



**In the Matter of:**

**NASSER MIDAMBA,**

**ARB CASE NO. 2019-0052**

**COMPLAINANT,**

**ALJ CASE NO. 2016-SOX-00003**

**v.**

**DATE: February 18, 2021**

**VERIZON WIRELESS TEXAS, LLC,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Bill R. Johnson, Esq.; *Law Office of Bill R. Johnson*; Houston, Texas**

***For the Respondent:***

**Ruthie N. White, Esq.; William R. Stukenberg, Esq.; and DeAndrea C. Young, Esq.; *Jackson Lewis, P.C.*; Houston, Texas**

**Before: James D. McGinley, *Chief Administrative Law Judge*, Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges***

## **DECISION AND ORDER**

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). Complainant, Nasser Midamba, filed a retaliation complaint, alleging that his former employer, Verizon Wireless Texas, LLC (Respondent), violated SOX's whistleblower protection provisions by retaliating against him because he engaged in protected activity.

## BACKGROUND

Complainant began working as an engineer for Respondent on July 7, 2008, in Respondent's West Gulf Coast region. His job duties included managing Respondent's real estate initiatives, including antenna sectorization, generator deployments, and generator upgrades. Complainant's job also included an annual performance agreement and performance reviews. In March 2012, Complainant signed a performance agreement for that year. In July 2012, Respondent combined the eastern and western regions and Jana Luecke became Complainant's supervisor. Ms. Luecke determined that Complainant would not be able to achieve the goals laid out in his 2012 performance agreement and placed him on a performance improvement plan. Ultimately, Respondent fired Complainant in January 2013.

On April 9, 2013, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA). Complainant alleged that Respondent retaliated against him when it put him on the performance improvement plan, gave him negative performance reviews, and fired him for reporting what he believed were SOX violations. On September 25, 2015, OSHA dismissed the complaint.

Complainant appealed to the Office of Administrative Law Judges (OALJ) on October 21, 2015. A hearing was held on May 7-8, 2018, and August 16-17, 2018. On April 10, 2019, the ALJ issued a Decision and Order (D. & O.) dismissing the complaint.

On April 24, 2019, Complainant appealed to the Administrative Review Board (Board).

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board his authority to act on appeal from ALJ decisions arising under the SOX and issue agency decisions in those matters.<sup>1</sup> In SOX cases the Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.<sup>2</sup>

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<sup>1</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>2</sup> 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) (citation omitted).

## DISCUSSION

SOX prohibits covered employers, like Respondent, from discharging or otherwise discriminating against an employee for “provid[ing] information . . . regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . .”<sup>3</sup> To prevail on his SOX claim, Complainant must prove by a preponderance of the evidence that: 1) he engaged in activity that SOX protects; 2) Respondent took unfavorable personnel action against him; and 3) the protected activity was a contributing factor in the adverse personnel action.<sup>4</sup> If Complainant can establish each of these elements, Respondent may avoid liability under the Act if it proves by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant’s protected activity.<sup>5</sup>

The ALJ determined that Complainant was unable to establish that he engaged in protected activity or that his alleged activity contributed to the adverse actions. The ALJ concluded that none of these activities were protected because Complainant failed to establish Respondent had violated or was intending to violate the SOX.<sup>6</sup> In addition, the ALJ concluded that, even if these activities were protected, they did not contribute to the adverse actions taken against

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<sup>3</sup> 18 U.S.C. § 1514A(a)(1).

<sup>4</sup> 29 C.F.R. § 1980.109(a); *see also* 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)); *Sylvester v. Parexel Int’l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 9-10 (ARB May 25, 2011).

<sup>5</sup> 29 C.F.R. § 1980.109(b); *see also* 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)); *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Nos. 2007-0021, -0022, ALJ No. 2004-SOX-00011, slip op. at 6 (ARB Aug. 31, 2009).

<sup>6</sup> In determining that Complainant’s belief of SOX violations was not reasonable, the ALJ cited: 1) inconsistencies in Complainant’s testimony and between his testimony and that of other witnesses; 2) Complainant’s testimony that he was told vendors were not required to have real estate licenses; 3) Complainant’s years of experience working in the industry; and 4) the fact that the only evidence that Ms. Luecke had been a principal of Charlie Craig & Associates was a picture on a website which had been removed in 2009, three years before Complainant had raised his complaints. D. & O. at 57-60.

Complainant.<sup>7</sup> The ALJ explained that the decision-makers responsible for terminating Complainant's employment all testified credibly and consistently that they had no prior knowledge of Complainant's alleged protected activity.<sup>8</sup> The ALJ rejected Complainant's argument that Respondent's explanation for his firing was pretextual.<sup>9</sup> In short, the ALJ found "the clear weight of the evidence shows that Respondent fired Complainant solely because of his poor performance."<sup>10</sup>

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<sup>7</sup> *Id.* at 60-65.

<sup>8</sup> *Id.* at 60-61.

<sup>9</sup> *Id.* at 63-65.

<sup>10</sup> *Id.* at 65.

On appeal, Complainant contends the ALJ erred in concluding that he had not engaged in protected activity. Specifically, Complainant contends that his activities are protected because he believed Respondent had violated or was intending to violate the SOX. Complainant also contends the ALJ erred in finding that Respondent had no knowledge of his complaints based on a “cat’s paw” theory—Complainant argues that his multiple complaints to human resources demonstrate Respondent’s knowledge of his alleged complaints. Complainant further contends that the ALJ erred in concluding that his alleged activities were not a contributing factor to the adverse actions he experienced, which were based on allegations of deviation from standard procedure, disparate treatment, temporal proximity, and pretext.

Having reviewed the ALJ’s Decision and Order and the parties’ briefs on appeal, we conclude that the ALJ made no errors of law, and substantial evidence in the record supports the ALJ’s findings that Complainant did not engage in protected activity. Even if Complainant had engaged in a protected activity, we conclude that substantial evidence supports the ALJ’s finding that protected activity was not a contributing factor to the adverse actions Respondent took against Complainant. Notably, Complainant had a lengthy history of poor performance dating back to 2009, and he was unable to meet the goals in his performance improvement plan, even after Respondent amended it so it would be easier for Complainant to complete it satisfactorily.

Therefore, the ALJ’s Decision and order is summarily **AFFIRMED**.

**SO ORDERED.**