



Issue Date: 07 July 2014

CASE NO.: 2014-SOX-00030

IN THE MATTER OF

**GREGORY KELLY,
Complainant**

v.

**STATE OF ALABAMA –
PUBLIC SERVICE COMMISSION,
Respondent**

**ORDER GRANTING RESPONDENT’S MOTION TO DISMISS
AND CANCELLING HEARING**

This case arises out of Section 806 of the Sarbanes-Oxley Act of 2002 (“SOX” or “the Act”), technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 U.S.C. §1514A *et seq.*, and the employee protective provisions promulgated hereunder at 29 C.F.R. Part 1980. Under SOX, the Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees of publicly traded companies who are allegedly discharged, retaliated against, or otherwise discriminated against, with regard to their terms and conditions of employment, for providing information about fraud against company shareholders to supervisors, federal agencies, or members of Congress.

I. BACKGROUND

A. Procedural History

On April 9, 2014, Gregory Kelly (Complainant) filed his Complaint with OSHA in this matter. In brief, Complainant alleged that he was harassed and eventually terminated in retaliation for voicing concerns that officials with the State of Alabama – Public Service Commission (Respondent) were violating provisions of SOX, and committing corporate and criminal fraud.

On April 22, 2014, OSHA found that the Complaint had no merit and listed several reasons for its decision. First, Respondent is not a “company” within the meaning of 18 U.S.C. § 1514A. Also, Complainant was employed by Respondent as a State Employee; thus, he is not an “employee” within the meaning of SOX. Additionally, Complainant was terminated on or about

April 9, 2009, and Complainant filed his SOX complaint April 9, 2014. As this complaint was not filed within 180 days of the alleged adverse employment action, it is deemed untimely.

On May 13, May 14, May 18, and May 19, 2014, Complainant filed letters to the Office of Administrative Law Judges expressing his objections to the OSHA findings. On June 3, 2014 this Court issued a Notice of Hearing and Pre-Hearing Order to Complainant and the Respondent.

On June 20, 2014, Complainant responded to the Notice of Hearing and reiterated his allegations. He identified his suit as being against the State of Alabama and several members of the Alabama Public Service Commission and Alabama State Personnel Board, both individually and in their official capacities. (Comp. Resp., p. 1).

Also on June 20, 2014, Respondent filed a Motion to Dismiss for failure to state a claim upon which relief can be granted. 29 C.F.R. § 18.1; Fed. R. Civ. P. 12(b)(6).

On June 27, 2014, Complainant filed a Memorandum in Opposition to Defendant's Motion to Dismiss. Complainant stated that the Office of Administrative Law Judges has jurisdiction to hear the merits of his claim, thus the claim should not be dismissed under Federal Rule of Civil Procedure Rule 12(b)(1).

On June 30, 2014, Complainant supplemented his opposition memorandum with information regarding the alleged installation of Smart Meters throughout the state by the Respondent, and that this was another reason why the Respondent's Motion to Dismiss should be denied.

B. The Parties' Contentions

1. Complainant

Complainant asserts that Respondents violated, among other acts, SOX, the SEC's Fair Disclosure laws, RICO, and civil rights statutes by terminating his employment because of a string of emails he wrote to federal and state officials and public employees warning about defective education and training and law enforcement violations, as well as environmental and safety abuses in the State of Alabama. (Comp. Resp., pp. 2-3). From 2005 to 2014, Complainant states that he sent emails and certified letters alleging various claims alleging a practice of discrimination and retaliation, among other acts. (*Id.*). Complainant was terminated from his position on or about April 5, 2009. He seeks to be reinstated as "merit system senior engineer" in the Alabama Public Service Commission, or in a comparable position, among other relief. (*Id.* at 17).

2. Respondent

Respondent asserts that Complainant has not met the threshold for a plausible claim that Respondent is an entity subject to the whistleblower provisions of SOX. (Mtn. to Dis., p. 3). Specifically, the Complaint filed by Complainant fails to establish that the whistleblower

provisions of SOX apply to this Respondent. Additionally, Respondent is neither a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 nor a company that is required to file reports under section 15(d) of the Securities Exchange Act of 1934. *Id.* Thus, the SOX claim is not possible against this Respondent. Furthermore, Complainant has not met the 180-day statute of limitations for filing a complaint following an adverse action; his termination was on or about April 5, 2009, and the SOX claim was filed approximately five years later on April 9, 2014. *Id.*

II. DISCUSSION

A. Standard for Motion to Dismiss under Rule 12(b)(6)

Although 29 C.F.R. Part 18, the Rules of Practice and Procedure for Administrative Hearings, does not contain a section pertaining to such a motion to dismiss, 29 C.F.R. § 18.1(a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. Respondent seeks to dismiss the case through Rule 12(b)(6) regarding the failure to state a claim upon which relief can be granted. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant can prove no set of essential facts in support of the complaint which would entitle the complainant to the relief sought. *Conley v Gibson*, 355 U.S. 41 (1957); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1056–57 (11th Cir. 2007).

Unlike a motion for summary decision filed after discovery, a facial challenge of a complaint under a whistleblower claim through a Rule 12(b)(6) motion points to a missing essential element (no protected activity or adverse action) or a legal bar to the claim (e.g., sovereign immunity, lack of coverage over the respondent, the statute of limitations). *Evans v. U.S. Environmental Protection Agency*, ARB Case No. 08-059, ALJ Case No. 2008-CAA-3, slip op. at p. 10 (ARB July 31, 2012). A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint, not the merits of the case. *Id.*

The ARB has stated that SOX claims are rarely suited for Rule 12 dismissals, and dismissals should be a last resort. *Sylvester v. Parexel Int'l., LLC*, ARB Case No. 07-123, ALJ Case Nos. 2007-SOX-39 AND 2007-SOX-42, slip op. at 13 (ARB May 25, 2011).

B. Jurisdiction and Coverage under SOX

Section 806 of SOX, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. Section 1514A(a) states, in relevant part:

- (a) 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)), 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, 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 section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A; *see also Hendrix v. American Airlines, Inc.*, 2004-AIR-00010, 2004-SOX-00023 (ALJ Dec. 9, 2004) (unpublished).

A **company** means “any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or 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.” 29 C.F.R. § 1980.101(d).

An **employee** is means “an individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person.” 29 C.F.R. § 1980.101(g).

Thus, the aggrieved employee’s first responsibility is to show that the Act covered his employer.

Complainant has failed to adequately address the applicability of SOX and does not assert that Respondent is a company with a class of securities registered under Section 12 of the Securities and Exchange Act of 1934 (SEA) or that Respondent is required to file reports under

Section 15(d) of the SEA.¹ Respondent has supplied an affidavit from John Garner, the Chief Administrative Law Judge and Executive Director of the Alabama Public Service Commission,² to support its contention that the Public Service Commission is a governmental entity organized under the laws of the State of Alabama. (Garner Aff., ¶ 3). Specifically, the Commission is “a statutorily created agency of the State of Alabama that is under the supervision of three statewide, elected public service commissioners.” *Id.* at ¶ 3. Also, the Commission is neither a company with a class of securities registered under Section 12 of the SEA nor is it required to file reports under Section 15(d) of the SEA. *Id.* at ¶¶ 5-6. Thus, the Commission, and, likewise, the State of Alabama, are not a “company” or covered employer under SOX.³

Field v. Denver Water, ARB Nos. 09-099, 09-100, ALJ Nos. 2009-SOX-22 and 24 (ARB May 26, 2011), is instructive in this matter. In *Field*, the ARB held that the administrative law judge properly granted summary decision because Denver Water was not demonstrated by the complainant to be a covered company under Section 806, i.e., a company “with a class of securities registered” under the Securities Exchange Act, or that is “required to file reports” under the Act. 18 U.S.C.A. § 1514A(a). *Field*, ARB Nos. 09-099, 09-100, slip op. at pp. 3-4. The ARB rejected the complainant’s theory to maintain his claim because there *should* be legal protection for workers claiming fraud by a government agency, such as Denver Water. *Id.* at 4.

Although Complainant has only briefly an alleged connection of the State of Alabama and the Commission to owning or managing securities as a way to secure jurisdiction or obtain relief under SOX, another case, *Crown v. City of Chicago, et al. and Cook County, et al.*, 2010-60 (Oct. 29, 2010) is also instructive in the context of governmental entities, securities laws, and SOX. (Ltr. Of May 13, 2014, p. 1-3; Opp. to Mtn., EX 2).

In *Crown*, the complainant asserted that he engaged in SOX protected activity by prevailing in a state Freedom of Information Act request regarding previously withheld information related to a defendant that involved SOX activity related to the Cook County pension fund. *Crown*, 2010-SOX-60, slip op. at 2. Mr. Crown stated that he suffered retaliation, including blacklisting, denial of employment, denial of pension benefits and intimidation, for the protected activity. *Id.*

The City of Chicago moved for dismissal primarily because the City is “a municipal corporation which owns and manages a portfolio of publicly traded securities,” but the City itself does not *issue* securities under Section 12 of the SEA, nor is it required to file reports under Section 15(d). *Crown*, 2010-SOX-60, slip op. at p. 3. The court in *Crown* analyzed the text of Section 806 of the Act, 18 U.S.C. § 1514A and determined that employer liability under Section 806 is limited to companies that issue securities that are registered under Section 12 of the SEA or that file reports under Section 15(d). *Id.* at p. 5 (emphasis added). While the City of Chicago may own and manage other companies’ securities, the named respondent, “City of Chicago” is

¹ Complainant has asserted violations under Section 13(a) and 14(a) of the SEA. (Ltr. of May 14, 2014, p. 1; Ltr. of May 18, 2014, p. 1).

² Mr. Garner was also named by Complainant as a Respondent, both individually and in his official capacity, in the Response to the Notice of Hearing. (Comp. Resp., p. 1).

³ Similarly, the State Personnel Board, whom Complainant has named as a Respondent in some pleadings, is also not a “company” under SOX.

not a publicly traded company and does not issue its own class of securities under Section 12 of the SEA or Section 15(d). Thus, the City of Chicago, and likewise, Cook County, were not covered entities or covered employers under SOX. *Id.* at p. 6. The court dismissed the City of Chicago for failure to state a claim upon which SOX relief may be granted and Cook County for lack of subject matter jurisdiction. *Id.* at pp. 6-7.

Complainant, who appears *pro se*, has identified himself as a “government whistleblower” under SOX and RICO and other acts ranging from civil rights to environmental safety. (Comp. Resp., p. 4). He has also identified himself as a “corporate whistleblower” who was fired in retaliation for his whistleblowing reports of corporate wrongdoings. (Opp. to Mtn., p. 5). Complainant cited the Supreme Court’s recent decision in *Lawson v. FMR LLC*, 572 U.S. ___, 134 S. Ct. 1158 (2014) for the proposition that alleged “racketeering” employers like the Respondent may be subject to SOX claims “because they are a contractor or subcontractor of a publicly traded company.” (Opp. to Mtn., p. 6). He also refers to environmental disclosure laws, and that the Respondents are “‘totally ignoring’ the SOX and SEC rules that require them to inform investors that climate change and global warming may pose to their businesses.” *Id.* at 9.

This case was investigated by OSHA and has reached this Court as a SOX claim. Complainant’s SOX claim is missing a threshold requirement: the existence of a company with a class of securities registered under Section 12 of the SEA, or that Respondent is required to file reports under Section 15(d) of the SEA. The State of Alabama and the Commission, his employer until April 9, 2009, do not meet this requirement. The Public Service Commission is not a contractor or subcontractor of a publicly traded company.⁴ The State of Alabama is not a publicly traded company.

Complainant also states, without statutory support, that RICO has a 10-year statute of limitations and that this possibly extends his statute of limitations for the SOX claim and expands the scope of his claims. (Ltr. of May 14, 2014, p. 1). He also requests that his complaint be tolled or held in “abeyance” because of his disabilities. *Id.* Even if a SOX entity or covered employer existed in this matter, the statute of limitations for filing a SOX claim is 180 days from the date on which the violation, i.e. the discrimination or retaliation, occurs. 18 U.S.C. § 1514A(b)(2)(D). In this matter, the adverse employment action against Complainant was April 9, 2009, or five years before the Complaint was filed with OSHA, which well exceeds the 180-day limitation. SOX regulations do not provide for “abeyance” of a claim due to federal disability laws and statutes. 18 U.S.C. § 1514A *et seq.* Nonetheless, such delay in this claim, or the filing of a new or amended complaint, would not help Complainant because there is no SOX entity or covered employer in this matter.

C. Conclusion

Since the State of Alabama – Public Service Commission does not issue securities registered under Section 12 and is not required to file reports under Section 15(d) of the SEA, Respondent is not subject to the employee protection provisions of Section 806 of SOX. As a result, Complainant’s SOX complaint against the State of Alabama – Public Service Commission must be dismissed for failure to state a claim upon which SOX relief may be granted.

⁴ Similarly, the State Personnel Department is not a contractor or subcontractor of a publicly traded company.

III. ORDER

For the aforementioned reasons, it is **ORDERED** that the Motion to Dismiss set forth by the Respondent, State of Alabama – Public Service Commission is hereby **GRANTED**.

YOU ARE HEREBY NOTIFIED that a formal hearing on the merits of the above proceeding which was scheduled to commence at **9:00 a.m.** on **August 4, 2014**, in **Birmingham, Alabama**, is cancelled.

SO ORDERED this 7th day of July, 2014, at Covington, Louisiana.

CLEMENT J. KENNINGTON
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 issuance of the administrative law judge's decision. 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(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived 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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1980.110(a).

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(e) and 1980.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1980.110(b).