

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 May 2012

In the Matter of:
HUNTER R. LEVI,
Complainant,

Case No. 2012-SOX-00011

v.

**AEROTEK, INC, and
ALLEGIS GROUP,**
Respondents,

HUNTER R. LEVI,
Complainant,

Case No. 2012-SOX-00012

v.

STEPHEN BISCOTTI,
Respondent.

Complainant
Pro Se

William E. Corum, Esquire
For Respondents

Before: DANIEL F. SOLOMON, Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT
HEARING CANCELLED

PROCEDURAL HISTORY

This proceeding arises under the Corporate and Criminal Fraud Accountability Act, Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, implementing regulations found at 29 C.F.R. Part 1980, and the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 C.F.R. Part 18.

On October 15, 2010, Complainant Hunter R. Levi filed two SOX complaints with the Occupational Safety and Health Administration (OSHA) alleging that Respondents engaged in retaliation against him in violation of Section 806 of the Sarbanes-Oxley Act. Specifically, Complainant alleged that Respondents discriminated against Complainant by terminating his employment in order to illegally aid Complainant's former employer, Anheuser Busch, by obstructing Complainant's SOX complaints against Anheuser Busch. Complainant references claims previously denied before the Department of Labor in *Levi v. Anheuser-Busch*

Companies, No. 08-3820 (8th Cir. Jan. 14, 2010) (unpublished per curiam) (appeal of decision of W.D.Mo., No. 08-00398), *cert. denied*, *Levi v. Anheuser-Busch Companies, Inc.*, 130 S. Ct. 3421 (U.S. June 14, 2010). OSHA dismissed the instant complaints as untimely on January 18, 2012. In a letter dated January 27, 2012, Complainant filed a timely notice of appeal objecting to the Secretary's findings and requested a de novo hearing before an Administrative Law Judge ("ALJ") pursuant to 29 C.F.R. § 1980.106. On February 9, 2012, I issued a Notice of Assignment and Notice of Hearing and Prehearing Order, scheduling this matter for a formal hearing on April 11, 2012, in Kansas City, Missouri. I then issued a Second Prehearing Order, rescheduling the hearing for June 19, 2012, and consolidating Complainant's two claims 2012-SOX-00011 and 2012-SOX-00012, on March 9, 2012.

On April 2, 2012, I issued an Order to Show Cause ordering the parties to show cause as to why this case should not be dismissed. The parties were afforded until May 7, 2012, to file responses. The Order to Show Cause also addressed the rules on ex parte communications and requested that Complainant serve a copy of all filings on Respondents' attorneys of record. On April 17, 2012, I issued another Order for Complainant to submit exact copies of all past filings to Respondents' attorneys and all parties of record. I expanded the response date for the Order to Show Cause to May 14, 2012. On April 27, 2012, I issued a Fourth Prehearing Order again asking Complainant to submit exact copies of all past filings to Respondents' attorneys and all parties of record. Subsequently, on May 7 and May 9, 2012, I issued Fifth and Sixth Prehearing Orders asking Complainant to submit exact copies of all past filings to Respondents' attorneys and all parties of record.

On May 14, 2012, I received a letter from Respondents, indicating they had yet to receive any response from Complainant concerning my April 2, 2012, Order to Show Cause. Respondents also renewed the request that I dismiss this case. I note that Complainant has submitted numerous filings addressing several issues.

I have repeatedly advised Complainant to seek legal representation.¹

In this Order I hereby dismiss the complaints on three independent bases:

1. The claims are untimely.
2. The Respondents are not publicly-traded companies and therefore I lack jurisdiction unless an exception exists. No valid exception has been provided.
3. Complainant repeatedly attempted to "sandbag" the Respondents by failing to provide proper notice to record counsel and by repetitively failing to follow procedural Orders.

REGULATIONS

Hearings before the Office of Administrative Law Judges are conducted pursuant to 29 C.F.R. Part 18, unless otherwise provided. Additionally, the Federal Rules of Civil Procedure

¹ In my April 2 Order, I reminded Complainant that I am not permitted to advise Complainant how to proceed: There may be, indeed, legal procedures that may benefit him. He should seek the advice of counsel how to take discovery and develop the evidence that may benefit his case. He should read the rules in all of 29 C.F.R. subpart 18. As set forth in my Notices of Hearings and Pre-Hearing Orders, all discovery shall adhere to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 C.F.R. Part 18.

apply in any situation not controlled by these rules or rules of special application. *See* 29 C.F.R. § 18.1(a). 29 C.F.R. §§ 18.40 and 18.41 provide the governing regulations for a motion for summary decision. 29 C.F.R. § 18.40(d) (motion for summary decision) sets forth in part:

The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

Summary decision is appropriate when the record “show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). *See also* 29 C.F.R. § 18.40. No genuine issue of material fact exists when the “record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the “absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

POSITIONS OF THE PARTIES

COMPLAINANT

Complainant alleges that Respondents engaged in multiple SOX violations, including “retaliating against a SOX whistleblower and litigator by terminating [Complainant], falsifying [Complainant]’s work record, and lying under oath to cover it up...” Concerning whether an adverse action occurred, Complainant states that Respondents have failed to provide any documentation demonstrating Complainant voluntarily quit his employment, among other arguments. Complainant asserts he did not quit and that Aerotek asked Complainant for his resume in 2005 to set up a new assignment in Kansas City. Complainant also argues that the 180-day filing period does not begin to run until the employer notifies the employee of the adverse action against the employee. Complainant argues Respondents have not provided any evidence of notifying Complainant of an adverse action against him.

Additionally, Complainant alleges that Respondents admitted to terminating Complainant’s employment in a civil proceeding, filed in the U.S. District Court, Western District of Missouri. *See Levi v. Aerotek, Inc.*, No. 09-CV-00053 (W.D.Mo. Sept. 21, 2009) (dismissal based on res judicata). Complainant also states Respondents falsely accused Complainant of quitting employment in Missouri state unemployment proceedings in 2005 and 2006.²

² In my Order dated April 2, 2012, I denied Complainant’s request to amend his complaint as Complainant failed to properly serve Respondents. Although William E. Corum, Esquire, was record counsel in these cases, he was not served. Complainant submitted the request to amend his complaint after Respondent filed an answer and after the investigation was concluded.

Despite my Order, Complainant’s arguments extend to the matters that he wished to include in his request to amend the complaint.

RESPONDENTS

Respondents argue that Complainant’s SOX claims are entirely frivolous and request that I issue summary judgment in their favor and dismiss this case. In their response to the Order to Show Cause, filed on March 21, 2012, Respondents allege the timeline of facts for this case is as follows:

STATEMENT OF THE TIMELINE

Date	Description	Citation Source
01/08/79	Mr. Levi’s employment with AB (Anheuser Busch) begins.	Ex. 2, <i>Levi I</i> Complaint, p. 2.3
02/14/03	AB suspends Mr. Levi indefinitely with intent to discharge.	Ex. 12, ARB Final Decision and Order dated 4/30/03, p. 3.
11/19/04	Mr. Levi sends OSHA what it deems to be Mr. Levi’s first SOX complaint against AB.	Ex. 13, Levi Letter dated 11/19/04; Ex. 12, ARB Final Decision and Order, dated 4/30/08, pp. 3, 8.
02/2005	Mr. Levi’s employment with Aerotek begins.	Ex. 6, <i>Levi II</i> Complaint, p.1. 4
10/2005	Mr. Levi voluntarily leaves his employment with Aerotek.	Ex. 6 <i>Levi II</i> Complaint, p. 1; Ex. 14, Missouri Court of Appeals dated 9/16/06.
11/15/06	Mr. Levi sends Aerotek his so-called “SOX interrogatories.”	Ex. 15, Levi letter dated 11/15/06.
04/30/08	ARB determines that Mr. Levi’s first SOX complaint against AB is untimely.	Ex. 12, ARB Final Decision and Order dated 4/30/08
06/02/08	Mr. Levi files a federal lawsuit against AB, Aerotek, and others (<i>Levi I</i>).	Ex. 2, <i>Levi I</i> Complaint.
10/27/08	<i>Levi I</i> dismissed with prejudice.	Ex. 3, Order dated 10/27/08
02/12/09	Mr. Levi files a second federal lawsuit against Aerotek and Allegis (<i>Levi II</i>).	Ex. 6, <i>Levi II</i> Complaint.
09/21/09	<i>Levi II</i> dismissed.	Ex. 7, <i>Levi II</i> Order dated 9/21/09
11/03/10	Mr. Levi files the present SOX complaint with OSHA.	Ex. 11, 11/3/10 SOX Complaint.

As an initial matter, Respondents deny they engaged in any unlawful retaliatory conduct toward Complainant. Respondents maintain that Complainant voluntarily left his employment with Aerotek and thus Respondents did not take any adverse employment action against Complainant. Complainant, however, alleges that in *Levi II*, Respondents admitted to terminating Levi, and as a result, Respondents cannot claim that no adverse action occurred. In response, Respondents state that Complainant misread the following quotation, in bold, from the briefing on the Motion to Dismiss filed in *Levi II*:

³ Respondents use the abbreviation *Levi I* to refer to case No. 4:08-cv-00398-RED, filed on June 2, 2008, in the U.S. District Court for the Western District of Missouri. Complainant attempted to relitigate the denied SOX claims, filed claims for wrongful discharge under state law, and a civil conspiracy charge. On October 27, 2008, District Judge Richard Dorr dismissed this case for failure to state a claim upon which relief may be granted. Complainant appealed to the 8th Circuit Court of Appeals, which dismissed on January 14, 2010.

⁴ Respondents use the abbreviation *Levi II* to refer to case No. 4:09-cv-00053-DW, filed against Respondents Aerotek and Allegis on February 12, 2009, in the U.S. District Court for the Western District of Missouri. This claim was based on allegations that Defendant Aerotek unlawfully terminated Complainant in 2005, denied him unemployment benefits in 2005, lied in Missouri unemployment proceedings about Plaintiff’s termination, and refused to answer Sarbanes-Oxley Act interrogatories. The Court noted that Judge Dorr had issued an order granting a motion to dismiss the claims. In the current action, Complainant alleged that Respondents Aerotek and Allegis conspired to wrongfully terminate his employment, defamed him, lied in unemployment proceedings about his termination, and unlawfully interfered with an investigation under the Sarbanes-Oxley Act. The court noted:

The same factual allegations raised in the case before Judge Dorr underlie the claims.... The claims Plaintiff brings in the instant action could have been brought in the previous case.

On September 21, 2008, District Judge Dean Whipple dismissed this case on *res judicata* grounds.

After leaving AB, Levi began working for Labor Ready, a staffing company, and was assigned to work at “Vascor,” then a client of Labor Ready. In about February 2005, Vascor engaged Aerotek, another staffing company and business competitor of Labor Ready, to provide staffing services and take over the Labor Ready contract. At that time, Aerotek essentially inherited Levi as a contract worker who was still working at Vascor.

Levi worked for Aerotek from that point until October 2005, when he left Vascor and moved to Kansas City, Missouri. Following the move Levi was not assigned to new employment by Aerotek and he attempted to collect unemployment benefits from the state of Missouri, but was denied based upon a finding that he had voluntarily resigned his employment. (Emphasis added).

Respondents maintain that they did not make any admission in this briefing or anywhere else in the filings of *Levi I* and *Levi II*. Rather, Complainant attempts to convert the quotation in bold into an admission. However, Respondents assert they did not make such an admission. Therefore, Respondents did not engage in any adverse employment action.

However, even if adverse action occurred, Respondents argue the complaint is untimely. Complainant alleges he was wrongfully terminated in October 2005. Complainant did not file his SOX complaint until five years later, many more days than the 180-day deadline under SOX. 18 U.S.C. § 1514A(b)(2)(D). Respondents also argue that none of the Respondents are covered entities under SOX. Because SOX whistleblower protection only applies to publicly-traded companies, and Respondents assert that Aerotek and Allegis are privately-held, with Mr. Bisciotti, at best, the agent of a privately-held company, Complainant’s complaints fall out of the purview of SOX.

DISCUSSION

TIMELINESS

Under the statute and applicable regulations, a SOX complaint must be filed not later than 180 days after the date that an alleged violation of the Act occurs. 18 U.S.C. § 1514A(b)(2); 29 C.F.R. § 1980.103(d).⁵

Respondents argue that even assuming, *arguendo*, the existence of an adverse employment action, Complainant’s SOX complaints are untimely. Complainant alleges he was wrongfully terminated in October 2005. However, Complainant did not file his SOX complaints until October 15, 2010, five years after his employment with Aerotek ended.

Complainant argues that the 180-day filing period does not begin to run until the employer notifies the employee of the adverse action against the employee. Complainant argues Respondents have not provided any evidence of notifying Complainant of an adverse action against him. However, Respondents point to the following events, which occurred more than 180 days before Complainant filed his SOX complaints, to demonstrate that Complainant was aware of the alleged SOX violation more than 180 days before he filed his SOX complaints.

⁵ In 2010, the filing period was amended from 90 to 180 days. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(c)(1)(A), 124 Stat. 1376, 1848 (2010). Because I find Complainant’s SOX complaints untimely under the 180-day filing period, I also find them untimely applying the 90-day filing period, if applicable.

1. On November 15, 2006, when his first two SOX complaints against AB [Levi v. Anheuser-Busch Co.] were pending, Mr. Levi sent Aerotek's CEO his so-called "SOX interrogatories," in which he suggests that Aerotek allegedly terminated his employment and contested his entitlement to unemployment benefits in order to help AB retaliate against him and to diminish the resources with which he could fight AB. Ex. 15, Levi Letter dated 11/15/06. Mr. Levi noted that he had been writing to Aerotek about his termination and AB "since January 17, 2006. *Id.* at p. 1.
2. In his third SOX complaint against AB, filed in early 2007, Mr. Levi alleged that AB "blacklisted" him in his employment with Aerotek and, thus, that Aerotek did not "rehire" him in October 2005. Ex. 17, OSH dismissal dated 4/27/07; Ex. 12, ARB Final Decision and Order dated 4/30/08.
3. On June 2, 2008, Mr. Levi filed a lawsuit against AB, Aerotek, and others (*Levi I*), alleging that "AB was aided in the wrongful termination of Levi" by numerous conspirators, including Aerotek, which allegedly terminated Mr. Levi, fraudulently denied him unemployment benefits, and "refused to answer SOX interrogatories presented to CEO." Ex. 2, *Levi I* Complaint.
4. On February 12, 2009, Mr. Levi, filed a lawsuit against Aerotek and Allegis (*Levi II*), alleging that they wrongfully terminated Mr. Levi to assist AB and in violation of a number of laws, including SOX. Ex. 6, *Levi II* Complaint.
5. On April 16, 2009, Aerotek and Allegis submitted the briefing, in *Levi II*, in which they allegedly "admitted" to having terminated Mr. Levi's employment. Ex. 1, Memo. Supp. Defs.' Mot. Dismiss.
6. On April 28, 2009, Mr. Levi sent Allegis' Chairman a letter demanding \$1 million to settle *Levi II* and stated, among other things, "Your companies are at serious risk from AB exposure, whether you helped them before or after the fact, when you terminated me and lied about it under oath.... Allegis will be exposed to billions in potential losses, because they terminated a SOX whistleblower and lied about it, to protect their AB interests." Ex. 18, Levi letter dated 4/28/09.

Respondents' Response to the Order to Show Cause (March 21, 2012).

Respondents point out that Complainant filed four prior SOX complaints against Anheuser Busch. According to Complainant, in his fourth complaint against Anheuser Busch, the Secretary of Labor ruled he had engaged in protected activity. Respondents note that Complainant stated that "[o]nly then was [he] able to go forward against [Aerotek and Allegis] because SOX requires the complainant to be engaged in SOX protected activity while suffering an adverse employment action by his employer." See Complainant's Complaint (November 3, 2010) at 3. However, Respondents assert that in Complainant's fourth SOX complaint, the Administrative Review Board merely "assume[d] for purpose of his complaint that Levi's act of filing three previous whistleblower complaints is protected activity." Furthermore, Respondents state there is no requirement that a complainant obtain a determination of protected activity before filing a SOX complaint.

Complainant also argues that Respondents cannot claim untimeliness as a defense without pointing to a date on which an adverse action occurred. However, Respondents assert they do not need to concede that an adverse action occurred in October 2005 to assert a timeliness defense.

Under federal discrimination statutes, the time for filing an administrative charge of employment discrimination begins running when a discrete unlawful practice takes place. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007). *See also Nat'l RR Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). A discrete adverse action “takes place” when a decision is made and communicated to the complainant, even if the effects of the action do not occur until later. *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980). *See also* 29 C.F.R. § 1980.103(d) (a SOX violation occurs “when the discriminatory decision has been both made and communicated to the complainant.”). Although Complainant argues Respondents have not provided any evidence of notifying Complainant of an adverse action against him, I find Complainant was aware of the alleged SOX violation more than 180 days before he filed his SOX complaints.

Complainant’s complaints are based, in part, on leaving his employment with Aerotek in October 2005. As Complainant’s SOX complaints were filed on October 15, 2010, long after the filing period lapsed, his complaints appear to be untimely. Furthermore, upon review of the record and the arguments presented by the parties, I do not find any new, actionable instances that would extend the 180-day filing period.⁶ I note that Complainant alleges that Respondents admitted to terminating Complainant’s employment in a 2009 civil proceeding, filed in the U.S. District Court, Western District of Missouri. *See Levi v. Aerotek, Inc.*, No. 09-CV-00053 (W.D.Mo. Sept. 21, 2009).⁷ However, even this if this alleged admission constituted an actionable adverse action, Complainant did not file his SOX complaints until more than one year later. Complainant also alleges that Respondents lied under oath in Missouri state unemployment proceedings in 2005 and 2006. Even assuming this alleged action is a violation of the Act, Complainant filed his SOX complaints well beyond the filing period.

Complainant makes additional allegations of acts of criminal obstruction of a government agency proceeding and acts of mail and wire fraud by Respondents in 2011. Complainant alleges that Respondents lied to the Secretary of Labor while the SOX complaints presently before me were under investigation by OSHA. Any of these additional allegations are a part of and subsumed in this matter before me. Although Complainant generally alleges criminal obstruction and criminal acts, Complainant has not set forth any pleadings, affidavits, or materials describing what these alleged criminal acts are that Respondents committed or relate them to a potential SOX violation. Even in a light most favorable to Complainant, Complainant has not provided any facts to evidence the occurrence or describe the substance of these alleged criminal acts. Therefore, I still find this claim to be untimely filed.

Moreover, I do not find, and the parties did not present, any legal basis to apply principles of equitable tolling or equitable estoppel. Therefore, upon reviewing the record as a whole, in a light most favorable to Complainant, I find no genuine issue of material fact

⁶ In the cases against Anheuser Busch, Complainant asserted that false statements made by opposing counsel on a Motion to Dismiss a SOX whistleblower in his initial claim gave rise to an independent action for whistleblowing in a second case. The record showed that the alleged false statements were objected to and, in part, were a basis for appeal of the first case. I found that any allegations regarding false statements were subsumed in the earlier action.

⁷ While this claim was pending, Complainant filed a Federal Tort Claim Liability Act case alleging that the United States Department of Labor interfered with or obstructed Complainant’s “various” civil actions against his former employer, Anheuser Busch Companies, Inc., and complaints he submitted pursuant to the whistleblower provision of the Sarbanes-Oxley Act. *See* 18 U.S.C. § 1514A; *Levi v. United States*, Case 1:12-cv-00635-UNA (U.D.C. D.C., April 23, 2012). The case was dismissed in a memorandum opinion. Complainant did not notify me or the Respondents concerning this case.

concerning the timeliness of Complainant's SOX complaints, and accordingly, these claims must be dismissed on the basis that they are time-barred.

NONE OF THE RESPONDENTS IS A "COMPANY" UNDER THE ACT

Section 806 of SOX provides whistleblower protection for employees of publicly-traded companies. 18 U.S.C. § 1514A(a). The Act and its implementing regulations define a "company" subject to the Act as any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c) or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization...."⁸

Respondents argue that none of the Respondents are covered entities under SOX. SOX whistleblower protection only applies to publicly-traded companies, and Respondents assert that Aerotek and Allegis are privately-held, with Mr. Bisciotti, at best, the agent of a privately-held company. Aerotek and Allegis do not issue securities under section 12 of the Securities Exchange Act of 1934 and are not required to file reports under section 15(d) of the Securities Exchange Act of 1934. Therefore, Respondents argue they are not companies subject to Section 806 of the Act. Furthermore, Mr. Bisciotti is not a corporate entity of any kind and therefore, he is also not subject to the Act. Respondents refute Complainant's allegation that Respondents are "agents" of AB and state that the Act is not "intended to provide general whistleblower protection to employees of any employer whose business involves acting in the interests of public companies." Respondents' Response to the Order to Show Cause (March 21, 2012) (citing *Brady v. Calyon Securities*, 406 F. Supp.2d 307, 318 (S.D.N.Y. 2005)).

Respondents state that Complainant holds the following "conspiracy theory":

(1) Stephen Bisciotti co-founded Aerotek in 1983; (2) Mr. Bisciotti currently owns the Baltimore Ravens of the National Football League; and (3) AB advertises on television during NFL games; therefore, (4) Aerotek (and its parent company Allegis) had an interest in keeping AB happy; and (5) Aerotek would terminate one of its employees if AB requested it.

⁸ I note that there appears to be no consensus on whether the Act applies to employees of private companies that are contractors, subcontractors, or agents of public companies. See, e.g., *Lawson v. FMR LLC*, 2012 WL 335647 at *6 (1st Cir. 2012) (only employees of the defined public companies are covered by these whistleblower provisions). Cf. *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, No 04-149, 2006 WL 3246904, at *10 (ARB May 31, 2006); but see *Johnson v. Siemens Bldg. Techs., Inc.*, No. 08-032, 2011 WL 1247202, at *12 (ARB Mar. 31, 2011) (stating that *Klopfenstein* should be read as stating the broader proposition that a private company can be held liable under §1514A where such private company would be considered a public company's agent under common law principles, not only when the private company is the public company's agent for employment purposes). However, I do not find, and the parties have not presented, any evidence that such a relationship exists. Regardless, as stated in this order, I find several other grounds upon which to dismiss Complainant's SOX complaints.

Respondents argue that Complainant has not provided any evidence that Anheuser Busch generally controls, directs and controls Aerotek's employment decisions, or in this specific case, that Anheuser Busch had any input in the alleged decision to terminate Complainant.

I find no evidence, and Complainant has not provided any such evidence, that any of the Respondents, Aerotek and Allegis, are publicly-traded companies, or that Mr. Bisciotti is an officer or agent of such a company. Upon reviewing the record as a whole, in a light most favorable to Complainant, I find no genuine issue of material fact concerning Respondents' status as a publicly-traded company or officer of a publicly-traded company. Accordingly, Complainant's SOX complaints must be dismissed on this ground.

FAILURE TO OBEY LAWFUL ORDERS

Apparently, Complainant attempted to seek relief without providing proper notice to the attorney of record. I repeatedly specifically Ordered him to submit copies of all documents proffered to me to his opponent.

Counsel for Respondents states that he has received nothing from Complainant in response to my numerous orders that Complainant provide him with copies of all past filings in this matter. Section 18.38 provides the following on ex parte communications:

- (a) The administrative law judge shall not consult any person, or party, on any fact in issue unless upon notice and opportunity for all parties to participate. Communications by the Office of Administrative Law Judges, the assigned judge, or any party for the sole purpose of scheduling hearings or requesting extensions of time are not considered ex-parte communications, except that all other parties shall be notified of such request by the requesting party and be given an opportunity to respond thereto.
- (b) Sanctions. A party or participant who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions, including, but not limited to, exclusion from the proceedings and adverse ruling on the issue which is the subject of the prohibited communication.
SOURCE: 48 FR 32538, July 15, 1983.

29 C.F.R. § 18.38 (Ex parte communications).

Accordingly, I may impose sanctions on a party who makes prohibited ex parte communications. I have issued five separate orders requiring Complainant to serve copies of all filings on counsel for Respondents. As stated by counsel for Respondents, and finding no evidence to the contrary, Complainant has failed to comply with my orders on ex parte communications. Counsel for Respondents still has not received several of Complainant's filings.

As a result of Complainant's failure to comply with the rules on ex parte communications, despite numerous orders to do so, I find Complainant's engagement in ex parte communications to constitute grounds for dismissal of his complaint.

ORDER

Based on the foregoing, IT IS ORDERED that the SOX complaints in the above-captioned matter are **DISMISSED WITH PREJUDICE**.

The hearing scheduled for June 19 in Kansas City, Missouri, is hereby **CANCELLED**.

A

Daniel F. Solomon
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).