

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

_____)	
JOE COLLINS,)	
)	
Complainant,)	
)	Case No. 2015-SOX-00016
v.)	
)	Judge: Stephen Henley
AMERIPRISE FINANCIAL)	
SERVICES, INC.,)	
)	
Respondent.)	
_____)	

**SOLICITOR OF LABOR’S BRIEF REGARDING WHETHER OALJ HAS
JURISDICTION OVER THIS MATTER**

In response to the Acting Chief Administrative Law Judge’s (“ALJ”) May 20, 2015 Notice of Docketing and Order to Show Cause Why Matter Should Not be Dismissed for Lack of Jurisdiction, the Office of the Solicitor (“SOL”) respectfully submits this brief explaining its conclusion that this matter should be dismissed for lack of jurisdiction over *pro se* Complaint Joe Collins’ (“Collins”) whistleblower claim filed under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“SOX”), as amended, 18 U.S.C. § 1514A. SOL conferred with OSHA, which indicated that it will docket Collins’ complaint, conduct an investigation, issue findings, and if appropriate, issue a preliminary order pursuant to 29 C.F.R. §§ 1980.104-105.

In his notice and order, the ALJ ordered the parties to file briefs showing cause as to why the Office of Administrative Law Judges should not dismiss this matter for lack of jurisdiction. The ALJ also invited SOL to file a brief in this matter.

I. Background

Collins filed a complaint with OSHA's Austin Area Office on June 22, 2009 alleging that he was subject to retaliatory "increased scrutiny" from his employer,¹ Respondent Ameriprise Financial Services, Inc. ("Ameriprise"), for, among other things, reporting to FINRA certain alleged misstatements of Ameriprise's investments in reserve funds. *See* Formal Complaint, copy attached as Exhibit 1. Collins further alleges that he received a letter of reprimand and a \$2,500 fine from Ameriprise as a result of what he believes are protected activities under SOX.² Collins sent a letter terminating his relationship with Ameriprise on June 16, 2009 because he did "not wish [to] associate" with "a morally corrupt organization." The effective date of Collins' termination was June 30, 2009.

Collins' franchise agreement with Ameriprise apparently required that he arbitrate SOX whistleblower claims under FINRA arbitration rules prior to filing with OSHA. Ameriprise indicated that it would enforce the provision and OSHA stayed the investigation pending the outcome of the FINRA arbitration. Although OSHA conducted a limited preliminary investigation, mainly contacting Ameriprise's attorneys, it did not assign a case number to Collins' complaint and did not issue findings pursuant to 29 C.F.R. § 1980.105.

According to a November 11, 2011 letter Collins sent to OSHA, the previously scheduled November 15-18, 2011 arbitration was cancelled in favor of a non-binding mediation. *See* Nov. 11, 2011 letter, copy attached as Exhibit 2. The parties did not sign an agreement at the

¹ In communications with OSHA, Ameriprise indicated that it disputes that Collins was an employee or that it was his employer. SOL takes no position on this dispute at this time.

² It appears that Collins also reported certain Ameriprise activities to Ameriprise's Legal Department, the FBI, the SEC, and other entities.

mediation and the arbitration was not rescheduled.³ The letter inquired into the status of the complaint. There is currently no record of OSHA taking action in response to the November 11, 2011 letter.

Although OSHA never issued findings in this matter, Collins filed a letter with the Office of Administrative Law Judges (“OALJ”) requesting review of his June 2009 complaint. OALJ received a second letter requesting a hearing on the issue on May 12, 2015. *See* May 5, 2015 letter, copy attached as Exhibit 3. In particular, Collins sought a hearing on his claim before an ALJ because OSHA “erred in not pursuing this case further.” *See* May 5, 2015 letter.

II. Argument

A. OALJ does not have jurisdiction over the instant claim because OSHA did not issue written findings or a preliminary order.

Administrative courts like the OALJ are tribunals of limited jurisdiction. *See, e.g., In the Matter of: The Applicability of Wage Rates and Fringe Benefits Collectively Bargained by Ocean Shipholdings Inc. and American Maritime Officers*, 2013 WL 499366, ARB Case No. 11-066 at *5 n.20 (Jan. 23, 2013) (citing cases standing for the proposition that an administrative agency may exercise only those powers granted to it by statute or regulation). The OALJ’s authority to hear SOX whistleblower claims stems from 18 U.S.C. § 1514A(b) and SOX’s implementing regulations. *See* 29 C.F.R. §§ 1980.105-106. In particular, § 1980.105 provides that OSHA must issue written findings as to whether or not there is reasonable cause to believe that respondent retaliated against the complainant in violation of SOX, and where appropriate, issue a preliminary order. A party objecting to OSHA’s findings and order issued under §

³ In a letter dated May 5, 2015 addressed to OALJ, Collins explained that he later signed a \$7,500 settlement with Ameriprise under “duress.” *See* May 5, 2015 Letter. According to the letter, the parties eventually entered into arbitration in spring or summer 2014. Ameriprise submitted a “Motion to Dismiss” in those proceedings and Collins represents that no decision had been made on that motion as of May 5, 2015.

1980.105 may file objections and/or a request for hearing with the OALJ. 29 C.F.R. § 1980.106(a). The regulations also provide that a respondent may seek an award of attorney fees before the OALJ if it alleges that the complaint was frivolous or brought in in faith. *Id.* Regardless of the relief sought, a party must file such objection and/or request “within 30 days of receipt of the findings and preliminary order pursuant to § 1980.105(b).” *Id.* (emphasis added).

There is no provision in the statute or the implementing regulations, however, conferring jurisdiction on the OALJ to hear claims where, as here, OSHA did not issue formal written findings. Any objections and/or requests for a hearing may be made only upon receipt of formal findings issued under § 1980.105(b). 29 C.F.R. § 1980.106. Indeed, the Chief Administrative Law Judge may only assign a case to an ALJ upon receipt of an objection to the findings. *See* 1980.107(b). Tellingly, SOX Section 806 and its implementing regulations contemplate a situation where OSHA does not timely issue a final decision and accordingly provides a remedy to complainants in such cases. 18 U.S.C. § 1514A(b)(1)(b); 29 C.F.R. § 1980.114. Specifically, where OSHA does not issue a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due complainant’s bad faith, the complainant may bring an action in the appropriate United States district court. *Id.* No provision provides similar relief before the OALJ.

Since SOX and its implementing regulations only provide a party leave to file an objection and/or request for hearing before the OALJ upon OSHA’s actual issuance of formal written findings, SOL believes that the OALJ currently lacks authority to exercise jurisdiction over this matter. Accordingly, it is appropriate to dismiss Collins’ claim.

B. OSHA will issue findings in this matter.

SOL has consulted with OSHA and we have together concluded that this case should

have been docketed and investigated under the applicable procedures. OSHA, pursuant to 29 C.F.R. §§ 1980.104-105, will docket the complaint, conduct an investigation to the extent it deems necessary, issue formal written findings, and if necessary, issue a preliminary order.

III. Conclusion

For the reasons set forth above, SOL believes that the OALJ currently lacks authority to exercise jurisdiction over the instant matter. OSHA will docket the complaint, conduct an investigation to the extent it deems necessary, issue formal written findings, and if necessary, issue a preliminary order.

Respectfully submitted,

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