



In the Matter of:

PATRICIA LEVIEGE,

ARB CASE NO. 2019-0058

COMPLAINANT,

ALJ CASE NO. 2016-SOX-00001

v.

DATE: March 19, 2021

VODAFONE US, INC.,

RESPONDENT.

Appearances:

*For the Complainant:*

Monique Miles, Esq.; *Old Towne Associates, P.C.*; Alexandria, Virginia

*For the Respondent:*

Bronwyn H. Pepple, Esq.; *Lewis, Bess, Williams & Weese P.C.*; Denver, Colorado

Before: James D. McGinley, *Chief Administrative Law Judge*, James A. Haynes and Stephen M. Godek, *Administrative Appeals Judges*

## DECISION AND ORDER

PER CURIAM. 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 Patricia Leviege filed a complaint alleging that her former employer, Vodafone US, Inc., retaliated against her because she engaged in SOX-protected activities. On April 29, 2019, an Administrative Law Judge (ALJ) issued a Decision

and Order (D. & O.) denying the complaint. For the following reasons we affirm the ALJ.

#### BACKGROUND

Vodafone is a multi-national communications company that employed Leviege as a “Commercial In Life Specialist” in its Ashburn, Virginia office. Leviege’s responsibilities included ensuring the accuracy of invoices. In 2013 and 2014, she worked on a project that involved the creation of an inventory of electronic equipment being used by Bank of America (BOA), a Vodafone client. The project was governed by a Master Professional Services Agreement (MPSA).<sup>1</sup>

The project incorporated ten milestones. Milestone 4 of the contract required Vodafone to finalize the inventory of electronic devices, which required physically locating each device. BOA had provided Vodafone with an inaccurate list of these devices, so Vodafone subcontracted with a company called Black Box to locate each device. Leviege was one of the Vodafone employees responsible for generating list entries that BOA would review and, when necessary, provide corrections.<sup>2</sup>

Leviege’s employment with Vodafone ended in October 2014. She filed her SOX complaint on January 23, 2015. Leviege contends that during her employment, she engaged in SOX-protected activities that contributed to her discharge. According to Leviege, she informed various Vodafone managers and supervisors that individuals in the company had (1) billed BOA for services that had not been performed; (2) overstated company revenue; (3) encouraged her to input false information into the inventory system; (4) manipulated data in a billing file; and (5) paid certain employees’ salaries twice in a single pay period.<sup>3</sup>

OSHA investigated Leviege’s claims and found that Vodafone had not retaliated against her in violation of the SOX. Leviege subsequently requested a hearing, which the ALJ initiated on May 31, 2017. The hearing was suspended after the third day due to Leviege’s illness, and she died on September 19, 2017. Respondent’s counsel did not cross-examine Leviege prior to her death.

The ALJ conducted another five days of hearing, from December 18-22, 2017, with Leviege’s son acting on her behalf. On April 29, 2019, the ALJ issued a D. & O. in which he concluded that Leviege had not engaged in SOX-protected activity

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1 D. & O. at 4-7.

2 *Id.* at 5-6.

3 *See* Complainant-Appellant’s Opening Brief at 4-7, 10-12.

during her employment. Leviege’s representative appealed the ALJ’s D. & O. to the Board. We issued a briefing order, and the parties filed briefs.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under the SOX.<sup>4</sup> The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ’s factual determinations if they are supported by substantial evidence.<sup>5</sup> Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>6</sup> The Board will also uphold ALJ credibility determinations unless they are “inherently incredible or patently unreasonable.”<sup>7</sup>

### DISCUSSION

The SOX provides that a covered employer may not discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because the employee provides information to a supervisor “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>8</sup> Thus, to prevail on her SOX claim, Leviege must prove by a preponderance of the evidence that (1) she engaged in activity that SOX protects; (2)

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4 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).

5 29 C.F.R. § 1980.110(b); *Johnson v. The Wellpoint Cos., Inc.*, ARB No. 2016-0020, ALJ No. 2010-SOX-00038, slip op. at 3 (ARB Aug. 31, 2017).

6 *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

7 *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB May 9, 2019); accord *Formella v. U.S. Dep’t of Labor*, 628 F.3d 381, 391 (7th Cir. 2010) (“[T]he resolution of [a credibility contest] belongs in all but the extraordinary case to the judge who heard and observed the witnesses first hand.”).

8 18 U.S.C. § 1514A(a)(1).

Vodafone took unfavorable personnel action against her; and (3) the protected activity was a contributing factor in the adverse personnel action.<sup>9</sup>

To demonstrate that she engaged in SOX-protected activity, a complainant must prove that (1) she subjectively believed that the conduct complained of constituted a violation of one of the laws listed in Section 806, and (2) a reasonable person of similar experience, training, and factual knowledge would objectively believe that a violation had occurred.<sup>10</sup> A complainant need not cite a specific code provision she believes was violated to engage in protected activity, but nonetheless has to complain or provide information about conduct that she reasonably believes concerns one of the six specifically enumerated categories in the statute: mail fraud, bank fraud, wire fraud, securities fraud, any provision of Federal law relating to fraud against shareholders, or any rule or regulation of the SEC.<sup>11</sup> General assertions of wrongdoing untethered from these enumerated categories are not protected, nor are general inquiries.<sup>12</sup> Moreover, although a complainant need not prove an actual violation of law, she must do more than speculate, argue theoretical scenarios, or share mere beliefs that some corporate activity is wrong and may theoretically affect the corporation's financial statements and its shareholders.<sup>13</sup>

The ALJ concluded that Leviege's testimony was not credible. He examined Leviege's allegations and made findings of fact that are supported by the record.

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9 See 29 C.F.R. § 1980.109(a); see also 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 49121(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).

10 *Sylvester*, ARB No. 2007-0123, slip op. at 14-15.

11 *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 n.6 (2d Cir. 2014) ("We note that the statute does require plausible allegations that the whistleblower reported information based on a reasonable belief that the employer violated *one of the enumerated provisions* set out in the statute" (emphasis original)); *Welch v. Chao*, 536 F.3d 269, 276-77, 279 (4th Cir. 2008) ("[Welch] utterly failed to explain how Cardinal's alleged conduct could reasonably be regarded as violating any of the laws listed in" SOX); *Thibodeau v. Wal-Mart Stores, Inc.*, ARB No. 2017-0078, ALJ No. 2015-SOX-00036, slip op. at 15 (ARB Dec. 17, 2020) ("A complainant is protected only if the complainant supplies information concerning conduct that the complainant reasonably believes constitutes a violation of one of the specifically enumerated categories.").

12 See *Welch*, 536 F.3d at 277; *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009); *Reilly v. Glaxosmithkline, LLC*, No. 19-2897, 2020 WL 4013118, at \*3-4 (3d Cir. July 16, 2020) (unpublished).

13 *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 355 (4th Cir. 2008); *Lamb v. Rockwell Automation, Inc.*, 249 F. Supp. 3d 904, 913 (E.D. Wis. 2017).

The ALJ concluded that “it makes no difference if Complainant had a reasonable basis to believe Respondent was violating SOX since I have found she did not report these alleged violations to anyone.”<sup>14</sup> Based upon our review of the record, we find no reason to overturn the ALJ’s credibility findings, and therefore, we agree with the ALJ’s conclusion.

Leviege alleged that Vodafone billed BOA for services that had not been performed at the time of billing. The ALJ found that BOA agreed to be billed for parts of the project prior to their completion.<sup>15</sup> The MPSA is in evidence, but Leviege cites to no provision that was violated, nor does she explain why billing for services not completed constituted a violation of the laws listed in the SOX.

Leviege argued before the ALJ that Vodafone overstated its earnings by reporting income from unpaid invoices. But the ALJ relied on the testimony of two Vodafone managers who explained that Vodafone booked revenue only after services have been delivered.<sup>16</sup> Leviege has not addressed that ruling in her appeal to the Board.

Leviege also alleges that in November 2013, Kevin Jarvis, her supervisor, encouraged her to forge information in the inventory list. On appeal, Leviege cites her hearing testimony as evidence that she reported Jarvis’ actions.<sup>17</sup> The ALJ did not credit that testimony, and he cited her failure during her deposition to confirm that she told someone about Jarvis’ actions. The ALJ found that Leviege “downplayed the significance of Jarvis’s request, stating that it was simply a conversation between her and Jarvis and she did not expect anything to result from it.”<sup>18</sup> The ALJ also found that Jarvis credibly denied that Leviege “ever complained about any fraudulent billing or accounting practices or that she ever mentioned Enron or violations of the Sarbanes-Oxley Act.”<sup>19</sup>

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14 D. & O. at 14.

15 *Id.* at 9, 16.

16 *Id.* at 16.

17 Complainant’s Brief at 7, citing Hearing Transcript at 595, 603-4, 645-646, 680-681.

18 D. & O. at 10, citing Deposition of Patricia Leviege at 168 (“Q: Did you tell anybody that Kevin tried to get you to forge this data in 2013? A: At the time it was a conversation. I’ve never been in this kind of situation before, I didn’t think anything was going to come of it, it was just a conversation that him and I had.”).

19 D. & O. at 10.

Citing an email Jarvis sent to several individuals, Leviege asserts she complained that Jarvis “manipulated data in the billing file and was not punished.” In the email, Jarvis asks for a “sample of the inventory I will receive on Monday as I need to know how different it is to the original so I know how much work will be involved in manipulating it into the final billing file.”<sup>20</sup> Leviege does not explain how this email describes an illegal act.

Finally, on a single occasion, Vodafone paid some of its employees twice their salary in a single pay period. This was an unintentional error, about which the ALJ opined that “Complainant’s contention regarding this double payment issue is further evidence of her lack of credibility.”<sup>21</sup>

### CONCLUSION

Leviege failed to prove that she engaged in SOX-protected activity during her employment at Vodafone. We therefore **AFFIRM** the ALJ’s D. & O. and **DENY** Leviege’s complaint.

**SO ORDERED.**

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20 Complainant’s Exhibit 57.

21 D. & O. at 12.