



Issue Date: 01 June 2016

Case No.: 2016-SOX-00021

In the Matter of:

DAVID CHRISTENSON,
Complainant,

v.

THE ORVIS COMPANY, INC.,¹
Respondent.

**DECISION AND ORDER DISMISSING THE ABOVE-CAPTIONED CASE WITH
PREJUDICE FOR LACK OF JURISDICTION AND ORDER CANCELLING THE
HEARING**

This action arises under the employee protection provisions of § 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (CCFA), Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (SOX). A hearing in the above-captioned case is currently scheduled for Tuesday, November 15, 2016 in or near Panama City, Florida.

Procedural History

On August 10, 2015, Complainant, who is pro se, filed a complaint with the Occupational Safety and Health Administration (“OSHA”), in which he alleged that Respondent terminated his employment in retaliation for engaging in protected conduct under SOX. OSHA dismissed his complaint on January 14, 2016, after finding that “Respondent is not a company within the meaning of 18 U.S.C. § 1514A in that it is not a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) and is not required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d)).” *Secretary’s Findings* at 2. Complainant appealed to the Office of Administrative Law Judges on February 2, 2016.

On August 10, 2015, Complainant, who is pro se, filed a complaint with the Occupational Safety and Health Administration (“OSHA”), in which he alleged that Respondent terminated his

¹ In the caption, the Respondent has been referred to as Orvis Retail Store. The caption is changed to properly reflect the name of the Respondent

employment in retaliation for engaging in protected conduct under SOX. OSHA dismissed his complaint on January 14, 2016, after finding that “Respondent is not a company within the meaning of 18 U.S.C. § 1514A in that it is not a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) and is not required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)).” *Secretary’s Findings* at 2. Complainant appealed to the Office of Administrative Law Judges on February 2, 2016.

On May 4, 2016, Respondent filed *Respondent’s Motion to Dismiss*, requesting that the Court dismiss “Complainant’s appeal . . . for failure to state a claim upon which relief can be granted,” and for “failure to follow the procedural requirements for filing an appeal.” *Respondent’s Motion to Dismiss* at 1. Respondent states that Complainant has brought his SOX retaliation claim under 18 U.S.C. § 1514A, which “provides protection for employees of publicly traded companies who allege violations of various securities laws that harm shareholders of such companies.” *Id.* at 2. However, Respondent states that it is a privately held company, and not subject to Section 1514A:

Specifically, Orvis is not a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), nor is it required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)). Orvis is not a subsidiary or affiliate of such a company. See Affidavit of Robert J. Bean, attached as Exhibit 2.

Accordingly, as a matter of law, Complainant’s allegations do not meet the requirements needed to make out a SOX retaliation claim and this appeal should be dismissed on that basis.

Id. at 3. The Secretary’s Findings based on the initial DOL investigation in this case concluded that Respondent is not subject to the whistleblower provisions of SOX. *Id.* at 4. Respondent also states that Complainant has not provided the necessary facts to demonstrate that Respondent is a publicly traded company and “does not set forth objections that could support a conclusion that the Secretary’s Findings were incorrect.” *Id.* Additionally, Respondent states:

Furthermore, Complainant’s wrongful termination allegation is grounded in his belief that he was terminated because he was owed sales commissions, that he had filed workers’ compensation claims and that he had contacted OSHA alleging violations in an Orvis store. See Secretary’s Findings, Exhibit 1, at pp. 2-3. Such allegations would not support a whistleblower claim under SOX, even if Orvis were a publicly traded company subject to the Act.

Id. at 4. Finally, Respondent states that the above-captioned case should be dismissed because Complainant’s appeal is procedurally defective:

The Secretary’s Findings, dated January 14, 2016, make clear that to file an appeal of the SOX portion of the ruling, Complainant had to “file objections” and serve a copy to Orvis at 178 Conservation Way, Sunderland, VT 05250, Attn:

Pam Nemlich.” Exhibit 1, at 4. This instruction is consistent with the mandatory requirements for perfecting an appeal, as set forth in 29 C.F.R. § 1980.106(a), which include the requirements of both (i) stating objections and (ii) serving the Respondent with the appeal at the same time that the actual appeal is filed.

Complainant did not serve Orvis with the appeal or any objections. See Affidavit of Pam Nemlich, attached as Exhibit 3, ¶¶ 4-5. The first time that Orvis learned that Complainant had filed this appeal was when the Complainant emailed dates to Orvis, as contemplated by the ALJ’s Preliminary Order dated March 10, 2016, asking that the parties confer as to a hearing date. Nemlich Affidavit, Ex. 3, at ¶¶ 4-5.

Complainant has provided no proof of service or other evidence to demonstrate that the appeal was properly served upon Orvis. Accordingly, the only evidence in the record on this subject shows that the appeal was not perfected and therefore not timely submitted as required under 29 CFR § 1980.106(a). The Secretary’s Findings, dated January 14, 2016, were not properly appealed.

Id. at 4-5.

In a letter filed with this Court on April 27, 2016, entitled *Response to Respondent’s Initial Statement*, Complainant offers a response to *Respondent’s Motion to Dismiss*:

1. Mr. Lebowitz should be sanctioned for his frivolous statement. Let’s just get on with the merits of the case and stop wasting time.
2. I am an individual who has been placed into a “Pro Se” capacity. I am not an attorney nor should I be held to that standard in an administrative court.
3. This case should be decided on its merits and in the interest of justice.
4. This case should not be decided on some made-up technicality.
5. If needed I should be allowed to correct any deficiencies in the interest of justice. Mr. Lebowitz has been served and I will grant him any additional time that he needs. The hearing is not until November, 2016. I have properly titled all pleadings and served all parties via US Mail and email when available. Mr. Lebowitz has received all pleadings via US Mail and email but yet he refuses to acknowledge my emails or to communicate with me. I have politely asked him to [at] least acknowledge receipt of my emails.

Response to Mr. [Lebowitz’s] three items:

- a. I followed the Department of Labor’s directives completely and accurately. I also sent emails to the company management and two separate law firms. This is a moot point as Orvis has retained Mr. [Lebowitz], hence the deficiency has been corrected. Orvis has not and will not be harmed due to some perceived notice of defective service. This case must be decided on its merits and in the interest of justice. Statement of Fact: Orvis was properly and timely served.

b. The Department of Labor identified the Parties. Orvis never objected to the identification and thereby loses this right. Orvis never corrected the deficiencies.

c. I was fired before the Department of Labor concluded its investigation. I filed the complaints in good faith. The Department of Labor never informed me that I could be fired if Orvis was not a public company. Once I filed the complaint I should be covered. I feel very strongly that Mr. Lebowitz is playing semantics and misleading the court. Orvis provided the fraudulent financial reports to companies that are covered. Orvis has never denied the accusations of providing fraudulent reports or to the stealing of commissions from its employees. Orvis knew that it was providing fraudulent financial reports to public companies that were in turn governed by 18 USC. Mr. Lebowitz has not denied my accusations from my previous pleadings and thereby loses the right to deny them from this point forward. Please reference the pleadings. I was fired for filing whistleblower complaints and the Department of Labor accepted those complaints and notified Orvis. This opened an investigation. You can't fire me for filing a complaint without telling me that I can be fired for filing a complaint. No one would ever file a whistleblower complaint. My filing a federal whistleblower complaint will protect companies that are governed by 18 USC. We are talking about justice. Do I have protection because I informed my government, who could be a victim, that they have received fraudulent tax returns? There are three parts to a complaint. The first is the complaint, the second is the investigation and the third is the conclusion. How can I be fired for filing a complaint?

A man can be found guilty of murder with circumstantial evidence in a criminal case. This is not a criminal case yet or is it? Does a civil case have a 5th Amendment Right? It seems to me that if Orvis had operated legally they would have stated so and provided the proof. By not denying the accusations they have incriminated themselves and admitted guilt. Why would Orvis waste the time with such a frivolous response when they can get right to the merits?

There is no doubt that Orvis stole from its employees, provided an unsafe work environment and provided fraudulent financials to public traded companies, government insured companies, government regulated companies, etc.

Complainant's Response to Respondent's Initial Statement at 1-2.

Complainant filed an additional response on May 13, 2016, entitled *Response to Respondent's Opposition for Summary Judgment and Motion to Dismiss*, stating the following:

(I accuse Orvis of criminally violating Federal Law and they never said or stated that they did not do it. Orvis, an outdoor and active retail store, denied me two work comp claims because I rode a bicycle to work and they have never denied that fact.)

(The court is in a precarious position. I have provided proof of Federal Felony Crimes and Orvis has not contested that fact in any of its pleadings. Misprision of

a Felony applies here. The court cannot look the other way because of some technicality with service. In simple terms I have given the court a gift that cannot be returned. Should I be protected or not? I am trying to protect the sales associates, my government and other businesses and yet I am the bad guy and the one that gets fired for doing the right thing.)

(I am an individual who is trying to do the right thing which in today's world is very unpopular. All of us should be protected from criminals and terrorists.)

The one glaring issue for me is why did Mr. Lebowitz not address the merits of the case. He took the time to get frivolous affidavits from Chief Financial Officer Robert J. Bean and Director of Human Resources Pamela Nemlich. Why did they not address the theft of commissions from the sales associates, the unsafe (both mentally and physically) work environment, the providing of fraudulent financials to the IRS and other government agencies as well as publicly traded companies that are regulated and insured by our government, etc. If my accusations were false they could be considered slanderous but they are not.

Orvis has lost the right to contest the facts of the case. The court can issue a summary judgment.

Attorney Todd H. Lebowitz, Chief Financial Officer Robert J. Bean and Director of Human Resources Pamela Nemlich did not contest the facts of the case. It is not a matter of supplying evidence they just did not contest the facts. Why?

Mr. Lebowitz wants to limit the scope of this case and simplify it. That cannot be done. This is an extremely complicated case that is governed by many different Federal Laws.

When is someone protected? Is it when they file the complaint? Is it when they filed the complaint and the investigation is started? Is it when the investigation is concluded? I was fired during the investigation. Mr. Lebowitz and Orvis has never contested that I operated in good faith. It took me a year to get back commissions. I never received an audit until after I was fired. I am still owed commissions as are all of the other sales associates.

Even if I was wrong on everything they should not be allowed to fire me. I followed the Orvis handbook and labor laws.

I truly consider Mr. Lebowitz's Opposition to be frivolous.

Response to Respondent's Opposition for Summary Judgment and Motion to Dismiss.

Finally, although not in response to Respondent's *Motion to Dismiss*, Complainant filed a letter with this Court on April 12, 2016, in which Complainant argues that this Court has jurisdiction over his case:

I believe that the Sarbanes-Oxley Act protects companies that receive fraudulent financials from whoever. Am I wrong? Should I be protected as a Federal Whistleblower for protecting the IRS, Wells Fargo Bank, etc.? Once Orvis provided fraudulent financials to companies that are governed by securities law then too became governed by the securities laws and hence Sarbanes-Oxley.

....

It appears that Orvis stock has traded publicly in the past and that it has not always been privately held. I am attempting to confirm this fact with an independent source. A simple affidavit by Mr. Lebowitz stating that Orvis stock has never been traded and that any outstanding stock could not be publicly traded or sold might satisfy my concerns.

The question then must be asked is: does Orvis structures their financials in accordance with SEC rules and regulation because of the outstanding stock. "Privately held" is a play [on] words and not an exact definition. I believe Orvis qualifies as a publicly traded company. Please don't be misled by semantics. It falls to Orvis to provide proof that their stock cannot be publicly traded and that it truly is a private company. I also believe that outside ratings companies have valued Orvis in accordance with SEC rules and regulations. This was done so Orvis could provide SEC certified financials to publicly traded companies, banks, the IRS, etc.

*Complainant's April 12, 2016 Letter at 1-2.*²

Discussion

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges ("Rules of Procedure") provide that:

A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. If the opposing party fails to respond, the judge may consider the motion unopposed.

29 C.F.R. § 18.70(c).

In the present case, 18 U.S.C. § 1514A applies only to the following types of employers:

[Any]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

² Claimant filed two additional documents with the Court on May 24, 2016 and May 27, 2016. However, neither filing references the jurisdictional issue addressed in this Order.

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. 781) or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization . . .

18 U.S.C. § 1514A(a). Respondent alleges that it is not an Employer as defined by the Act because it “is not a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), nor is it required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)). Orvis is not a subsidiary or affiliate of such a company.” *Respondent’s Motion to Dismiss* at 3. Additionally, Respondent attached a sworn affidavit from Robert J. Bean, Chief Financial Officer for Respondent, stating that it is not an Employer as defined by the Act. Complainant has not presented any specific evidence supporting his contention that Respondent is in fact a company as described by the Act, although he makes clear that he opposes a dismissal. Additionally, even if Complainant’s contentions were supported, his statements that Respondent is an Employer under the Act because it dealt with publicly traded companies is incorrect. *See* 18 U.S.C. § 1514A(a)

As Complainant has provided no evidence showing that Respondent is an Employer as defined by 18 U.S.C. § 1514A, I find that the Court does not have subject-matter jurisdiction to hear the case.

ORDER

Accordingly, **IT IS HEREBY ORDERED** that the hearing in the above-captioned case is **CANCELLED. IT IS FURTHER ORDERED** that the above-captioned matter is **DISMISSED** with prejudice.

LARRY S. MERCK
Administrative Law Judge

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).