

**U.S. Department of Labor**

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**Issue Date: 03 April 2012**

**Case No.: 2012-SOX-00006**

*In the Matter of:*

**RANDALL PITTMAN**

Complainant,

v.

**DELL, INC.,  
CEDAR-SINAI MEDICAL CENTER,  
RYDEK PROFESSIONAL STAFFING,  
AETNA, INC.,  
SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP,  
CAPITAL GROUP COMPANIES, INC.,  
BLUMENTHAL NORDREHAUG & BHOWMIK,  
DONGELL LAWRENCE FINNEY, LLP.**

Respondents.

**ORDER DISMISSING COMPLAINT**

This action involves a complaint 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, *et seq.* ("Sarbanes-Oxley," "SOX," or "Act" (enacted July 30, 2002) and the implementing regulations at 29 C.F.R. Part 1980. Randall Pittman ("Complainant") filed his whistleblower complaint with OSHA on April 15, 2011, against the following respondents: Dell, Inc. ("Dell"), Aetna, Inc. ("Aetna"), Capital Group Companies, Inc., Cedars Sinai Medical Center ("Cedars"), Sheppard, Mullin, Richter & Hampton ("Sheppard Mullin"), Rydek Professional Staffing ("Rydek"), Blumenthal, Nordrehaug & Bhowmik, and Dongell, Lawrence, Finney LLP.

***Procedural History***

Complainant filed his Prehearing Statement and Exhibit Index on February 3, 2012. Rydek Professional Staffing ("Rydek") and Dongell Lawrence Finney LLP ("DLF") filed a Prehearing Statement of Position ("Rydek Mot.") on February 17, 2012. Cedars Sinai Medical Center filed a "Respondents Cedars-Sinai Medical Center's and Sheppard Mullin, Richter & Hampton, LLP's Motion for Summary Decision or in the Alternative for a Protective Order" ("Cedars Mot.") on February 15, 2012, along with exhibits 1 and 2. Dell filed a "Respondent Dell Inc.'s Motion for Summary Judgment or in the Alternative, For a Protective Order" ("Dell Mot.") along with exhibits 1 through 9 on February 14, 2012. Aetna filed a Prehearing Statement

of Position (“Aetna Mot.”) on February 16, 2011. Complainant filed a Motion to Dismiss Respondents Capital Group Companies, Inc. and Blumenthal, Nordrehaug & Bhowmik on February 3, 2012. The hearing in the matter was originally scheduled for April 10, 2012.

On February 24, 2012, the undersigned issued a “Decision And Order Dismissing Parties, Order To Show Cause Why Respondents’ Motion For Summary Judgment Should Not Be Granted, and Order Continuing Hearing Without Date.” The following parties were dismissed from the case: Rydek Professional Staffing, Aetna, Inc., Sheppard Mullin, Richter & Hampton, LLP, Blumenthal, Nordrehaug & Bhowmik, Dongell Lawrence Finney, LLP, and Capital Group Companies. The undersigned set March 16, 2012, as the deadline for all supplemental briefings. On March 1, 2012, Complainant filed a “Complainant’s Opposition to Respondent’s Motions for Summary Judgment, Motions for Protective Orders and Motion for Continuance of Trial” along with exhibits A- J. On March 19, 2012, Complainant also filed the “Complainant’s Motion for Reconsideration of Order Dismissing Respondents and Request to Take Judicial Notice of Complainant’s Trial Exhibits” along with exhibits 1-35. On March 19, 2012, Respondents Dell and Cedars Sinai filed their supplemental briefs. On March 29, 2012, Respondent Aetna Inc. submitted an “Opposition to Complainant’s Motion for Reconsideration of Order Dismissing Respondent’s and Request to Take Judicial Notice of Complainant’s Trial Exhibits.”

### **FINDINGS OF LAW AND FACT**

First, Complainant argues that this tribunal abused its discretion when it dismissed respondents Rydek, DLF, Aetna and Sheppard Mullin from this action without giving him an opportunity to respond to Respondents’ motions to dismiss. After reevaluating all of the evidence in light of the additional documents submitted by Complainant and the other parties, including Complainant’s Motion for Reconsideration of Order (EX 1– 35) and Complainant’s Opposition to Respondent’s Motion for Summary Judgment (EX A – J), the undersigned remains of the opinion that Complainant’s claims against these parties fail as a matter of law and are not actionable under SOX for the reasons outlined in the original order. The undersigned incorporates all of the findings that he made on February 24, 2012, into this order.

Second, Complainant argues that the undersigned applied the wrong statute of limitations period to his claims. According to Complainant, he filed a SOX Complaint with OSHA on July 26, 2010, against his former employers Bank of America (“BOA”), Siemens, and a number of other agents wherein he alleged that these respondents retaliated against him in violation of the Act. In that complaint, he sued BOA and others “for wire fraud against their own employees by failing to pay them all wages due” and alleged that all the parties launching a discrimination and harassment campaign against him for filing complaints under the American Recovery and Reinvestment Act of 2009, SOX, and the California Private Attorneys General Act of 2004. Compl. Mot. for Reconsideration, EX A at 9.<sup>1</sup> In that complaint, Complainant reported that around December 28, 2009, he also filed a class action discrimination complaint against Bank of America, Randstand, and Sapphire Technologies with the EEOC alleging that said respondents “engaged in a systematic pattern of discrimination against African Americans in

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<sup>1</sup> Complainant subsequently filed a wage-and-hour complaint against various listed parties with the California’s Labor and Workforce Development Agency (“LWDA”).

pay, promotion, hiring, firing and other terms and conditions of employment ... and owe their African American employees and applicants millions of dollars in back pay.” *Id.* at 6. On January 26, 2011, Complainant allegedly amended his BOA OSHA complaint by adding Dell, Cedars Sinai Medical Center, Aetna, Rydek and Sheppard Mullin as named respondents. *Id.* at EX B. According to Complainant, he subsequently notified OSHA investigator Sewali Patel that he wants to bifurcate his SOX claim and file a separate complaint against Dell and its agents. Complainant argues that pursuant to the “relation back doctrine” his claims against Dell and others relate back to his July 26, 2010, filing or in the alternative to January 26, 2011. In *Gonzalez v. Colonial Bank*, ARB No. 05-060, ALJ No. 2004-SOX-39 (ARB May 31, 2005), the Board stated the following about an ALJ’s authority to permit an amendment of the complaint:

An administrative law judge may permit a complainant to amend a complaint when the amendment is reasonably within the scope of the original complaint, the amendment will facilitate a determination of a controversy on the merits of the complaint and there is no prejudice to the public interest and the rights of the parties. An amended complaint will relate back to the original complaint for purposes of determining the timeliness of the complaint when the amendment adds a party against whom a claim is asserted if the claim in the amended pleading arose out of the conduct, transaction, or occurrence described in the original pleading. Furthermore, an amended complaint relates back if, within the limitations period, the party to be added received notice of the filing of the action such that the party will not be prejudiced in maintaining a defense on the merits, and the party knew or should have known that, but for a mistake concerning the identity of the proper party, the complainant would have brought an action against the proper party.

*Id.*, slip op. at 3 (footnotes omitted). According to the Secretary’s Findings, on April 15, 2011, Complainant filed the OSHA complaint which is the subject of the current litigation. This is the date that the undersigned will rely on going forward.<sup>2</sup> The complaint which was filed on April 15, 2011, does not arise from the same conduct, transaction, or occurrence as Complainant’s other filings against Bank of America, Country Wide Financial Corporation, Randstand Professionals, Sapphire Technologies, Siemens, Manatt, Phelps & Phillips, The Day & Zimmerman Group, Seyfath Shaw, Littler Mendelson, Morgan, Lewis & Bockius, Kenneth Lewis, Barbara Desoer, Angelo Mozilo, Ben Noteboom, Charles T. Manatt and Does 1-100. Complainant merely alleges that Dell and others have engaged in similar violations of the law as

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<sup>2</sup> Complainant’s exhibit B is a printout of the “Sixth Amendment to Complaint to Identify Doe Respondents” dated January 26, 2011. The document indicates that Complainant would like to add Dell, Cedars-Sinai, Aetna, Rydek and Sheppard Mullin as Does 12 through 16. There is no evidence that this document was ever received or accepted by OSHA. The Secretary’s Findings also don’t indicate that the complaint against Dell and others was filed before April 15, 2011.

the parties he has previously sued.<sup>3</sup> When Complainant filed his BOA complaint there was no reason for Dell and others to know that Complainant would subsequently also sue them. The only tangential connection between Siemens and Dell is that Dell tried to verify Complainant's employment history. When Complainant was applying to work with Dell, he supplied his recruiter with several documents proving that he was a former employee of Siemens and had filed a lawsuit against Siemens in the past. The recruiter informed Complainant that he had a duty to notify Dell about his previous lawsuits. Complainant alleges that he was compelled to disclose to Respondents his status as a whistleblower because his former employer Siemens failed to verify his employment. Complainant also alleges that Dell subjected him to different terms and conditions of employment after he made these disclosures. According to Complainant, Dell and Siemens have "business relationships," and Dell violated the Act by retaliating against him for filing a prior SOX complaint against Siemens. As an employer, Dell has a right to ask its applicants about their employment history and to verify such history. The fact that Siemens may have wrongfully failed to confirm Complainant's employment with the company is an event which is discrete from Complainant's subsequent work experience at Dell. Dell hired Complainant on August 22, 2009, and converted him to a full time employee on December 12, 2009. Based on the information before the undersigned, the complaints which Complainant filed on July 26, 2010 and April 15, 2011, appear completely unrelated. Thus, allowing Complainant to rely on the earlier date will not facilitate the determination of the current controversy and will prejudice the parties.

In the alternative, Complainant argues that the statute of limitations in this case should not begin to run until Aetna unequivocally denies his disability claim. Aetna Life Insurance administers Dell's short term disability group plan. The short term benefit plan that is the subject of this lawsuit, is governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.* Complainant has produced zero evidence that Dell had any input in the Disability Claims Administrator's decision to deny his short-term disability benefits or that the denial was driven by a discriminatory motive. On February 3, 2010, Aetna denied Complainant's request for FMLA and CFRA because Complainant reportedly failed to work the minimum number of hours required in the 52 weeks proceeding the first day of absence. EX 14. The following day it also denied his short term disability benefits. According to Complainant, on February 28, 2010, he received a letter from Aetna indicating that his claim was suspended pending receipt of medical records from the VA Hospital. Aetna allegedly did not receive the records on time and dismissed his claim. On June 2, 2010, Aetna upheld its decision to deny benefits because based on all the medical records there was still a "lack of clinical documentation to support" Complainant's inability to perform the material duties of his

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<sup>3</sup> Complainant points out that Morgan Lewis and Seyfarth Shaw have represented Siemens and Dell in past employment matters and Morgan Lewis currently represents Dell in this action. Specifically, Complainant alleges that attorneys from these firms previously filed a motion to declare him a vexatious litigant in Los Angeles Superior Court. In that case, Complainant was suing Siemens Health Diagnostics and Does 1-50. *See* Dell Mot. EX 1. Since none of the attorneys or firms, which represent Respondents in the current action, have represented Complainant in his previous litigation, this arrangement does not create a conflict of interest. Furthermore, parties have a right to defend themselves in court and the act of filing a motion does not constitute "blacklisting" especially when Dell wasn't even a party to the previous lawsuits. *See Peoples v. Brigadier Homes, Inc.*, 87-STA-30 (Sec'y Jun. 16, 1988); *Barcamerica int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 593, n.4 (9th Cir. 2002); *Pittman v. Siemens AG*, 2007-SOX-15 (ALJ July 26, 2007).

occupation. EX 23. Complainant filed his final appeal of the decision on June 13, 2010. EX 24. On September 15, 2010, Aetna sent Complainant a letter indicating that his original request for benefits on February 4, 2010 was denied “due to the lack of medical evidence” however, “[a]fter review of the information submitted on appeal it has been determined that further evaluation is needed to address [his] eligibility for STD benefits, Hence, the denial of STD benefits, effective 2/04/10, has been overturned.” Compl. EX H. The letter goes on to indicate that the Disability Claim Analyst will contact Complainant regarding his eligibility for benefits. *Id.* According to Complainant, two days later, Aetna’s representative, Katrina Dorival, contacted him by phone and told him to disregard the September 15, 2010, letter because his claim was being submitted for additional review. Complainant allegedly “dismissed his disability claim” on September 22, 2010, because “he believed that Aetna and Dell were retaliating against him in reprisal for his protected disclosures.” Complainant’s Prehearing Statement at 6. All of the events outlined above took place more than 180 days before Complainant filed his April 15, 2011, OSHA complaint. Furthermore, as discussed in the undersigned’s February 24, 2012, Decision and Order, Complainant was never employed by Aetna, and Aetna was never Dell’s agent for employment purposes. Accordingly, Aetna was properly dismissed from the lawsuit, and Complainant’s claims remain time barred.

Complainant does not present any additional evidence showing that he suffered an adverse action from any of the Respondents in the 180 days preceding his OSHA filing date of April 15, 2011. He failed to provide a full statement of acts or omissions with pertinent dates as requested by the undersigned on February 24, 2012. Complainant’s allegations remain the same. Around February 2, 2010, Complainant requested disability leave of absence pursuant to Dell’s short-term disability plan, which Aetna denied. Compl. Opp. at 12. He was terminated from his position with Dell on February 6, 2010. *Id.* By September 22, 2010, Complainant exhausted his third appeal and believed that Aetna and Dell were retaliating against him in reprisal for disclosures. Compl. Opp. at 14. According to Complainant’s own contentions, his remaining option at that point was to file an action against Aetna in district court. Compl. at 9. Around February or March of 2010, Complainant applied for a “job on Cedars’ website.” Compl. EX 17. Sometime prior to January 2, 2011, Complainant reportedly applied for the Desk Side Support Technician position with Dell. EX 32. He received a standard e-mail indicating that Dell is “currently reviewing [his] experiences and qualifications for the position” and if the profile corresponds to Dell’s requirements, a member of its Global Talent Acquisition Team will contact him. *Id.* Complainant failed to present evidence that he was qualified for the position or that the position remained open and the employer continued to seek applicants from persons of Complainant’s qualifications. *See Levi v. Anheuser Busch Co.*, ARB No. 08-086, ALJ No. 2008-SOX-28 (ARB Sept. 2009). On February 1, 2011, Complainant sent a letter to Morgan Lewis, Dell (Dina Hanna), Sheppard Mullin, Aetna, Cedars Sinai (Angela Harvey), and Rydek demanding to be reinstated to his job. In this e-mail, Complainant reminds the recipients that he has filed a complaint against Dell, Cedars-Sinai, Aetna and Rydek with the DOL pursuant to SOX. He also reports that Dell’s short term disability program “violates state and federal laws and has defrauded its own employees, the state of California and the Federal Government out of millions of dollars.” Compl. Opp. at EX I. Without elaborating on the facts, Complainant reiterates that after he filed his complaint “Respondents blacklisted, threatened, intimidated, refuse to re-hire, refused to accommodate his disability, denied him disability benefits and failed to pay him all wages owed in retaliation for his protected disclosures.” *Id.* at 15. After examining

the exhibits, the undersigned finds that Complainant failed to present specific facts which support these contentions. See *Pittman v. Siemens*, 2007-SOX-0015 (ALJ Jul 26, 2007) (“to prove blacklisting, a complainant must show evidence that a specific act of blacklisting occurred); *Pickett v. Tennessee Valley Auth.*, ARB Case Nos. 00-56,00-59 (Nov. 28, 2003) (“Subjective feelings on the part of a complainant toward an employer’s action are insufficient to establish that any actual blacklisting took place.”).

Third, Complainant argues that the undersigned should sanction Respondents Rydek and DLF for filing false pleadings. According to Complainant, Rydek misrepresented the fact that it did not run a credit check on him, did not admonish him not to discuss his compensation arrangement with its clients, and did not inform him in writing that it looked forward to placing him at other assignments in the future. Complainant argues that the undersigned relied on Rydek’s false statements in dismissing Rydek from the case. Complainant’s own pleading support the undersigned’s findings. Complainant has indicated that around November of 2009 Dell notified him that it wanted to hire him as a permanent employee. Compl. Oppo. at 8. Complainant also alleged that on December 12, 2009, he notified his Rydek recruiter that Dell converted him to a full time employee. *Id.* at 9. According to Complainant, once he received the offer he “informed Dell’s Managers that he wanted to negotiate a salary that was commensurate with his education and experience and with the salaries of his peers.” *Id.* at 8. Complainant then met with Manager Troy Reed to discuss his job offer and asked Reed to disclose the salary range for the position that he was being hired for. When Reed told Complainant that this information was confidential, Complainant threatened to file an EEOC action against Reed. Thus, Complainant’s own allegations support Rydek’s contention that it had no control over his pay, promotions, terms and conditions of employment or employment termination after he was offered a permanent position with Dell. Complainant goes on to allege that in December of 2009, Seyfarth discovered that Complainant was employed by its client Dell and immediately contacted Dell and Rydek, which caused Rydek to place Complainant on its “do not hire” list. According to Complainant, he has reasons to believe that Seyfarth attorneys were acting on behalf of Siemens and on behalf of his former employer Bank of America when they contacted Rydek and Dell. Complainant has failed to present any evidence that Rydek “blacklisted” him. On the contrary, Complainant points the undersigned to an email dated July 27, 2010, from Rydek’s President informing him that a position came up which fits his qualifications.<sup>4</sup> EX 27. Thus, Complainant has failed to present evidence demonstrating that he has an actionable cause of action against Rydek which falls within the statute of limitations.<sup>5</sup>

Accordingly, Randall Pittman’s complaint against Dell, Inc., Cedars-Sinai Medical Center, Rydek Professional Staffing, Aetna, Inc., Sheppard Mullin Richter & Hampton LLP, Blumenthal Nordrehaug & Bhowmik, Dongell Lawrence Finney, and Capital Group Companies is **DISMISSED** with prejudice. In light of the duplicative nature of the complaints filed by Mr. Pittman, the undersigned urges the ARB to impose pre-filing restrictions on this complainant as

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<sup>4</sup> Complainant does not dispute that Rydek’s is a privately held S-Corporation.

<sup>5</sup> Complainant also wants the undersigned to grant leave to amend this complaint to add his co-worker Ben Yates as a named complainant. According to Complainant, Yates worked for Dell from around May 2009 until on or about September 22, 2011, and was allegedly subject to the same discrimination, wage and hour violations, and retaliation while working for Dell as Complainant. Since the undersigned is dismissing Complainant’s complaint in its entirety, there is no need to address this issue.

it had on complainant in *Saporito v. Florida Power and Light Co.*, ARB Nos. 09-072, 128, 129, 141, 2009 ERA 1,6,9,12 (ARB Apr. 29, 2011) (finding that the “right of access to the courts is neither absolute nor unconditional and conditions and restriction on each person’s access are necessary to preserve the judicial resources for all other persons”) (internal citations omitted).

**IT IS SO ORDERED.**

A

Russell D. Pulver  
Administrative Law Judge

*San Francisco, California*

**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 the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). 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](mailto: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(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive 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. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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(c). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).