



**Issue Date: 15 November 2017**

**CASE NO.: 2017-SOX-00018**

**IN THE MATTER OF:**

**DON R. TALBERT**  
**Complainant**

**v.**

**FMC TECHNOLOGIES**  
**Respondent**

**ORDER OF DISMISSAL**

This proceeding arises under the Sarbanes-Oxley Act of 2002, technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 U.S.C. § 1514A et seq., (herein SOX or the Act), and the regulations promulgated hereunder at 29 C.F.R. Part 1980, which are employee protective provisions.

On August 8, 2016, Complainant Don R. Talbert filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging his termination by Respondent FMC Technologies violated the SOX employee protection provision. On February 7, 2017, OSHA dismissed the complaint. Thereafter, Complainant requested a hearing with the Office of Administrative Law Judges (OALJ), and the matter was assigned to the undersigned for hearing.

While this case was pending before OALJ, Complainant filed a complaint in Texas state court against Respondent alleging violations of state law and federal law, including his SOX claim under 18 U.S.C. § 1514A. On October 10, 2017, Respondent filed a Notice of Removal of Complainant's state court action to the United States District Court for the Southern District of Texas.

Upon learning of Respondent's removal of Complainant's state court action to federal court, the undersigned held a conference call with the parties to determine whether the removal of the state court action to federal district court deprived OALJ of jurisdiction. During the call, the parties agreed that the undersigned likely did not have jurisdiction over this claim. I agree.

Under SOX, a complainant may file a SOX whistleblower claim in federal district court seeking de novo review when the DOL has not issued a final agency decision within 180 days of the filing of a complaint with OSHA, provided there is no showing that the delay is due to

complainant's bad faith. 18 U.S.C.A. § 1514(b)(1)(B); 29 C.F.R. § 1980.114(a). Where a complaint is filed in federal district court, DOL regulations state that the federal district court "will have jurisdiction over such an action." 29 C.F.R. § 1980.114; *see also Mozingo v. The South Fin. Grp.*, ARB No. 07-040, ALJ No. 2007-SOX-002 (ARB Feb. 8, 2007) (ARB dismissing appeal on filing of a complaint in federal district court).

After reviewing proceedings in this case, I dismiss Complainant's SOX complaint. Complainant's civil suit filed in Texas state court encompasses both state law claims and the federal SOX claim that is pending before DOL. After the Texas state court complaint was filed, Complainant's SOX claim, along with his state claim, were removed to federal district court more than 180 days after its filing with OSHA. Indeed, the proceedings that led to the DOL's loss of jurisdiction in this case (removal of Complainant's SOX whistleblower claim from state to federal court) is distinguishable from proceedings where a complainant pursues a non-SOX claim arising out of the same set of facts and involving the same parties in state court based on state law, or in federal court based on federal law. In that situation, SOX would not foreclose DOL's jurisdiction over a complainant's federal SOX administrative action.<sup>1</sup> Consequently, dismissal of Complainant's action due to lack of jurisdiction is proper.

Having considered the foregoing,

**IT IS HEREBY ORDERED** that the instant Complaint is **DISMISSED** with prejudice.

**ORDERED** this 15<sup>th</sup> day of November, 2017, 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 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

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<sup>1</sup> 18 U.S.C.A. § 1514A(d) ("Rights retained by employee") provides: "Nothing in this section [Section 1514A] shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement."

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. § 1978.110(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. § 1978.110(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, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(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. §§ 1978.109(e) and 1978.110(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. § 1978.110(b).