



Issue Date: 12 April 2017

2017-SOX-00010

In the Matter of

RENE A. BURNS,

Complainant,

v.

THE UPSTATE NATIONAL BANK,

Respondent.

ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Sarbanes-Oxley Act (“SOX,” “the Act”), Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A, and the implementing regulations at 29 C.F.R. Part 1980. In this Order, I find that the Complainant has failed to show cause why her complaint should not be dismissed for lack of jurisdiction.

PROCEDURAL BACKGROUND

Rene A. Burns (“Complainant”) filed a complaint with the Secretary of Labor on November 22, 2016, alleging The Upstate National Bank (“Respondent”) violated the employee protection provisions of the Act by terminating her employment on November 10, 2016 in retaliation for engaging in protected activities. In a letter dated December 13, 2016 the Secretary of Labor, acting through the Assistant Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region 2, dismissed the complaint on the grounds that the Respondent, and by extension the Complainant, were not covered by the Act. On December 15, 2016, Complainant filed a letter with the Chief of the Office of Administrative Law Judges appealing the dismissal. On February 15, 2017, I issued an Order to Show Cause instructing Complainant to show cause why her complaint should not be dismissed for want of jurisdiction.

On February 28, 2017, Complainant submitted documentation in response to my Order. Respondent replied by letter on March 13, 2017.

STATUTORY AND REGULATORY BACKGROUND

Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A, and the applicable regulations at 29 C.F.R. Part 1980, generally prohibit company retaliation for lawful cooperation with investigations and protects employees who suffer an adverse action for reporting allegations of financial fraud. The Act's coverage is limited to employees of companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or companies that are required to file reports under section 15(d) of the Securities and Exchange Act of 1934.

Thus, unless Respondent falls under one of the two categories specified in the Act, it is not covered under the Act's prohibition against retaliatory conduct.

FACTS AND ANALYSIS

The Complainant has alleged that as a result of certain protected actions she took in 2015 and 2016, her position was eliminated in an act of retaliation in November 2016. While the acts alleged may indeed indicate retaliation, to be covered under Sarbanes-Oxley the jurisdictional elements still need to be met. Among the submissions by the Complainant is a copy of the Respondent's Employee Handbook which affirmatively states that Upstate would not retaliate against any employee who participated in a government investigation, or who filed a complaint with a government agency—two of the activities the Complainant engaged in. Moreover, the Handbook specifically cites Sarbanes-Oxley as governing its handling of whistleblower matters.

However, the Respondent cannot confer jurisdiction under Sarbanes-Oxley on itself, even if it so desires. Even though Upstate cites to Sarbanes-Oxley in its Employee Handbook and commits to a policy of non-retaliation, the prerequisites of either having a class of securities registered under section 12 of the Act or being required to file reports under section 15(d) of the Act still must be met in order for this Agency to have jurisdiction. Thus, the OSHA investigator found that while the complaint was timely filed, "Respondent is not a company within the meaning of 18 U.S.C. §1514A and Complainant is not an employee within the meaning of 18 U.S.C. §1514A, because Respondent is not a publicly traded company. Complainant and Respondent are not covered by SOX."

Upstate's response to Complainant's submissions confirms the finding of the investigator. Upstate states that it is not a publicly traded company and hence does not come under the jurisdiction of Sarbanes-Oxley. The Security and Exchange Commission's public data base has no listing for Respondent. Accordingly, it appears that the Department of Labor's Office of Administrative Law Judges has no jurisdiction in this matter.

Wherefore, the Complaint in this matter is dismissed.

SO ORDERED.

MARC R. HILLSON
Administrative Law Judge
Washington, D.C.

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).