



Issue Date: 18 March 2013

Case No.: 2012-SOX-00039

In the Matter of:

**HUNTER R. LEVI,
Complainant,**

v.

**ANHEUSER-BUSCH INBEV /
ANHEUSER-BUSCH, LLC,¹
Respondents.**

**Appearances: Hunter R. Levi, *Pro Se*²
Overland Park, Kansas
For the Complainant**

**Joseph J. Torres, *Esq.*
Winston & Strawn
Chicago, Illinois
For the Respondents**

**SUMMARY DECISION AND ORDER
DISMISSING THE COMPLAINT**

Background and Procedural History

Following his discharge in 2003 from Anheuser-Busch, Inc.,³ Mr. Hunter R. Levi (hereinafter “Complainant” or “Mr. Levi”), filed a series of “SOX”-related claims against

¹ On December 14, 2011, Complainant amended his complaint to add a Respondent, Zenith Administrators, Inc.

² Complainant is acting *pro se* in this matter and all due consideration of his status has been accorded him in rendering this decision.

³ Anheuser-Busch, LLC is a wholly owned subsidiary of Anheuser-Busch Companies, LLC (formerly Anheuser-Busch, Inc.) InBevSA acquired both in 2008 (now Anheuser-Busch InBev).

Respondents,⁴ all of which were subsequently dismissed by Administrative Law Judges and upheld by the Administrative Review Board (ARB).⁵

Sometime prior to May 12, 2011, Complainant inquired about his pension benefits under the St. Louis Teamster Brewery Workers Pension Plan (“Plan”). On or about May 12, 2011, Complainant received a pension plan benefit determination worksheet from the Anheuser-Busch retirement plans department reflecting a date of initial participation of January 1, 1979, an employment termination date of March 4, 2003 and a credited service date of February 28, 2003. On June 9, 2011, Complainant filed the instant complaint with the U.S. Department of Labor (“DOL”), Occupational Safety and Health Administration (“OSHA”), alleging Respondents retaliated against him in violation of the Act for “blowing the whistle on AB and ABInBev securities fraud” by secretly changing his termination date from August 6, 2003⁶ to March 4, 2003, thereby intentionally reducing his pension benefits. The Regional Administrator did not find a violation of the Act and issued findings to that effect on behalf of the Secretary of Labor on August 17, 2012. Complainant timely filed objections to the *Secretary’s Findings* on September 13, 2012. Pursuant to a Notice of Hearing and Prehearing Order issued on October 3, 2012, this case was scheduled for formal hearing on January 30, 2013 in Kansas City, Missouri but indefinitely continued on the Court’s motion.

By letter dated December 27, 2012, and filed January 2, 2013, Complainant moved this court for summary decision, submitting Respondents “failed to offer a just cause defense against Levi’s complaint after Levi filed his request for SOX de novo hearing . . . on September 11, 2012.” Respondents’ response in opposition was filed January 11, 2013 and Complainant’s reply on January 18, 2013.⁷

On January 4, 2013, Respondents moved for summary decision in the above captioned matter submitting, in part, that the Administrative Review Board has previously found Complainant engaged in no SOX-protected activity or conduct before his termination from Anheuser-Busch on March 4, 2003. Thus, his current claim is barred by application of the collateral estoppel doctrine.

⁴ Section 806 of the Sarbanes-Oxley (SOX) Act generally prohibits company retaliation for lawful cooperation with investigations and protects employees who suffer an adverse action for reporting allegations of financial fraud.

⁵ See *Levi v. Anheuser-Busch Companies, Inc.*, ARB Nos. 06-102, 07-020, 08-006 (ARB Apr. 30, 2008), *pet. for review denied*, *Levi v. Department of Labor*, 360 Fed. Appx. 710, 2010 WL 114808 (8th Cir. Jan. 14, 2010), *cert. denied* ___ U.S. ___, 131 S. Ct. 122 (2010); *Levi v. Anheuser-Busch Companies, Inc.*, ARB No. 08-086 (ARB Sept. 25, 2009), *pet. for review denied*, *Levi v. Department of Labor*, 388 Fed. Appx., 556, 2010 WL 3001373 (8th Cir. Aug. 3, 2010), *cert. denied*, ___ U.S. ___ 131 S. Ct. 1575 (2010).

⁶ Both Complainant and Respondent have cited in their respective filings to August 6, 2003 as the apparent date of discharge. However, the arbitrator’s summary decision upholding Complainant’s discharge is dated August 1, 2003. See *Appendix to Respondent’s Memorandum in Support of Motion for Summary Decision*, Vol. II, Tab 2D.

⁷ In support of his motion for summary decision and award of damages, Complainant appears to rely on 29 C.F.R. § 18.5, *Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Judges*, which provides that “within thirty (30) days after the service of a complaint, each respondent shall file an answer.” Complainant appears to argue that Respondent’s first filing with this tribunal was on January 4, 2013, more than 30 days after Complainant’s request for hearing on September 13, 2012. Assuming, but not deciding, that section 18.5 applies to a party’s request for a de novo hearing before an administrative law judge after receiving the Secretary’s Findings denying a SOX complaint, Complainant did not properly serve Respondents’ attorney-of-record. See *Supplemental Order Requiring Complainant to Serve Documents on Respondent’s Attorney of Record*, issued January 23, 2013. Complainant’s motion for summary decision is denied.

In the alternative, Respondents argue that Complainant fails to establish a genuine issue of material fact that he suffered an adverse personnel action or that the protected activity was a contributing factor in the unfavorable action. The Respondents aver that Complainant's allegations, explanations and elaborations cannot transform his pension benefit calculation into an adverse personnel action. Respondents also aver that Complainant has submitted no evidence that the individual who made Complainant's pension determination decision had knowledge of Complainant's purported "protected activity" and that the Complainant failed to identify any competent, admissible evidence of record tending to show that the alleged "protected activity" in 2003 was a contributing factor in his 2011 pension calculation. Finally, Respondents submit they have identified legitimate, non-discriminatory reasons for Complainant's pension determination, which Complainant cannot rebut as pretextual.

Complainant's response opposing summary judgment, dated January 11, 2013 and filed January 15, 2013, repeats his claim that "[t]here is no dispute [complainant] was engaged in SOX protected activity in 2011, when ABI acted against [complainant's] pension and "there is no dispute that in 2011, ABI knew of [complainant's] SOX protected activity." Complainant also asserts Respondent's collateral estoppel argument is "unauthorized and ludicrous on its face. What ABI did in 2011, and what ABI revealed in 2011 about prior actions could not be decided by an ALJ in 2006, or the ARB in 2008."⁸

Respondents filed a Reply to Complainant's Opposition to Respondents' Motion to Dismiss on January 11, 2013. Respondents again argue that that the individual who prepared Complainant's benefits determination worksheet had no knowledge of his "protected activity;" and that Complainant has failed to establish that his purported "Protected Activity" was a contributing factor to his pension determination.

Positions of the Parties

Complainant

Complainant was born on November 11, 1955 and began working for Anheuser-Busch on January 8, 1979 until his wrongful termination in 2003. In May 2011, he inquired about certain information regarding his pension benefits. On or about May 12, 2011, Complainant received an estimation of benefits letter from the Anheuser-Busch pension department, which reflected a termination date of March 4, 2003, which Complainant submits is incorrect. Complainant alleges this document proves that Respondents secretly changed his termination

⁸ Mr. Levi has filed numerous documents with this court. To ensure that Respondent's counsel received copies of all filings, I ordered that all documents filed by Complainant with this tribunal be served only on opposing counsel and not on Respondents or its officers directly. *See Supplemental Order Requiring Complainant to Serve Documents on Respondent's Attorney of Record*, issued January 22, 2013. By letter filed February 1, 2013, Complainant asserts he cannot comply with the order because to do so would cause him to violate federal law and that "the [undersigned] ALJ had no authority to issue [the order] because ABI was in default and additional proceedings are not authorized" and asks that I "move immediately to find for Levi, as federal law requires the ALJ to do." Complainant also contends that the "ALJ is doubling down on his criminal obstruction by issuing a sua sponte order that betrays itself with its instructions to Levi" and "any attempt by the ALJ to withdraw, amend, explain or act on his January 22, 2013 ... orders will be further criminal obstruction by the ALJ. "

date from August 6, 2003 (sic) to March 4, 2003 intending to reduce his future pension entitlement in retaliation for accusing Anheuser Busch of engaging in securities fraud prior to his termination, and then fraudulently concealed this secret termination from March 4, 2003 to May 12, 2011. As a remedy for violating the employee protection provisions of SOX, Complainant alternatively seeks a change in his credited service to 32 years and 9 months or a modification in his employment termination date from March 4, 2003 to August 6, 2003 (sic).⁹ *See Filing of Hunter R. Levi SOX Whistleblower Complaint Against Anheuser-Busch Companies, Inc. and its Parent, ABInBev NV SA & Investigative Referral to USDOL Concerning Possible Large Scale ERISA Fraud by ABInBev in Determining AB Pension Payouts*, dated June 9, 2011 at page 11.

Respondents

Complainant was indefinitely suspended from Anheuser Busch (AB) on February 14, 2003 for violation of plant rules¹⁰ and his suspension was converted to a discharge, effective March 5, 2003. *See Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. II, Tab 2C. Complainant performed no further work for AB following his suspension on February 14, 2003. *See Bergman Affidavit, Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. II, Tab 2, pg. 4. Complainant's union challenged the discharge, which was subsequently upheld in arbitration by summary decision on August 1, 2003 and formal decision on September 22, 2003.¹¹ *See Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. II, Tab 2D and 2E. Complainant then filed a series of SOX related complaints, three of which were dismissed by the Administrative Review Board on April 30, 2008, finding that Complainant had not engaged in any SOX protected activity prior to his March 2003 discharge. As Complainant's latest claim also alleges 2011 retaliation for pre-discharge protected activity, Respondents submit Complainant is collaterally estopped from proceeding with his current complaint.

Even if Complainant has engaged in SOX protected activity, Respondents submit the complaint should still be dismissed because Mr. Levi has suffered no adverse employment action. Respondents submit the uncontroverted evidence shows that, in accordance with the St. Louis Teamster Brewery Workers Pension Plan, an employee's benefit determination date (BDD) is the last day of the final month in which contributions are made to the plan on behalf of a participant. *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. 1, Tab 1A; Vol. II, Tab 3C. The undisputed evidence shows that the last contribution made by Anheuser-Busch on behalf of Complainant was in February 2003 so his benefit determination date is February 28, 2003. *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. 1, Tabs B and C. This BDD would still be

⁹ Again, the arbitrator upheld Complainant's March 5, 2003 discharge by summary decision on August 1, 2003. *See supra* note 6.

¹⁰ Complainant was terminated for disrespect and refusal to cooperate in an investigation. *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. II, Tab 2B.

¹¹ Complainant's suit against Anheuser Busch for wrongful discharge and civil conspiracy was dismissed with prejudice by the U.S. District Court for the Western District of Missouri on October 27, 2008, a decision affirmed in *Hunter R. Levi v. Anheuser Busch Companies, Inc., et al*, 08-3820 (8th Cir, Jan. 14, 2010). *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. I, Tab P.

February 28, 2003 even if Complainant's date of discharge was August 1, 2003¹², September 22, 2003¹³ or today as Complainant has presented no evidence he received any compensation from Anheuser-Busch after February 28, 2003.¹⁴ See Seamans Affidavit, *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. 1, Tab 1.

Finally, Respondents submit that, even if Complainant suffered an adverse employment action, neither Zenith American Solutions (formerly Zenith Administrators), the third party administrator of the St. Louis Teamster Brewery Workers Pension Plan, Complainant's pension plan, nor any Anheuser Busch employee in the company pension plan department were aware of the reasons for Complainant's February 14, 2003 suspension or subsequent discharge.

Discussion

Section 806 of the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1514A, and applicable regulations issued at 29 C.F.R. Part 1980 (2010)¹⁵ generally prohibits company retaliation for lawful cooperation with investigations and protects employees who suffer an adverse action for reporting allegations of financial fraud. The Act extends protection to employees of any company "with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781) or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 780(d))...." SOX complainants are governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century

¹² The date the arbitrator issued her summary decision upholding the discharge.

¹³ The date the arbitrator issued her final decision.

¹⁴ In accordance with Plan rules, Complainant appealed the May 12, 2011 pension determination on June 3, 2011 to the retirement plan administrator. On October 14, 2011, the retirement plan administrator denied Complainant's appeal. See *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. 1, Tab I. Complainant appealed that decision to the plan trustees on October 28, 2011. See *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. 1, Tab H. On May 17, 2012, the plan trustees denied Complainant's appeal, thus exhausting the claims review procedure. See *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. 1, Tab P. Complainant then filed an Employee Retirement Income Security Act (ERISA) action challenging the pension benefit determination in United States Federal District Court for the Eastern District of Missouri on July 3, 2012. See *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. II, Tab 12. It appears this civil complaint is still pending. (Case 4:12-CV-01209-DDN).

¹⁵ The Sarbanes-Oxley Act creates "whistleblower" protection for employees of publicly-traded companies by prohibiting employers from retaliating against employees because they provided information about potentially unlawful conduct. Specifically, the Sarbanes-Oxley Act provides:

No [publicly-traded company], or any officer [or] employee...of such company, may discharge. . . an employee...because of any lawful act done by the employee —

(1) to provide information...regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the [SEC], or any provision of Federal law relating to fraud against shareholders, when the information . . . is provided to a person with supervisory authority over the employee.

18 U.S.C. § 1514A(a); see also *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 (4th Cir. 2008); *Allen v. Admin, Review Bd.*, 514 F.3d 468, 475 (5th Cir. 2008).

(AIR 21), 49 U.S.C.A. § 42121. A complainant alleging a violation of Section 806 must prove by a preponderance of the evidence: (1) that he engaged in protected activity or conduct; (2) that he suffered an adverse personnel action; and (3) that the protected activity was a contributing factor in the unfavorable action. *See, e.g., Villanueva v. Core Laboratories*, ARB 09-108, ALJ No. 2009-SOX-006, at 8 (ARB Dec 21, 2011). Accordingly, an employee bears the initial burden of making a *prima facie* showing of retaliatory discrimination; the burden then shifts to the employer to rebut the employee's *prima facie* case by demonstrating by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity. 49 U.S.C. § 42121 (b)(2)(B).

Respondents have requested the case be dismissed through summary decision. Summary judgment is proper when the record (i.e., pleadings, affidavits and declarations offered with the motion and evidence developed in discovery) demonstrates that there are no genuine issues of material fact, and that the moving party is entitled to disposition as a matter of law." 29 C.F.R. § 18.40(d), 18.41(a); Fed. R. Civ. P. 56 (c); *see Townsend v. Big Dog Holdings, Inc.*, 2006-SOX-28 (ALJ Feb. 14, 2006); *see also Richardson v. JP Morgan Chase & Co.*, 2006-SOX-82 (ALJ Jul. 7, 2006). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). A court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000). The party who brings the motion for summary decision bears the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 US 317, 106 S. Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 106 S. Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 US 242 (1986); *Rusick v. Merrill Lynch & Co.*, 2006-SOX-45 (ALJ Mar. 22, 2006). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present "specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue of material fact exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *Anderson*, 477 U.S. at 242. However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. *Id.* at 249.

For purposes of the Motion for Summary Decision, Complainant has established that the Respondents are "Employers" under the Act

A publicly traded company acts as an employer by exercising control of the employee's work product or by establishing, modifying, or interfering with the terms, conditions, or privileges of his or her employment. Respondent submits that Complainant was terminated by Anheuser-Busch in 2003. Anheuser-Busch InBev did not acquire Anheuser-Busch until 2008. As such, Respondents argue Complainant cannot proceed with a SOX claim "against an entity who did not own or control Anheuser-Busch in 2003." Determination of the actual legal status of Anheuser-Busch InBev as an employer in this case is not necessary since the case is being dismissed as to all Respondents involved for reasons described herein. However, for the

purposes of this decision, Anheuser-Busch InBev and Anheuser-Busch, LLC are considered, *arguendo*, to have been Complainant's employer.

I need not determine whether Complainant properly joined Zenith Administrators as a Respondent or whether Zenith can be considered Complainant's "Employer" under the facts of this case. Even if properly joined and even if Zenith's calculating Complainant's retirement benefits can be considered as "interfering" with the terms, conditions or privileges of Complainant's employment with Anheuser-Busch, the instant complaint is dismissed on other grounds.

Complainant is Barred from Proceeding by the Doctrine of Collateral Estoppel

Issue preclusion provides that a court's final decision on an issue actually litigated and necessarily decided in a previous suit is conclusive on that issue in a subsequent suit. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 850 n.4 (9th Cir. 2000). Issue preclusion, frequently referred to as "collateral estoppel", would bar Mr. Levi from litigating an issue that has already been decided in a former proceeding when there is identity of parties, identity of issues between the former and subsequent proceedings, and when the party opposing collateral judgment had a full and fair opportunity to litigate the issue at the prior proceeding. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006). The doctrine of collateral estoppel precludes "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Bedwell v. Spirit Miller N.E., L.L.C.*, ARB No. 10-024, slip op. at 4 (Oct. 27, 2011).

In order to prove retaliatory discrimination in this case, Complainant must have engaged in "protected activity" - that is by providing information or a complaint to a covered supervisor or other individual authorized to investigate and correct misconduct where such information or complaint regarded conduct that he reasonably believed constituted one of six violation types enumerated in § 1514A(a) of the Act. Significantly, that protected activity must have taken place *prior to his discharge* from Anheuser-Busch. Respondent submits that fact has already been decided against Complainant and he is collaterally estopped from proceeding with the current claim. I agree.

In the instant complainant, Mr. Levi alleges he was employed by Anheuser Busch from January 8, 1979 until his discharge in 2003 and that Respondents "illegally retaliated against me for blowing the whistle on AB and ABINBev securities fraud; by intentionally reducing my pension payments which I became eligible for at age 56, on November 11, 2011." *Complainant's June 9, 2011 SOX Complaint, at pg. 1.*

As noted above, Mr. Levi previously filed three separate complaints alleging his Employer, Anheuser-Busch, violated the whistleblower protection provisions of SOX, referenced by Complaint in his current complaint. An administrative law judge dismissed each case and Mr. Levi timely requested review. The ARB consolidated the three cases and issued a final decision and order affirming the dismissal in all three cases. The ARB decision vividly, and accurately, captures the nature of Mr. Levi's complaints to various Anheuser-Busch and

government personnel and need not be repeated in detail here.¹⁶ Suffice it to say, for purposes of this case, Mr. Levi's correspondence with Respondents and various federal agencies beginning in 1997 and continuing to his February 14, 2003 suspension included allegations of racial discrimination, harassment and retaliation, poor corporate decision making, missed business opportunities, poor labor relations and workplace safety issues, and unspecified complaints of corporate arrogance, wasting company resources, violations of federal law, engaging in bad corporate behavior and excessive compensation. The ARB found that none of the complaints Mr. Levi raised before his discharge from Anheuser-Busch were SOX-protected activity.

To succeed in a whistleblower case, Mr. Levi must have engaged in SOX-protected activity prior to his discharge from employment. In other words, he must have been a whistleblower. While retaliatory acts may happen after discharge, the protected activity forming the first element of the case must have occurred prior to termination. As such, Mr. Levi "must have provided information regarding ABI's conduct that he reasonably believed constituted a violation of mail fraud, wire, radio or television fraud, bank fraud, securities fraud or any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders." Here, Mr. Levi alleges the 2011 reduced pension calculation by Anheuser-Busch was in retaliation for "blowing the whistle on AB and ABINBev securities fraud," whistleblowing which must occurred prior to his termination as an Anheuser-Busch employee in March 2003. However, Complaint has provided no evidence of such complaint and, as the ARB found, "although Levi made general, conclusory accusations of bad corporate governance, safety problems, and racial discrimination against ABI prior to his discharge, these do not constitute SOX-protected activity." *Levi v. Anheuser-Busch Companies, Inc.*, ARB Nos. 06-102, 07-020, 08-006, *slip op.* at 13.

After deliberation on the arguments, supporting briefs, and supporting documents submitted by the parties, the undersigned finds that the ARB has already concluded that Complainant did not engage in any SOX-protected activity prior to his 2003 discharge from Anheuser-Busch, a decision which is now a final judgment. That former proceeding involved the same parties, identity of issues between the former and current proceedings, and Mr. Levi had a full and fair opportunity at the former proceeding to litigate the issue of whether or not he actually engaged in SOX-protected activity prior to his discharge. Therefore, the instant claim, alleging a retaliatory act by Respondents based on Mr. Levi's pre-discharge activity, is barred by collateral estoppel. Accordingly, Respondents are entitled to summary decision and dismissal of the complaint.

Complainant has Failed to Establish that He Suffered an Adverse Personnel Action

Assuming, but not deciding, that Mr. Levi's current complaint, is not barred by collateral estoppel and assuming, but not deciding, that Mr. Levi did engage in protected activity prior to his 2003 discharge, Respondent is still entitled to summary decision as Complaint has failed to offer evidence showing he suffered an adverse personnel action when he received his pension determination in 2011.

¹⁶ *Levi v. Anheuser Busch Companies, Inc.*, *supra* note 5, at fn. 1.

Consistent with the St. Louis Teamster Brewery Workers Pension Plan, the amount of an employee's pension benefit is calculated on the number of days actually worked for Anheuser-Busch, not the effective date of termination.¹⁷ Mr. Levi did not work for pay for Anheuser-Busch after February 14, 2003 when his employment was suspended, a fact he does not dispute. Thus, February 2003 was the last month in which pension contributions were made to the Plan on Mr. Levi's behalf.¹⁸ The Trustees of the St. Louis Teamster Brewery Workers Pension Plan determined Mr. Levi's benefit determination date was February 28, 2003 and that his pension was properly calculated.¹⁹ Mr. Levi has presented no specific evidence to the contrary and "may not simply rest upon mere allegations or denials of such pleading." 29 C.F.R. § 18.4(c).

After deliberation on the arguments, supporting briefs, and supporting documents submitted by the parties, the undersigned finds that the Complainant has failed to establish that he suffered an adverse action as required by the Act. Because he is unable to establish an essential element of his whistleblowing complaint, Mr. Levi's claim must fail. Accordingly, the Respondents are entitled to summary decision and dismissal of the complaint.²⁰

The Remaining Issues Raised by the Parties are Moot

In that Complainant's claim is barred by collateral estoppel and he has failed to establish a *prima facie* case, due to the lack of proof he suffered an adverse personnel action, the remaining procedural and substantive issues raised by the Parties are now moot.

FINDINGS OF FACT

After deliberation on all the submissions of the Parties, and a thorough review of the case law, statutes and regulations pertinent to the Act, the undersigned finds, for the sole purposes of the Motion to Dismiss, that:

1. Respondents are employers/individuals/supervisors within the meaning of the Act.

¹⁷ See *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. I, Tab 1A (St. Louis Teamster Brewery Workers Pension Plan), at 4 ("Benefit Determination Date means the last day of the final month in which contributions are due on behalf of the Participant pursuant to Section 11.01").

¹⁸ See *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. I, Tab 1D (Benefit Determination Worksheet prepared for Complainant) at 1 (noting that Complainant's date of last contribution was February 28, 2003).

¹⁹ See *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision* Vol. II, Tab 2 (Affidavit of Michelle Bergman, supervisor in Respondent's People Department) at 3 (explaining that Complainant's discharge date and pension were determined in a way that conformed with the "regularly conducted business practice" of Respondent's People Department).

²⁰ As noted above, on July 3, 2012, Complainant filed an Employee Retirement Income Security Act (ERISA) action challenging his pension benefit determination in United States Federal District Court for the Eastern District of Missouri. See *Appendix to Respondent's Memorandum in Support of Motion for Summary Decision*, Vol. II, Tab 12. It appears this civil complaint is still pending. (Case 4:12-CV-01209-DDN).

2. Complainant submitted written communications to company personnel/supervisors prior to March 2003, which are the bases of the Complainant's current request for relief under the Act.
3. Complainant's communications were not communications that rose to the level of "protected activity" under the Act, previously decided against Complainant by the Administrative Review Board.
4. Complainant did not suffer an adverse employment action on or about May 12, 2011, when he received his pension determination.
5. Complainant has failed to establish a *prima facie* case for relief under the Act.
6. Respondents are entitled to a summary decision in the form of Dismissal of the cause of action.

ORDER

Respondents' Motion for Summary Decision is **GRANTED** and the cause of action is **DISMISSED**.

IT IS SO ORDERED.

STEPHEN R. HENLEY
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. 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).