



In the Matter of:

VINAY YADAV,

ARB CASE NO. 2020-0048

COMPLAINANT,

ALJ CASE NO. 2020-SOX-00017

v.

DATE: June 24, 2021

FROST BANK,

RESPONDENT

Appearances:

For the Complainant:

Vinay Yadav; *pro se*; San Antonio, Texas

For the Respondent:

Mario A. Barrera, Esq.; *Norton Rose Fulbright US LLP*; San Antonio, Texas

Before: James D. McGinley, *Chief Administrative Appeals Judge*, James A. Haynes and Randel K. Johnson, *Administrative Appeals Judges*

ORDER DISMISSING COMPLAINT

PER CURIAM. 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, 18 U.S.C. § 1514A (2010) (SOX), as amended, and its implementing regulations at 29 C.F.R. Part 1980 (2020). On January 8, 2020, Vinay Yadav filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his former employer, Frost Bank, committed various adverse actions against him in violation of the SOX. On January 10, 2020, OSHA concluded that Frost Bank discharged Yadav “on or about July 8, 2019” and therefore his complaint was untimely.

Yadav requested a hearing on his complaint before an Administrative Law Judge (ALJ). The ALJ conducted a conference call during which the parties agreed to resolve potentially dispositive procedural issues before setting a hearing date. The ALJ directed Yadav to submit a Bill of Particulars containing a list of the adverse actions Frost Bank took against him, the date of each action, and “a statement explaining why the action would be considered retaliatory unless the retaliation is self-evident (e.g., a suspension or termination).”¹ Yadav submitted a Bill of Particulars on March 20, 2020 in which he accused Frost Bank of “criminal-trespass conspiracy, aggravated-assault, bodily-injuries, perjuries, evidence destruction, spoliation, [and] intentional infliction of emotional distress.”²

On April 3, 2020, Frost Bank filed a Motion to Dismiss Yadav’s complaint. Frost Bank asserted that Yadav’s complaint was untimely because the company had discharged Yadav from employment on November 18, 2018 and Yadav was not entitled to equitable tolling of the limitations period. Yadav responded to the Motion to Dismiss by contending that Frost Bank’s managers and employees were engaged in a conspiracy against him.³

The ALJ issued an Order on Respondent’s Motion to Dismiss on May 19, 2020. The ALJ concluded that Yadav’s submissions to that point asserted the following potentially adverse employment actions by Frost Bank: (1) making various threats of criminal prosecution and termination and attempting to force him to resign on multiple occasions between March 20 and November 13, 2018; (2) reassigning him to a different job in July 2018; (3) issuing him warning letters on August 6, 2018; (4) physically assaulting him on November 19, 2018; (5) sending him a backdated termination letter in December 2018; (6) communicating derogatory information about him to government officials in June and July 2019

¹ Bench Memorandum at 2.

² Bill of Particulars by Vinay Yadav at 2. Many of the alleged adverse actions in this case involve criminal proceedings and penalties imposed by entities other than Frost Bank. *See, e.g.*, Complainant’s Initial Brief at 2, 8-9.

³ Complainant’s Response to Frost Bank’s Motion to Dismiss at 2.

resulting in his conviction; and (7) engaging in libelous actions against him as recently as February 2020.⁴

The ALJ also concluded that Yadav's SOX complaint was untimely except for the allegations regarding the release of derogatory information and libel. To determine whether the remaining allegations constituted adverse employment actions, the ALJ directed Yadav to identify, in a response "no more than five pages and submitted in an appropriate font size," "the dates upon which he alleges Respondent released or communicated any such information about him, to whom it released the information, and what the information was."⁵

On May 28, 2020 Yadav submitted a "Response to the ALJ's Order Dated May 19, 2020" (Response to the ALJ's Order), in which he again listed his accusations but failed to provide the descriptions the ALJ ordered. On June 16, 2020, the ALJ issued an Order of Dismissal dismissing Yadav's remaining claims for "fail[ing] to state a case upon which relief can be granted."⁶ Yadav appealed the ALJ's rulings to the Board. Both parties filed briefs and appendices.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under SOX.⁷ In considering a motion to dismiss for failure to state a claim, we accept the non-movant's factual allegations as true and draw all

⁴ Order on Respondent's Motion to Dismiss at 6.

⁵ *Id.* at 7.

⁶ Order of Dismissal at 2. The ALJ stated that Yadav submitted a 17-page document in response to his Order on Respondent's Motion to Dismiss. *Id.* But both parties indicated that Yadav submitted a five-page document. *See* Complainant's Reply Brief on the Merits, Appendix (Complainant's Appendix) at 63-67 and Respondent's Appendix at 79-83. We need not remand the case to resolve this discrepancy because the issue before us is whether Yadav stated a claim for relief in his complaint, Bill of Particulars, or Response to the ALJ's Order, all of which we have reviewed de novo.

⁷ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

reasonable inferences in his favor.⁸ The ARB reviews an ALJ's orders on motions to dismiss de novo.⁹

DISCUSSION

To prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that: 1) he engaged in activity that SOX protects; 2) the respondent took unfavorable personnel action against him; and 3) the protected activity was a contributing factor in the adverse personnel action.¹⁰ The SOX provides that any employee who believes he has been discharged or otherwise discriminated against in violation of the SOX, shall commence “[a]n action . . . not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.”¹¹

Under the rules governing proceedings before ALJs, “[a] party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.”¹² To defeat Frost Bank's Motion to Dismiss, Yadav is required to allege specific facts that, if proven, would constitute whistleblower retaliation under the SOX.¹³

⁸ *Tyndall v. U.S. EPA*, ARB No. 1996-0195, ALJ Nos. 1993-CAA-00006, 1995-CAA-00005, slip op. at 2 (ARB June 14, 1996).

⁹ *Johnson v. The Wellpoint Cos., Inc.*, ARB No. 2011-0035, ALJ No. 2010-SOX-00028 (ARB Feb. 25, 2013).

¹⁰ 29 C.F.R. § 1980.109(a); *see also* 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)).

¹¹ 18 U.S.C. § 1514A(b)(2)(D).

¹² 29 C.F.R. § 18.70(c).

¹³ *See, e.g., Wright v. Union Pacific R.R. Co.*, 990 F.3d 428, 433 (5th Cir. 2021) (under Title VII of the Civil Rights Act of 1964, the Railway Labor Act, and Texas state law) (to survive a motion to dismiss for failure to state a claim, a complainant must “allege facts going to the ultimate elements of the claim . . .”).

Yadav filed his SOX complaint on January 8, 2020. It was therefore untimely with respect to all of the actions described above that were allegedly taken before July 12, 2019. On appeal Yadav argues that he entitled to equitable tolling of the 180-day limitations period because he filed a complaint with the Federal Bureau of Investigation on November 14, 2018.¹⁴

The Board has recognized four principal, but not exclusive, circumstances in which equitable tolling may be granted: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his or her action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.¹⁵ Yadav does not assert that he filed a SOX claim with the FBI, and he has not stated any facts indicating that any of the other equitable tolling exceptions apply in this case.

With respect to the timely claims of libel and the release of derogatory information, the ALJ directed Yadav to clarify those allegations by identifying “the dates upon which he alleges Respondent released or communicated any such information about him, to whom it released the information, and what the information was.”¹⁶ We have reviewed Yadav's SOX complaint, Bill of Particulars, and Response to the ALJ's Order. These documents do not indicate that Yadav's timely allegations constitute adverse personnel actions taken by Frost Bank. Yadav's submissions do not contain the information the ALJ requested, but instead repeat vague accusations about legal proceedings separate from the one before us.¹⁷

¹⁴ Complainant's Initial Brief at 26-27.

¹⁵ *Swinney v. Fluor Corp.*, ARB No. 2015-0044, ALJ No. 2014-SOX-00041, slip op. at 3 (ARB June 11, 2015).

¹⁶ Order on Respondent's Motion to Dismiss at 7.

¹⁷ For example, Yadav stated that a “court reporter” informed him about “Frost Bank's Adverse Actions - Slanders, Libel, Perjuries, Spoliation and it's (sic) full Conspiracy.” Response to the ALJ's Order at 3. He also stated, in referring to litigation, that Frost Bank “published . . . false documents . . . to various third parties” and “[e]ngaged in various libels against him.” *Id.*

CONCLUSION

In sum, the ALJ gave the complainant every reasonable opportunity to amend his complaint to clarify whether it stated a cause of action cognizable under SOX, and he failed to do so.¹⁸ Upon our own review, we are also unable to discern any grounds to find a possible cause of action under the relevant statute. The allegations presented in Yadav's complaint, Bill of Particulars, and Response to the ALJ's Order are either untimely or fail to state a claim upon which relief can be granted. We therefore **DENY** the complaint.¹⁹

SO ORDERED.

¹⁸ Our ruling is consistent with prior decisions holding that, prior to granting a motion to dismiss for failure to state a claim, "it is reasonable and prudent to expect ALJs to provide a complainant an opportunity to amend the complaint with additional factual information – including that taken from supplementary information or documents that the complainant provided to OSHA during the investigatory phase of the complaint." *Evans v. U.S. EPA*, ARB No. 2008-0059, ALJ No. 2008-CAA-00003 (ARB July 31, 2012).

¹⁹ Yadav also asks the Board to "vacate the order of the ALJ with a proper judgement in such terms that Complainant is permitted to file a de novo case against Frost Bank in a U.S. District Court as his private right of action under 18 U.S.C. § 1514A." Complainant's Initial Brief at 30. We deny this request.