



Issue Date: 04 November 2019

CASE NO.: 2019-SOX-00012

In the Matter of:

YUNHEE KIM,
Complainant,

vs.

SK HYNIX MEMORY SOLUTIONS,
SK HYNIX, SK TELECOM,
TONY YOON, STEVE SON, and KEY SONG
Respondents.

ORDER DENYING MOTION TO DISMISS

On December 13, 2018, Respondents SK Hynix Memory Solutions, SK Hynix, SK Telecom, Tony Yoon, Steve Son, and Key Song (collectively, “Respondents”) moved to dismiss Complainant Yunhee Kim’s request for a hearing on her whistleblower complaint under Section 806 of the Sarbanes-Oxley Act (“SOX,” “SOX Act,” or the “Act”). *See* 18 U.S.C. § 1514A; *see also* 29 C.F.R. Part 1980.¹ The motion was the equivalent of a Rule 12(b)(1) motion under the Federal Rules of Civil Procedure,² arguing that Complainant had failed to plead facts to establish the subject-matter jurisdiction of this tribunal to hear this matter.

On March 18, 2019, I issued an Order Granting Motion to Dismiss and Granting Leave to Amend Request for Hearing in which Claimant was given until no later than May 3, 2019, to allege additional facts to establish jurisdiction.³ On March 21, 2019, I issued an additional order requiring the parties to provide supplemental briefing on the applicability of *Sylvester v. Parexel International LLC*, 2011 WL 2165854, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042 (ARB May 25, 2011).⁴

¹ Following an investigation, OSHA issued Secretary’s Findings dated November 15, 2018, finding no jurisdiction over Complainant’s employer, SK Hynix Memory Solutions. Complainant filed objections and requested a hearing on December 13, 2018. Respondents filed a statement in opposition dated December 21, 2018, citing 29 C.F.R. § 1980.109(c), which allows, in essence, dismissal or judgment on the pleadings for reasons including lack of subject matter jurisdiction. *See* 29 C.F.R. § 18.70(a)(c).

² As the OALJ Rules of Practice and Procedure expressly look to the Federal Rules of Civil Procedure where no OALJ rule, or other statute or procedural rule, directly applies, I consider FRCP 12(b) and its body of law to be persuasive authority. *See* 29 C.F.R. § 18.10(a).

³ *See* Order dated March 18, 2019.

⁴ *See* Order dated March 21, 2019.

Since that time, I have received a series of briefs from both parties concerning *Sylvester* as well as a First Amended Complaint (“FAC”) from Complainant. The briefs also discussed the SOX Act and whether this is the proper forum to hear this case. In the FAC, the Complainant describes SK Group, also known as SK Holdings, as a “Chaebol.” Complainant borrowed the description of a Chaebol from Wikipedia; a Chaebol is a “large industrial conglomerate that is run and controlled by an owner or family in South Korea. A Chaebol often consists of a large number of diversified affiliates, controlled by an owner whose power over the group often exceeds legal authority.” (FAC p. 1.)

The questions before me are (a) what is the burden Complainant must meet to survive a motion to dismiss for lack of subject-matter jurisdiction; and, (b) has Complainant shown facts that she was employed by an affiliate of a company that falls under the Act, in contrast to the facts shown by Respondents?

I answer those two questions below, and will deny the motion to dismiss. Under *Sylvester*, and contrary to the thrust of my March 18, 2019, order in this case, Complainant is not required to plead to the standards established in the *Twombly/Iqbal* line of cases (“*Twiqbal*”) to defeat a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Moreover, the parties dispute the facts that go to whether Complainant’s employer is covered by the Act, rendering summary decision impossible. *See* 29 C.F.R. § 18.72.

I. Discussion

The SOX Act was adopted in the wake of the Enron scandal in order to protect employees of publicly traded companies who provide evidence of fraud. *See Lawson v. FMR LLC*, 571 U.S. 429, 434-35 (2014). The whistleblower provision bars retaliation by any company “that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company” 18 U.S.C. § 1514A; *see also* 29 C.F.R. § 1980.101(d) (same).

A SOX claim requires a complainant to prove three elements, each by a preponderance of the evidence: “(1) he or she engaged in activity or conduct that SOX protects; (2) the respondent took unfavorable personnel action against him or her; and (3) the protected activity was a contributing factor in the adverse personnel action. *Sylvester*, 2011 WL 2165854, at *7 (2011).

Element 1 is where the dispute here lies. Respondents contend that Complainant’s employer was not an employer covered by SOX, and in doing so challenges my jurisdiction. *E.g. Morrison v. Nat’l Australian Bank*, 561 U.S. 247, 254 (2010) (subject matter jurisdiction is a reference to a “tribunal’s power to hear a case.”). As clear from the motions preceding this order, the alleged deficiency is that Complainant has failed to show that Complainant’s employer was an “affiliate” of SK Group or SK Holdings.

Whether an employer is a SOX-covered employer is not, strictly speaking, a jurisdictional question. *See Sylvester*, 2011 WL 2165854, at *8-9; *but see Crown v. City of*

Chicago, 2010 WL 4361068, 2010-SOX-60 (ALJ Oct. 29, 2010) (City of Chicago not a publicly traded company; finding no SOX subject-matter jurisdiction). *Morrison* explains the distinction well, drawing a line between the decision on whether a tribunal may decide a dispute *at all* from the decision on whether the defendant in the dispute is one that the law in question covers. 561 U.S. at 254. The former is a subject-matter jurisdiction question, the latter a merits question, and even Courts of Appeals blur this distinction. *Id.*

Under SOX, the Department of Labor's subject-matter jurisdiction arises "when the parties are properly before it, the proceeding is one of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court's action is not obviously frivolous." *Sylvester*, 2011 WL 2165854, at *8 (citing *Sasse v. U.S. Dept. of Justice*, ARB No. 99-053, ALJ No. 1998-CAA-007, slip op. at 3 (ARB Aug. 31, 2000)). The Board explained that the "pleading standard applicable to SOX cases... is not particularly onerous;" there is no requirement of plausibility in the initial filing, as is required in FRCP 12(b)(6) motions under the *Twiqbal* cases. The Board examined the *Twiqbal* cases and Federal Rules of Civil Procedure 8 and 12, and contrasted that litigation-initiating procedure with the procedure adopted for launching SOX cases. While the SOX regulations require only an informal set of allegations from a complainant, to be followed by an OSHA investigation, the Federal Rules of Civil Procedure as interpreted in *Twiqbal* require pre-filing investigation by a plaintiff, *see* Fed. R. Civ. P. 11, and the filing of a complaint based on that pre-filing investigation that meets the *Twiqbal* plausibility standard. The Board analogized that *Twiqbal* does not apply to SOX complainants, because doing so would be the equivalent of requiring a complainant to submit a near-formal federal court complaint to OSHA. *Sylvester*, 2011 WL 2165854, at *8-10.

Once a SOX complainant has initiated her case with OSHA with a "not obviously frivolous" complaint, and OSHA has made findings, "the ALJ's subject matter jurisdiction to hear SOX whistleblower complaints exists pursuant to the Secretary of Labor's delegation of her hearing and adjudication authority under 18 U.S.C.A. § 1514A(b) to Department of Labor Administrative Law Judges" *Sylvester*, 2011 WL 2165854, at *9. In the background here is the fact, worth spelling out, that both OSHA and the OALJ lie in the Executive Branch in a single agency. Formal agency adjudication, established and governed by provisions of the Administrative Procedure Act, 5 U.S.C. §§ 556-57, as well as the individual statutes assigning disputes to agencies for adjudication, has many of the features of litigation before the federal Article III courts but not all of them. In this context, there is no bright line between invoking the jurisdiction of OSHA to investigate and OALJ to decide disputed facts.⁵

Moreover, "not *obviously* frivolous" is a very low standard. By implication, it is a lower bar to clear than simply "not frivolous." *See* Fed. R. Civ. P. 11(b)(2) (requiring pleadings to contain "nonfrivolous" arguments). Also, the SOX regulations set a substantive requirement that complainants state a *prima facie* case in their complaint for OSHA to open an investigation. *See* 29 C.F.R. § 1980.104(e). Here, it is clear from the record that Complainant submitted a

⁵ Congress is free to craft different means of enforcement and adjudication, and even within labor and employment law, has done so. *Compare* 18 U.S.C. § 1514A(b) with 29 U.S.C. § 660(c) (protecting whistleblowers under the Occupational Safety and Health Act through OSHA investigation, and, litigation brought in federal court solely by the Secretary of Labor) with 29 U.S.C. §§ 215(a)(3), 216(b) (protecting whistleblowers under the Fair Labor Standards Act through private right of action in federal court).

complaint to OSHA that was not obviously frivolous and met the *prima facie* standard, leading to OSHA's investigation and the Complainant's eventual request for a hearing at OALJ.

That is not the end of the line for Respondents' motion. Applying the logic of *Morrison* and *Sylvester*, I will briefly examine coverage not as jurisdictional, but as a threshold merits issue. Here, even if I converted Respondents' motion to a motion for summary decision under 29 C.F.R. § 18.72, the facts as pled in the Complainant's FAC and supporting papers are in sufficient dispute with the facts pled by Respondents to survive summary decision. *See id.* (summary decision only where there is "no dispute as to any material fact").

Complainant alleges that SK Hynix, the owner of SK Hynix Memory Solutions, is a subsidiary controlled by either the Chaebol that runs SK Telecom, or is controlled by SK Telecom itself. Complainant's direct employer, SK Hynix Memory Solutions, can be found as an affiliate on SK Group's website. (FAC Exhibit 1.) Chey Tae-Won is allegedly the Chairman of both SK Group and SK Hynix. The largest shareholder of SK Hynix is SK Telecom. In SK Group's June 2018 Interim Condensed Consolidated Financial Statements, SK Hynix is listed as an "associate." In SK Telecom's 2012 annual report, SK Telecom acquired a "controlling stake" in SK Hynix. The Korean government investigated SK Hynix as part of a larger investigation of Chey Tae-Won and SK Group. (FAC p. 1-3.)

SOX bars retaliation by any company "that is 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" 18 U.S.C. § 1514A; *see also* 29 C.F.R. § 1980.101(d) (same). I discussed "subsidiary" and "affiliate" at length in my March 18, 2019 order, but in brief an "affiliate" is defined by Black's Law Dictionary, in the context of securities, as "[o]ne who controls, is controlled by, or is under common control with an issuer of a security." *Rothstein v. Am. Int'l Grp., Inc.*, 837 F.3d 195, 206 (2d Cir. 2016) (quoting *Affiliate*, *Black's Law Dictionary* (10th ed. 2014)). Similarly, the Securities and Exchange Commission ("SEC") defines "affiliate" as a "person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." 17 C.F.R. § 230.144(a)(1). And the question of control is, again as discussed in my March 18 order, highly fact dependent, and will turn on resolution of facts that are disputed here.

Respondents, of course, dispute whether any or all of the facts alleged by the Complainant gave rise to control sufficient to establish coverage of SK Hynix Memory Solutions. But for just one example of how detailed and disputed facts as to control may have to be resolved at trial before OALJ, in *Klopfenstein v. PPC Flow Technologies Holdings, Inc.*, 2009 WL 2844805, ARB Nos. 07-021, 07-022, ALJ No. 2004-SOX-11 (ARB Aug. 31, 2009), the ARB affirmed the ALJ's holding that the non-publicly traded subsidiary of a publicly traded parent company had acted as the parent's agent for the purpose of discharging the complainant, and therefore was properly named as a respondent in the complainant's SOX complaint. 2009 WL 2844805 at *4-6. The complainant was vice president of a division of a subsidiary of the aforementioned subsidiary. *Id.* The policy, a violation of which the complainant was allegedly discharged for, was a policy of the parent company. *Id.* The official who fired the complainant was both president of the subsidiary and executive vice president of the parent. *Id.* The ALJ determined that the firing official conferred with other senior managers from both the subsidiary

and the parent following an investigation of and report on the violation of the policy, some of whom gave input leading to the firing. *Id.* While Mr. Klopfenstein lost as a matter of causation, his subsidiary employer was a covered employer. *Id.* at *7-8.

If there was no dispute about the coverage-related facts alleged here, I could construe Respondents' motion as a motion for summary decision and grant it, as coverage is a threshold merits issue. But there are factual disputes for discovery and trial.

II. Order

It is ORDERED that following the additional briefing and filings, my March 18, 2019, order is VACATED, and Respondents' December 13, 2018 Motion to Dismiss is DENIED.

It is further ORDERED that the parties shall meet and confer as to a discovery schedule and trial date, and contact my office with a proposal no later than November 15, 2019.

EVAN H. NORDBY
Administrative Law Judge