes-Oxley. None of the factual allegations involves a violation of any of the specified criminal statutes or fraud upon shareholders. Complainant's argument that his activities were protected because they were specified in auditing standards adopted by SOX for measuring Data Center compliance is without merit. Complainant does not explain what the aforementioned "auditing standards" are, or how they relate to violations covered by the Sarbanes-Oxley Act. The whistleblower provisions covered by SOX do not relate to standards for auditing physical security at the premises of a covered entity, or to fire inspections or access control, as the Complainant alleges. They relate to fraud upon shareholders, and Complainant has not alleged any such fraud.

Accordingly, I find that Complainant has failed to state a claim upon which relief can be granted under Sarbanes-Oxley. Because I find that Complainant has failed to allege sufficient facts to establish a *prima facie* case, I need not decide whether Complainant's SOX complaint was timely filed.

Order

Based on the foregoing, IT IS HEREBY ORDERED that the Sarbanes-Oxley whistleblower complaint of Stephen Svendsen is DISMISSED.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
Administrative Law Judge

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. 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).