



**Issue Date: 02 February 2017**

**CORRECTED COPY**

CASE No.: 2016-SOX-00040

*In the Matter of:*

**MICHAEL OPELA,**  
*Complainant*

v.

**APOGEE ENTERPRISES, INC., et al,**  
*Respondents.*

**DECISION AND ORDER GRANTING RESPONDENTS'  
MOTION TO DISMISS IN PART**

This case arises out of a complaint filed by Michael Opela (“Complainant”) against Apogee Enterprises, Inc. under the Sarbanes-Oxley Act of 2002 (“SOX”), 18 U.S.C. § 1514A, and against Apogee Enterprises, Inc.; Tubelite, Inc.; Harmon, Inc.; Alumicor Ltd.; Linetec; and Wausau Window and Wall (“Respondents”) under the Consumer Product Safety Improvement Act (“CPSIA”), 15 U.S.C. § 2087. This case is currently pending before me for a formal hearing.

Complainant filed his original complaint with the Occupational Safety & Health Administration (“OSHA”) on October 15, 2014, and amended his complaint to include additional respondents on February 27, 2015. OSHA dismissed the complaint on June 17, 2016, finding that Complainant did not engage in protected activity under either CPSIA or SOX. Complainant appealed to the Office of Administrative Law Judges (“OALJ”) on July 14, 2016. On August 25, 2016, I issued a Notice of Assignment and Preliminary Order, and I issued a Notice of Hearing and Prehearing Order on October 26, 2016.

The matter before me is Respondents’ Motion to Dismiss Complaint in Part, filed on September 20, 2016. Respondents argue that Complainant has not adequately pled a violation of one of the enumerated SOX violations. Respondents further contend that Complainant has not alleged that he was an employee of any respondent other than Wausau Window and Wall,

meaning he has not adequately alleged a CPSIA claim against five of the six respondents. Accordingly, Respondents request that I dismiss each claim except for the CPSIA claim against Wausau Window and Wall.

On November 15, 2016, Complainant filed a Response to Respondents' Motion to Dismiss, arguing that Complainant did allege a fraud on Apogee's shareholders sufficient to sustain a SOX claim. Complainant further argued that he was an employee of each of the respondents under the CPSIA claim because his employment "could be affected by" each respondent, satisfying the text of the regulation. *See* 29 C.F.R. § 1983.101(h).

For the reasons set forth below, I find that the allegations, evaluated in the light most favorable to Complainant, support neither a claim under SOX against Apogee Enterprises, Inc., nor a claim under CPSIA against any of the Respondents except Wausau Window and Wall.

### **FACTUAL BACKGROUND**

Complainant worked for Wausau Window and Wall for ten months. (Compl. at 1).<sup>1</sup> He was hired on October 31, 2013 and began work on December 30, 2013. *Id.* Complainant alleges that he discovered various safety concerns with the products of Wausau, specifically concerns regarding the material strength and tempers of materials used in a number of projects. *Id.* Complainant observed that this "creates a significant safety concern as the material strength is critical to meeting code required loads." *Id.*

Complainant brought these concerns to his supervisor Gene Pagel and Wausau's President Jim Waldron. *Id.* at 2. He then arranged for a meeting with the Vice President of Continuous Improvement, Mike Weis; two purchasing agents, Becca Borek and Craig Eddelburg; Brad Fehl; and Victor (last name unknown). *Id.* After the meeting, Victor agreed to contact Wausau's suppliers, Gordon, Patrick, and Tubelite, to determine how they were testing material strength. *Id.* Victor then reported that none of Wausau's three main suppliers (Gordon, Patrick, and Tubelite) were testing for material strength. *Id.*

On September 24, 2014, the Vice President of Human Resources for Wausau met with Complainant about his employment history, allegedly confronting Complainant because he did not list a prior position with Forensic Building Science on his resume when he applied for the Wausau position. *Id.* Complainant alleged that he discussed this position with Wausau when he

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<sup>1</sup> As used in this decision, "Compl." followed by a page number refers to Complainant's October 15, 2014 Complaint; "C. Resp." followed by a page number refers to Complainant's February 27, 2015 response to Respondent's Position Statement; "R. Br." followed by a page number refers to Respondents' Brief accompanying Motion to Dismiss in Part dated September 20, 2016; and "C. Br." followed by a page number refers to Complainant's Response to Respondents' Motion dated November 15, 2016.

interviewed and even used a non-compete agreement from that position to draft a non-compete agreement for his contract with Wausau. *Id.* at 2–3.

Wausau terminated him on September 25, 2014, purportedly because he did not disclose the prior position in the application process. *Id.* at 3. Complainant contends that Wausau bypassed their “four tier discipline process” and did not respond to his follow-up questions. *Id.* He avers that he filed an “appeal” with Wausau’s parent company, Apogee Enterprises, Inc., which—according to Complainant—then determined that “there was no support for the accusations” but that “management does not support [Complainant] coming back.” *Id.* According to Complainant, the contact at Apogee “told me that if I sign a general release document and absolve[] them of any wrong doing, then they would give me three months’ severance pay.” *Id.* Complainant concluded that Wausau and its sister companies, suppliers, and parent company violated the CPSIA, and that Wausau’s parent company committed fraud on its shareholders by producing dangerous products. *Id.*

### **STANDARD OF REVIEW**

To survive a motion to dismiss in an administrative proceeding, a complaint must provide fair notice of the claim.<sup>2</sup> *Johnson v. Wellpoint Companies, Inc.*, ARB No. 11-035, slip op. at 6 (Feb. 25, 2013). A complaint need only set forth: “(1) some facts about the protected activity, showing some ‘relatedness’ to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought.” *Evans v. U.S. EPA*, ARB No. 08-059, slip op. at 9 (July 31, 2012). In evaluating Complainant’s allegations, I assume that all facts in the Complaint are true and “draw all reasonable inferences in favor of the non-moving party.” *Id.* at 10.

### **DISCUSSION**

#### *SOX Claim*

Section 806 is SOX’s employee protection provision, which “prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain fraudulent acts.” *Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, slip op. at 8 (May 25, 2011) (*en banc*); 18 U.S.C. § 1514A. The burdens of

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<sup>2</sup> Motions to dismiss for failure to state a claim are disfavored in SOX cases before the OALJ. *Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, slip op. at 13 (May 25, 2011) (*en banc*). If additional evidence beyond the pleadings is in the record, an administrative law judge should consider the motion as one for summary decision pursuant to 29 C.F.R. § 18.40. *Id.*; *Erickson v. U.S. EPA*, ARB No. 99-095, slip op. at 3 n.3 (July 31, 2001). However, the record contains only the pleadings before OSHA and the undersigned. The complaint submitted to OSHA includes attachments, but none are relevant to the issues raised through Respondents’ Motion. Because of this lack of evidence, I find that this matter is most fairly resolved as a motion to dismiss for failure to state a claim based strictly on the allegations found in the pleadings.

proof in a SOX action are governed by 49 U.S.C. § 42121. 18 U.S.C. § 1514A(b)(2)(C). To establish a prima facie case, Complainant has to prove by a preponderance of the evidence that: (1) he engaged in SOX-protected activity; (2) Apogee Enterprises, Inc. subjected him to adverse action; and (3) his protected activity was a contributing factor in the adverse action. *Hoffman v. Solis*, 636 F.3d 262, 267–68 (6th Cir. 2011); *Johnson v. BNSF Ry. Co.*, ARB No. 14-083, slip op. at 3 (June 1, 2016); see 29 C.F.R. § 1980.102; cf. 29 C.F.R. § 1980.104(e)(2) (prescribing four-element definition of prima facie showing in connection with the initial investigation into the allegations).

Protected activity under SOX must involve reporting related to one of the six enumerated categories of the Act: mail fraud, wire fraud, bank fraud, securities fraud, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476–77 (5th Cir. 2008); see 29 C.F.R. § 1980.102(b). A complainant need not cite an actual violation of law to sustain a complaint. *Sylvester*, ARB No. 07-123 at 16–17. A whistleblower is protected even if he or she complains of a “reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories.” *Id.* at 17 (quoting *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1001 (9th Cir. 2009)); see *Halloum v. Intel Corp.*, ARB No. 04-068 (Jan. 31, 2006).

However, a whistleblower “must ordinarily complain about a material, misstatement of fact (or omission) about a corporation’s financial condition on which an investor would reasonably rely.” *Smith v. Hewlett Packard*, ARB No. 06-064, slip op. at 9 (Apr. 29, 2008). “A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough.” *Harvey v. Home Depot USA, Inc.*, ARB No. 04-114, slip op. at 15 (June 2, 2006). Furthermore, a complainant cannot rely on allegations of company wrongdoing alone, but must allege that he or she engaged in protected activity by reporting that wrongdoing. *Reddy v. MedQuist, Inc.*, ARB No. 04-123, slip op. at 8 (Sept. 30, 2005).

Here, Complainant alleged the following facts regarding his SOX claim: “I believe that since Apogee International is the parent company for Wausau, that Wausau action is fraud against the shareholders of Apogee International because if something would happen because of the product not being up to specification and fail that Apogee International could be held liable or it would affect the profits of Wausau which would affect the profits of Apogee International.” (Compl. at 3). He elaborated on this position in his brief: “Opela’s Complaint further alleged that Wausau/Apogee’s act of using non-conforming materials with direct knowledge that such materials were non-conforming exposed Wausau and Apogee to serious and substantial liability; which, in turn, directly exposed Apogee’s shareholders to a horrific loss. This, in effect and as alleged by Opela, is a fraud on Apogee’s shareholders.” (C. Br. at 2–3). These statements accuse Apogee of a SOX violation relating to shareholder fraud due to faulty products. See 18

U.S.C. § 1514A(a). Complainant can properly state such a claim by alleging that he reported wrongdoing to Apogee related to violation of one of the enumerated provisions of SOX. *See Smith*, ARB No. 06-064.

Respondent Apogee Enterprises, Inc. asserts that Complainant's allegations are not sufficient to sustain a SOX whistleblower claim. Complainant averred that he discovered a "significant safety concern," which he reported to several other employees of Wausau, including Wausau's President, as described previously. (Compl. at 1). However, Complainant mentions neither reporting to Apogee nor any direct assertions of shareholder fraud. After appealing his termination to Apogee, the company provided him with a proposed severance agreement. Beyond this communication, Complainant has alleged no other direct communications with Apogee Enterprises about his discovery.

Viewing all the evidence in the light most favorable to the Complainant, he has failed to allege with any specificity that Wausau's practice of not testing material strength constitutes fraud on Apogee's shareholders. Assuming that Complainant truly discovered a fraudulent company practice of overlooking safety concerns and was dismissed by Wausau for doing so, he has provided only vague assertions that this practice *may* expose the parent company to liability, *were* an accident to occur, and this liability *might*, in turn, harm Apogee's shareholders. Complainant has therefore alleged precisely the "mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors." *Harvey v. Home Depot USA, Inc.*, ARB No. 04-114, slip op. at 15 (June 2, 2006). The Administrative Review Board has explicitly determined that this type of speculation is insufficient as a matter of law to support a SOX claim. *Id.* at 14-15.

Furthermore, Complainant has neither alleged nor submitted evidence establishing that he reported any concerns to Apogee Enterprises, Inc. Complainant's only contact with the parent company was to appeal his termination after it took place. (Compl. at 3). Nowhere does he allege that he reported concerns about either product safety or shareholder fraud to Apogee Enterprises. He only reported his concerns to Wausau employees.

Reporting to Wausau might be sufficient under the Act if Wausau were acting as an agent of Apogee. *See Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, slip op. at 13-15 (May 31, 2006); 29 C.F.R. § 1980.101(f). However, Complainant does not allege that Wausau or any Wausau employee is Apogee's agent. Complainant provides no allegations that Wausau's employees reported his concerns to Apogee or that Apogee directed the adverse action against him. Furthermore, he does not allege that his termination was caused by his reporting to Apogee, meaning he has also failed to allege causation. *See Evans v. U.S. EPA*, ARB No. 08-059, slip op. at 9 (July 31, 2012).

Because Complainant failed to report his allegations of shareholder fraud to Apogee, he did not engage in protected activity under the Act. *See Allen v. Admin. Review Bd.*, 514 F.3d 468, 476–77 (5th Cir. 2008). Similarly, Complainant has failed to meet his burden of alleging that Wausau’s safety concerns will affect Apogee’s shareholders. Even considering all the evidence in the record in the light most favorable to Complainant, these deficiencies cannot be cured. Accordingly, Respondents’ Motion to Dismiss regarding the SOX claim against Apogee Enterprises, Inc. is **GRANTED**.

#### *CPSIA Claims*

The Consumer Protection Safety Improvement Act (“CPSIA”) and implementing regulations also protect employees against discharge for providing information about a violation of the Act. 15 U.S.C. § 2087(a); 29 C.F.R. § 1983. In order to establish a *prima facie* claim under the CPSIA’s whistleblower provision, a complainant must “allege the existence of facts and evidence” that: “(1) the employee engaged in a protected activity; (2) the respondent knew or suspected that the employee engaged in the protected activity; (3) the employee suffered an adverse action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.” 29 C.F.R. § 1983.104(e)(2).

Both the Act and the regulations require that the complainant be an “employee” of the respondent. *See* 15 U.S.C. § 2087(a); 29 C.F.R. § 1983.104(e)(2). Because the Act does not define “employee,” I rely on the definition found in the regulations. The regulations define “employee” as “an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by a manufacturer, private labeler, distributor, or retailer.” 29 C.F.R. § 1983.101(h). Respondents contend that Complainant has only alleged that he was an employee of one of the Respondents. (R. Br. at 4). Therefore, Respondents request that I dismiss the CPSIA claims against Tubelite, Alumicor, Linetec, Harmon, and Apogee.

The regulations include three provisions concerning who should be considered an employee. The first two involve directly working for or applying to work for an employer. 29 C.F.R. § 1983.101(h). Here, it is clear that Complainant has only directly worked for and applied to work for Wausau Window and Wall. *See* Compl. at 1 (“I was employed by Wausau Window and Wall”). The issue, then, is whether Complainant’s “employment could be affected by” the other Respondents. 29 C.F.R. § 1983.101(h).

One thing affects another when it produces an effect or change in the object being affected. *Affect Definition*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/affect> (last visited Jan. 17, 2017). Complainant would have me apply this dictionary

definition to interpret § 1983.101(h) in his favor. (C. Br. at 4–5). This argument is not frivolous in that the plain text of the regulation merely requires that one’s “employment *could be* affected” by the actions of “a manufacturer, private labeler, distributor, or retailer.” See § 1983.101(h) (emphasis added). And if this sub-section stood alone in providing regulatory guidance as to the meaning of “employee” for the purposes of the Act, it would apparently operate to create a legally-significant employment relationship between a manufacturer, labeler, distributor, or retailer and anyone whose employment could be affected by its actions.

However, the clause does not stand alone, and I must interpret this provision in light of the two limiting clauses with which it is located in the regulatory code. See *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 485–87 (2006) (limiting the meaning of an expansive phrase by considering the context in the statute). The other portions of the sub-section contemplate an explicit employer-employee relationship or its creation. The language at issue is more expansive, but should nevertheless be interpreted in a manner consistent with the rest of the definition to refer to a situation where a complainant’s employment is controlled by another party without a formal employment agreement. The Administrative Review Board has supported this interpretation of a similar regulation in another whistleblower statute. See *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, 07-121, slip op. at 10 (June 30, 2009) (noting that the test for an employee under AIR 21 is whether an employer “exercised control over the terms, conditions, or privileges of the complainant’s employment”). Examples of such control include: “the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant.” *Id.* An independent contractor is another classic example of where a respondent could exercise control without a formal employment arrangement. See *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028 (Jan. 30, 2004) (interpreting the AIR 21 whistleblower provisions to include as an “employee” a complainant who “arguably” had been hired as an independent contractor).

Therefore, I review the allegations to determine whether Complainant’s employment “could be affected by,” that is, was controlled by, Tubelite, Alumicor, Linetec, Harmon, or Apogee. I note the following alleged facts regarding the corporate structure of these Respondents: (1) Tubelite is a supplier to Wausau and sister company; (2) Apogee is the parent company of Wausau and all other Respondents; (3) Linetec is a sister company of Wausau who maintains inventory and provides dimension checks; and (4) Alumicor and Harmon are sister companies of Wausau. (Compl. at 1–2; C. Resp. at 1). As previously discussed, Complainant reported his termination to Apogee, but Apogee did not assist Complainant beyond providing a release and severance pay. (Compl. at 3). While this evidence tends to show an administrative relationship between Apogee and Wausau, Complainant has provided no other allegations or evidence regarding the influence or control of Apogee or the other Respondents over his own employment.

Considering all the pleadings in the light most favorable to the Complainant, I find that Complainant has not alleged that his employment was controlled by any Respondent other than Wausau Window and Wall. Other than Wausau, Complainant only interacted with Apogee, and only after his termination was final. (Compl. at 3). There is no indication that Apogee could direct that Complainant be hired back by Wausau, even accepting Complainant's assertion that an unidentified Apogee employee indicated that "there was no support for the accusations" that led to Complainant's termination. This indicates that Apogee actually had little to no control over Wausau's hiring decisions. Even assuming that the sister companies and Apogee were aware of or consciously producing and supplying dangerous products, Complainant cannot claim whistleblower protection without being an employee of those companies. Without any further evidence relating to the control of the other Respondents over Complainant's employment, the complaint does not support CPSIA claims against any Respondent except Wausau Window and Wall. Accordingly, Respondents' Motion to Dismiss regarding Complainant's CPSIA claims against Respondents Apogee Enterprises, Inc., Tubelite, Alumicor, Linetec, and Harmon is **GRANTED**.

### **ORDER**

The SOX complaint against Apogee Enterprises, Inc., is hereby **DISMISSED**. The CPSIA complaints against Apogee Enterprises, Inc., Tubelite, Inc., Harmon, Inc., Alumicor Ltd., and Linetec are hereby **DISMISSED**. Only the CPSIA complaint against Wausau Window and Wall will **PROCEED TO TRIAL** beginning at 9:30 AM on March 21, 2017, at or near Eau Claire, Wisconsin, at a specific location to be determined.

**SO ORDERED.**

**WILLIAM T. BARTO**  
Administrative Law Judge

WTB/kel

**NOTICE OF APPEAL RIGHTS UNDER SOX:** 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](mailto: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).

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