



Issue Date: 12 December 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 REQUEST TO CERTIFY LEGAL QUESTIONS FOR
INTERLOCUTORY APPEAL**

Respondents SK Hynix Memory Solutions, SK Hynix, SK Telecom, Tony Yoon, Steve Son, and Key Song (collectively, “Respondents”) ask me to certify two questions of law to the Administrative Review Board, relating to pleading and subject-matter jurisdiction in Sarbanes-Oxley Act (“SOX,” “SOX Act,” or the “Act”) whistleblower cases before OALJ. *See* 18 U.S.C. § 1514A.

Because I find, for the reasons below, that there is neither a “substantial ground for difference of opinion” nor that an immediate appeal would “materially advance the ultimate termination of the litigation,” I will deny the petition.

BACKGROUND

On December 13, 2018, Respondents moved to dismiss Complainant Yunhee Kim’s request for a hearing on her whistleblower complaint. On March 18, 2019, I granted the motion to dismiss while also granting Complainant leave to amend her complaint. On May 17, 2019, Respondents moved to dismiss the since amended complaint and the request for a hearing on her whistleblower complaint under Section 806 of the SOX Act *See* 18 U.S.C. § 1514A; *see also* 29 C.F.R. part 1980.¹ They argued that, as a matter of law, neither “SK Telecom nor SK Hynix was an ‘affiliate’ of SKHMS.”² *See* Motion to Dismiss, May 17, 2019.

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. §

Respondents' motion was the Equivalent of a Rule 12(b)(1) motion under the Federal Rules of Civil Procedure,³ as the motion argued that Complainant had failed to plead facts to establish the subject-matter jurisdiction of this court. This motion came after supplemental briefing on the effect of *Sylvester v. Parexel International LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, 2011 WL 2165854, (ARB May 25, 2011), on this matter.

On November 4, 2019, I issued an order denying Respondents' motion to dismiss for lack of subject-matter jurisdiction (discussed below).⁴ On November 15, 2019, I received Respondents' Notice of Request and Request to Certify Legal Questions for Interlocutory Appeal to the Administrative Review Board ("ARB") with respect to the November 4, 2019, order. Respondents requested that I certify two legal questions to the ARB:

- 1) What is the pleading standard on a motion to dismiss for lack of subject-matter jurisdiction in SOX cases; and
- 2) What is the legal standard and pleading requirements necessary to establish "affiliate" status under 18 U.S.C.A. § 1514A and related case law

See REQ p. 2.

Respondents call for reading *Sylvester* as applying *only* to Rule 12(b)(6) motions to dismiss for failure to state a claim, arguing "*Sylvester* is *not* the standard for determining subject matter jurisdiction in SOX cases." See Request to Certify, p. 4. Respondents argue that the Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction in SOX cases is more demanding than the "not obviously frivolous" standard seen in *Sylvester*; Respondents contend that the "Rule 12(b)(1) motions in whistleblower cases apply a different standard that focuses on objectively determinable facts, often outside of either party's control." See Request to Certify, p. 5. Respondents further contend that if the ARB "determines that Kim has not pled that SKHMS is an 'affiliate' as a matter of law, then this litigation will be terminated." *Id.* at 7.

DISCUSSION

I. ARB Standard for Interlocutory Rulings

The ARB has the authority to issue final agency decisions in cases arising under SOX. This includes the "discretionary authority to review interlocutory rulings in exceptional

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 This issue is determinative, in that if her employer, SKHMS, is not an affiliate of SK Telecom or SK Hynix, then even if Complainant engaged in what would otherwise be protected whistleblowing activity, she would not be protected by SOX.

³ 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 Rule 12(b) and its body of law to be persuasive authority. See 29 C.F.R. § 18.10(a).

⁴ For completeness, I also entertained the argument that coverage was not a jurisdictional question, but instead a threshold merits issue, hypothetically converting Respondents' motion to a motion for summary decision under 29 C.F.R. § 18.72. Even then, as I noted, Complainant's complaint and supporting papers sufficiently dispute the facts pled by Respondents to survive summary decision.

circumstances.”⁵ When a party seeks judicial review of a decision of an ALJ, they must provide service to “all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB.” 29 C.F.R. § 1980.110.⁶

The ARB does not generally “accept petitions for review of an ALJ’s non-final dispositions.” *Benjamin Heckman v. M3 Transport LLC/SLT Expressway, Inc., and Lyons Capital, LLC*, ARB No. 16-083, ALJ No. 2012-STA-059, 2016 WL 7212571, *1 (ARB Nov. 10, 2016). The ARB will look to see whether there is a “controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal would materially advance the ultimate termination of the litigation.” *Id.* (citing cases; citing 28 U.S.C. § 1292(b)).⁷ But interlocutory appeals are disfavored. *Id.* Under both ARB case law and federal court interpretation of 28 U.S.C. § 1292(b), interlocutory appeals must pass through “a dual gatekeeper system. . . . Both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden.” *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-138. ALJ No. 2005-SOX-65, 2005 WL 4889054, *4 (ARB October 31, 2005) (quoting *In re Ford Motor Co.*, 344 F.3d 648, 648 (7th Cir. 2002))

Here, there are no “substantial grounds for difference of opinion” as to what is the pleading standard to establish subject-matter jurisdiction in SOX cases, because the ARB has spoken directly to the issue. Furthermore, an immediate appeal would likely lead to a remand to decide the factual dispute, outlined in my November 4, 2019 order, as to whether SK Telecom is an “affiliate” for the purposes of SOX, delaying a final resolution of this case

II. There is No Substantial Grounds for Difference of Opinion

Respondents contend that the pleading standard for subject-matter jurisdiction in SOX cases is unclear, asserting that *Sylvester* “is limited to Fed .R. of Civ. Proc. 12(b)(6) motions to dismiss for failure to state a claim.” Request to Certify, p. 4. To the contrary, the standard is well settled, and there are no substantial grounds for a difference of opinion as to what that standard is.

Borrowing language from the *Sylvester* decision itself: “[f]irst, we address the issue of subject matter jurisdiction.” *Sylvester*, 2011 WL 2165854 at *6. In the November 4, 2019 Order, I explained that there is no “bright line between invoking the jurisdiction of OSHA to investigate and OALJ to decide disputed facts.” See Order, Nov. 4, 2019. I explained that whether a tribunal may decide a dispute *at all* is a question of jurisdiction, and whether the defendant in the dispute is one that the law in question covers is a question of the merits. See *generally Morrison v. Nat’l Australian Bank*, 561 U.S. 247, 254 (2010).

Sylvester held that the Department of Labor’s subject-matter jurisdiction in SOX cases arises “when the parties are properly before it, the proceeding is one of a kind or class which the

⁵ See Secretary’s Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board) 84 Fed. Reg. 13,072, 13073 (Apr. 3, 2019).

⁶ 29 C.F.R. § 1980.110 Decision and orders of the Administrative Review Board (March 5, 2015).

⁷ The Board will consider interlocutory appeals under the collateral order doctrine. *Heckman*, 2016 WL 7212571 at *1 (citing cases).

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. 1988-CAA-00007, slip op. at 3 (ARB Aug 31, 2000)).

In the recent decision of *Rene Burns v. Upstate National Bank*, ALJ No. 2017-SOX-00010, ARB No. 2017-0041, 2019 WL 3293928 (Feb. 26, 2019), the ARB reaffirmed the *Sylvester* "not obviously frivolous" standard. The ARB found that a complainant had failed to plead subject-matter jurisdiction because he pled no facts at all showing that his employer was an entity covered by SOX. Thus, a complainant fails to show subject-matter jurisdiction by failing to "identify any evidence in the record that could support a factual finding" that their employer is "covered under the SOX whistleblower provisions." *Id.* (emphasis added). In order to invoke the DOL's subject-matter jurisdiction, a whistleblower must allege in his or her filings facts that could establish jurisdiction. Those facts must be "not obviously frivolous." *Id.*

III. Cases Cited to by Respondents Use the Same Standard as *Sylvester*

Underscoring that there are no substantial grounds for a difference of opinion, the cases cited in Respondents' request are consistent with *Sylvester*. Respondents cite *Dos Santos v. Delta Airlines, Inc.*, 2012-AIR-00020, 2013 WL 1282257 (Jan 11, 2013) (Purcell, ALJ), as an authority supporting the "limited scope of the *Sylvester* decision." Request to Certify, p. 4. This is not a full and fair assessment of Judge Purcell's decision in *Dos Santos*, which includes a discussion of both motions to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) and motions to dismiss for failure to state a claim under Rule 12(b)(6), citing and following *Sylvester* throughout this discussion. 2013 WL 1282257 at *4-5; see also *id.* (citing *Sasse v. U.S. Dept. of Justice*, ARB No. 99-053, ALJ No. 1988-CAA-00007, slip op. at 3 (Aug. 31, 2000)). Applying *Sylvester*, Judge Purcell wrote first that subject-matter jurisdiction exists "when... the claim set forth in the paper writing invoking the court's action 'is not obviously frivolous.'" 2013 WL 1282257 at *4 (quoting *Sasse*, slip op. at 3). Judge Purcell went on to consider the respondent's motion as a motion to dismiss for a failure to state a claim. *Id.* at *5. In doing so he quoted the ARB's language in *Sylvester* highly skeptical of motions to dismiss in SOX cases: "ALJs are entitled to manage their caseloads and decide whether a particular case is so meritless on its face that it should be dismissed in the interests of justice." *Id.* He ultimately denied the motion on the extensive factual record presented.⁸

And in *Merten v. Berkshire Hathaway, Inc.*, the ARB vacated and remanded, in light of *Sylvester*, a dismissal on subject-matter jurisdiction grounds issued prior to *Sylvester*. In *Merten*, the ARB again highlighted the distinction between subject-matter jurisdiction and dismissal for failure to state a claim, and held that an ALJ had erred by granting a Rule 12(b)(1) motion to dismiss when he found that "Merten did not set forth facts in his complaint that supported a finding that... the Respondents were employers subject to the SOX." ARB No. 09-025, 2011 WL 2614301 at *2 (June 16, 2011). The ARB held that this was error because by "filing a complaint alleging that the Respondents violated the SOX by terminating his employment, Merten properly invoked the DOL's jurisdiction to adjudicate his complaint. 2011 WL 2614301 at *2 (citing

⁸ *Dos Santos* presented an issue of first impression as to the extraterritorial application of AIR21's whistleblower provisions. Judge Purcell found that on the facts pled, the protected activity was not extraterritorial. 2013 WL 1282257 at *27.

Sylvester, ARB No. 07-123, slip op. at 11). In remanding for proceedings on the merits, the ARB emphasized that:

[d]ismissal is even less appropriate when the parties submit additional documents that justify an amendment or further evidentiary analysis under 29 C.F.R. § 18.40 (ALJ Rule 18.40), the ALJ rule governing motions for summary decision, which is analogous to Fed. R. Civ. P. 56 (summary judgment). In contrast, Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the OALJ rules. . . . Merten's complaint instead requires further analysis pursuant to ALJ Rule 18.40 or an evidentiary hearing on the merits.

Id. at *3 n.9 (citing *Sylvester*, ARB No. 07-123, slip op. at 13).

Respondents cite to cases such as *Nielsen v. Avecom*, 762 F.3d 214 (2d Cir. 2014) and *Evans v. U.S. Environmental Protection Agency*, ARB No. 08-059, ALJ No. 2008-CAA-00003, slip op. at 9 (ARB July 31, 2012), as supporting their claim that *Sylvester* only informs the standard of Rule 12(b)(6) motions. However, *Nielsen* upholds a federal district court's dismissal of a SOX claim on Rule 12(b)(6) grounds, applying the *Twombly/Iqbal* pleading standard applicable in that forum – but not this forum – to the complainant's failure to plausibly plead protected activity. *See* 762 F.3d at 218-19, 223-24. *Sylvester* is controlling precedent here. In *Evans*, the Board discussed and extended *Sylvester* to adopt, in whistleblower cases before itself and OALJ, the pre-*Twombly/Iqbal* “fair notice” pleading standard. *See Evans*, 2012 WL 3164358 at *4-7.

It is worth noting that Respondents argue for an “objective and more demanding rule 12(b)(1) standard” for pleading jurisdictional facts, as opposed to the “not obviously frivolous” standard they argue applies only to Rule 12(b)(6) motions to dismiss. *See* REQ p. 4, 5. This would require whistleblower complainants to establish jurisdictional facts in their pleadings by a higher evidentiary standard than the facts that go to the merits themselves.

This is a misreading of *Sylvester*. The plain language of *Sylvester* and the passel of decisions cited above clearly establish the “not obviously frivolous” standard for Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction in SOX cases.

IV. Certifying Interlocutory Review Would Not Materially Advance the Litigation

As cited above, the standard for certifying a question of law for appeal is conjunctive; there must be both grounds for difference of opinion as to a legal question *and* the answer to that question must advance the ultimate resolution of the case. *See, e.g., Heckman*, 2016 WL 7212571 at *1. But here, there is *also* a factual dispute set forth in the pleadings that has not yet been resolved as to the degree of control exercised by the publicly-traded parent company over the Complainant's direct employer, so as to render the employer an “affiliate” and therefore covered by SOX. *See* Nov. 4, 2019 Order. Were I to certify the requested issues of law, it would likely only delay resolution of the case, as the coverage issue may turn on resolution of this factual dispute. There is no reason why the coverage issue of law cannot be reviewed and decided by the ARB after a hearing on the merits resolving these disputed facts. *See Powers*,

2005 WL 4889054 at *4-5 (“piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation”).

CONCLUSION

For these reasons, I decline to certify the questions of law framed by Respondents.

SO ORDERED.

EVAN H. NORDBY
Administrative Law Judge