



In the Matter of:

RODNEY GLOSS,

ARB CASE NO. 2021-0039

COMPLAINANT,

ALJ CASE NO. 2020-CAA-00008

v.

DATE: October 22, 2021

TATA CHEMICALS NORTH AMERICA,

RESPONDENT.

Appearances:

*For the Complainant:*

Rodney Gloss; *pro se*; Loveland, Colorado

*For the Respondent:*

Ronald W. Taylor, Esq.; *Venable LLP*; Baltimore, Maryland; Benjamin E. Stockman, Esq. and Teresa M. Biviano, Esq.; *Venable LLP*; New York, New York

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

## ORDER OF REMAND

PER CURIAM. Rodney Gloss (Complainant) worked for Tata Chemicals North America (Respondent) until his termination in September 2019. Complainant subsequently filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that his termination from the company violated the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX) and the Clean Air Act (CAA). OSHA later dismissed the complaint for failure to

establish a prima facie case. Complainant filed an appeal with the Office of Administrative Law Judges (OALJ). Respondent filed a Motion to Dismiss, or alternatively, for Summary Decision, which the ALJ granted. Complainant appealed the ALJ's decision to the Administrative Review Board (Board).

## BACKGROUND

In February 2018, Respondent hired Complainant as Vice President of Finance and Corporate Controller.<sup>1</sup> Respondent is a subsidiary of an Indian company, Tata Chemicals Limited, and its intermediate holding company, Valley Holdings Inc.<sup>2</sup> Respondent's subsidiary, Tata Chemicals (Soda Ash) Partners (TCSAP), operates Respondent's facility in Wyoming.<sup>3</sup> None of these companies are registered under Section 12 or have reporting obligations under Section 15(d) the Securities and Exchange Act of 1934 (SEA).

Respondent learned of an issue with the equipment that is used to control dust emissions at the Wyoming facility, hired legal counsel to investigate the matter, and disclosed the issue to the Wyoming Department of Environmental Quality (WDEQ) in October 2018.<sup>4</sup> The disclosure stated that the issue had potentially violated certain state permit laws, and that Respondent had taken steps to remediate any unlawful activity.<sup>5</sup> In December 2018, Respondent's CEO informed Complainant of the matter.<sup>6</sup> In January 2019, Complainant informed Respondent's third-party accountants of the issue to account for the potential resulting penalties.<sup>7</sup> On September 4, 2019, Respondent informed Complainant that it was terminating his employment effective September 27, 2019.<sup>8</sup>

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<sup>1</sup> Order Granting Respondent's Motion for Summary Decision (D. & O.) at 1.

<sup>2</sup> *Id.* at 3, 4.

<sup>3</sup> Respondent's Brief at 4.

<sup>4</sup> D. & O. at 6.

<sup>5</sup> *Id.* The CEO explained that as a result of the malfunctioning equipment, certain employees had falsified dust emission reports to WDEQ. *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* In his appeal to the OALJ, Complainant stated that the disclosure was made "in accordance with professional accounting standards." *Id.*

<sup>8</sup> *Id.* at 8 n.13.

On October 25, 2019, Complainant filed a complaint with OSHA, alleging that Respondent had violated the CAA by terminating his employment in retaliation for reporting fraud to the accountants.<sup>9</sup> On August 20, 2020, OSHA dismissed the complaint, concluding that Complainant had not established a prima facie case under the CAA.<sup>10</sup> On September 19, 2020, Complainant filed an appeal with the OALJ. On March 4, 2021, Respondent filed a Motion to Dismiss, or alternatively, for Summary Decision. On March 26, 2021, Complainant filed an Amended Complaint, adding claims under the SOX and Dodd-Frank Consumer Finance Protection Act of 2010 (Dodd-Frank) after the ALJ granted Complainant leave to amend. On April 9, 2021, Respondent filed its Amended Motion to Dismiss, or alternatively, for Summary Decision. On April 22, 2021, Complainant filed his opposition.

On May 26, 2021, the ALJ issued an Order Granting Respondent's Motion for Summary Decision. The ALJ first considered whether Respondent was a covered company under the SOX. The ALJ explained that SOX's whistleblower protection provision generally protects employees of publicly traded companies, including companies with a class of securities registered under section 12 of the SEA or required to file reports under section 15(d) of the SEA. Though Respondent and its parent company are not public, Complainant argued that the SOX whistleblower statute applied because TCSAP was in joint venture partnerships with two public companies that consolidated the subsidiary's financial results into their financial statements.<sup>11</sup>

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<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 3. In his response to the Motion, Gloss states as follows:

“SOX indicates no “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.” “As used in this part: “Affiliate” means any person that controls, is controlled by, or is under common control with another person.” (Even if the common control rests with the parent company in India?)” ...

“TCSAP and TCSAP Holdings, TCNA subsidiaries, are joint ventures and Owens-Illinois and Church and Dwight, publicly traded US companies, are joint venture partners. In one form or another, the financial results are consolidated into / included within those publicly traded companies' financial statements. The Acts state that if the financial results of a company are consolidated into / included within those of publicly traded company, then SOX is without question applicable.”

The ALJ concluded that the connection between Respondent and the public companies was too tenuous to apply the SOX.<sup>12</sup> The ALJ stated that Respondent's business with publicly traded entities did not automatically confer SOX coverage, opining that whether a subsidiary of Respondent is in a joint venture with a publicly traded company is not evidence that "Respondent's own financial information is included in the consolidated financial statements of a publicly traded company" as required for SOX coverage.<sup>13</sup> The ALJ reached the same conclusions with respect to Respondent's immediate parent company.<sup>14</sup> The ALJ concluded that Respondent was not subject to the provision and granted summary decision on the SOX claim.

The ALJ then concluded that Respondent is not a covered person under the Dodd-Frank claim because it does not provide consumer financial products or services and granted summary decision on that claim.<sup>15</sup>

Last, the ALJ discussed whether Respondent was entitled to summary decision on the CAA claim. The ALJ stated that Complainant had asserted one instance of protected activity: Complainant notifying its third-party accountants of the alleged fraud and possible liability for fines "in accordance with professional accounting standards." The ALJ explained that the CAA prohibits retaliation against an employee for engaging in a proceeding related to public health or the environment.

The ALJ found that Complainant had not raised environmental concerns to his employer or filed a complaint with an external entity with any authority to administer or enforce the CAA.<sup>16</sup> Instead, the CEO had informed him about the alleged fraud and had already reported it to a regulatory entity.<sup>17</sup> Complainant notified the accountants for the purpose of complying with professional accounting

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Gloss Motion, Affidavits, and Arguments in Response to Respondent's Amended Motion to Dismiss, etc. of 4/9/21 (Complainant's Response) at 10, 11 (emphasis omitted).

<sup>12</sup> D. & O. at 3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 5. Complainant does not appeal this decision.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.* at 6-7.

standards, not for environmental purposes.<sup>18</sup> In a footnote, the ALJ also remarked that Complainant’s CAA claim appeared to be untimely, as he had filed it more than thirty days after being apprised of his termination.<sup>19</sup> However, the ALJ did not ultimately rely on the untimeliness to grant summary decision.<sup>20</sup> Thus, the ALJ concluded that Complainant had not engaged in protected activity under the CAA, and granted summary decision on that claim. Accordingly, the ALJ dismissed Complainant’s complaint.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to review appeals of ALJ’s decisions pursuant to the SOX and CAA.<sup>21</sup> The Board reviews an ALJ’s grant of summary decision de novo.<sup>22</sup>

### DISCUSSION

Complainant appeals the summary decisions for the SOX and CAA claims. An ALJ may issue summary decision “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed,” viewed in the light most favorable to the non-moving party, “show that there is no genuine issue as to any material fact and that a party is entitled” judgment as a matter of law.<sup>23</sup> We address each claim in turn.

Complainant first contests the ALJ’s conclusion that Respondent is not a covered employer under the SOX whistleblower statute. Under the statute, an

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<sup>18</sup> *Id.* at 6.

<sup>19</sup> *Id.* at 10 n.13. The ALJ also noted that Complainant failed to allege sufficient facts to support his arguments that the complaint was timely because of a hostile work environment and that the limitations period should be equitably tolled. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> 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).

<sup>22</sup> *Nortell v. N. Cent. Coll.*, ARB No. 2016-0071, ALJ No. 2016-SOX-00013, slip op. at 2 (ARB Feb. 12, 2018); *Minthorne v. Virginia*, ARB No. 2009-0098, ALJ Nos. 2009-CAA-00004, -00006, slip op. at 3 (ARB July 19, 2011).

<sup>23</sup> *Reddy v. Medquist, Inc.*, ARB No. 2004-0123, ALJ No. 2004-SOX-00035, slip op. at 4 (ARB Sept. 30, 2005).

employer may not “discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee,” including providing information to regulators involving securities laws violations.<sup>24</sup> An employer covered under the statute includes “any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or any company 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.”<sup>25</sup>

The ALJ noted that Respondent demonstrated that neither it nor its parent companies are registered under Section 12 or required to file reports under section 15(d). The ALJ further determined that Respondent’s connection with two public companies engaged in a joint venture partnership with its subsidiary was too tenuous to establish coverage, stating that the relationship was not evidence that Respondent’s own financial information was included in the consolidated financial statements of a public company. The ALJ noted that a private company conducting business with a publicly traded company does not itself confer SOX coverage.<sup>26</sup>

The ALJ, however, did not fully consider SOX’s coverage language when granting summary decision. The ALJ viewed Respondent’s relationship with the public companies as merely conducting business, citing SOX case law dismissing coverage based on commercial transactions.<sup>27</sup> The decision’s analysis section did not discuss whether Respondent was a “subsidiary or affiliate whose financial information is included in the consolidated financial statements of [any of the public] companies.”<sup>28</sup> In his response to Respondent’s motion for summary decision, Complainant in effect argued that the SOX whistleblower provision covered Respondent as a subsidiary or an affiliate<sup>29</sup> whose financial information is

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<sup>24</sup> 18 U.S.C. § 1514A(a) (2010).

<sup>25</sup> 29 C.F.R. § 1980.101(d); 18 U.S.C. § 1514A(a).

<sup>26</sup> D. & O. at 3 (citing *Fleszar v. Am. Med. Assoc.*, ARB Nos. 2007-0091, 2008-0061, ALJ Nos. 2007-SOX-00030, 2008-SOX-00016, slip op. at 4 (ARB Mar. 31, 2009)).

<sup>27</sup> *Id.*

<sup>28</sup> 18 U.S.C. 1514A(a).

<sup>29</sup> The Dodd-Frank Act, the legislation that included the SOX whistleblower statute, defines an affiliate as “any company that controls, is controlled by, or is under common control with another company.” 12 U.S.C. § 5301(1) (providing that the term affiliate has the same meaning as provided in 12 U.S.C. § 1841(k)). Dodd-Frank defines a subsidiary as “any company which is owned or controlled directly or indirectly by another company.”

consolidated into the financial statements of public companies.<sup>30</sup> Viewed in a light most favorable to him as the non-moving party, this created a genuine issue of material fact, because Respondent concedes the shared ownership of 25% of TCSAP by a public company. The question to be answered is whether this ownership or any other relationship between TCNA or TCSAP and public companies results in consolidated financial statements under the applicable accounting rules of the public company.<sup>31</sup> We therefore must reverse the ALJ's decision granting summary decision on the SOX claim, and remand the claim for further proceedings. On remand, the ALJ may allow for further discovery and briefings on the matter as she sees fit.

Respondent argues that Complainant raised this argument for the first time on appeal and it should not be considered by the Board.<sup>32</sup> We determine that Complainant did adequately raise the issue in his response to the summary decision motion.<sup>33</sup> Though Complainant's discussion of the issue was somewhat terse, we construe "papers filed by pro se complainants," like Complainant, "liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude."<sup>34</sup>

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12 U.S.C. § 5301(18) (providing that the term subsidiary has the same meaning as provided in 12 U.S.C. § 1813(w)(4)).

<sup>30</sup> Complainant's Response at 10, 11.

<sup>31</sup> In the response to Complainant's opposition to summary decision, Respondent did not address Complainant's argument that Respondent was a covered employer because of its subsidiary's joint venture partnerships with public companies. *See* Response to Complainant-Appellant Rodney Gloss' Opposition to Respondent's Motion to Dismiss.

<sup>32</sup> *Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 2005-0066, ALJ No. 2005-SOX-00001, slip op. at 9 (ARB Sept. 28, 2007) ("Under our well-established precedent, we decline to consider arguments that a party raises for the first time on appeal.").

<sup>33</sup> In the section addressing SOX coverage, Complainant wrote:

TCSAP and TCSAP Holdings, TCNA subsidiaries, are joint ventures and Owens-Illinois and Church and Dwight, publicly traded US companies, are joint venture partners. In one form or another, the financial results are consolidated into / included within those publicly traded companies' financial statements. The Acts state that if the financial results of a company are consolidated into / included within those of publicly traded company, then SOX is without question applicable.

Complainant's Response at 11.

<sup>34</sup> *Salyer v. Sunstar Eng'g*, ARB No. 2014-0055, ALJ No. 2012-STA-00023, slip op. at 3 n.3 (ARB Sept. 29, 2015) (citations omitted).

Complainant next contests the ALJ's conclusion that he did not engage in activity protected under the CAA. The CAA provides that an employer may not fire an employee for engaging in protected activity.<sup>35</sup> The CAA defines protected activity as "commenc[ing] a proceeding," "testify[ing] in such a proceeding," "assist[ing] in such a proceeding," or "participat[ing] in any other action to carry out the purposes" of the CAA.<sup>36</sup> The ALJ stated that Complainant only alleged one instance of protected activity: Complainant alerting Respondent's accountants of the possible environmental fraud and the potential for fines. The ALJ concluded that this activity was not protected under the CAA.

Complainant contends that he also engaged in protected activity after reporting the issue to the accountants in a sequence of events between January 1, 2019, and April 14, 2021, that included several follow-ups with Respondent's CEO to ensure the previous fraudulent environmental reporting was cured. Indeed, in his response to Respondent's summary decision motion, Complainant contended that his "compelling [Respondent] to self-file non-compliance reports with the WDEQ" and "discussions with the CEO and the environmental compliance staff" was protected activity.<sup>37</sup> The ALJ, however, did not discuss these alleged protected activities in the decision. Accordingly, the ALJ erred in granting summary decision on the CAA claim.<sup>38</sup> We therefore vacate the ALJ's grant of summary decision on the CAA claim and remand for the ALJ to address all of the Complainant's alleged protected activities.<sup>39</sup>

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<sup>35</sup> 42 U.S.C. § 7622(a).

<sup>36</sup> *Id.*

<sup>37</sup> Complainant's Response at 17.

<sup>38</sup> *See Farrar v. Roadway Express*, ARB No. 2006-0003, ALJ No. 2005-STA-00046, slip op. at 9 (ARB Apr. 25, 2007) (holding that an ALJ erred when it granted summary decision without addressing an alleged instance of an adverse employment action in a whistleblower complaint).

<sup>39</sup> Respondent also contends that the CAA claim must be dismissed because the complaint was untimely. A complainant must file a CAA discrimination claim within thirty days of receiving final, definitive, and unequivocal notice of the adverse employment action. 42 U.S.C. § 7622(b)(1); *Jenkins v. U.S. EPA*, ARB No. 1998-0146, ALJ No. 1988-SWD-00002, slip op. at 13 (ARB Feb. 28, 2003). In a footnote in her decision, the ALJ stated that it "also appears Complainant's complaint to OSHA was untimely" but that she "need not reach this point because [she] dismiss[ed] the claim on other grounds." Because the ALJ did not actually rule on Respondent's untimeliness argument, we decline to address it. *See Adm'r, Wage and Hour Div. v. Volt Mgmt. Corp.*, ARB No. 2018-0075, ALJ No. 2012-LCA-



**CONCLUSION**

For the foregoing reasons, we **VACATE** and **REMAND** the ALJ's grant of summary decision for the SOX claim and the ALJ's grant of summary decision for the CAA claim.

**SO ORDERED.**