



Issue Date: 24 February 2012

Case No.: 2012-SOX-00006

RANDALL PITTMAN

Complainant,

v.

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

Respondents.

**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**

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. The hearing in this matter is currently scheduled for April 10, 2012.

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.

OSHA’s Findings

The Secretary determined that Complainant was allegedly terminated from Dell on February 7, 2010, and denied short-term disability claim from Aetna on March 3, 2010. Dell’s Mot. at EX 2. Complainant’s resume was allegedly forwarded to Dell on or around January 8, 2011, although he was never hired. *Id.* The Secretary concluded that since the complaint was filed within 180 days of one of these alleged adverse actions, it was timely. *Id.* The Secretary further concluded that Dell and Aetna were companies within the meaning of 18 U.S.C. § 1514A and that Cedar Sinai, Rydek, Blumenthal, and Capital Group were contractors, subcontractors and agents of Dell, a covered company within the meaning of 18 U.S.C. § 1514A. *Id.* First, the Secretary noted that “Complainant failed to engage in protected activity under SOX because he lacks a subjective and objective belief that Respondents were engaged in any alleged fraudulent activity or violations of Securities and Exchange rules and regulations.” *Id.* Second, the Secretary found that “[e]ven if Complainant’s prior filings with OSHA are considered protected under SOX, Complainant also failed to suffer an adverse action. Complainant’s only timely adverse action allegedly occurred on or around January 8, 2011, when Complainant’s resume was forwarded to Dell” and he was not rehired. *Id.* However, the Secretary noted that there was no “evidence that Complainant ever applied or was qualified for an open position.” *Id.* Accordingly, the Secretary reached a conclusion that Complainant neither engaged in protected activity nor suffered an adverse employment action. *Id.*

SOX Overview

Section 806 of SOX provides “whistleblower protection for employees of publicly traded companies.” 18 U.S.C. § 1514A (a). It prohibits companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or those which are required to file reports under section 15(d) of the Act, “or any officer, employee, contractor, subcontractor or agent of such company” from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to “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)” 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 SEC, or any provision of Federal law relating to fraud against shareholders. *Id.* Employees of publicly traded companies are also 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 a violation of the aforesaid fraud statutes, SEC rules, or federal law. *Id.*

Federal Regulations implementing SOX at 29 C.F.R §1980.101 define “employee” as follows: 1) an individual presently or formerly working for a company or company representative; 2) an individual applying to work for a company or company representative; or 3) an individual whose employment could be affected by a company or company representative. The regulations also define “company representative” as any “officer, employee, contractor, subcontractor, or agent of a company.” See e.g., *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 6 (1st Cir. 2006). Despite the proliferation of ARB and district court decisions, there appears to be no consensus on whether Section 806 extends its coverage beyond “employees” of “public companies to encompass also the employees of private companies that are contractors, subcontractors, or agents of those public companies.”¹ The First Circuit Court of Appeals was the first one to address this issue in *Lawson v. FMR LLC*, 2012 WL 335647 (1st Cir. 2012) and concluded that only “the employees of the defined public companies are covered by these whistleblower provisions.” *Id.* at *6. The clause “officer, employee, contractor, subcontractor, or agent of such company” merely lists the representatives who are “also barred from retaliating against employees of the covered public company employer who engaged in protected activity.” *Id.* In *Lawson*, plaintiffs brought a lawsuit alleging retaliation under SOX by their corporate employers which were private companies that provided advice and management services by contract to a Fidelity family of mutual funds, “public companies.”² *Id.* at *2. One of the plaintiffs alleged that he had been terminated by defendants in retaliation for raising concerns about inaccuracies in a revised registration statement for certain Fidelity funds. *Id.* at *3. The defendants, all private companies, filed a motion to dismiss arguing that plaintiffs were not covered employees under § 1514A(a)(1). *Id.* at *4. Plaintiffs argued that coverage extends not only to employees of public companies but also to employees of those public companies’ officers, employees, contractors, subcontractors, and agents. *Id.* at *6. Defendants counter argued that § 1514A(a) “provides that no public company – or any officer, employee, contractor, subcontractor, or agent of that company – may discriminate against an *employee of such a public company* for engaging in protected whistleblower activity.” *Id.* The district court sided with the plaintiffs and held that Section 806 encompasses employees of private companies that are contractors or subcontractors of public companies. The Court of Appeals reversed and after analyzing the statutory text and legislative history concluded that only the employees of defined companies (those who file reports with the SEC pursuant to section 15(d) of the 1934 Act or those with a class of securities registered under section 12 of the 1934 Act) are covered by the whistleblower provisions.

The Court noted that “some opinions by the DOL ARB and by DOL ALJs have indicated that an employee of a non-public company may be able to proceed against his or her employer under § 1514A where such a non-public employer is a contractor, subcontractor, or agent to a public company for employment purposes – that is, where the non-public company retaliates against its own employee at the public companies behest. See *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, No 04-149, 2006 WL 3246904, at *10 (Dep’t of Labor ARB May 31, 2006);

¹ *Minkina v. Affiliated Physician’s Group*, 2005-SOX-19 (ALJ Feb 22, 2005) (holding that a complainant who was allegedly a contractor or subcontractor of various publicly traded companies did not qualify as an employee covered under the language referring to “any officer, employee, contractor, subcontractor, or agent” because “this language simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of the covered employer.”). *Smith v. Hewlett Packard*, 2005-SOX-88 (ALJ Jan 19, 2006).

² The mutual funds were required to file reports under 15(d) of the Securities Exchange Act of 1934.

Zang, 2008 WL 7835900, at *14; *but see Johnson v. Siemens Bldg. Techs., Inc.*, No. 08-032, 2011 WL 1247202, at *12 (Dep't of Labor ARB Mar. 31, 2011)(stating that *Klopfenstein* should be read as stating the broader proposition that a private company can be held liable under § 1514A where such private company would be considered a public company's agent under common law principles, not only when the private company is the public company's agent for employment purposes)." *Id.* at fn. 7. The 1st Circuit declined to address this issue because the plaintiffs did not argued on appeal that the private companies were acting "as a contractor, subcontractor or agent of a public company for *employment purposes*, and retaliated *against its own employee* at the direction of the public company." *Id.* (emphasis added). The Court also refused to decide whether the private companies and the public Fidelity funds should be considered a "single integrated enterprise" for the purpose of evaluating whether plaintiffs are covered employees because the issue was not raised on appeal. *Id.* at fn. 1.

Once complainant demonstrates that he is an employee of a covered company, he must also prove the following elements by a preponderance of the evidence: (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) respondent knew that complainant engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. Respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. To prevail on a failure to hire claim, complainant must establish that: 1) he applied and was qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected; and 3) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Levi v. Anheuser Busch Co.*, ARB 08-086, ALJ No. 2008-SOX-28, slip op. 5 (ARB Sept. 25, 2009); *see Hasan v. U.S. Dep't of Labor*, 298 F.3d 914, 916-17 (10th Cir. 2002). The SOX complaint "must contain a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations." *Shelton v. Time Warner Cable*, 2006-SOX-76, slip op. at 6 (ALJ Aug. 31, 2006).

SOX Statute of Limitations

An employee alleging retaliation under SOX must file a complaint within 180 days of the date on which the alleged violation occurred. *See Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010); 76 Fed. Reg. 68084-97 (Nov. 3, 2011). In SOX whistleblower cases, the statute of limitations begins to run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision. *See, e.g., Rollins, v. American Airlines*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 2 (ARB Apr. 3, 2007 (re-issued)); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005). *Coppinger-Martin v. Solis*, 627 F.3d 745 (9th Cir. 2010)(plaintiff's claim accrues when plaintiff learns of or discovers "actual injury," i.e., adverse employment action, and not when plaintiff suspects "legal wrong," i.e., that employer acted with discriminatory intent). The relevant date is when the employer communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer's action. *Snyder v. Wyeth Pharms.*, ARB No. 09-008, ALJ No. 2008-SOX-055, slip op. at 6 (ARB Apr. 30, 2009)(citing *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111,-128, ALJ No. 1997-ERA-053, slip op. at 36 (ARB Apr. 30, 2001).

Complainant's Allegations

According to Complainant, on June 8, 2009, he applied for an Information Technology position that Rydek posted on the internet. Dell EX 3 at 2. On the same day, he was contacted by a Rydek Recruiter who was looking to fill a position at Perot Systems Corporation, which was subsequently purchased by Dell around October of 2009. *Id.* at 4. Dell was allegedly seeking an IT Analyst to join Cedars' Information Technology Department. *Id.* Complainant was informed that before starting work he would have to undergo a background check. *Id.* On or about August 7, 2009, the recruiter contacted Complainant and informed him that his former employer Siemens Health Diagnostics ("Siemens") and Kforce Inc ("Kforce") failed to verify his employment. *Id.* Complainant supplied the recruiter with several documents proving that he was a former employee of Siemens and Kforce and informed the recruiter that he has filed a lawsuit against Siemens in the past. *Id.* On August 10, 2009, Complainant emailed the recruiter a copy of two legal documents relating to the claims he had filed against Siemens with the Department of Labor and in state court. *Id.* The recruiter informed Claimant that he had a duty to notify Dell and Cedars about Complainant's lawsuits. Around August 10, 2009, the recruiter e-mailed Complainant various documents which Complainant had to fill out before starting the job. *Id.* Complainant alleges that he was "coerced into signing documents which stipulated that he would never be promoted or hired by Dell." *Id.* Complainant further alleges that [Dell's] policies had a discriminatory effect on Complainant and other African American employees and applicants." *Id.* at 5.

On or about August 22, 2009, Complainant was hired by Dell and assigned to work at Cedars' Medical Center in Beverly Hills, California. *Id.* at 5. According to Complainant, he was under direct supervision of both Dell and Cedars' managers, and his "status as a whistleblower was well known." *Id.* Complainant asserts that Respondents had knowledge of the fact that he had filed prior discrimination complaints with the EEOC, the DOL, and prior lawsuits in state and federal court against his former employers. *Id.* at 5-6. According to Complainant, as a direct result, Respondents placed Complainant under surveillance by giving him a different colored badge than his peers and by limiting his access to his own office building. *Id.* at 6. Complainant was allegedly forced to work off the clock, denied proper rest breaks when working on special projects, and harassed because of his race and disability for complaining about his working conditions. *Id.*

Around November of 2009, Complainant allegedly began to suffer from a disability which prompted him to seek medical attention. *Id.* Complainant provided his managers with doctors' notes and requested accommodations. *Id.* Dell's HR Department allegedly contacted Complainant's doctor and "told him that Dell had a business to run" and would not accommodate Complainant. *Id.* On December 22, 2009, Complainant allegedly filed a complaint with Dell's employee hotline complaining that Dell had engaged in discrimination against a class of African American employees. *Id.* Complainant also reported that he was allegedly not being paid for all the hours he worked. *Id.* On December 30, 2009, Complainant informed Dell and Cedars' management that he will file a LWDA complaint if Dell does not change its practices. *Id.* at 7. On February 2, 2010, Complainant called Dell's employee hotline and requested a leave

of absence for his medical condition. *Id.* Complainant requested that his leave begin on or about March 15, 2010. *Id.* On February 4, 2010 and February 5, 2010, Complainant called in sick as a result of his medical condition. *Id.* On February 3, 2010, Complainant received a letter from Aetna, informing him that Aetna was responsible for administering Dell's leave policies. The letter informed Complainant that he was denied leave under the Family Medical Leave Act and under California Family Rights Act. *Id.*

Complainant was allegedly terminated from Dell on February 7, 2010. Dell EX 3 at 2. On February 25, 2010, Aetna's Claims Administrator sent Complainant a letter notifying him that his complaint was being suspended because Aetna did not receive his medical records from the West Los Angeles VA Hospital. *Id.* at 7. On the same day, Complainant filed a complaint against Dell and Yoo with the Cedars' Human Resources Department. *Id.* Complainant met with Cedars' HR Manager Angela Harvey. *Id.* at 8. Complainant notified Harvey that he had reason to believe that Dell was engaging in a systematic pattern of discrimination against its African American employees. *Id.* According to Complainant, Harvey assured him that she would investigate the claims and suggested that he apply for a job with Cedars. Complainant applied for a job which was posted on Cedars' website. *Id.*

On March 3, 2010, Aetna notified Complainant that his short-term disability claim had been denied because it failed to receive his records from the VA Hospital. Complainant filed his appeals to the denial of his disability claims on February 2, 2010 and March 31, 2010. *Id.* at 9. On June 2, 2010, Aetna denied Complainant's second appeal. On June 13, 2010, Complainant filed his third appeal. *Id.* On March 27, 2010, Complainant filed a complaint against Respondents with the LWDC wherein he alleged that Respondents had engaged in a wage and hour fraud scheme. *Id.* at 9. On June 15, 2010, Complainant filed a complaint against Respondents with the EEOC wherein he once again alleged that Dell was engaging in a systematic pattern of discrimination against blacks, women and disabled. *Id.* Around October 2011, Dell and Cedars transferred the work that Complainant's department was performing to another state.

Complainant alleges that he engaged in the following protected activities:

- 1) On August 10, 2009, Complainant notified Rydek that he had filed a SOX complaint against his former employer Siemens AG. Complainant also notified Rydek that he had filed a lawsuit against Siemens in the Los Angeles Superior Court.
- 2) On December 22, 2009, Complainant filed a complaint with Dell's employee hotline wherein he alleged massive wage and hour fraud as well as claims of systematic racism. Complainant believes that wage and hour fraud was fraud against Dell's shareholders.
- 3) On December 30, 2009, Complainant notified Dell and Cedars' Management via e-mail that he and his coworkers had not been paid all wages due them.
- 4) On March 15, 2010, Complainant filed a complaint against Dell, Cedars and Aetna with the OFCCP.

- 5) On March 27, 2010, Complainant filed a complaint against Respondents with the LWDA.
- 6) On May 6, 2010, Complainant added Respondents to a lawsuit that had been filed in the Los Angeles Superior Court entitled *Pittman v. Bank of America et. al.*, Case No. BC417574.
- 7) On June 13, 2010, Complainant informed Aetna that he had reason to believe that Dell and Aetna's disability plan was illegal because it did not comply with California laws.
- 8) On January 26, 2011, Complainant filed a SOX complaint against Respondents with DOL.

According to Complainant, Respondents knew of his protected activities. He alleges that the following adverse actions were taken against him: termination from job, denied rehire, denied wages and benefits, blacklisted, denied disability benefits, denied medical leave, subjected to hostile work environment, and invasion of privacy by disclosing his confidential medical records to prospective employers.

SUMMARY DECISION

The court should grant the motion for summary disposition when the record (i.e., pleadings, affidavits and declarations offered with the motion and evidence developed in discovery) demonstrate that there are no genuine issues of material fact, and that the moving party is entitled to disposition as a matter of law.” 29 C.F.R. § §18.40(d), 18.41(a); Fed. R. Civ. P. 56 (c); *see Townsend v. Big Dog Holdings, Inc.*, 2006-SOX-28 (ALJ Feb. 14, 2006); *see also Richardson v. JP Morgan Chase & Co.*, 2006-SOX-82 (ALJ Jul. 7, 2006). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). A court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000). The party who brings the motion for summary decision bears the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. *Rusick v. Merrill Lynch & Co.*, 2006-SOX-45 (ALJ Mar. 22, 2006). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present “specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue of material fact exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *Anderson*, 477 U.S. at 242. However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. *Id.* at 249.

1. Rydek Professional Staffing

Rydek Professional Staffing (“Rydek”) is a national employment agency that provides temporary and permanent workers to Dell and other publicly traded corporations. Complainant

alleges that Rydek was Complainant's co-employer and an "agent" of Dell and other publicly traded corporations. Dell Mot. EX 3 at 2.

Rydek's Position Statement

Rydek stipulates that on June 8, 2009, Complainant applied to Rydek for an information technology position. Rydek Mot. at 3. Rydek asserts that it is a privately held S-Corporation, registered in the State of California. *Id.* It operates under the fictitious name Rydek Professional Staffing, which is not publicly traded. *Id.* The corporation was founded in 1998, and its function is to screen and provide candidates to customers for open employment positions. *Id.* Once the candidates are screened, Rydek's customers interview the candidates and make hiring determinations. *Id.* Rydek initially started out servicing the Southern California area with staffing services in the technology industry, and thereafter expanded into several industries across the United States. *Id.*

On June 9, 2009, Rydek recruiter, Raymond Carlson, contacted Complainant by telephone and provided him information about a Service Desk Support Analyst position with Perot Systems at Cedars-Sinai Hospital. *Id.* at 4. Mr. Carlson submitted Complainant's information to Perot Systems for the position, and Complainant was interviewed by Perot Systems on June 12, 2009. *Id.* Rydek believes that Perot Systems hired another candidate for the job. *Id.* In early July of 2009, a Desk Side Support Technician position opened up with Perot Systems at Hollywood Presbyterian Medical Center. *Id.* Mr. Carlson discussed the position with Complainant and submitted Complainant's information to the employer. *Id.* In mid-July another Service Desk position opened up with Perot Systems, servicing Cedar-Sinai Hospital. *Id.* Perot Systems interviewed Complainant on July 21, 2009, and again on July 29, 2009. *Id.* Perot Systems requires Rydek to provide a background check on anyone being considered for contract work, which includes investigation of criminal convictions and employment verification. *Id.* Rydek is required to notify the customer of any anomalies in the candidate's history. *Id.* In Complainant's case, Corporate Screening was not able to verify his employment with the company. Mr. Carlson relayed this information to Perot Systems. *Id.* Despite the problem, Perot Systems approved Complainant to start work without the verification. *Id.* Rydek did not conduct a credit check on Complainant.

After interviewing Complainant, Perot Systems retained him as a contractor for the Service Desk position at Cedars-Sinai Hospital. *Id.* Complainant began working on August 11, 2009. *Id.* at 5. In his new capacity, he provided support services to the personnel of Cedars-Sinai Hospital. *Id.* Complainant was paid by Rydek and managed by Perot Systems. *Id.* at 5. Perot Systems has a maximum rate that can be billed per position, and Rydek set pay rates according to the schedule. According to Rydek because of the nature of the business relationship between Rydek and its customers, it has an incentive to insure that its candidates are paid at the highest rate permissible. *Id.* The pay rate for the Service Desk position held by Mr. Pittman was \$13-\$14 per hour, and Complainant was paid \$14 per hour. *Id.* No one at Rydek informed Complainant that he was not permitted to discuss his wages. *Id.*

On December 12, 2009, Complainant contacted Mr. Carlson and informed him that Perot Systems had converted him to a full-time employee. *Id.* at 5. At this point, Complainant was no

longer employed by or through Rydek. Once Complainant was converted to a full time employee of Perot Systems, Rydek had no control over his pay, promotions, terms and conditions of employment, or employment termination. *Id.* There was no agreement whereby Rydek agreed to assist Complainant in finding future employment after his placement ended. *Id.* Complainant was employed by Rydek only from August 11, 2009, through December 14, 2009. *Id.* During this four month period, Complainant did not make any complaints to Rydek, and Rydek never received information that Complainant complained to Perot Systems or Cedars-Sinai Hospital. According to Rydek, it did not take any adverse employment actions against Complainant. *Id.* Mr. Carson never met Complainant in person and did not know he was African-American until he received an e-mail sent by Complainant to two employees of Rydek on April 12, 2010. *Id.* at 5. Rydek never received information regarding Complainant's alleged disabilities, and Complainant has never disclosed any disabilities. *Id.* at 6. Rydek remains unaware of any such disabilities. *Id.*

Based on the evidence submitted by the parties Complainant's claims against Rydek are time-barred as a matter of law. Even if Rydek was arguably Complainant's employer from August 11, 2009, through December 14, 2009, which it is not under *Lawson*, the relationship was terminated on December 14, 2009. Complainant was subsequently terminated from Dell on February 6, 2010. Complainant filed his complaint with OSHA on April 15, 2011, more than 180 days after any potential adverse action. Accordingly, Complainant's claims against Rydek are **DISMISSED**.

2. Dell, Inc.

Dell Inc. filed its motion for "Summary Decision or in the Alternative for a Protective Order" on February 14, 2012. Dell argues that Complainant "was briefly employed by Dell as a help desk customer service representative. He happened to work on the Cedars-Sinai account, but he was in no way employed by Cedars-Sinai and was not managed by Cedars-Sinai." Dell Mot. at 2. According to Dell, the undersigned should dispose of Complainant's case on summary judgment because Complainant has not alleged an actionable claim and because his claim is barred by the statute of limitations. First, Dell argues that protected activity under SOX must involve an alleged violation of federal law directly related to fraud against shareholders. According to Dell, Complainant failed to communicate a belief that is both subjectively and objectively reasonable that Dell's conduct violated one of the laws enumerated in SOX relating to fraud against shareholders.³ Second, Dell asserts that Complainant's cause of action is time

³ Dell's counsel seems to ignore the fact that Complainant's previous whistleblower complaints can constitute protected activity. See 18 U.S.C.A. § 1514A(a)(2); *McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29 (ALJ Oct. 5, 2006) (finding that complainant engaged in protected activity by, *inter alia*, filing and appealing two SOX whistleblower claims and that respondent was aware that these claims were filed). In this case, Complainant filed a number of SOX complaints against his previous employers even though most of those complaints were dismissed with prejudice. See *Pittman v. Siemens, et.al.*, 2007 SOX-00015 (July 26, 2007). Nevertheless, it is true that threats to file complaints with the EEOC, the DOL and other agencies are insufficient if the alleged violation of a federal law does not directly relate to fraud against shareholders. *Smith v. Hewlett Packard*, 2005-SOX-88 to 92 (ALJ Jan. 19, 2006) (citing *Harvey v. The Home Depot, Inc.*, 2004-SOX-20 (ALJ May 28, 2004)).

barred because he failed to demonstrate any alleged adverse employment action which potentially falls within the relevant time period.

For the purposes of the current action only adverse actions which took place after October 17, 2010 (or 180 days preceding Complainant's OSHA filing on April 15, 2011) remain viable. Since more than 180 days have passed following Claimant's allegedly retaliatory termination from Dell on February 6, 2010, Complainant's claim with respect to this adverse action is time barred. *See* Dell Mot. EX 2; Complainant's Prehearing Statement at 5. According to Complainant "at various times after February 6, 2010, Respondents blacklisted [him] within and without their organizations." *Id.* Complainant notes that on March 26, 2010, Cedars' attorney Richard Simmons sent him a threatening letter wherein Simmons indicated that Cedars would take legal action against him if he did not refrain from contacting Cedars. Dell Mot. EX 3 at 8. According to Complainant, Simmons' letter constitutes evidence of blacklisting. *Id.* Complainant also allegedly demanded reinstatement on February 1, 2011, but Respondents refused to re-hire him. Complainant's Prehearing at 6. According to OSHA's findings Complainant's resume was also forwarded to Dell on or around January 8, 2011, although he was never hired. Dell Mot. EX 2. OSHA found that Dell received the resume as a referral, but it was unclear who sent the resume. *Id.* A Dell employee sent Complainant a canned email entitled "Thank you for our interest in joining the Dell team." *Id.* OSHA found that Complainant's attempts to secure a job at Dell appear to be analogous to a job inquiry rather than a job application. *Id.* Complainant also alleges that Respondents disclosed his confidential medical records to his former and prospective employers. Dell Mot. EX 3 at 6.

Complainant's right to seek relief for his termination from Dell is time barred because Complainant filed his OSHA complaint more than 180 days after the event. Dell correctly asserts that Complainant's allegations that his resume was forwarded to Dell and that he was not hired for a position are insufficient to show an adverse action. Complainant has failed to indicate what position Dell was seeking applicants for (if any), the qualifications required for the putative position, what Complainant's qualifications were, and whether the position remained open after Complainant was rejected. *See Levi v. Anheuser Busch Co.*, ARB 08-086, ALJ No. 2008-SOX-28, slip op. 5 (ARB Sept. 25, 2009); *see Hasan v. U.S. Dep't of Labor*, 298 F.3d 914, 916-17 (10th Cir. 2002). The fact that Complainant unilaterally demanded reinstatement to his old position and that Dell declined to reinstate him is also insufficient. *See Zdziech v. Daimler Chrysler Corp.*, 114 Fed. Appx. 469, 471 (3d Cir. 2004) ("The repeated refusal to an employer to reinstate an employee to a formerly held position ... does not give rise to a new claim of discrimination); *see also Hall v. The Sotts Co.*, 211 Fed. Appx. 361, 363 (6th Cir. 2006); *Johnsen v. Houston Nana Inc., JV & Alyeska Pipeline Serv. Co.*, ARB No. 00-064, ALJ No. 99-TSC-4, 2003 WL 244812 (Jan. 27, 2003) (holding that complainant cannot "extend the limitations period by repeatedly renewing [his] demand for reinstatement and then counting [his] time to file from each denial.").

Complainant also failed to present any specific evidence which shows that Dell or Cedars blacklisted him from rehire or future employment. A letter written by an attorney to an opposing party in the course of representing a client who is charged with retaliation does not constitute an act of blacklisting or an additional adverse act by the client. *Peoples v. Brigadier Homes, Inc.*, 87-STA-30 (Sec'y June 16, 1988) (assertions made by complainant's counsel do not constitute

evidence); *Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 593, n. 4 (9th Cir. 2002) (citing *Smith v. Mack Trucks*, 505 F.2d 1248, 1249 (9th Cir.1974)) (the arguments and statements of counsel “are not evidence and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment.”). A similar argument was raised in *Levi v. Anheuser Busch Co.*, ARB Nos. 06-102, 07-020, 08-006, slip op. 14 (ARB Apr. 30, 2008). In that case, complainant filed a second complaint alleging that employer’s counsel made false statements during a telephone conference and alleged that these false statements constitute ongoing retaliation designed to derail his SOX complaint and blacklist him. The ARB upheld the dismissal of the complaint stating that statements of counsel “do not constitute a separate actionable adverse action.” *Id.* at slip op.15.

Complainant failed to allege adverse actions which are not time barred. In order to avoid dismissal of his complaint, he must show that he suffered an adverse act 180 days before his OSHA filing on April 15, 2011. Complainant must provide a full statement of acts or omissions with pertinent dates. If the allegations fail to meet the standards discussed above, Complainant claims against Dell will be dismissed.

3. Cedars-Sinai Medical Center

Cedars-Sinai Medical Center (“Cedars”) is a hospital which is located in Beverly Hills, California. Complainant alleges that Cedars was Complainant’s co-employer and an agent of Dell and other publicly traded corporations. Dell EX 3 at 2. According to Complainant he was “under the direct supervision of Dell and Cedars’ Management.” *Id.* at 5. Complainant alleges that on February 25, 2010, he filed a complaint against Dell with Cedars’ Human Resources Department and met with Cedars’ HR Manager Angela Harvey. Complainant notified Harvey that he had reason to believe that Dell was engaging in a systematic pattern of discrimination against its African American employees. According to Complainant, Harvey assured him that she would investigate the claims and suggested that he apply for a job with Cedars. Complainant applied for a job which was posted on Cedars’ website. Cedars-Sinai alleges that it never employed Complainant even for a single day. Cedars Resp. at 1. According to Cedars, Claimant was employed by Dell as a help desk customer service representative and worked on the Medical Center’s account. According to Cedars-Sinai, Complainant was never employed by Cedars Sinai nor was he hired, directed, controlled, supervised or managed by the Medical center. *Id.* at 4.

For the reasons discussed above, Complainant risks having his claims against Cedar-Sinai dismissed if he fails to allege an adverse act which occurred 180 days before he filed his OSHA complaint. In order to avoid summary judgment, Complainant must provide specific facts or omissions and pertinent dates. Cedar-Sinai’s counsel also argues that Cedar-Sinai is not a publicly traded company within the meaning of the Act, but fails to fully brief the issue.

4. Aetna, Inc.

Aetna Inc. is provider of health care, dental, pharmacy, group life, and disability insurance, and employee benefits. Aetna is and was a publicly traded corporation. Aetna was responsible for administering Dell’s leave policies. Claimant alleges that Aetna was his co-employer and an agent of Dell and other publicly traded corporations. Dell Mot at EX 3 at 2.

Complainant alleged that around November of 2009, he began to suffer from a disability which prompted him to seek medical attention. On March 3, 2010, Aetna notified Complainant that his short-term disability claim has been denied because it failed to receive his records from the VA Hospital. Complainant appealed the denial of his disability claims on February 2, 2010 and March 31, 2010. *Id.* at 9. On June 2, 2010, Aetna denied Complainant's second appeal. On June 13, 2010, Complainant filed his third appeal. On February 3, 2010, Complainant received a letter from Aetna, informing him that Aetna was responsible for administering Dell's leave policies. The letter informed Complainant that he was denied leave under the Family Medical Leave Act and under California Family Rights Act. On February 25, 2010, Aetna's Claims Administrator sent Complainant a letter notifying him that his complaint was being suspended because Aetna did not receive his medical records from the West Los Angeles VA Hospital. On February 16, 2012, Aetna filed a "Precautionary Prehearing Statement of Position" alleging that it should be dismissed from the case. According to Complainant, Aetna sent him a letter on September 15, 2010, reversing the denial of his disability benefits; however, a claims administrator called Complainant the same day and informed him that his claim would be submitted for further review.

Aetna alleges that it is a claims administrator and has never employed Complainant within the provisions of SOX. Second, Aetna indicates that the conduct that Complainant alleges as a basis for liability occurred in 2010, far beyond the 180 statute of limitations. Under *Lawson*, Complainant was never an employee of Aetna, and Aetna does not qualify as an "agent" under section 806 as a matter of law. Accordingly, the claims against Aetna are **DISMISSED**.

5. **Dongell, Lawrence, Finney, LLP**

Dongell Lawrence Finney ("DLF") is a limited liability partnership which initially represented Rydek in this action. Rydek Mot. at 6. In his pleading amending his complaint to name DLF, Complainant alleges that DLF "acted as the agent for Dell" and "conspired with the other Respondents to intimidate, threaten, blacklist and to deny employment to Complainant in reprisal for him reporting Respondents' SOX violations to a number of Government agencies[.]" In his Prehearing Statement, Complainant alleges that DLF "advised Rydek to not pay Complainant all wages due to him, including his vacation pay." *Id.* at 6.

The role of DLF was limited to representing Rydek in response to Complainant's allegations. Providing legal advice to a client in the course of representation does not convert an attorney into an "agent" of the employer for the purpose of Section 806 liability. Accordingly, Complainant's claims against Dongell, Lawrence, Finney are **DISMISSED**.

6. **Sheppard, Mullin, Richter & Hampton LLC**

Sheppard Mullin is an international law firm which provides legal services to Cedars-Sinai. Complainant alleges that Sheppard Mullin is an agent of Dell, Cedars Sinai and other publicly traded corporations. Sheppard Mullin's role in this action is limited to representing Cedars Sinai. Accordingly, it is not an "agent" for the purposes of Section 806 liability as a matter of law. Complainant's claims against Sheppard Mullin are **DISMISSED**.

7. The Capital Group Companies, Inc.

On February 3, 2012, Complainant filed a Motion to Dismiss Respondents The Capital Group Companies, Inc. (“Capital Group”) and Blumenthal, Nordrehaug & Bhowmik (“Blumenthal”) without prejudice. On February 10, 2012, the Capital Group Companies, Inc. filed a letter indicating that it does not oppose Complainant’s Motion to Dismiss. Accordingly, Complainant’s motion is granted and Capital Group Companies is **DISMISSED** as a party.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and on the entire record, I issue the following order:

1. Complainant’s claims against the following parties are **DISMISSED**: Rydek Professional Staffing, Aetna, Inc., Sheppard, Mullin, Richter & Hampton, LLP, Blumenthal, Nordrehaug & Bhowmik, Dongell Lawrence Finney, LLP, and the Capital Group Companies Inc.
2. With respect to Dell and Cedars-Sinai, Complainant failed to allege adverse actions which are not barred by the statute of limitations. In order to avoid dismissal at the summary judgment stage, Complainant must show that he suffered an adverse act 180 days before his OSHA filing on April 15, 2011. Complainant must provide a full statement of acts or omissions with pertinent dates. If the allegations fail to meet the standards discussed above, Complainant claims against Dell and Cedars-Sinai will be dismissed. The parties are also urged to brief the issue of Cedars-Sinai’s liability in light of the decision in *Lawson v. FMR LLC*, 2012 WL 335647 (1st Cir. Feb. 3, 2012).
3. Complainant shall file **on or before March 16, 2012** his response to this Order to Show Cause why his claims against Dell and Cedars-Sinai should not be dismissed.
4. Briefs by Dell and Cedars-Sinai addressing their liability in light of the *Lawson* decision shall be filed **on or before March 16, 2012**.
5. In view of the pending matters set out hereinabove, the hearing currently scheduled for April 10, 2012, in Long Beach, California is hereby **CONTINUED** without date.

SO ORDERED

A

Russell D. Pulver
Administrative Law Judge

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.

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).