



In the Matter of:

ZUBAIR SHAIKH,

ARB CASE NO. 2017-0049

COMPLAINANT,

ALJ CASE NO. 2017-SOX-00025

v.

DATE: February 14, 2019

NATIONAL BANK OF PAKISTAN,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Zubair Shaikh; *pro se*; Bronx, New York

For the Respondent:

Harris M. Mufson, Esq.; *Proskauer Rose LLP*; New York, New York; and Dana Berber, Esq.; *Proskauer Rose LLP*; Newark, New Jersey

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*

PER CURIAM

FINAL DECISION AND ORDER

The Complainant, Zubair Shaikh, filed a retaliation complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2010) (SOX) and its implementing regulations, 29 C.F.R. Part 1980 (2018).

Section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer or a federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1).

Shaikh alleged that his former employer, National Bank of Pakistan, violated the SOX whistleblower protection provisions by discharging him on May 2, 2016, because he engaged in protected activity. Shaikh filed his initial complaint of unlawful retaliation with the United States Department of Labor on November 3, 2016. The Department's Occupational Safety and Health Administration (OSHA) dismissed Shaikh's claim because it was untimely filed and because the National Bank of Pakistan, the Respondent, is not a SOX-covered entity.

Shaikh appealed the OSHA decision to the Office of Administrative Law Judges (OALJ). Before the ALJ, Respondent filed a motion for summary decision on the two grounds that OSHA relied upon in denying the complaint: 1) because Shaikh's complaint was untimely, and 2) because Respondent is not a publicly traded company, it is not a covered entity under the SOX. Shaikh responded to the motion and requested that it be denied. Upon consideration of the motion for summary decision and Shaikh's response, the ALJ issued his Order Granting Motion for Summary Decision (Order) on both grounds that Respondent asserted. Shaikh filed a petition requesting that the Administrative Review Board (ARB or the Board) review the ALJ's order. We affirm because Respondent is not a covered SOX employer and is therefore not subject to its prohibitions. The second issue decided below regarding the timeliness of Shaikh's complaint is, therefore, moot and we offer no opinion concerning it.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board his authority to issue final agency decisions under the SOX.¹ The ARB reviews an ALJ's grant of summary decision de novo under the same standard the ALJ applies. Summary decision is permitted where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."

¹ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 FR 69378-01 (Nov. 16, 2012).

29 C.F.R. § 18.72(a) (2018). The ARB views the record on the whole in the light most favorable to the non-moving party. *Micallef v. Harrah's Ricon Casino & Resort*, ARB No. 16-095, ALJ No. 2015-SOX-025, slip op. at 3 (ARB July 5, 2018).

DISCUSSION

An employee alleging employer retaliation in violation of the SOX must demonstrate that his or her employer is a covered company under the SOX whistleblower provisions. To be covered by SOX, Respondent must meet one of the requirements set forth below:

Whistleblower Protection for Employees of Publicly Traded Companies.--No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or 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, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee

18 U.S.C. § 1514A(a).

In its motion for summary decision, Respondent submitted the affidavit of Nasir Qureshi, Respondent's Executive Vice President, who attested that Respondent is not a publicly traded company, or an officer, employee, contractor, subcontractor, or agent of a publicly traded company.² In response to Respondent's assertion, Shaikh does not argue that Respondent is a publicly traded company under the SOX. Instead, Shaikh argues that the SOX whistleblower protection provisions cover every U.S. employer. As the ALJ explained, complainants seeking SOX-whistleblower protection must demonstrate that the employers they file against are covered employers under the SOX whistleblower provisions. Shaikh has failed to raise a genuine issue of

² See ALJ's Order at 5.

material fact on this matter and, therefore, we affirm the ALJ's Order granting summary decision regarding it.³

ORDER

Accordingly, we **AFFIRM** the ALJ's Order Granting Motion for Summary Decision regarding coverage and **DENY** Shaikh's complaint.

SO ORDERED.

³ Because we affirm the ALJ's conclusion that Shaikh has failed to raise a genuine issue of material fact regarding the Respondent's coverage under the SOX, we need not discuss the ALJ's holding on the timeliness of Shaikh's complaint or any assignments of error in regard to that issue.