In the Matter of:

DR. DANIEL ULIBARRI, **ARB CASE NO. 07-003**

COMPLAINANT, **ALJ CASE NO. 2005-SOX-046**

v. **DATE: July 31, 2008**

AFFILIATED COMPUTER SERVICES,

RESPONDENT.

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ELENA MASON,

COMPLAINANT, **ALJ CASE NO. 2006-SOX-047**

v.

AFFILIATED COMPUTER SERVICES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:
Daniel Ulibarri, pro se, Elena Mason, pro se, *Plano, Texas*

For the Respondent:
Samuel Zurik III, Esq., The Kullman Firm, *New Orleans, Louisiana*

FINAL DECISION AND ORDER

Dr. Daniel Ulibarri and Elena Mason filed complaints with the United States Department of Labor alleging that when their former employer, Affiliated Computer Services (ACS), fired them, it violated the employee protection provisions of the Sarbanes-Oxley Act of 2002 (SOX).[1] A Labor Department Administrative Law Judge (ALJ) dismissed their complaints and later denied their motion to reconsider. They appealed. We affirm.

BACKGROUND

ACS is a publicly traded company that provides business process and information technology services.[2] It hired Ulibarri in 2001, and by 2003 he worked in Dallas as ACS's Vice President of Human Resources Global Delivery Services. Mason began work at ACS in 2004. Her title was International Human Resources Generalist for Asia Pacific. She coordinated human resources between the Asia and Dallas offices. ACS fired Ulibarri and Mason on August 9, 2004, for unsatisfactory performance.

Three months later Ulibarri and Mason (the "Complainants") filed their SOX complaints. They alleged that ACS violated the SOX when it fired them after they called attention to possible fraud by ACS employees in India. The SOX prohibits publicly traded companies from taking adverse employment action against employees who provide information to the company 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 (fraud "in connection" with "any security" or the "purchase or sale of any security"), any rule or regulation of the SEC, 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 relating to any such alleged violation.[3]

After the case was assigned to an ALJ, ACS moved to stay the proceedings. The company's Dispute Resolution Program (DRP) provided that "All Disputes not otherwise settled by the Parties shall be finally and conclusively resolved . . . by binding arbitration."[4] By its terms, the DRP contractually bound ACS and its employees, except those covered under a collective bargaining agreement.[5] Therefore, ACS argued that since the plan bound Ulibarri and Mason and applied to all disputes, the ALJ should stay the Department of Labor proceedings and compel arbitration. The Complainants

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1 18 U.S.C.A. § 1514A (West Supp. 2008).

2 http://www.acs-inc.com/.

3 18 U.S.C.A. § 1514A(a).

4 Respondent's Exhibit (RX) 1, p. 5.

5 *Id.*, p. 4.

responded to the ACS motion, arguing that the contract was void ab initio or, alternatively, that ACS had breached the DRP agreement and thereby forfeited its right to compel arbitration.

The ALJ's Decision

The ALJ conducted a hearing to determine whether the DRP precluded Ulibarri and Mason from litigating their SOX complaints in the Labor Department. After taking evidence and reviewing post-hearing briefs, the ALJ rejected the Complainants' arguments that the contract was void because of failure of mutual consideration and because it was unconscionable.[6]

He also found that ACS did not breach the agreement. The Complainants asserted that ACS managers did not adequately investigate their arguments that they should not be terminated. Furthermore, they claimed that ACS's counsel told them that he would change the reason for terminating them from "for cause" to "voluntary resignation" only if they agreed not to take further action against ACS.[7] Therefore, according to Ulibarri and Mason, ACS did not follow the DRP, thus breaching the agreement and negating their obligation to arbitrate. But the ALJ found that the fact that ACS might have breached any of the non-arbitration provisions of the DRP was irrelevant because the terms of the plan are severable, and the invalidity or unenforceability of one section did not void another. Thus, since ACS did not breach the arbitration provision, Ulibarri and Mason were bound to arbitrate their SOX claims.[8] Accordingly, the ALJ granted ACS's motion to stay the Labor Department proceedings and ordered ACS to inform him of the status of the arbitration.

By June 30, 2006, the Complainants had not proceeded to arbitration. The ALJ ordered them to show cause why their SOX complaints should not be dismissed. They responded and indicated that they would not be pursuing arbitration. As a result, the ALJ dismissed their complaints.[9]

Motion for Reconsideration

Ulibarri and Mason petitioned the ALJ to reconsider his decision to dismiss their complaints. They argued, for the first time, that their SOX complaints, filed with the Department of Labor, were not subject to arbitration because during the hearing their

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[6] January 13, 2006 Decision and Order at 19-21.

[7] Transcript at 72-73; Complainants' Post Trial Brief at 19-20.

[8] Decision and Order at 21-22. The ALJ also found that the Complainants had timely filed their SOX complaints with the Department of Labor. *Id.* at 16-17.

[9] July 24, 2006 Order to Dismiss.

attorney did not "highlight," and therefore did not "sufficiently communicate," the following portion of the "Questions and Answers" section of the DRP:

> Will I still be able to go the Equal Employment Opportunity Commission (EEOC) or the National Labor Relations Board?
>
> Yes. The DRP applies to relief you may seek personally through the courts for a workplace dispute. You are still free to consult the appropriate state Human Rights Commission, the EEOC, the National Labor Relations Board *or any other government regulatory agency* regarding your workplace problem. Of course, we hope you will feel the DRP is so effective you will not need to go anywhere else.[10]

Therefore, the Complainants argued, the ALJ should find that the DRP specifically excluded their Labor Department SOX complaint from mandatory arbitration. To do so would "correct a manifest error of fact" that exists only because of attorney error.[11] They also argued, for the first time, that the ALJ erred in staying the proceedings and then dismissing their complaints because ACS did not initiate the arbitration process, which the DRP requires.[12]

The ALJ denied the motion to reconsider. He noted that during the hearing he had specifically questioned the Complainants' attorney about the scope of their challenge to the DRP. The attorney explicitly stated that his clients were making only two arguments - the employment contract (which included the DRP) was void ab initio and that ACS had released the Complainants from their contract obligations because it had breached the contract. Therefore, citing *Link v. Wabash Railroad Co*.,[13] the ALJ held that Ulibarri and Mason were bound by their attorney's actions. He also rejected their argument that ACS was obligated to initiate arbitration because the DRP does not require the company to invoke the process.[14]

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[10] RX 1, p. 16. The entire DRP, including the "Questions and Answers" section, was part of the record before the ALJ.

[11] Motion to Reconsider at 2-3.

[12] Comments on Respondent's Response to Motion to Reconsider at 5-9, dated September 11, 2006.

[13] 370 U.S. 626, 633-634 (1962).

[14] Order on Motion to Reconsider.

DISCUSSION

Ulibarri and Mason have petitioned us to review the ALJ's order denying their motion to reconsider. The Administrative Review Board (ARB) has the authority to review an ALJ's recommended SOX decision and to issue the Labor Department's final decision.[15] We review the ALJ's findings of fact under the substantial evidence standard.[16] We review the ALJ's conclusions of law de novo.[17]

The essence of the Complainants' pro se petition for review and the supporting briefs, as we understand them, is that the ALJ committed two errors in denying their motion for reconsideration. First, they contend that the ALJ erred because he did not find that the DRP excludes their SOX complaints from mandatory arbitration. Second, they argue that the ALJ erred in finding that the DRP does not require ACS to initiate the arbitration process against itself. Neither argument has merit.

Both the record below and ARB precedent support the ALJ's decision that Ulibarri and Mason could not rely on the "You are still free to consult . . . any other government regulatory agency" language in the DRP that the Complainants read as excluding their SOX claims from arbitration. The record clearly reflects the fact that the Complainants' attorney specifically informed the ALJ that he was challenging arbitration of his clients' SOX claims on two grounds only: the employment contract (which included the DRP) was void ab initio or, alternatively, that ACS had breached the contract, thus releasing Ulibarri and Mason from the obligation to arbitrate.[18] The ALJ, therefore, found that the Complainants "implicitly conceded" the issue of whether the DRP applied to SOX claims.[19]

The Complainants argue to us, as they did to the ALJ, that this finding constitutes a "manifest error of law or fact" because the DRP is part of the record and their attorney erroneously did not argue that language in the DRP excludes their SOX claims from arbitration. But the ALJ did not err as a matter of law. Ulibarri and Mason are accountable for the acts and omissions of their attorney.[20] They voluntarily chose their

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[15] 29 C F.R. § 1980.110 (2007); Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002).

[16] 29 C.F.R. § 1980.110 (b).

[17] *Henrich v. Ecolab, Inc.*, ARB No 05-030, ALJ No. 2004-SOX-051, slip op. at 7 (ARB June 29, 2006).

[18] Transcript at 22-27.

[19] Order on Motion to Reconsider at 5.

attorney and cannot avoid the consequences of his failure to argue that the DRP excludes SOX claims from arbitration.[21] "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent . . . ."[22]

Nor did the ALJ err in finding that the DRP does not require ACS to initiate arbitration of the Complainants' SOX claims, and therefore ACS did not breach the employment contract by not initiating arbitration. The Complainants point to portions of the DRP as evidencing ACS's obligation to initiate arbitration: "Either you or ACS files a demand for arbitration with AAA or JAMS," and "If the demand for mediation or arbitration is initiated by the company, such fees will be paid by the company," and, "AAA or JAMS shall serve copies of the request [for arbitration] on all other parties to the dispute."[23] The Complainants construe this text as "specifically and clearly stat[ing] that 'EITHER PARTY' may initiate and even 'DEMAND' arbitration."[24]

As noted, the ALJ rejected the Complainants' interpretation: "The contract obligated Respondent to participate and abide by its [arbitration's] outcome. Contrary to Complainants' argument, the agreement did not require Respondent to invoke the process on behalf of Complainants."[25]

We agree. The cited DRP text must be understood in the larger context of American jurisprudence. In that context, arbitration is an adversarial process.[26] Therefore, unless the parties contract otherwise, the burden to initiate arbitration rests with the aggrieved party seeking relief.[27] ACS is not the aggrieved party; the

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[20] *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-006, slip op. at 5-6 (ARB Aug. 27, 2002) citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396 (1993); *see also Steffenhagen v. Securitas Sverige, AR*, ARB No. 03-139, ALJ No. 2003-SOX-024, slip op. at 4-5 (ARB Jan. 13, 2004).

[21] *See Link v. Wabash*, 370 U.S. at 633-634.

[22] *Id.* The Court did note, however, "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.

[23] Brief at 18.

[24] *Id.*

[25] Order on Motion to Reconsider at 6.

[26] *Austin Mun. Sec., Inc. v. NASD*, 757 F.2d 676, 691 (5th Cir. 1985).

Complainants are. Thus, the ALJ correctly found that the DRP does not specifically require that ACS invoke arbitration on behalf of the Complainants, and, for the reasons just stated, cannot be read to impose such a requirement.

CONCLUSION

Since both the record and applicable legal precedent support the ALJ's findings and conclusions in denying the Complainants' motion to reconsider, he did not commit error. Therefore, we **DISMISS** Ulibarri's and Mason's complaints.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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[27] THOMAS H. OEHMKE, J.D. & JOAN M. BROVINS, J.D., 32 CAUSES OF ACTION 2D §§ 26, 27 (2007).