



Issue Date: 23 October 2013

Case No.: 2012-SOX-00030

In the Matter of

MICHAEL KLAWANS
Complainant

v.

SOCIETE GENERALE
Respondent

**DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION**

This matter arises under the employee protection provisions of the Corporate and Criminal Fraud and Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (“Sarbanes-Oxley,” “SOX,” or “the Act”).

PROCEDURAL BACKGROUND

On May 25, 2012, Michael Klawans (“Complainant”) filed a formal complaint against Societe Generale (“Respondent” or “SG”) under the Act with the Department of Labor, Occupational Safety and Health Administration (“OSHA”). In that complaint, the Complainant alleged that he was terminated from his employment with Respondent in retaliation for protected whistleblowing activities.

On June 20, 2012, following an investigation, OSHA dismissed the complaint, finding: (1) that the Respondent is not a company within the meaning of 18 U.S.C. § 1514A in that it neither has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (“SEA”), nor is it required to file reports under Section 15(d) of the SEA; and (2) the Complainant is not an employee covered under 18 U.S.C. § 1514A.

By letter from his counsel dated July 18, 2012 which was received by the Office of Administrative Law Judges (“OALJ”) on July 19, 2012, the Complainant filed a timely appeal of OSHA’s determination.

Administrative Law Judge (“ALJ”) Ralph Romano was assigned to this matter and he issued a hearing notice dated August 17, 2012, setting a hearing date of December 11, 2012. In

response to a letter to ALJ Romano dated September 5, 2012 from Respondent's counsel advising that Respondent had not received a copy of Complainant's appeal of the OSHA dismissal of his complaint, Complainant's counsel provided Respondent with a copy of that appeal as well as ALJ Romano's hearing notice.

Respondent filed a "Motion for Summary Decision" with supporting memorandum and affidavits on October 3, 2012, and requested a stay of all proceedings pending a determination of its dispositive motion. Complainant submitted a letter dated October 12, 2012 in response, stating that Respondent's Motion for Summary Decision was "premature" and "deficient" and noting that pertinent discovery had not been completed. In its requested letter reply dated October 25, 2012, Respondent contended that it is not a covered company under the Act and that further discovery was unnecessary.

ALJ Romano retired from the OALJ and a notice of reassignment was issued to the parties on November 6, 2012, advising them that I had been assigned to the case and retaining the hearing date previously set by ALJ Romano. I issued a Notice Rescheduling Hearing and Prehearing Order dated November 13, 2012, re-setting the hearing date to April 24, 2013. The parties submitted initial submissions as directed.

On January 18, 2013, I held a teleconference call on the record with the parties to address the outstanding discovery issues. I directed the parties to complete discovery on the issue of jurisdiction and to supplement their prior pleadings.

Complainant timely filed his "Response To Respondent's Motion For Summary Dismissal" which was received by this office on June 10, 2013. In further support of its Motion for Summary Decision, Respondents' timely submitted a Memorandum of Law in Further Support and an Affidavit of Governor Tipton with exhibits which were received by this office on July 15, 2013.

THE STANDARD FOR GRANTING SUMMARY DECISION

Hearings before the OALJ are conducted pursuant to 29 C.F.R. Part 18, unless otherwise provided. Additionally, the Federal Rules of Civil Procedure ("FRCP") apply in any situation not controlled by these rules or rules of special application. See 29 C.F.R. § 18.1(a). 29 C.F.R. §§ 18.40 and 18.41 provide the governing regulations for a motion for summary decision. 29 C.F.R. § 18.40(d) (motion for summary decision) sets forth in part:

The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

Summary decision is appropriate when the record “show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). *See also* 29 C.F.R. § 18.40. No genuine issue of material fact exists when the “record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the “absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Derived from Rule 56 of the FRCP, that standard permits an ALJ to “enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40(d). The standard for granting summary decision is set forth at 20 C.F.R. § 18.40(d), which is based on FRCP 56. Summary decision is appropriate “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision.” 20 C.F.R. § 18.40(d). If the moving party meets the initial burden of showing no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence showing the existence of a genuine issue for trial. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The moving party need not provide evidence negating elements on which it does not bear the burden at hearing. It only needs to identify those portions of the record which “demonstrate the absence of a genuine issue of material fact.” *Celotex Corp.*, 477 U.S. at 323. If the non-movant fails to establish the existence of an element that is essential to his case and on which they bear the burden of proof at hearing, there is no genuine issue of material fact and the movant is entitled to summary judgment. *Id.* Credibility, doubts, and reasonable inferences are resolved in favor of the non-moving party, but “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party,” summary judgment is appropriate. *Matsushita*, 475 U.S. at 586.

In adjudicating a summary decision motion, I must view all facts and inferences in the light most favorable to the non-moving party. *Lee v. Schneider Nat’l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002). “To prevail on a motion for summary judgment, the moving party must show that the nonmoving party ‘fail[ed] to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.’ *Bobreski v. U.S. Emtl. Prot. Agency*, 284 F. Supp. 2d 67, 73 (D.D.C. 2003) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Accordingly, a moving party may prevail by pointing to the “absence of evidence proffered by the nonmoving party.” *Bobreski*, 284 F. Supp. 2d at 73. Furthermore, a party opposing a motion for summary decision “may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing.” 29 C.F.R. § 18.40(c); *Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec’y July 14, 1995).

Positions of the parties

Complainant

In his Response to Respondent's motion for summary decision, the Complainant offers the following:

- The October 13, 2012 affidavit of SG's in-house counsel, Governor Tipton, Esquire, is "perjured and fraudulent" rendering SG's summary decision motion unsupported.
- SG has not established it is entitled to an exemption from SOX coverage, for e.g., it has not shown any SEC determination of a reporting exemption.
- Paul Birkel and Danielle Sindzinger as individuals are subject to SOX.

Respondent

In its Memorandum of Law in Further Support of its Summary Decision Motion, SG contends that it is not covered under SOX because it is not required to register pursuant to Section 12 of the SEA or to file reports pursuant to Section 15(d) of the SEA. SG maintains that it has never listed its securities on any securities exchange in the United States and that it is entitled to a registration exemption under Section 12 of the SEA because of its American Depository Receipt ("ADR") program. According to the Respondent, it is the Complainant's burden to establish that SG is covered by SOX and Complainant has failed to do so. Finally, the Respondent contends that Mr. Tipton's initial affidavit submitted with its initial motion for summary decision is valid and any existing defect has been cured by the submission of a new affidavit which accompanied SG's Memorandum of Law in Further Support of that initial motion.

DISCUSSION

Complainant was employed by SG as Head of the Treasury Desk in the United States for approximately 17 years until his termination on or about November 29, 2011. *See* Complainant's Initial Submission dated December 24, 2012 at 1. Complainant alleges that his position with SG was eliminated after he reported his concerns about "deficient internal controls" and objected to a directive he discontinue certain e-mail communication. *Id.*

His complaint has been brought pursuant to Section 806 of the Sarbanes-Oxley Act, which is entitled, "Civil action to protect against retaliation in fraud cases," and provides in pertinent part:

- (a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES- No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer,

employee, contractor, subcontractor, or agent of such company, 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—

- (b) to provide information regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud and swindle], 1343 [fraud by wire, radio, or television], 1344 [bank fraud], or 1348 [security fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information...is provided to...—
- (c) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).¹⁸ U.S.C § 1514A(a). The implementing regulations track this language. See 29 CFR § 1980.102, 69 Fed. Reg. 52113 (2004).

Respondent has moved for summary decision, representing that (1) it is not publicly traded on any stock exchange, does not have any class of securities that is registered under Section 12 of the SEA and (2) it is not required to file reports under Section 15(d) of the SEA. Specifically, Respondent has proffered two affidavits of its Deputy General Counsel, Governor Tipton, Esquire, in support of its summary decision motion. The first affidavit, dated October 3, 2012, was submitted with Respondent's Motion for an Order granting summary judgment also dated October 3, 2012 and the second affidavit with exhibits was submitted with the Respondent's Memorandum of Law in Further Support of its summary judgment motion dated July 12, 2013.¹

As Respondent notes in its Memorandum in Further Support of its summary decision motion, “[t]he test for determining whether a company is a covered employer for purposes of the SOX whistleblower provision is a simple one contained within the statute itself.” *See* Respondent's Memorandum at 6-7. Specifically, SOX provides that it applies to a “company [i] with a class of securities registered under section 12 of the Securities Exchange Act (15 U.S.C. 781), or [ii] that is required to file reports under section 15(d) of the Securities Exchange Act of 1934....” Respondent relies on the affidavits of Mr. Tipton who stated the following:

- SG is a bank incorporated under the laws of France and headquartered in Paris, France;
- SG's securities are not publicly traded on any United States exchange;
- SG is not an affiliate or subsidiary of a company with a class of securities registered under Section 12 of the SEA, as amended or that is required to file reports under Section 15(d) of the SEA, the consolidated financial statements of which include SG's financial information;
- SG does not register a class of securities under Section 12 of the SEA;

¹¹ These affidavits are referred to herein as “Tipton Aff. I” and “Tipton Aff. II,” respectively.

- SG is not required to file reports under Section 15(d) of the SEA;
- SG has an American Depository Receipts (“ADRs”) program; the ADRs represent a certain number of shares of SG and are traded on a limited basis in the United States over-the-counter markets;
- SG’s ADRs are not traded on any United States exchange.

See Tipton Aff. II (Exhibit A at 1 – 2, ¶¶ 4 – 11).

Respondent notes that securities traded under the ADR program are exempt from registration under the SEC Rule 12g3-2(b), and therefore SG is not required to file reports under section 15(d) of the Securities Exchange Act. See Respondent’s Memorandum In Further Support at 7 - 8. Mr. Tipton averred that SG complies with all of the requirements of the Rule 12g3-2(b) exemption.² Tipton Aff. (Exhibit A, ¶ 12). In the case of *Deutschmann v. Fortis Investments*, ALJ No. 2006-SOX-00080 (ALJ Jun. 14, 2006), the ALJ held that the respondent was not a covered employer under SOX and granted its motion for summary decision. Respondent correctly noted that the ALJ’s conclusion in *Deutschmann*, was based on crediting the respondent’s affidavits which asserted that respondent’s securities were not listed on an United States exchange and that its ADR program qualified for the Rule 12g3-2(b) exemption. I find that the same circumstances are presented in the instant matter: SG’s ADR program excludes it from the registration requirements of Section 12(g) of the Securities Exchange Act.

Complainant contends that Mr. Tipton’s statements in support of Respondent’s summary decision motion should be discounted because he could not recall whether he signed the first affidavit in the presence of the duly authorized and licensed notary who is also Mr. Tipton’s paralegal. See Complainant’s Response, Exhibit B (Tipton Deposition at 13). I agree with the Respondent that the legal authority which the Complainant has cited in support of his assertion that Mr. Tipton’s October 3, 2012 affidavit be discounted is not on point.³ In addition, I note Respondent submitted a second affidavit from Mr. Tipton and Complainant has provided the deposition testimony of Mr. Tipton with his response in opposition to SG’s summary decision motion. In that deposition testimony, Mr. Tipton averred that the contents of his 2012 affidavit are true. Complainant’s Response, Exhibit B (Tipton Deposition at 8). Mr. Tipton’s second affidavit, identical to the first, was signed before a notary, and cured any procedural error committed in the execution of the first one. Tipton’s Aff. II, Exhibit A.

Complainant also argues that Respondent has not met its burden to establish its exemption from SOX coverage. Respondent counters that it is Complainant’s burden to

² In order to qualify for the exemption, a foreign private issuer must not be required to file reports under Section 13(a) or 15(d) of the Exchange Act, maintain a primary trading market for the class of securities represented by the ADR program in a foreign jurisdiction, and publish on its website certain information it has made public in its home country, filed with the principal stock exchange in its primary trading market, and distributed to its security holders. See 17 C.F.R. § 240.12g3-2(b)(1)-(b)(3).

³ As Respondent noted, the majority of the cases Complainant has cited concern election law and the issue of candidate petition validity when its signatures were not properly verified; other cases cited involve the issue of whether an affiant actually signed an affidavit or was aware of what he signed. See e.g., *Leahy v. O’Rourke*, 307 A.D.2d 1008 (2d Dept 2003); *in re Estate of Giannopoulos*, 89 Misc. 2d 961, 964 (N.Y. Sur. Ct. Queens Cnty. 1977). Those issues are not present in the instant matter.

establish such coverage. I agree. Whether Respondent is covered under SOX is an essential element of subject matter jurisdiction to be established by Complainant in this matter. *See, e.g., Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *Field v. Denver Water*, ARB No. 09-100 (ARB May 26, 2011). Complainant maintains that SG has not shown that it is entitled to report-filing exemptions and cites the deposition testimony of Mr. Tipton that he was unaware of (1) the number of United States residents who own SG stock, and (2) whether SG securities was traded on certain US stock trading venues. *See* Complainant's Response at 10 – 11, 13.

A non-moving party who relies on conclusory allegations which are unsupported by factual data or sworn affidavit cannot thereby create an issue of material fact. *See Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993); *Rockefeller v. U.S. Department of Energy*, Case No. 1998-CAA-10 (Sept. 28, 1998); *Lawrence v. City of Andalusia Waste Water Treatment Facility*, Case No. 1995-WPC-6 (Dec. 13, 1995). Consequently, Complainant may not oppose Respondent's Motion for Summary Decision on mere allegations. Such responses must set forth specific facts showing that there is a genuine issue of fact for a hearing. 29 C.F.R. § 18.40(c).

Here, Complainant relies on conclusory allegations that SG is not entitled to reporting exemptions which would exclude it from SOX coverage, but has not cited to factual data or sworn affidavit to support such allegations. As Mr. Tipton noted in his deposition testimony: "If people are trading shares in some other way that does not relate to or involve a registration of securities by SG that is not being publicly traded." Complainant's Response, Exhibit B (Tipton Dep. at 26, lines 22 – 25). Complainant has cited no factual data or sworn testimony to support finding SG is a company covered by SOX. Regardless, I concur with Respondent's assertion that it is unnecessary to reach the question of SG's eligibility for the Rule 12g-3-2(b) exemption which Complainant apparently challenges. The threshold issue is whether SG is a company with a class of securities registered under section 12 of the SEA or a company required to file reports under section 15(d) of the Exchange Act. It is Complainant's burden to demonstrate that Respondent is a company with a class of securities registered under the SEA or that is required to file reports under the SEA; if Respondent is not shown to be such a company, then it is not a covered employer under SOX. *See, e.g., Field v. Denver Water*, ARB No. 09-100, 2011 WL 2165857 (ARB May 26, 2011).

I find Complainant has failed to make a showing sufficient to establish that SOX is applicable to SG. While Complainant has suggested SG should not be exempt for the requisite filing of reports under the SEA which would otherwise confer SOX coverage, he has not submitted any factual data, sworn affidavits, or other evidence to demonstrate such coverage exists.

Liability of Paul Birkel and Danielle Sindzingre

SOX makes clear that the misconduct it protects against is not only that of a publicly traded company itself, but also that of "any officer, employee, contractor, subcontractor, or agent of such company," who retaliates or otherwise discriminates against the whistleblowing employee. *See* 18 U.S.C. § 1514A(a). Similarly, the regulations implementing the Act state, in relevant part:

SOX provides for employee protection from discrimination by companies and representatives of companies because the employee has engaged in protected activity pertaining to a violation or alleged violation of [various federal statutes and regulations] relating to fraud against shareholders. 29 C.F.R. § 1980.100(a) (italics added). Consistent with the express provisions of the Act, the term “*company representative* means any officer, employee, contractor, subcontractor, or agent of a company.” § 1980.101. Furthermore, the term “named person means the employer and/or the company or company representative *named in the complaint who is alleged to have violated the Act.*” *Ibid.* (some italics added).

In Complainant’s Response it is noted that Paul Birkel and Danielle Sindzingre “are named as Aiders and Abettors of [Respondent] SG in its retaliation against Complainant.” *See* Complainant’s Response at 2, footnote 2. The fact that the determination letter setting forth OSHA’s findings on the complaint names only SG as Respondent in this matter is not dispositive of whether Mr. Birkle and Ms. Sindzingre are proper parties at this stage of the proceeding. The applicable regulations expressly provide, in relevant part:

Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the named person (or named persons) of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (redacted to protect the identify of any confidential informants). .

29 C.F.R. § 1980.104(a).

Thus, OSHA was required to notify all named persons identified by the Complainant upon its receipt of his May 25, 2012 complaint. Any failure by OSHA to comply with this mandate cannot be attributed to the Complainant, nor can it justify dismissal of his complaint. Furthermore, this is a de novo proceeding before the OALJ and the prior allegations of the parties and findings by OSHA are entitled to no weight.

The service requirement of the regulations applicable to this proceeding, including those requiring OSHA to serve complaints on all named individuals, is not jurisdictional. Its purpose is simply to ensure that respondents are given adequate notice of the lawsuit in sufficient time to respond and defend against the claims asserted therein. *See, e.g., Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB Case No 04-101 (Oct. 31, 2005).⁴

While the Complainant named Mr. Birkel and Ms. Sinzingre in his complaint filed with OSHA, there is no evidence of record to show that these individuals received actual notice of this proceeding from either OSHA or the Complainant himself. Therefore, I find it would be improper to issue any finding regarding them individually and decline to do so.

⁴ As the Board noted there, “the core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections.” *Id.*, slip op. at 6 quoting *Henderson v. United States*, 517 U.S. 654, 671 (1996).

CONCLUSION

In light of the evidence presented regarding the non-employer status of SG, and based on the foregoing jurisprudence, I find that Respondent is entitled to summary decision in this matter and its Motion for Summary Decision is hereby **GRANTED**. Accordingly, Complainant's complaint is hereby **DISMISSED** with prejudice.

IT IS SO ORDERED.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1980.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).