



In the Matter of:

MANNES NEUER,

ARB CASE NOS. 07-036

COMPLAINANT,

ALJ CASE NO. 2006-SOX-132

v.

DATE: August 31, 2009

**STEVEN BESSELLIEU, PRESIDENT,
SAPIENS AMERICAS,**

and

**RONI ALDOR, CEO,
SAPIENS INTERNATIONAL,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Gustav Goldberger, Esq., Silver Spring, Maryland

For the Respondents:

**Ian E. Bjorkman, Esq., Rachel Lebejko Priester, Esq., Wiggin & Dana LLP,
New Haven, Connecticut**

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Sarbanes-Oxley Act of 2002 (SOX)¹ and its implementing regulations.² Mannes Neuer filed a complaint

¹ 18 U.S.C.A. § 1514A (West 2006).

² 29 C.F.R. Part 1980 (2007).

alleging that the Respondents, Steven Bessellieu, President of Sapiens Americas, and Roni Aldor, CEO of Sapiens International, violated the SOX by discharging him from employment. On December 5, 2006, a Department of Labor Administrative Law Judge (ALJ) granted the Respondents' motion to dismiss. We affirm.

BACKGROUND

Sapiens International, a publicly traded corporation, is a global information technology company headquartered in Israel. Sapiens Americas is a privately held subsidiary of Sapiens International.³ Neuer worked for Sapiens International from April 1, 2000, until his transfer to Sapiens Americas on February 21, 2005. Sapiens Americas employed Neuer in North Carolina as a Private Marketing Director until his termination on January 17, 2006.⁴

On December 7, 2005, while he was in Israel on a business trip, Neuer met with Anat Dvash, a consultant Aldor hired to review the company's business practices. During the meeting, Neuer told Dvash that he had concerns about the performance of two managers with Sapiens Americas. Specifically, he told her that he believed that Richard Weidenback was severely over-tasked and that Mary Onate was incompetent.⁵

The next day, December 8, Neuer returned to work at Sapiens Americas in North Carolina.⁶ At a meeting on January 17, 2006, Bessellieu told Neuer that he was firing him. He offered Neuer a termination letter to sign. According to Neuer, he "was allowed only three days in which to sign the termination letter or else be deprived of Bessellieu's *tantalizing* settlement offer consisting of a substitution from the word 'fire' to the words 'laid off,' a letter of recommendation, one month severance pay, some unused vacation pay, and two weeks medical benefits."⁷ He signed the letter.⁸

On April 7, 2006, Neuer filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Bessellieu and Aldor violated the SOX by discharging him from employment on January 17.⁹ His complaint alleged that he

³ Complainant's Brief, Tab 1 (OSHA Complaint) at 1.

⁴ Complainant's Brief, Tab 1 (OSHA Complaint) at 1-2.

⁵ Complainant's Brief, Tab 1 (OSHA Complaint) at 5-6.

⁶ Complainant's Brief, Tab 1 (OSHA Complaint) at 5.

⁷ Complainant's Brief at 15 (emphasis in original).

⁸ Complainant's Brief, Tab 1 (OSHA Complaint) at 10.

⁹ ALJ Dismissal at 9; Complainant's Brief, Tab 1 (OSHA Complaint).

engaged in protected activity when he disclosed to Dvash that he believed that (1) Weidenbeck was “over-tasked which had the adverse effect of Sapiens Americas experiencing a significant decline” and (2) “Odate clearly lacked the ability to carry out [her duties as Marketing Director] and was in essence unfit for the job.”¹⁰

On June 1, 2007, the Respondents filed a Motion to Dismiss Neuer’s complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim for which relief can be granted and under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.¹¹ Specifically, the Respondents argued that they were entitled to dismissal of the case under Fed. R. Civ. P. 12(b)(6) because the complaint failed to establish on its face that Neuer engaged in a SOX-protected activity. The Respondents also argued that the ALJ did not have subject matter jurisdiction of the case because Neuer was not an employee of a publicly traded company, he was not a U.S. citizen, and his alleged protected activity occurred in Israel, not the United States.

The ALJ issued a Grant of Motion to Dismiss and Dismissal of Complaint on December 5, 2006. Although he found that he had subject matter jurisdiction of the claim, he nevertheless dismissed the complaint for failure to establish a viable claim under Fed. R. Civ. P. 12(b)(6). In this regard, he found that Neuer’s comments to Dvash on December 7, 2005, were not protected activity, a requisite element for whistleblower protection and relief under SOX.¹² Neuer petitioned this Board to review the ALJ’s decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the SOX.¹³ Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ’s findings of fact under the substantial evidence standard.¹⁴ The Board reviews an ALJ’s conclusions of law de novo.¹⁵

¹⁰ Complainant’s Brief, Tab 1 (OSHA Complaint) at 5-6.

¹¹ Respondents’ Motion to Dismiss Complaint at 1.

¹² ALJ Dismissal at 4-5.

¹³ Secretary’s Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110.

¹⁴ 29 C.F.R. § 1980.110(b).

¹⁵ *Levi v Anheuser Busch Cos.*, ARB Nos. 06-102, 07-020, 08-006, ALJ Nos. 2006-SOX-037, -108, 2007-SOX-055, slip op. at 6 (ARB Apr. 30, 2008).

DISCUSSION

The Legal Standards

The rules governing hearings in whistleblower cases contain no specific provisions for dismissing complaints for failure to state a claim upon which relief may be granted.¹⁶ It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims.¹⁷ Under Fed. R. Civ. P. 12(b)(6), all reasonable inferences are made in the non-moving party's favor.¹⁸ The burden is on the complainant to frame a complaint with "enough facts to state a claim to relief that is plausible on its face."¹⁹

To prevail on his SOX complaint, Neuer must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the Respondent knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.²⁰ The Respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.²¹ Thus, protected activity is an essential, that is, material element of Neuer's case.

SOX 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.A. §§ 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. Employees are also protected against discrimination when they have filed, testified in,

¹⁶ See 29 C.F.R. Part 18 (2008).

¹⁷ 29 C.F.R. § 18.1(a).

¹⁸ *Fullington v. AVSEC Servs, L.L.C.*, ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 5 (ARB Oct. 26, 2005).

¹⁹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2006).

²⁰ See 18 U.S.C.A. § 1514(b)(2); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008 (ARB July 29, 2005).

²¹ *Getman*, slip op. at 8. Cf. § 1980.104(c). See § 42121(a)-(b)(2)(B)(iv).

participated in, or otherwise assisted in a proceeding filed or about to be filed relating to a violation of the aforesaid fraud statutes, SEC rules, or federal law.²²

The employee must ordinarily complain about a material misstatement of fact or omission concerning a corporation's financial condition on which an investor would reasonably rely. The protected complaint must "definitively and specifically" relate to the SOX subject matter, be specific enough to permit compliance, and support a complainant's reasonable belief.²³

Protected Activity

On appeal, Neuer argues only that the ALJ erred in finding that he did not engage in protected activity when he disclosed his concerns about two Sapiens Americas managers to Dvash.

A SOX complaint "should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations."²⁴ A failure to comply with the indicated level of specificity could subject the complainant to dismissal. As we have already noted, according to his OSHA complaint, Neuer disclosed to Dvash that one manager was overworked, and the other was incompetent and redundant. Neuer did not allege that he believed, at the time he made disclosures of his concerns to Dvash, that the two managers, or anyone else, engaged in mail fraud, wire fraud, bank fraud, or securities fraud. Likewise, he did not allege that the managers violated any SEC rules and regulations, which regulate the issuance of, and transactions involving, the securities of publicly traded corporations. A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough.²⁵ For example, although a company that tolerates incompetence or poor management may not be acting in the best interests of its shareholders, a SOX-protected activity must involve an alleged violation of a federal law directly related to fraud or securities violations. "SOX protects shareholders from inaccurate reporting of a publicly held corporation's financial condition Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or

²² 18 U.S.C.A. § 1514A(a).

²³ *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 2005-SOX-088, -092, slip op. at 9 (ARB Apr. 29, 2008).

²⁴ 29 C.F.R. § 1980.103(a).

²⁵ *Smith v. Hewlett Packard*, slip op. at 9.

corporate expenditures with which the employee disagrees, or even possible violations of other laws . . . standing alone, is not protected conduct under the SOX.”²⁶

Neuer also does not identify in his brief to the Board any specific instances of fraud or false statements. Instead, he argues that the ALJ erred in “not affording [him] targeted discovery and a follow-up evidentiary hearing on the ‘protected activity’ issue.”²⁷ He admits, in effect, that he did not allege any SOX-protected activity when he states in his brief that if he had “received a full mandated OSHA investigation, follow-up discovery, and an evidentiary hearing, he would have substantially enhanced his chances of perfecting his initial allegations, at least sufficient to allow ALJ Gamm to consider the dismissal motion in a more meaningful and more appropriate perspective.”²⁸ But he was not entitled to an investigation and a full bearing because his OSHA complaint does not allege any facts that, if true, would establish that he engaged in SOX-protected activity. OSHA will not conduct an investigation of a complaint unless the complainant “makes a prima facie showing” that protected activity was a contributing factor in the adverse action that the complainant suffered.²⁹ Therefore, OSHA did not err in declining to investigate his complaint, and the ALJ did not err in denying him discovery and an evidentiary hearing.

CONCLUSION

Because Neuer’s complaint does not set out sufficient facts to state a claim to relief that is plausible on its face, we affirm the ALJ’s recommendation and **DISMISS** this complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

²⁶ *Harvey v. Home Depot U.S.A.*, ARB Nos. 04-114, -115, ALJ Nos. 2004-SOX-020, -036, slip op. at 14-15 (ARB June 2, 2006).

²⁷ Complainant’s Brief at 4-5.

²⁸ Complainant’s Brief at 20.

²⁹ 18 U.S.C.A. § 1514A (b)(2); 49 U.S.C.A. § 42121(b)(2)(B)(i) (“The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under [the employee protection provision] unless the complainant makes a prima facie showing that [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint”); 29 C.F.R. § 1980.104(b).