



**In the Matter of:**

**JAMES R. SHELTON,**

**ARB CASE NO. 06-153**

**COMPLAINANT,**

**ALJ CASE NO. 2006-SOX-076**

**v.**

**DATE: July 31, 2008**

**TIME WARNER CABLE,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**James R. Shelton, *pro se*, Fallbrook, California**

***For the Respondent:***

**Gregory S. Drake, *Time Warner Cable*, El Segundo, California**

**FINAL DECISION AND ORDER**

This case arises under the whistleblower protection provision of the Sarbanes-Oxley Act of 2002 (SOX)<sup>1</sup> and its implementing regulations.<sup>2</sup> James R. Shelton filed a complaint alleging that his former employer, Time Warner Cable (TWC), violated the SOX by discharging him from employment. TWC filed a Motion to Dismiss the complaint. On August 31, 2006, the ALJ issued a Recommended Decision and Order (R. D. & O.) dismissing the complaint. We affirm.

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<sup>1</sup> 18 U.S.C.A. § 1514A (West 2006).

<sup>2</sup> 29 C.F.R. Part 1980 (2007).

## BACKGROUND

TWC employed Shelton as a production assistant when it terminated his employment on December 17, 2004. According to TWC, it fired Shelton “after he blatantly disregarded a clear written warning ... to discontinue his abuse of the company-wide e-mail system.”<sup>3</sup>

On January 29, 2005, Shelton submitted a letter, with twenty-seven pages of attachments, to the Acting Assistant Secretary of Labor, in which he stated that TWC discharged him for inquiring about certain ERISA<sup>4</sup> matters and for complaining about the possibility of workplace violence at TWC. On January 31, 2005, Shelton submitted a second letter, with thirty-nine pages of attachments, to the Secretary of Labor, accusing TWC of firing him for bringing possible ERISA violations to the attention of company officials.<sup>5</sup>

Shelton submitted a third letter to the Secretary of Labor on October 28, 2005, inquiring about the status of his January 31, 2005 letter which, according to Shelton, constituted a SOX complaint. The Secretary forwarded the October 28, 2005 letter to the Occupational Safety and Health Administration (OSHA), which treated it as a SOX complaint against TWC. According to OSHA, it also received letters Shelton submitted to the Employee Benefits Security Administration (EBSA) and the Internal Revenue Service (IRS) on February 19, 2005, and March 9, 2005, respectively, in which he alleged that TWC retaliated against him for exercising his rights under ERISA.<sup>6</sup>

On April 3, 2006, OSHA found that none of the documents Shelton submitted to various agencies on January 29, January 31, February 19, and March 9, 2005, presented a complaint of retaliatory discrimination pursuant to the SOX. OSHA also found that Shelton’s October 28, 2005<sup>7</sup> SOX complaint was untimely.

Shelton requested a hearing before a Department of Labor Administrative Law Judge (ALJ). On June 30, 2006, prior to a hearing, TWC filed a Motion to Dismiss

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<sup>3</sup> Complainant’s Response in Opposition to Respondent Time Warner Cable’s Motion to Dismiss Complaint (Complainant’s Response), Exhibit (Ex.) 6.

<sup>4</sup> “ERISA” is the Employee Retirement Income Security Act of 1974, 29 U.S.C.A § 1001 *et seq.* (West 1999 & Supp. 2007).

<sup>5</sup> Secretary’s Findings at 1.

<sup>6</sup> *Id.* The EBSA and IRS letters are not included in the record before us.

<sup>7</sup> OSHA states that Shelton filed his SOX complaint on October 15, 2006. Secretary’s Findings at 1. We agree with the ALJ’s finding that Shelton filed the complaint on October 28, 2005. *See R. D. & O.* at 4, n.3 (citing a copy of the “original complaint” forwarded by the Deputy Regional Administrator).

Shelton's complaint, which the ALJ construed as a motion for summary decision pursuant to 29 C.F.R. § 18.40. TWC argued that Shelton's complaint should be dismissed because (1) the October 28, 2005 complaint was untimely; (2) the January 31, 2005 letter did not establish that Shelton filed a SOX complaint; and (3) TWC was not a publicly held company under the SOX.<sup>8</sup> Shelton responded to the Motion to Dismiss by arguing that he filed a timely complaint, and that TWC was subject to the SOX's whistleblower provisions.

On August 31, 2006, the ALJ issued an Order Granting Respondent's Motion to Dismiss (R. D. & O.). The ALJ concluded that a genuine issue of fact existed as to the relationship between TWC and Time-Warner Inc., a publicly held company subject to the SOX. Nevertheless, the ALJ also concluded that TWC was entitled to summary decision because (1) Shelton's October 28, 2005 complaint was untimely and (2) the materials Shelton submitted to the Department of Labor on January 29 and 31, 2005, failed to state a claim for relief under the SOX.<sup>9</sup> Shelton appealed the ALJ's decision to this Board.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Administrative Review Board (Board) her authority to issue final agency decisions under the SOX.<sup>10</sup> We review a decision granting summary decision *de novo*. That is, the standard the ALJ applies, also governs our review.<sup>11</sup> The standard for granting summary decision under the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges is similar to that found in Federal Rule of Civil Procedure 56, which governs summary judgment in the federal courts. Accordingly, summary decision is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.<sup>12</sup>

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<sup>8</sup> Motion to Dismiss at 2-4.

<sup>9</sup> R. D. & O. at 7-8.

<sup>10</sup> Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

<sup>11</sup> 29 C.F.R. § 18.40 (2006).

<sup>12</sup> Fed. R. Civ. P. 56(c); 29 C.F.R. § 18.40(d); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

## DISCUSSION

### A. Governing Law

The SOX's employee protection provision, Section 806, protects employees who provide information to a covered employer or a federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission (*see, e.g.*, 17 C.F.R. Part 210 (2007)), Form and Content of the Requirements for Financial Statements), or any provision of federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such alleged violation.<sup>13</sup>

An employee alleging retaliation in violation of the SOX should file his or her complaint with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may file with any OSHA officer or employee.<sup>14</sup> An employee alleging retaliation in violation of the SOX must file his complaint within 90 days after the alleged violation occurred.<sup>15</sup> Such a complaint "must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations."<sup>16</sup>

### B. Coverage

In its Motion to Dismiss, TWC states that it is entitled to summary decision on the grounds that it is not a publicly traded company.<sup>17</sup> We disagree. The SOX prohibits "any officer, employee, contractor, subcontractor, or agent" of a publicly traded company (i.e., having securities registered under section 12 of the Securities Exchange Act of 1934 or required to file reports under section 15(d) of the Act) from retaliating against employees

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<sup>13</sup> 18 U.S.C.A. § 1514A(a); 68 Fed. Reg. 31,864 (May 28, 2003).

<sup>14</sup> 29 C.F.R. § 1980.103(c).

<sup>15</sup> 18 U.S.C.A. § 1514A(b)(2)(D) ("An action ... shall be commenced not later than 90 days after the date on which the violation occurs."); 29 C.F.R. § 1980.103(d) ("Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.").

<sup>16</sup> 29 C.F.R. § 1980.103(b).

<sup>17</sup> Motion to Dismiss at 4.

who engage in SOX-protected activity.<sup>18</sup> The ALJ found that a factual dispute existed regarding the relationship between TWC, a subsidiary of Time-Warner Inc., and Time-Warner Inc., a publicly traded company subject to the Securities Exchange Act.<sup>19</sup>

The record supports the ALJ's finding. Shelton submitted sufficient evidence to create a genuine issue of fact over whether TWC was an agent of Time-Warner Inc., under the SOX for the purpose of this case.<sup>20</sup> We therefore concur with the ALJ's conclusion that TWC is not entitled to summary decision on the grounds that it is not covered by the SOX.

### **C. Timeliness**

We also conclude, as did the ALJ, that Shelton failed to file a timely SOX complaint. TWC discharged Shelton from employment on December 17, 2004. As noted above, an employee alleging retaliation in violation of the SOX must file his complaint within 90 days after the alleged violation occurred. Shelton was therefore required to file his SOX complaint by March 17, 2005. He failed to do so.

Shelton did not present a SOX claim in the materials he submitted to the Secretary and the Acting Assistant Secretary on January 29 and 31, 2005.<sup>21</sup> Those materials present claims pursuant to ERISA and Section 11(c) of the Occupational Safety and Health Act. They do not contain any allegation that TWC committed an act that constituted a violation of the SOX.

The record before us indicates that Shelton did not file a complaint alleging that TWC violated the SOX until October 28, 2005, which is more than 90 days after his discharge. We therefore agree with the ALJ's conclusion that TWC is entitled to summary decision because Shelton failed to file a timely SOX complaint.

## **CONCLUSION**

Shelton's October 28, 2005 complaint is time-barred, and he did not, prior to that date, file a complaint accusing TWC of violating the SOX. We therefore concur with the

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<sup>18</sup> 18 U.S.C.A. § 1514A.

<sup>19</sup> R. D. & O. at 8-9.

<sup>20</sup> See, e.g., Complainant's Response, Ex. 15 (excerpt from Time Warner Cable's Standards of Business Conduct Manual).

<sup>21</sup> Shelton does not argue before us that his letters to EBSA and the IRS constitute SOX complaints.

ALJ's conclusion that TWC is entitled to summary decision. Accordingly, we **AFFIRM** the ALJ's R. D. & O. and **DENY** Shelton's complaint.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**