



Issue Date: 28 January 2013

Case No.: 2011-SOX-31

In the Matter of:

LUIS FERNANDEZ,
Complainant,

v.

NAVISTAR INTERNATIONAL CORP.,
Respondent.

**ORDER FINDING GOOD CAUSE WHY THE COMPLAINT
SHOULD NOT BE DISMISSED**

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“SOX”), 18 U.S.C. § 1514A. The present matter is before me based on the undersigned’s Order to Show Cause Why the Complaint Should Not Be Dismissed, issued July 31, 2012. For the reasons outlined below, I find good cause why the complaints set forth in 2011-SOX-31 should not be dismissed.

In Complainant’s Memorandum Showing Cause Why the Complaint Should Not Be Dismissed (“Complainant’s Memorandum”), Complainant argues that, to meet the adverse action element required of a claim under SOX, he need only demonstrate that Respondent engaged in “conduct that is an unfavorable employment action that is more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” (Complainant’s Memorandum Showing Cause Why the Complaint Should Not Be Dismissed, Sept. 5, 2012; hereinafter “Comp. Memo.”). Complainant argues that the alleged adverse action need not affect the “terms and conditions of employment” and cites to *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003 (ARB Sept. 13, 2011) (SOX) in support of his position. Alternatively, Complainant argues that Respondent’s pursuit of a lawsuit seeking the return of arbitration and attorneys’ fees paid on Complainant’s behalf in the Illinois state courts and filing of an IRS Form 1099 are adverse actions that affected the terms and conditions of Complainant’s employment with Respondent.

In Respondent’s Reply to Complainant’s Memorandum Showing Cause Why the Complaint Should Not Be Dismissed (“Respondent’s Reply”), Respondent argues that post-employment actions are not actionable adverse employment actions under SOX and, in support of its position, cites to *Farnham v. International Manufacturing*, ARB No. 07-095 slip op. (ARB

Feb. 6, 2009) (SOX) and *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 04-115 (ARB June 2, 2006) (SOX). (Respondent's Reply to Complainant's Memorandum Showing Cause Why the Complaint Should Not be Dismissed, Sept. 27, 2012; hereinafter "Resp. Reply").

In making my decision on the Order to Show Cause Why the Complaint Should Not Be Dismissed, I have considered the materials submitted in connection with the Order, to include Complainant's Complaint and the legal arguments raised by the parties.

PROCEDURAL HISTORY

On February 13, 2008, Complainant received notice that he was being terminated from his employment with Respondent Navistar International Corporation. The termination became effective on February 15, 2008. On April 7, 2008, Complainant filed his first SOX complaint with OSHA, where he alleged that his termination was in retaliation for engaging in protected conduct under SOX. Following an investigation, OSHA found Complainant's allegations to be without merit and dismissed the complaint on March 23, 2009. Complainant timely appealed this determination to the Office of Administrative Law Judges. The case was designated as Case No. 2009-SOX-43 and was assigned to the undersigned on April 14, 2009. On December 7, 2009, I stayed these proceedings pending the Administrative Review Board's resolution of my Certification of an issue for interlocutory appeal. On March 4, 2010, the Administrative Review Board denied Respondents' Petition for Interlocutory Review.

By Order dated March 18, 2010, I granted Respondents' Consent Motion for Continued Stay in Case No. 2009-SOX-43, pending the outcome of an appeal in the Circuit Court of DuPage County, Illinois. The lawsuit before the Illinois Circuit Court involved the validity and enforceability of a Waiver and Release Agreement that Complainant signed shortly before he was terminated from Respondent Navistar International on February 13, 2008, which Respondents argued "fully releases the same claims [Complainant] is pursuing before" the Office of Administrative Law Judges.

On July 12, 2010, Complainant filed his second SOX complaint with OSHA, in which he alleged that Respondent Navistar International had engaged in two acts of post-employment retaliation against him for engaging in protected conduct under SOX. First, Complainant alleged that Respondent filed a reclamation claim against him in the Circuit Court of Cook County, Illinois. Second, he alleged that Respondent filed a Form 1099 with the IRS that reported payments to him of \$146,324 for arbitration costs and attorney's fees. Complainant argued that both of these events constitute "adverse employment actions" against him in retaliation for engaging in protected conduct under SOX.

Following an investigation, OSHA found that the alleged retaliatory conduct alleged in 2010 does not constitute an adverse employment action under SOX. Accordingly, OSHA dismissed the complaint on February 4, 2011. Complainant timely appealed this determination to the Office of Administrative Law Judges. The case was designated as Case No. 2011-SOX-31 and was assigned to the undersigned on March 9, 2011.

By Order dated April 12, 2011, I consolidated the cases designated as Case Nos. 2011-SOX-31 and 2009-SOX-43. I further ordered that the case designated as Case No. 2011-SOX-31 be placed in abeyance until the case designated as Case No. 2009-SOX-43 was removed from abeyance.

On February 9, 2012, Complainant, with the consent of Respondent Navistar International, filed a Consent Motion to Lift Stay and to Enter Briefing Schedule. Complainant indicated that the Appellate Court of Illinois, Second District had ruled in favor of Respondents on the issue of the validity of the Waiver and Release Agreement. As a result, the parties requested that the present SOX cases be removed from abeyance. Complainant also noted that the parties disagreed on whether the Waiver and Release Agreement applies to the present proceedings.

By Order dated February 10, 2012, I granted Complainant's Consent Motion and removed Case Nos. 2011-SOX-31 and 2009-SOX-43 from abeyance. I also granted Respondents 30 days to file a motion for summary decision. Complainant was granted 30 days from the date on which such a motion was filed to submit an opposition.

On March 9, 2012, Respondents filed a Motion for Summary Decision on both of Complainant's SOX claims. After extensive briefing by the parties and by Order dated July 31, 2012, I denied Respondents' Motion for Summary Decision.

By Order dated July 31, 2012, I also issued an Order to Show Cause Why the Complaint Should Not Be Dismissed with regard to the claims set forth in 2011-SOX-31. More specifically, I ordered Complainant to show cause why his complaint should not be dismissed for failure to state a claim under SOX.

On September 5, 2012, Complainant filed Complainant's Memorandum Showing Cause Why the Complaint Should Not Be Dismissed. On September 17, 2012, Respondent filed a Consent Motion for Extension of Time to Reply to Complainant's Memorandum Showing Cause Why the Complaint Should Not Be Dismissed. By Order dated September 18, 2012, I granted Respondent's Motion for Extension of Time. On September 27, 2012, Respondent filed Respondent's Reply to Complainant's Memorandum Showing Cause Why the Complaint Should Not Be Dismissed and Respondents' Motion for Leave to File *Instantly* Reply in Support of Motion to Reconsider, or in the Alternative, Certify Issues for Interlocutory Appeal to the Administrative Review Board.¹

DISCUSSION

Pleading Requirements

Neither the regulations promulgated under SOX nor 29 C.F.R Part 18 (procedures for administrative law judge hearings) set forth standards for dismissals for failure to state a claim. See 29 C.F.R. Parts 18 and 1980; *Evans v. Environmental Protection Agency*, ARB No. 08-059,

¹ Simultaneously with this Order, I have issued an Order Denying Respondents' Request for Reconsideration and Request to Certify Issues for Interlocutory Appeal with regard to 2009-SOX-00043.

slip op. at 9 (ARB July 31, 2012) (CAA). Thus, the standards set forth in the Federal Rules of Civil Procedure are applicable to this motion. 29 C.F.R. § 18.1(a) (“The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.”). Under Rule 12(b)(6), a party may move to dismiss a claim based on the opposing party’s “failure to state a claim upon which relief can be granted. . . .” Fed. R. Civ. Pro. 12(b)(6). However, Rule 12 motions challenging the sufficiency of the pleadings “are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge . . . rules.” *Sylvester v. Parexel Int’l*, ARB No. 07-123 slip op. at 13 (ARB May 25, 2011) (SOX). The heightened standards for evaluating the sufficiency of complaints in federal courts are not applicable to complaints under SOX.² *Id.* Rather, administrative whistleblower complaints that give “‘fair notice’ of the protected activity and adverse action can withstand a motion to dismiss for failure to state a claim.” *Evans*, ARB No. 08-059, slip op. at 9.

To sufficiently state and give fair notice of a claim, the complaint need only include “1) some facts about the protected activity, showing some ‘relatedness’ to [SOX], 2) some facts about the adverse action, 3) a general assertion of causation, and 4) a description of the relief that is sought.” *Evans*, ARB No. 08-059 slip op. at 9. When deciding whether to dismiss a complaint, the administrative law judge must assume the truth of all facts alleged in the complaint and draw all reasonable inferences in favor of the non-moving party. *Id.* at 10. Because this motion was brought about by an order of this Court, I will treat Complainant as the non-moving party. In deciding whether a complaint should be dismissed for failure to state a claim, the administrative law judge should not consider new evidence submitted by a party. *Id.* The determination of whether to dismiss a SOX complaint under Federal Rule of Civil Procedure 12(b)(6) “tests the sufficiency of the complaint, not the merits of the case.” *Id.*

SOX

In relevant part, SOX provides that no employer may “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment” because that employee engaged in protected conduct under SOX. 18 U.S.C. § 1514A(a); 29 C.F.R. § 1980.102(a). In order to satisfy his initial *prima facie* burden, Complainant must establish 1) that he engaged in SOX-protected activity or conduct; 2) that Respondent knew that Complainant engaged in the protected activity or conduct; 3) that he suffered an adverse employment action; and 4) that the circumstances are sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. 29 C.F.R. § 1980.104(b)(1)(i)-(iii) (2011); 76 Fed. Reg. 68,084, 68,094 (Nov. 3, 2011); *Funke v. Fed. Express Corp.*, ARB No. 09-004, slip op. at 7 (ARB July 8, 2011) (SOX). In the regulations implementing SOX, the Department of Labor defines an “employee” as “an

² These higher standards were enunciated by the U.S. Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcraft v. Iqbal*, 556 U.S. 662 (2009). The ARB has held that the Department of Labor “expressly rejected such a heightened standard at the complaint stage when it promulgated . . . SOX’s regulations.” *Sylvester v. Parexel Int’l*, ARB No. 07-123 slip op. at 13 n. 9 (ARB May 25, 2011) (SOX) (“OSHA believes that it would be overly restrictive to require a complaint to include detailed analyses when the purpose of the complaint is to trigger an investigation to determine whether evidence of discrimination exists.” (quoting 69 Fed. Reg. 52104, 52106 (Aug. 24, 2004))).

individual presently or formerly working for a company . . . or an individual whose employment could be affected by a company. . . .” 20 C.F.R. § 1980.101.

Adverse Employment Action

The Board has historically drawn guidance from Title VII jurisprudence when interpreting the anti-retaliation statutes within the jurisdiction of the Department of Labor. *Melton v. Yellow Transportation*, ARB No. 06-052, slip op. at 19 (ARB Sept. 30, 2008) (STA). A brief summary of U.S. Supreme Court Title VII and Board anti-retaliation jurisprudence is included below in order to provide context for my decision regarding the current state of the Board’s precedent as it pertains to SOX.

Supreme Court Title VII Jurisprudence

In *Burlington Northern & Santa Fe Railway Co.*, 548 U.S. 53 (2006), the United States Supreme Court interpreted the anti-retaliation provision set forth in Section 704(a) of Title VII. The Court contrasted the language of the anti-retaliation provision of § 704(a)³ with that of the anti-discrimination provision set forth in § 703(a).⁴ *Id.* at 61-62. The Court held that the language of Title VII’s anti-discrimination provision, including the phrase “compensation, terms, conditions, or privileges of employment,” “explicitly limit[s] the scope of that provision to actions that affect employment or alter the conditions of the workplace.” *Id.* at 62. Thus, the Court held that the anti-discrimination and anti-retaliation provisions of Title VII are not coterminous. *Id.* at 67. Rather, because the anti-retaliation provision of Title VII does not include such limiting language, the Court held that its scope “extends beyond work-place related or employment-related retaliatory acts.” *Id.* In contrast, the Court noted that the anti-discrimination provision, because its plain language narrows the scope of actionable conduct to that affecting the “compensation, terms, conditions or privileges of employment,” is limited in scope to actions that affect employment or alter the conditions of employment. *Id.*

³ The anti-retaliation provision provides that “[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment” because the employee or applicant engaged in protected activity. *Burlington Northern*, 548 U.S. at 62 (citing 42 U.S.C. § 2000e-3(a)) (emphasis added by the *Burlington* court).

⁴ The anti-discrimination provision provides:

It shall be an unlawful employment practice for an employer –

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Burlington Northern, 548 U.S. at 61-62 (citing 42 U.S.C. 2000e-2(a)) (emphasis added by the *Burlington* court).

Although the *Burlington Northern* Court held that the broad language of Title VII’s anti-retaliation provision did not limit the scope of actionable conduct to that which is employment-related, the Court also held that the provision does not protect from all retaliation. *Id.* at 67. Rather, the Court interpreted that provision as including a limitation on the degree of actionable retaliation. *Id.* To be actionable, retaliatory conduct must rise to a level of seriousness such that “it might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Id.* at 68 (internal quotations omitted). Thus, the *Burlington Northern* Court enunciated limitations on both the scope and degree of harm required to demonstrate discrimination with regard to the “compensation, terms, conditions, or privileges of employment” under Title VII’s anti-discrimination provision at § 703(a). In contrast, Title VII’s anti-retaliation provision at §704(a), which does not contain language limiting the scope of retaliatory conduct, only limits actionable conduct in terms of its degree.

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the United States Supreme Court addressed the meaning of “compensation, terms, conditions, or privileges of employment” under Title VII’s anti-discrimination provision at § 703(a). The Court held that the language “is not limited to ‘economic’ or ‘tangible’ discrimination.” *Id.* at 64. Rather, the Court stated that the language “evinces a congressional intent to strike at the entire spectrum of disparate treatment [of protected classes] in employment.” *Id.* (citations omitted). The Court also quoted with approval a Fifth Circuit case recognizing a cause of action for discrimination under Title VII based upon a discriminatory work environment and explaining that an employee’s protection under Title VII extends beyond strictly economic “aspects of employment”:

[T]he phrase ‘terms, conditions or privileges of employment’ in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. . . .

Id. at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)). However, the Court warned that “not all workplace conduct that may be described as ‘harassment’ affects a ‘term, condition, or privilege’ of employment.” *Id.* at 67.

Administrative Review Board (“Board”) Precedent

In *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 04-115 slip op. (ARB June 2, 2006) (SOX), the Board held that the complainant’s allegation of post-employment retaliation against his former employer was “not an adverse personnel action that affected the terms and conditions of his employment with that employer.” *Id.* at 21. The Board’s rationale was that, because the complainant no longer worked for the employer when the alleged harassment occurred, the former employer’s conduct necessarily could not have affected the terms and conditions of employment. *Id.*

In *Farnham v. International Manufacturing*, ARB No. 07-095 slip op. (ARB Feb. 6, 2009) (SOX), the Board held that a former employer’s post-termination civil lawsuit

against a former employee did not affect the “terms and conditions” of that employee’s former employment. The employer’s lawsuit against the former employee alleged tortious interference with the employer’s loan transactions, per se slander, and intentional infliction of emotional distress. *Id.* at 4. In affirming the administrative law judge’s dismissal of the former employee’s SOX complaint, the Board explained that the former employee had failed to establish how the employer’s lawsuit “injured him in any way in relation to ‘the terms and conditions of his employment.’” *Id.* at 10.

The Board has applied the *Burlington Northern* “materially adverse” standard to impose a limit on the degree of adverse employment actions that are actionable under SOX. *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052 slip op. at 24 (ARB Sept. 30, 2008) (STA); *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, slip op. at 16-20 (ARB Sept. 13, 2011) (SOX). In *Melton*, the majority of the Board held that the “terms and conditions” of employment language of Labor Department statutes limits only the scope of actionable conduct and does not apply to the degree of harm required to sustain a claim under SOX. *Melton*, at 18. Thus, the Board held that, in a SOX claim, the scope of harm “must be employment-related,” and the degree of harm must meet the *Burlington Northern* materially adverse standard. *Id.* at 18-19. Accordingly, under *Melton*, the alleged adverse action in a SOX complaint must be both 1) “employment-related” and 2) rise to a level of seriousness such that “it might have dissuaded a reasonable worker from” engaging in activity protected under SOX. *Id.*

In *Rowland v. Prudential Equity Group*, ARB No. 08-108 slip op. (ARB Jan. 13, 2010) (SOX), the Board held that a former employer’s filing of a district court action to enforce an arbitration award could constitute an adverse action under SOX. *Id.* at 10. The Board first rejected the complainant’s argument that a retaliatory adverse action under SOX need not relate to employment or the workplace. *Id.* at 9. The Board explained that, unlike the Title VII anti-retaliation provision at issue in *Burlington Northern*, the anti-retaliation provision in SOX “specifically limits adverse actions to those that affect the employee’s ‘terms and conditions of employment.’” *Id.* However, the Board held that the employer did offer an employment benefit when it offered to pay for the costs of arbitration and the employer’s own attorney’s fees. *Id.* at 9-10. Thus, the Board explained that, because the lawsuit resulted in the employee being required to pay for the costs of the arbitration proceedings and the employer’s attorney’s fees, the employer’s lawsuit against the former employee to recoup the arbitration costs and attorney’s fees was an adverse employment action.⁵ *Id.* at 10.

In *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003 slip op. (ARB Sept. 13, 2011) (SOX), the Board, in dicta, expressed its intention to “pick up where the *Melton* majority left off.” *Id.* at 18. Pointing to the Supreme Court’s broad reading of Title VII’s anti-discrimination provision in *Meritor Savings*, the Board stated that “‘terms and conditions of employment’ are not significant limiting words and should be construed broadly within the remedial context of [SOX].” *Id.* The Board explained that the “language ‘in the terms and

⁵ However, the Board held that the employee had forfeited her right to claim the employment benefit, the employer’s payment of the arbitration costs and employer’s own attorney’s fees, when she voluntarily agreed to pay for that benefit in return for the employer’s agreement to dismiss the arbitration action. *Rowland*, slip op. at 10. Thus, the Board held that although the lawsuit adversely affected an employment benefit, it did not affect an employment benefit to which the former employee was still entitled. *Id.*

conditions of employment’ does not limit [SOX]’s intended protection to economic or employment-related actions.” *Id.* The Board noted that SOX “contains very different language than the comparable Title VII provisions” and concluded that “a correspondingly different construction is required.” *Id.* at 19. Importantly, the Board also held that an adverse action is “simply something unfavorable to an employee, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis.” *Id.* at 29.

Post-Employment Employer Conduct as Adverse Action under SOX

Complainant argues that, under *Menendez*, post-employment adverse actions are actionable under SOX. According to Complainant, *Menendez* overruled both *Farnham* and *Harvey*, causing their restriction that only adverse actions that occur during the pendency of an employment relationship are actionable under SOX, to no longer be good law. (Comp. Memo. at 8-11). Respondent argues that the Board’s discussion of the scope of actionable employer conduct in *Menendez* is mere dicta and thus, not binding on this court. (Resp. Reply at 5). Further, Respondent reads *Menendez* more narrowly than does Complainant. Respondent takes the position that *Menendez*’s call for a broader interpretation of “terms and conditions of employment” is limited only to the location where the alleged conduct occurs and does not apply to the timing of the conduct. (Resp. Reply at 5-6). Thus, under Respondent’s reading of *Menendez*, retaliatory employer conduct that occurs outside of the workplace during the pendency of employment is actionable under SOX; whereas, no retaliatory conduct by the employer after the termination of the employment relationship is actionable.

As illustrated above, the development of the Board’s interpretation, regarding the scope of employer actions that fall within the ambit of “adverse employment actions” under SOX, has changed. *Farnham* and *Harvey* support the proposition that adverse actions taken after the termination of the employment relationship are not actionable under SOX. However, although not directly addressing the issue of post-employment adverse actions, the Board has since found, in *Rowland*, that a post-employment lawsuit can be an adverse employment action under SOX. Also, the Board, in *Menendez*, has since stated its intention to interpret the “terms and conditions of employment” language of SOX broadly in accordance with the statute’s remedial purpose. Although the Board communicated this intention in dicta, I find the discussion instructive on the issue of whether post-employment employer conduct is actionable under SOX.

The inclusion of post-employment adverse actions within the ambit of employer conduct under SOX is consistent with the plain language of SOX and the Department of Labor’s regulations implementing the Act. The regulations define “employee” to include “those formerly working for a company.” 29 C.F.R. 1980.101. An interpretation of SOX that includes post-employment adverse actions is also consistent with the Board’s statements of the purpose of SOX and other anti-retaliation statutes under the Department of Labor’s jurisdiction.⁶ *See*

⁶ The Board’s understanding of the purpose of anti-retaliation provisions within the jurisdiction of the Department of Labor is also consistent with the U.S. Supreme Court’s enunciation of the purpose of Title VII’s anti-retaliation provision. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997); *Burlington Northern*, 548 U.S. at 63 (“A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. [A] limited construction would fail to fully achieve the antiretaliation provisions ‘primary purpose,’ namely, ‘maintaining unfettered access to statutory remedial mechanisms.’” (quoting *Robinson*, 519 U.S. at 346)). The U.S. Supreme Court interpreted the term “employee” in Title VII’s anti-retaliation provision to include former employees

Menendez, slip op. at 20 (“[A] broader definition of the term “adverse action . . . is consistent with the expansive construction required of whistleblower statutes.”); *Williams v. American Airlines, Inc.*, ARB No. 09-018, slip op. at 15 (ARB Dec. 29, 2010) (AIR). I further find that interpreting the language of SOX in a manner that extends its protections to former employees who face post-employment retaliation is consistent with the purpose of anti-retaliation statutes – “maintaining unfettered access to statutory remedial mechanisms.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

An expansive interpretation of SOX that includes post-employment retaliation as an adverse action is also consistent with the Department’s recognition of “blacklisting” as a form of actionable adverse action under anti-retaliation statutes, although it frequently occurs only after the termination of the employment relationship. See *Egenrieder v. Metropolitan Edison/G.P.U.* 1985-ERA-23 (Sec’y Apr. 20, 1987); *Pickett v. Tennessee Valley Authority*, ARB Nos. 00-56 and 00-59, slip op. at 9 (ARB Nov. 28, 2003) (CAA) (“The ARB has stated that blacklisting is the ‘quintessential discrimination.’”); *Earwood v. Dart Container Corp.*, No. 93-STA-16, slip op. at 5 (Sec’y Dec. 7, 1994) (“[E]ffective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee’s protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result.”); *Webb v. Carolina Power & Light Co.*, ARB No. 96-176, slip op. at 7 (ARB Aug. 26, 1997) (ERA) (“Systematically excluding an individual from consideration for employment, by its very nature, is a continuing course of conduct and may constitute a continuing violation if it is based upon an employee’s protected activity.”); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 337, 345-46 (1997).

Prior to its decision in *Menendez*, the Board’s precedent excluded from SOX protection post-employment retaliation that relates to a complainant’s previous employment with a respondent. See *Farnham v. International Manufacturing*, ARB No. 07-095 slip op. (ARB Feb. 6, 2009) (SOX); *Harvey v. Home Depot*, ARB No. 04-114, slip op. at 21 (ARB June 2, 2006) (SOX). The rationale was that, in the absence of an employment relationship, there could be no adverse personnel action that affected the terms and conditions of the complainant’s employment with his former employer. *Id.* However, the Board’s precedent simultaneously includes blacklisting as an adverse action under whistleblower statutes within the jurisdiction of the Department of Labor. See *Egenrieder v. Metropolitan Edison/G.P.U.* 1985-ERA-23 (Sec’y Apr. 20, 1987). Blacklisting includes post-employment retaliation that relates to a complainant’s future employment with another employer despite the lack of an employment relationship with either the former or potential future employer. Thus, I find that the inclusion of post-employment adverse actions is consistent with the Board’s whistleblower precedent that

although the plain language did not include such language. *Robinson Shell*, 519 U.S. at 346. In so holding, the Court was persuaded by EEOC’s argument that

exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims.

Id. By analogy, failing to extend protection under SOX’s anti-retaliation provision would “undermine the effectiveness” of SOX’s corporate and fraud accountability provisions by allowing “the threat of post-employment retaliation” to deter potential whistleblowers from reporting SOX violations.

includes blacklisting as a form of prohibited post-employment adverse action despite the absence of an employment relationship at the time of the conduct.

For the reasons stated above, I find that post-employment adverse actions are within the scope of “adverse actions” under SOX.

The Relationship between an Adverse Action and the Employment Relationship under SOX

Having found that post-employment conduct can fall within the scope of cognizable adverse actions under SOX, I will address the issue of whether, and if so, to what extent, an adverse action must affect the terms and conditions of employment. The express language of SOX provides that no employer may “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee *in the terms and conditions of employment*.” 28 U.S.C. § 1514A (emphasis added). Title VII’s anti-discrimination provision prohibits discrimination “with respect to his compensation, terms, conditions, or privileges of employment.” 42 U.S.C. 2000e-2(a)(1). The U.S. Supreme Court, in *Burlington Northern*, interpreted this language to “explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace.” *Burlington Northern*, 548 U.S. at 62. However, in *Meritor Savings*, the Court quoted with approval a Fifth Circuit case stating that the phrase “terms, conditions, or privileges of employment” in Title VII is “an expansive concept.” *Meritor Savings*, 477 U.S. at 66.

The Board, in *Menendez*, explained that SOX “contains very different language than the comparable Title VII provisions and a correspondingly different construction is required.” *Menendez*, at 19. Although the Board did not clarify which differences in the statutes’ language it believed required different statutory interpretations, the Board concluded that “terms and conditions of employment are not significant limiting words [in SOX] and should be construed broadly within the remedial context of” SOX. The Board went further and stated that, under SOX, “the language ‘in the terms and conditions of employment’ does not limit [SOX]’s intended protection to economic or *employment-related* actions.” *Id.* (emphasis added). The Board understood the “terms and conditions” language of SOX to be distinguishable from the limiting language in Title VII. Accordingly, as *Menendez* is the most recent expression of the Board’s approach to interpreting the statutory language of SOX, I find that the Board’s most recent guidance compels me to find that an alleged adverse action need not be “employment-related” to support a cognizable claim under SOX. However, as I will explain below, I also find that Complainant has alleged adverse actions, the filing of the IRS Form 1099 and the Cook County lawsuit, that are related to his employment with Respondent.

COOK COUNTY LAWSUIT ALLEGING BREACH OF THE WAIVER AGREEMENT

Complaint

With regard to the Cook County lawsuit alleging breach of contract of the Waiver Agreement, Complainant alleges in his Complaint:

78. Pursuant to the [Executive Severance Agreement] (“ESA”), [Respondent] is obligated to advance to [Complainant] his reasonable attorneys’ fees and costs for exercising his right to enforce the ESA in arbitration.

79. Due to [Respondent’s] refusal to honor its obligations under the ESA, on or about May 30, 2008, [Complainant] initiated an arbitration proceeding pursuant to the ESA.

80. On or about October 6, 2008, [Complainant] obtained a court order from an Illinois state court in DuPage County . . . compelling [Respondent] to engage in arbitration.

. . . .

82. On or about June 21, 2010, the AAA ordered [Respondent] to advance [Complainant] \$200,000 for attorneys’ fees under the ESA.

. . . .

99. On or about April 13, 2010, [Respondent] filed an action for Breach of Contract under the Waiver against [Complainant] in Illinois state court in Cook County. . . .

100. [Respondent’s] complaint alleges breach of contract of the Waiver and demanded, as damages, the attorney’s fees [Respondent] advanced to [Complainant’s] counsel pursuant to the ESA. [Respondent] also sought certain costs it had expended in the arbitration. In total, [Respondent] is seeking about \$34,000 in Cook County.

. . . .

102. [Respondent] brought the lawsuit to further intimidate and punish [Complainant] in order to dissuade him from engaging in further protected conduct.

. . . .

141. The Cook County Action against [Complainant] is vexatious and a needless multiplication of already cumbersome and unnecessary proceedings against [Complainant].

142. Vexatious and redundant litigation as the result of protected activity would significantly chill whistle-blowing activity at [Respondent].

(Complainant’s Complaint for Relief Under the Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. § 1514A at 14, 16, 22; hereinafter “Complaint”).

Complainant's Legal Arguments

Complainant argues that, under *Menendez*, an alleged adverse action need not relate to the terms and conditions of Complainant's employment. (Comp. Memo. at 2). Alternatively, Complainant argues that, even if the alleged adverse action is required to affect the terms and conditions of his employment, the Cook County lawsuit was an adverse action that did affect the terms and conditions of his employment, to include his rights under the Executive Severance Agreement. *Id.* at 8. In Complainant's Memorandum, Complainant argues that *Farnham* and *Harvey* have both been overruled by *Menendez*. *Id.* at 8-11. Complainant argues that, even if *Farnham* is still binding legal precedent, it is distinguishable from the facts of the case at bar:

But *Farnham* is no longer good law and it is not the law that applies to this case, but even if it is, [Complainant's] Second SOX Complaint is distinct from the allegations found wanting in *Farnham* because . . . the adverse action[] alleged by [Complainant] – the Cook County lawsuit . . . – arise[s] directly from the terms and conditions of [Complainant's] employment with [Respondent]. While in *Farnham* the post-employment litigation was a three-count tort case arising out of the fallout of Farnham's resignation from the company, Respondents' lawsuit against Fernandez in Cook County is a breach of contract action seeking to enforce the Waiver and Release Agreement that [Complainant] signed as a condition of receiving his severance benefits. As the *Rowland* Court determined, arbitration of an employment dispute is considered an employment benefit. That is, the Cook County action directly affected the benefits and privileges of [Complainant's] employment with [Respondent] – namely, whether [Complainant] was in breach of the waiver affected whether [Respondent] would honor the arbitration process and decision.

Id. at 9.

Complainant further argues that *Harvey* has been overruled by *Menendez*, and, even if it has not, that it is distinguishable.

. . . *Harvey* is neither good law, nor is it applicable here. It is a 2006 case that is best explained by the fact that neither party responded to the ALJ's show cause order, and it has been overruled or overtaken by *Menendez*. But if *Harvey* has any applicability, [Complainant's] Second SOX Complaint is also distinguished from *Harvey* because both of the adverse actions in this case arise directly from the terms and conditions of [Complainant's] employment with [Respondent]. The post-employment litigation in *Harvey* was a state bar grievance by the employee against an attorney representing the former employer.

Id. at 10.

Alternatively, Complainant argues that, even if Complainant is required to demonstrate that the adverse action affected a term or condition of employment, the Cook County lawsuit was an adverse employment action that affected the terms and conditions of Complainant's employment with Respondent:

In this case, Respondents have pursued their lawsuit against [Complainant], and the lawsuit against [Complainant] in Cook County is a breach of contract action seeking to enforce the Waiver and Release Agreement that [Complainant] signed as a condition of receiving his severance benefits.

Id. at 10-11.

In May 2012, [Complainant] prevailed on a motion to dismiss the Cook County breach of contract action, and Judge Sutter's reaction to the suit further underlines its retaliatory nature. At the motions hearing, Judge Sutter roundly admonished [Respondent] for writing the Cook County Complaint in a manner that misled the court: 'I am very disturbed that those paragraphs were in the amended complaint purporting to quote the holding of the Appellate Court when in my view the holding of the Appellate Court is just the opposite.' In itself the Cook County suit is an adverse action; and when considered with the DuPage suit and Respondents' actions regarding Fernandez's benefits as well, it is a cumulative and spiteful adverse action.

Id. at 6 (citations omitted).

Not only [is] the Cook County suit . . . [an] adverse action affecting [Complainant's] employment benefits, they are clearly retaliatory. . . . [T]he Cook County suit was dismissed in May 2012, rejecting [Respondent's] argument that [Complainant] breached the Waiver and Release a second time by pursuing arbitration under the terms of the Executive Severance Agreement. Judge Sutter noted, 'It's clear that Judge Popejoy [who presided over the DuPage County action] ruled and the Appellate Court affirmed the attorney fees and arbitration expenses are not recoverable under [Respondent's] breach of contract claim for breach of the Waiver and Release Agreement. . . . I agree with [Complainant] that this case is essentially re-filing of the DuPage Chancery action.'

Id. at 11 (citations omitted).

Respondent's Legal Arguments

Respondent, in Respondent's Reply, argues that *Melton* and *Menendez* are inapplicable to the case at bar because "neither . . . involved post-employment actions in any way." (Resp. Reply at 4). According to Respondent, although *Melton* and *Menendez* addressed the concepts of the "degree" and "scope" of adverse actions under SOX, they are distinct in that the Board did not decide "whether post-employment actions can be adverse employment actions." *Id.* Respondent argues that *Menendez* does not stand for the proposition that adverse employment

actions under SOX can include actions taken after the termination of the employment relationship. *Id.* at 4-5. Rather, Respondent argues that the broadened scope enunciated in *Menendez* merely extends the scope of employer conduct that is actionable under SOX to include actions that “do not relate to the workplace.” *Id.* at 6. As an example, Respondent argues that “harassing an employee at the neighborhood bar after work” because they had engaged in protected activity would be an adverse action under *Menendez* despite there being “no direct connection to the employee’s terms or conditions of employment.”⁷ *Id.* Based on this reading of *Menendez*, Respondent contends that *Menendez* does not affect, let alone overrule, the Board’s decisions in *Farnham* and *Harvey*. *Id.* According to Respondents, *Farnham* and *Harvey* remain binding Board precedent and hold that post-employment actions cannot be adverse employment actions under SOX.⁸ *Id.*

Respondent argues that, in order to be an adverse action, a lawsuit “must target the employee with a retaliatory motive and be frivolous.” (Resp. Reply at 10). Respondent contends that the Cook County lawsuit is not retaliatory because “it seeks nothing from” Complainant and “an action that has no meaningful effect on a Complainant cannot be an adverse employment action.” *Id.* at 11. According to Respondent, “[a] lawsuit that was not intended to affect an allegedly aggrieved former employee, and which, in fact has not and will not affect that employee, cannot be retaliatory in nature.” *Id.* at 13.

Respondent characterizes the Cook County lawsuit as a suit seeking the return of the attorney’s fees and costs paid to Complainant’s counsel by Respondent. (Resp. Reply at 8, 11).

⁷ Respondent states that this type of employer conduct, “harassment at a neighborhood bar after work” while a complainant is still an employee of the respondent, is the “type of employer conduct *Menendez* was attempting to cover through SOX.” (Resp. Reply at 6). In *Menendez*, the complainant alleged five adverse employment actions: (1) breach of confidentiality by identifying *Menendez* as the individual who initiated an SEC investigation to other employer executives and outside counsel; (2) isolation at the workplace; (3) removal of job duties; (4) demotion; and (5) constructive discharge. *Menendez*, slip op. at 14, 21-27.

⁸ Respondent also argues that Complainant cannot establish the element of causation required under SOX. According to Respondent, too much time elapsed between Complainant’s protected activities and the alleged adverse actions to support an inference of causation. First, Complainant is not required to demonstrate causation by use of an inference based on temporal proximity to his protected activity; rather, Complainant may come forward with direct evidence of causation. *Oest v. Illinois Department of Corrections*, 240 F.3d 605, 616 (7th Cir. 2001). Second, the Seventh Circuit, in Title VII retaliation claims, has held that when evaluating time lapses with regard to the element of causation, a:

mechanistically applied time frame would ill serve our obligation to be faithful to the legislative purpose of Title VII. The facts and circumstances of each case necessarily must be evaluated to determine whether an interval is too long to permit [the trier-of-fact] to determine rationally that an adverse employment action is linked to an employee’s earlier complaint. The inference of causation weakens as the time between the protected expression and the adverse action increases, and then ‘additional proof of a causal nexus is necessary.’ Thus, we have permitted retaliation charges to proceed in the face of long intervals only when additional circumstances demonstrate that an employer’s acts might not be legitimate.

Id. (citing *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998); *McKenzie v. Illinois Dep’t of Transp.*, 92 F.3d 473, 485 (7th Cir. 1996)). Accordingly, any determination of causation by an inference in this case will require me to evaluate the evidence presented, a review that is beyond the standard applicable to this Order to Show Cause Why the Complaint Should not be Dismissed.

Respondent's argument on the merits of the Cook County lawsuit seems to be that: because the arbitrators found in favor of Respondent with regard to Complainant's claim of entitlement to benefits under the Executive Severance Agreement, Respondent is entitled to the return of the attorney's fees and costs advanced to Complainant's counsel. Respondent argues that "[a]t bottom, the Cook County Action (in everything but the caption)" is between Respondent and Complainant's counsel. *Id.* at 13. According to Respondent, the Cook County lawsuit cannot be deemed an adverse employment action because, even if Respondent prevails, Complainant will not be required to reimburse the attorney's fees sought in the litigation. *Id.*

Respondent alleges that it pursued the Cook County action to resolve the "only issue remaining at the conclusion" of the DuPage County lawsuit – whether Respondent's breach of the Waiver Agreement relieved Respondent of its obligation to pay Complainant's attorney's fees. (Resp. Reply at 11). According to Respondent, the DuPage County court did not decide the issue ("explicitly refusing to rule one way or the other and leaving adjudication of the matter to another court on another day") and left the issue not subject to review by Illinois appellate courts. *Id.* Thus, Respondent argues that the Cook County lawsuit is not an adverse action because it is not frivolous, does not target Complainant, and did not target him with retaliatory intent. *Id.* at 16.

Analysis

Complainant alleges that Respondent's prosecution of the Cook County lawsuit was an adverse employment action. Complainant avers that the suit affected the terms and conditions of his employment with Respondent because it "is a breach of contract action seeking to enforce the Waiver and Release Agreement [Complainant] signed as a condition of receiving his severance benefits." (Comp. Memo. at 10). As characterized by Respondent, the Cook County lawsuit sought, as damages, the return of the attorney's fees paid to Complainant's attorneys for their services on Complainant's behalf, and under the terms of the Executive Severance Agreement, during the arbitration dispute. (Resp. Reply at 8, 11). Complainant alleges, and asserts that the Cook County court agreed, that the issue of the recovery of these same attorney's fees had already been adjudicated, and affirmed on appeal, by the Illinois state courts in the DuPage County lawsuit. (Comp. Memo. at 11). Respondent replies to Complainant's allegation by asserting that the issue of whether Respondent was entitled to the return of the attorney's fees already paid on Complainant's behalf was an "issue remaining at the conclusion" of the DuPage County lawsuit. (Resp. Reply at 11).

In *Rowland*, the Board held that a lawsuit can be an adverse employment action under SOX without proof that the lawsuit was a sham. *Rowland*, ARB No. 08-108 slip op. at 7 (ARB Jan. 13, 2010) (SOX) (unpub.). In fact, the *Rowland* court expressly refused to extend the *Noerr-Pennington* doctrine⁹ to SOX cases:

⁹ Under the *Noerr-Pennington* doctrine, those "who petition the government for redress are immune from antitrust liability unless the petition is a sham." *Rowland*, ARB No. 08-108 slip op. at 5 (citing *E.R.R. President's Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965)). Recognizing a circuit split regarding whether the doctrine should be applied outside of the anti-trust context, the ARB declined to extend the *Noerr-Pennington* doctrine to SOX whistleblower cases. *Id.* at 7.

[A]uthority exists that lawsuits, counterclaims, and the like can be retaliatory under Title VII. We have often relied on Title VII jurisprudence in deciding whistleblower cases. We have not found a case in which the Ninth Circuit has applied the doctrine under Title VII. Absent any precedent that petitioning the government provides immunity in Title VII or whistleblower cases under our jurisdiction, we will not apply the *Noerr-Pennington* doctrine.

Id. at 7. Respondent cites to no Seventh Circuit or other binding precedent extending the *Noerr-Pennington* doctrine to SOX or other whistleblower statutes within the Board's jurisdiction, and I have found none. Accordingly, I will adhere to binding Board precedent and decline to apply the *Noerr-Pennington* doctrine to this SOX case. Accordingly, I find that the Complainant's allegation that Employer pursued the Cook County lawsuit to recoup the attorney fees paid on his behalf is sufficient to allege an adverse employment action under SOX.

THE IRS FORM 1099

Complaint

With regard to Respondent's issuance of an IRS Form 1099 to Complainant, Complainant alleges in his Complaint:

103. In or about the week beginning June 21, 2010, [Complainant] received a 2009 IRS Form 1099 from [Respondent], which falsely states that [Respondent] provided income to [Complainant] in 2009.

104. [Respondent] did not provide any income to [Complainant] in 2009.

105. The 10[9]9 Form states that [Respondent] paid [Complainant] \$146,324 in 2009.

106. [Complainant] received no income from [Respondent] during 2009.

107. [Respondent's] issuance of a fraudulent 1099 to [Complainant] imposes substantial financial hardship on [Complainant] in that he could incur significant tax liability for income he never received. [Respondent] utilized this improper intimidation tactic to compel [Complainant] to abandon his SOX retaliation claims against [Respondent].

108. [Respondent] did not provide [Complainant] any income during 2009 and never made any payment to [Complainant].

109. [Respondent] knew it did not provide [Complainant] any income during 2009.

Complainant's Legal Arguments

Complainant further argues in his Memorandum Showing Cause Why the Complaint Should Not Be Dismissed that Respondent's issuance of the IRS Form 1099 was an adverse employment action:

On top of the Cook County lawsuit filed in April 2010, only two months later Respondents issued [Complainant] a Form 1099 that reported "income" that [Complainant] never received. Respondents argue the Form 1099 represents the company's payment of legal fees (actually it was for the arbitrator's compensation) on [Complainant's] behalf for the arbitration of his severance benefits. . . . However, under the American Arbitration Association rules, which Respondents chose to govern any arbitration under [Complainant's] Executive Severance Agreement, the obligation to pay the arbitrators' compensation falls on the employer, not the employee. Thus, [Complainant] had no obligation at any point to pay for the arbitration or the fees of the arbitrators, Respondent . . . was at all times responsible for such payments under the AAA rules, and its payment was not on [Complainant's] behalf and cannot be considered his income for tax or any other purposes. Instead, the Form 1099 [Respondent] issued to [Complainant] that is the subject of the claim at bar, is just another way Respondents found to punish [Complainant] for his whistleblowing. A Form 1099 for \$146,324 results in tens of thousands of dollars in tax liability, which emphatically meets the ARB's standard of an action that is "unfavorable" and "more than trivial" Using the 1099 to attack [Complainant] with a financial punishment for speaking up about Respondents' accounting deficiencies is a pointed form of retaliation and an adverse action under SOX.

. . . .

[T]he Form 1099 is a direct result of [Complainant] choosing to exercise his employment benefit to have his claim arbitrated. Even using the less broad *Burlington* standard as a guide, no reasonable [Respondent] employee will choose to arbitrate a dispute with [Respondent] knowing that it will result in tens of thousands of dollars in tax liability for income the employee never receives. Thus, by issuing the trumped-up Form 1099, [Respondent] in effect nullifies the employment benefit it purports to offer in the form of paying the costs of arbitration. And as aforementioned, under the applicable *Menendez-Williams* standard, such actions are unfavorable and more than trivial.

(Comp. Memo. at 6-7, 9-10).

Respondent's Legal Arguments

Respondent argues that its issuance of the IRS Form 1099 to Complainant was not an adverse action because Respondent was required to submit the form to the Internal Revenue Service. (Resp. Reply at 13). Respondent further states that the United States Tax Code requires

employers to issue Form 1099s to “any person to whom [Respondent] provides income.” *Id.* Respondent points to authority in support of its position that the IRS interprets the term “income” broadly and that “courts have long held that income includes all economic benefits received that are not otherwise exempted under the tax code.” *Id.* at 13-14. Respondent further argues that because “taxpayers are treated as realizing taxable income when their expenses are paid by another,” Respondent’s payment of attorney’s fees and arbitration costs “on behalf of” Complainant constitutes income. In response to Complainant’s argument that the AAA rules require the employer to pay the expenses of arbitration, Respondent contends that none of its obligations to pay the costs of the arbitration were imposed under the AAA procedural rules; rather, Respondent claims that the arbitration panel required Respondent to pay the fees under the terms of the Executive Severance Agreement. (Resp. Reply at 15). Respondent further states that it is not the issuance of an IRS Form 1099 that imposes tax liability on the recipient; rather, it is the recipient’s receipt of benefits that triggers any tax liability as well as the issuer’s obligation to issue the Form 1099. *Id.* Thus, Respondent argues, because Respondent followed the tax code by issuing the Form 1099, the Form 1099 is not retaliation. *Id.*

Analysis

Complainant alleges that he was the subjected to an adverse employment action when Respondent filed an IRS Form 1099 reflecting income that Complainant never received. Complainant avers that the Form 1099 reflects the amount that Respondent paid for arbitration expenses. Respondent argues that it paid the arbitration expenses “on behalf” of Complainant; whereas, Complainant contends that Respondent was at all times responsible for the expenses of arbitration. Taking the facts alleged by Complainant as true, if Respondent was at all times responsible for the payment of arbitration expenses, then Complainant cannot be said to have “received a benefit” or to have had his “expenses paid by another.”

Respondent argues that the issuance of the IRS Form 1099 was not retaliatory because it did not directly result in tax liability for Complainant. Rather, Respondent contends, it is Complainant’s receipt of reportable income that requires his payment of taxes. I find this argument unpersuasive. An adverse employment action need not be tangible or purely economic. *Menendez*, slip op. at 20 (citing *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997); *Smith v. Secretary of the Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981); *Griffin v. Wackenhut Corp.*, ARB No. 98-067, slip op. at 13 (ARB Feb. 29, 2000) (ERA); *Boytin v. Pennsylvania Power & Light Co.*, 1994-ERA-032, slip op. at 6 (Sec’y Oct. 20, 1995)). Rather, the extent of financial harm is relevant to the remedy available under SOX, not whether the Complainant has alleged a prima facie case that is cognizable under SOX. *Id.*

Respondent argues that its payment of the arbitration expenses was reportable income pursuant to the tax code because the arbitration panel’s decision that Respondent was responsible for the payment of the costs of the arbitration was based on the terms of the Executive Severance Agreement. To the extent that this argument requires my consideration of evidence of record, to include the Executive Severance Agreement and the decisions of the arbitration panel, it is also unpersuasive in my determination of whether to dismiss the claim for failure to state a cognizable claim under SOX.

Respondent's argument that the IRS Form 1099 was not an adverse employment action because Respondent was required by law, the United States tax code, to file the form is premised on Respondent's own interpretation of the tax code and conclusion that the payment was properly reported as "income." However, as discussed above, Complainant's allegation that Respondent was at all times responsible for the payment of the arbitration expenses, if true, would negate Respondent's premise that it was under a legal obligation to file the 1099. At this stage of the proceedings, I decline to rule on whether the filing of an IRS 1099, when under a legal obligation to do so, would be an adverse employment action under SOX. Rather, this decision under my Order to Show Cause Why the Complaint Should Not Be Dismissed is limited to my review of the factual allegations as set forth in the Complaint and the legal arguments of the parties.

Accordingly, I find that the Complainant's claim that Employer's filing of an IRS Form 1099 reporting the costs of arbitration as Respondent's income is sufficient to allege an adverse employment action under SOX.

Conclusion

Having considered the complaint and legal arguments of the parties, I find good cause why the complaint in 2011-SOX-31 should not be dismissed for failing to state a claim for which relief can be granted under the Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. 1514A. Accordingly, I find that this Complaint should not be dismissed for failure to state a cause of action under SOX.

SO ORDERED.

LARRY S. MERCK
Administrative Law Judge