U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

BENTZION S. TURIN,

COMPLAINANT,

v.

MAIDEN HOLDINGS, LTD; MAIDEN INSURANCE COMPANY LIMITED; MAIDEN HOLDINGS NORTH AMERICA, LTD; ART RASCHBAUM, Individually; Representative of the Estate of MICHAEL KARFUNKEL, Deceased, Individually; and BARRY ZYSKIND, Individually,

RESPONDENTS.

ARB CASE NO. 2021-0066

ALJ CASE NO. 2010-SOX-00018
ALJ THERESA C. TIMLIN

DATE: June 29, 2023

Appearances:

For the Complainant:
Edward S. Rudofsky, Esq.; Melville, New York

For the Respondents:
A. Michael Weber, Esq. and Emma Diamond, Esq.; *Littler Mendelson, P.C.*; New York, New York
Edward T. Ellis, Esq. and Alexa J. Laborda Nelson, Esq.; *Littler Mendelson, P.C.*; Philadelphia, Pennsylvania

For Respondent Barry Zyskind:
Y. David Scharf, Esq., Danielle C. Lesser, Esq. and Sara L. Estela, Esq; *Morrison Cohen LLP*; New York, New York

Before BURRELL and MILTENBERG, Administrative Appeals Judges

DECISION AND ORDER

PER CURIAM:

This case arises under the whistleblower protection provisions of Section 806 of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A, and its implementing regulations at 29 C.F.R. Part 1980 (2022).

On July 3, 2007, Respondent Maiden Holdings, LTD (Maiden) hired Complainant Bentzion S. Turin (Turin) to be its General Counsel.[1] On December 15, 2008, Maiden fired Turin.[2] On January 15, 2009, Maiden advised Turin that it had discharged him for cause.[3] On April 3, 2009, Turin filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Maiden and its co-respondents[4] had not discharged him for cause but, instead, because he had engaged in whistleblowing activities protected by Section 806.[5]

On September 2, 2021, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) denying Turin's complaint in its entirety.[6] The ALJ thoroughly explained her factual findings and legal conclusions. She concluded that Turin failed to meet his burden of proving he engaged in SOX-protected activity before his discharge. We summarily affirm the ALJ's protected activity findings.[7]

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1 Decision and Order (D. & O.) at 13; Transcript (Tr.) 90.

2 D. & O. at 45 (citing Tr. 721).

3 *Id.* at 56-57 (citing JX QQ; CX 686; CX 687).

4 Turin's OSHA complaint named Maiden Insurance Company Limited, Maiden Holdings North America, LTD, Art Raschbaum, Michael Karfunkel, and Barry Zyskind as Respondents.

5 18 U.S.C. § 1514A(a)(1).

6 D. & O. at 134.

7 Not every case is appropriate for summary affirmance, but such opinions can be useful and promote efficiency. The undersigned agree with the Eighth Circuit that "'[t]he summary affirmance process . . . allows [a] Board to concentrate its resources on cases where there is a reasonable possibility of reversal, or where a significant issue is raised in the appeal . . . .'" *Ngure v. Ashcroft*, 367 F.3d 975, 984 (8th Cir. 2004) (citation omitted). *See* Andrew Hoffman, *The Federal Circuit's Summary Affirmance Habit*, 2018 B.Y.U. L. REV. 419, 431 (2018) (citations omitted) ("Summary affirmance is a valuable tool for promoting efficiency. . . ."); Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 738 (2020). Summary affirmances have been widely used for decades, by the Supreme Court, the Circuit Courts of Appeals, and the Board.

The Secretary of Labor has delegated to the Board the authority to issue agency decisions under the SOX.[8] In SOX cases, the Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews conclusions of law de novo.[9] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[10] The Board will uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable."[11]

For Turin to prevail on his SOX claim, he had the burden of proving, by a preponderance of evidence, that he: (1) engaged in activity protected by the statute; (2) that he suffered an adverse employment action; and (3) that the protected activity was a contributing factor in the adverse action.[12]

The ALJ found Turin failed to carry his burden on the threshold requirement of proving, by a preponderance, that he engaged in activity protected by SOX.[13] SOX prohibits covered employers from retaliating or otherwise discriminating against an employee who provides information or otherwise assists in an investigation regarding conduct "which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities and commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . . ."[14]

On appeal, Turin presents several arguments in support of his assertion that he engaged in SOX-protected activity prior to the decision to terminate his employment, including claims that he complained to several individuals about Maiden's method of financing an acquisition.

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8 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. 13,186 (Mar. 6, 2020).

9 29 C.F.R. § 1980.110(b); *Burns v. The Upstate Nat'l Bank*, ARB No. 2017-0041, ALJ No. 2017-SOX-00010, slip op. at 2 (ARB Feb. 26, 2019).

10 *Leviege v. Vodafone US, Inc., A*RB No. 2019-0058, ALJ No. 2016-SOX-00001, slip op. at 3 (ARB Mar. 19, 2021) (quoting *Consol. Edison Co. of N.Y. v. Nat'l Lab. Rels. Bd.*, 305 U.S. 197, 229 (1938)).

11 *Id.* (citations omitted).

12 29 C.F.R. § 1980.109(a).

13 D. & O. at 127.

14 18 U.S.C. § 1514A(a)(1).

Upon careful consideration of the parties' briefs on appeal, and having reviewed the evidentiary record as a whole, we have determined that substantial evidence supports that ALJ's findings and legal conclusions that Turin did not engage in protected activity under SOX.[15] None of Turin's arguments establish that the ALJ abused her discretion or that she committed reversible error on protected activity. As demonstrated by the ALJ's thorough analysis in the D. & O., substantial evidence supports the ALJ's finding that Turin did not have a subjective, good-faith belief that the conduct he complained of constituted a violation of SOX.[16] Further, the ALJ correctly found that Turin did not have an objectively reasonable belief of a violation.[17] Again, as demonstrated by the ALJ in her D. & O., substantial evidence supports the ALJ's finding that a reasonable corporate lawyer, with experience comparable to Turin's, would not have believed that any of Maiden's actions violated any of the specifically enumerated provisions set forth in SOX.[18] We affirm the ALJ's finding that Turin did not engage in SOX-related protected activity prior to his discharge.

Because a complainant's "failure to prove any one of" the aforementioned three "elements necessarily requires dismissal of her whistleblower claim,"[19] and because we agree with the ALJ that Turin failed to prove he engaged in protected activity under § 1514A(a)(1), we need not reach the questions of whether Turin's protected activity caused him to suffer an adverse employment action or that his alleged protected activity was a contributing factor in the adverse action.

Furthermore, because protected activity is a requisite element of Turin's case as a whole, his entire claim fails and we need not address any of the ALJ's other findings of fact or conclusions of law regarding his other arguments.[20] Specifically,

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15 Turin asserts that the ALJ's discussion of protected activity in a November 9, 2016 Order Denying a Motion to Dismiss constitutes a binding decision that Turin engaged in protected activity. We disagree. The ALJ's decision discussed a prima facie case and was not a final ruling after hearing.

16 D. & O. at 115-18.

17 *Id.* at 126-27.

18 *Id.* at 118-27.

19 *Stewart v. Lockheed Martin Aeronautics Co.*, ARB No. 2014-0033, ALJ No. 2013-SOX-00019, slip op. at 2 (ARB Sept. 10, 2015).

20 *See, e.g., Blount v. Nw. Airlines, Inc.*, ARB No. 2009-0120, ALJ No. 2007-AIR-00009, slip op. at 9 (ARB Oct. 24, 2011); *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 n.3 (2019) ("In light of our disposition of the case, we need not and do not consider that argument"); *Northrop Grumman Sys. Corp. v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 927 F.3d

we make no findings of fact or conclusions of law concerning the ALJ's order dismissing AmTrust and AIIM as Maiden's fellow respondents.[21] Even if those entities had not been dismissed as respondents, there are no facts that would change our affirmation of the ALJ's conclusion that Turin failed to prove that he engaged in SOX-protected activity in the instant case.[22]

CONCLUSION

Substantial evidence of record supports the ALJ's conclusion that Turin failed to prove that he engaged in SOX-protected activity prior to Maiden's decision to discharge him. We therefore summarily **AFFIRM** the ALJ's September 2, 2021 Decision and Order. Accordingly, the complaint in this matter is **DENIED**.

SO ORDERED.[23]

THOMAS H. BURRELL
Administrative Appeals Judge

NED I. MILTENBERG
Administrative Appeals Judge

226, 235 n.11 (4th Cir. 2019) ("Because [it] conclude[d] that Seguin did not engage in protected activity under § 1514A(a)(1)," the Fourth Circuit Court of Appeals did not address other arguments raised by the employer on appeal.).

[21] Decision and Order Dismissing Respondents AmTrust and AIIM (ALJ Nov. 9, 2016).

[22] *See, e.g., Hoffman v. Nextera Energy, Inc.*, ARB No. 2012-0062, ALJ No. 2010-ERA-00011, slip op. at 14 (Edwards, J., concurring) (ARB Dec. 17, 2013).

[23] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.