



Issue Date: 24 November 2015

Case No.: 2015-SOX-00033

In the Matter of:

BRENDA FRANKLIN, *pro se*,
Complainant,

v.

AREVA, INC.,
Respondent.

ORDER DISMISSING COMPLAINT

This case arises under the employee “whistle blower” protection provisions of Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, as amended (“SOX”), 18 U.S.C.A. § 1514A, and its implementing regulations found at 29 CFR Part 1980. The claim was referred to the Office of Administrative Law Judges for formal hearing upon appeal by Complainant of the August 14, 2015, Assistant Regional Administrator, Philadelphia Region, Occupational Safety and Health Administration determination that the Respondent employer is not a covered company within the meaning of the SOX and dismissal of the complaint filed May 4, 2015.

By Order of October 26, 2015 the Complainant was advised of her right to representation; the manner in which a formal hearing would be conducted, including right to present documentary and testimonial evidence and examine witnesses; and present argument. She was advised of the issues in this case. She was advised in detail of the requirement that the Respondent Employer be a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 or be required to file reports under Section 15(d) of the Securities Exchange Act of 1934. She was advised that the documentation she submitted with her request for hearing demonstrated that Respondent Employer was a foreign company not registered under Section 12 of the Securities Exchange Act of 1934 or required to file reports under Section 15(d) of the Securities Exchange Act of 1934. The Complainant was directed to “Show Cause Why the Complaint Should Not be Dismissed for Lack of Jurisdiction” by filing a response with this Office by 4:00 PM, Monday, November 23, 2015. She was advised that failure to file a response by November 23, 2015 could result in her complaint being dismissed. The Complainant signed the certified mail receipt for the Order on October 28, 2015. No response has been received.

STATUTORY FRAMEWORK

The statutory provisions of SOX, at 18 U.S.C. §1514A, provides in pertinent part:

- “(a) No company with a class of securities registered under section 12 of the Security Exchange Act of 1934 ... or that is required to file reports under section 15(d) of the Security Exchange Act of 1934 ... 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 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) person with supervisory authority over the employee 9or 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.”

Implementing federal regulations applicable to the SOX at 29 CFR Part 1980 provide, in pertinent part:

§1980.101 Definitions. As used in this part:

- (a) *Act* means section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, July 30, 2002, codified at 18 U.S.C. 1514A, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, July 21, 2010.
- (b) ...
- (c) ...
- (d) *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.
- (e) ...
- (f) *Covered person* means any company, including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or any nationally recognized statistical rating organization, or any officer, employee, contractor, subcontractor, or agent of such company or any nationally recognized statistical rating organization.
- (g) *Employee* 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.

§1980.102 Obligations and prohibited acts.

- (a) No covered person may discharge, demote, suspend, threaten, harass or in any other manner retaliate against, including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee ... has engaged in any of the activities specified in ... this section.
- (b) An employee is protected against retaliation ... by a covered person for 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 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 –
 - (i) a Federal regulatory or law enforcement agency;
 - (ii) any member of Congress or any committee of Congress; or,
 - (iii) 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.”

§1980.109 Decision and orders of the administrative law judge.

- (a) ... A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.
- (b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

To establish a prima facie case of unlawful retaliation under SOX at the adjudication level, the Complainant must prove by a preponderance of the evidence (1) that she engaged in protected activity, (2) that the covered employer had knowledge of the protected activity, (3) that she was subjected to an adverse employment action with respect to her compensation, terms, conditions, or privileges of employment, and (4) that the protected activity was a contributing factor in the adverse employment action. *Fordham v. Fannie Mae*, No. 12-061, 2014 WL 5511070 (ARB Oct. 9, 2014) citing *Bechtel v. Administrative Review Board, U.S. Dept. of Labor*, 710 F.3d 443 (2nd Cir.2013); *Gale v. U.S. Dept of Labor*, 384 Fed. Appx. 926 (11th Cir. 2010) *unpub*; *Stone v. Webster Engineering Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997) Protected activity is a contributing factor if “the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer’s decision.” 76 FR 68087 (Nov. 3, 2011) “If the employee does not prove one of these elements, the entire complaint fails.” *Coryell v. Arkansas Energy Services, LLC.*, No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013)

If the Complainant proves a prima facie case under SOX when before the Administrative Law Judge, the Respondent will not be held to have violated SOX if it establishes by clear and convincing evidence that the adverse employment action was the result of events and/or decisions independent of the protected activity. “Clear and convincing evidence is ‘evidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Coryell v. Arkansas Energy Services, LLC.*, No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013) quoting *Warren v. Custom Organics*, No. 10-092, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2013 WL 143761 (ARB Jan. 9, 2013)

It is a jurisdictional requirement under SOX that the Complainant be employed by a “company with a class of securities registered under section 12 of the Security Exchange Act of 1934 ... or [a company] that is required to file reports under section 15(d) of the Security Exchange Act of 1934” and that the company or an officer, employee, contractor, subcontractor, or agent of such company took an action against the Complainant that is prohibited by SOX. See 18 U.S.C. §1514A(a). This jurisdictional requirement must be in existence at the time of the alleged adverse employment action. See *Roulett v. American Capital Access Service Corp.*, 2004-SOX-78 (ALJ Dec. 22, 2004)[employee could not bring a claim for relief under SOX when the employer was not subject to the requirements of §12 or §15(d) of the Securities Exchange Act on the date he was terminated; company not subject to the requirements of §12 or §15(d) of the Securities Exchange Act does not become subject to SOX solely because it engages in business with publicly traded companies], *dismissed* upon removal to Federal District Court, ARB Case No. 05-045 (Aug. 30, 2005), *dismissed*, 2007 WL 747800, No. 5-CV-07455(KMW) (S.D. N.Y., Mar. 2, 2007); *Tumban v. BioMerieux, Inc.*, 2007 WL 778426 (M.D. N.C., Mar. 13, 2007)[SOX only applies to publicly traded companies]; *Goodman v. Decisive Analytics, Corp.*, 2006-SOX-11 (ALJ Jan. 10, 2006)[employees of non-public company providing services to publicly traded company are not afforded SOX whistleblower protection] Note also that since passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,¹ which amended specific portions of SOX, employees of non-public subsidiaries owned by publicly traded companies are entitled to whistleblower protection under SOX.

DISCUSSION

In this case the complaint was filed on May 4, 2015; therefore, only adverse actions alleged to have occurred on and after November 6, 2014 may be considered.² The only adverse employment action set forth in the complaint on and after November 6, 2014, is the December 1, 2014 termination of employment. Accordingly, it is a jurisdictional requirement that the Complainant establish that the named Respondent was a company with a class of securities registered under section 12 of the Security Exchange Act of 1934 or a company that was required to file reports under section 15(d) of the Security Exchange Act of 1934 or an officer, employee, contractor, subcontractor, or agent of such company or a subsidiary of a publicly traded company on December 1, 2014.

¹ P.L. 111-203 (July 21, 2010), 124 Stat. 1852

² SOX requires that a complaint be filed with the Secretary of Labor “not later than 180 days after the date on which the violation occurs or after the date on which the employee became aware of the violation.” 18 U.S.C. 1514A(b)(2)(D)

In her September 15, 2015 appeal of the Secretary's findings, the Complainant states "AREVA is the largest nuclear supplier in the world and is owned and controlled by the French. If you look at the ownership of the Company, you will find that the French government owns roughly 87%, Kuwait government owns roughly 4.8%, with the balance being spread across some employee ownership and other European entities ... AREVA failed to gain a presence on the NYSE but was successful in gaining their public trading activities on the Euronext listing ... Most all of [AREVA's] large customers are utilities that are publicly traded. AREVA is the largest nuclear supplier in the world with the American presence as a service provider to the U.S. nuclear and energy corporations that are publically traded." The Complainant indicates that the named Respondent is neither a publicly traded company with a class of securities registered under §12 of the Security Exchange Act of 1934; or a company that was required to file reports under §15(d) of the Security Exchange Act of 1934; or a subsidiary owned by such a publicly traded company.

After deliberation on the administrative file, this presiding Judge finds that, when the pleadings and documents submitted are considered in a light most favorable to the Complainant, the Complainant has failed to establish the basic jurisdictional requirement that the named Respondent is a publicly traded company with a class of securities registered under §12 of the Security Exchange Act of 1934; or a company that was required to file reports under §15(d) of the Security Exchange Act of 1934; or a subsidiary owned by such a publicly traded company. Accordingly, the complaint must be dismissed for lack of jurisdiction under SOX.

ORDER

IT IS HEREBY ORDERED that the complaint filed under the provisions of SOX on May 4, 2015 **is DISMISSED.**

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic

File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 should identify the legal 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).

When 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, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).