



Issue Date: 09 September 2016

CASE NO.: 2015-SOX-00025

In the Matter of:

PATRICIA MICALLEF,
Complainant,

vs.

**HARRAH'S RINCON CASINO & RESORT,
HCAL, LLC, and CAESAR'S ENTERTAINMENT
CORPORATION,**
Respondents.

ORDER GRANTING SUMMARY DECISION

This matter arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (the "Sarbanes-Oxley Act," or "SOX"), 18 U.S.C. §1514A, and the regulations at 29 C.F.R. Part 1980. It is not currently set for hearing.

Respondents HCAL, LLC, and Caesars Entertainment Corporation, Inc., filed a Motion for Summary Decision on July 22, 2016. Complainant opposes the motion.

Although Movants advance several arguments in support of their Motion, only one matters. The Complainant alleges she engaged in "protected activity" by raising certain complaints. To obtain relief under SOX, those complaints must "definitively and specifically" relate to fraud or securities laws, as set forth in 18 U.S.C. §1514A. Ms. Micallef's claims do not, and I must therefore grant the Motion. I do not consider, because I have no jurisdiction to do so, whether Ms. Micallef has any remedy against Movants under any legal theory other than a violation of SOX.

On a motion for summary decision, I must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact, and whether the moving party is entitled to summary decision as a matter of law. *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert den* 498 U.S. 1026 (1991); 29 C.F.R. §1978.107; 29 C.F.R. §§ 18.40(c), 18.41(a). I must look at the record as a whole, and determine whether a fact-finder could rule in the non-moving party's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio*

Corp., 475 U.S. 574, 587. Summary decision is proper “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

In order to establish a *prima facie* case under SOX, a Complainant must show that 1) he engaged in protected activity or conduct 2) Respondents knew of, or suspected, the protected activity; 3) Complainant suffered an unfavorable personnel action; and 4) the protected activity was a contributing factor in the unfavorable action. *Van Asdale v. International Game Technology*, 577 F.3d 989, 996 (9th Cir. 2009).

“Once the moving party has demonstrated an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation” (emphasis added). *In the Matter of Hooker v. Westinghouse Savannah River Company*, ARB No. 03-036, ALJ No. 01-ERA-16 (ARB, August 26, 2004).

1. HCAL MAY BE SUBJECT TO SOX

Movants begin by arguing SOX does not apply to HCAL because “it is not a publicly traded company and is not subject to Sarbanes-Oxley (SOX)” (Motion, p. 1). In Movants’ view, “HCAL is a privately held limited liability company formed under the laws of the State of Nevada” and “not subject to the SOX” (Motion, p. 10; *see also* Motion, Exhibit 15). (Elsewhere, Movants contend HCAL, under a “Management Agreement” of May 25, 2001, “act[s] exclusively as the agent for the Rincon Band assisting it in the operation of the Casino.” Motion, p. 2. The complete “Management Agreement” is not before the court on this motion.¹)

The whistleblower-protection provisions of SOX apply to any

. . . company with a class of securities registered under section 12 of the Securities Exchange Act of 1934, or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 *including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company . . . or any officer, employee, contractor,*

¹ Because there is no support for this assertion as required under 29 C.F.R. §18.72, I can draw no conclusions whatever about the Rincon Band’s and HCAL’s respective rights and obligations under the Management Agreement. Ms. Micallef attaches a partial copy of what she asserts is the “Management Agreement” as Exhibit C1 to her Opposition, but that copy is incomplete, and I need not and do not rely on it in any way in ruling on this Motion.

subcontractor, or agent of such company (emphasis added). 18
U.S.C. §1514A, subsection (a).

Movants' own Evidence, Exhibit 15 to the Motion, identifies the "Managing Member" of the limited liability company as "Caesars Entertainment Operating Company, Inc."² This fact raises, without disproving, the possibility that HCAL, LLC, is a subsidiary, affiliate, or agent of Caesars Entertainment Operating Company, Inc. Even if it did not, I cannot grant summary decision in favor of HCAL, LLC, unless I first find it does not appear on the consolidated financial statements of a publicly-traded parent. *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18 (ARB June 28, 2011). The Motion gives me no factual basis for such a finding, and accordingly fails on this point.³ *See also Lawson v. FMR LLC*, ___ U.S. ___, 134 S.Ct. 1158, 2014 U.S. LEXIS 1783, 2014 WL 813701 (2014).

2. THE RINCON BAND CANNOT CONFER SOX IMMUNITY ON HCAL

Movants next argue that HCAL is immune because the Rincon Band of Luiseño Indians has conferred its sovereign immunity upon HCAL under the Rincon Tribal Code, under the tribe's Ordinance Establishing Tribal Court Jurisdiction, under the tribe's gaming compact with the State of California, and under various court and administrative decisions (Motion, pp. 10-14). For the reasons set forth below, I cannot draw that conclusion based on the record before me.

Movants' own evidence (Motion, Exhibit 15) suggests that HCAL is not organized under tribal law, but rather under the laws of the State of Nevada. This fact alone distinguishes this case from cases such as *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), in which a corporation, formed under tribal ordinance and wholly-owned and managed by the tribe, and which produced economic benefits that inured exclusively to the benefit of the tribe, was held immune from claims of negligence. "*Tribal corporations acting as an arm of the tribe* enjoy the same sovereign immunity granted to a tribe itself" (emphasis added). *Cook, supra*, 548 F.3d at 725. But HCAL is not a tribal corporation. The evidence before the

² The Motion provides no information about whether Caesars Entertainment Operating Company, Inc., is or is not publicly-traded. Because I must view the evidence in support of the Motion in the light most favorable to the non-moving party, I cannot simply assume the corporation is not publicly-traded. Movants must show it is not. They have made no such showing.

³ If Caesars Entertainment Operating Company, Inc., were not the parent company of HCAL, and if HCAL's business does not appear on the consolidated financial statements of Caesars Entertainment Operating Company, Inc., a simple declaration from a witness with personal knowledge of those facts might have sufficed to trigger the Complainant's obligation to provide evidence to the contrary. I base my ruling on this argument on the Movants' failure to present evidence in support of it, but I note that Exhibit C36 attached to Complainant's Opposition would suffice to show a dispute on this point, if it were necessary for me to consider the Opposition.

court in this case shows it is owned, at least in part, and managed entirely, by Caesars Entertainment Operating Company, Inc., rather than by the tribe. What is more, there is no evidence in the record on this motion to show that HCAL generates economic benefits exclusively for the tribe, and none for itself or for any of its Members apart from the tribe.⁴

“Tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity.” *Maxwell v. County of San Diego*, 708 F.3d 1075, 1087-88 (9th Cir. 2013). And courts are “extremely hesitant to extend this fundamental and carefully limited immunity to private parties whose only relationship to the sovereign is by contract.” *Del Campo v. Kennedy*, 517 F.3d 1070, 1076 (9th Cir. 2008). Indeed,

Our reluctance to expand sovereign immunity to private entities is reinforced by the consideration that the recognition of state sovereign immunity with regard to an entity results in restrictions on federal legislative as well as judicial authority with regard to that entity, including ‘restrictions on the power of Congress, acting under certain Article I powers, to create privately enforced federal causes of action against the [entity].’ . . . So limiting Congress’s power to regulate a private company simply because it has contracted with a state would radically alter the bounds and nature of federal authority . . .” *Del Campo, supra*, 517 F.3d at 1076.

Here, too, this court struggles to understand why the Rincon Band should have the power to delegate its sovereign immunity to a private party of its own choosing. In this case, to do so would prohibit Congress from regulating the legal relationships between a non-Indian employer, to all appearances engaged in interstate commerce, and its non-Indian employees. In the case of SOX in particular, this strikes this court as an untoward result. It should make no difference whatever to the Rincon Band if Congress chooses to prevent a non-tribal business from retaliating against its own employees in the manner prohibited under SOX. It certainly does not limit the Band’s sovereignty in any way.⁵

The Motion fails on this point.

⁴ Again, I decide this issue without consideration of Ms. Micallef’s Opposition, although her Exhibit C1, at page 27, suggests HCAL charges the tribe a fee for its services under the Management Agreement.

⁵ The decision of *Rincon San Luiseno Band of Mission Indians and HCAL, LLC v. Dan McAllister/Treasurer-Tax Collector of San Diego County*, Case No. 04-cv-1159H, even as Movants describe it (Motion, pp. 12-13), does not compel a different result. Under that decision, HCAL was not subject to a local hotel occupancy tax because it had “no ownership in the gaming facilities” subject to the tax. This does not constitute a finding that HCAL itself has any form of immunity.

3. CAESARS ENTERTAINMENT CORPORATION MAY HAVE EMPLOYED MS. MICALLEF

Next, Movants argue “there is no competent evidence demonstrating that [Ms.] Micallef was employed by Caesars Entertainment Corporation while she worked at the Casino” (Motion, p. 14). Once again, Movants misapprehend their burden. If they wish the court to conclude that Ms. Micallef was not employed by Caesars Entertainment Corporation, and to find there is no dispute as to that “fact,” it is up to Movants to support their assertion with a citation to supporting evidence. It should be a simple matter, if the assertion were true, for Movants to provide a declaration or affidavit to that effect from a witness with personal knowledge of the fact. Instead, Movants implicitly fault Ms. Micallef for a lack of evidence on the subject.

Ms. Micallef’s statements at deposition identifying her employer as “Harrah’s Rincon” (Motion, Exhibit 14) do not cure this defect. This is especially true when the Movants themselves argue, without evidentiary support:

Although Ms. Micallef’s employment documents often refer to “Harrah’s Rincon Casino & Resort,” that, again, is not a legal entity, but simply a trade name commonly used to refer to the Gaming Enterprise owned and operated by the Rincon Band and located on its reservation (Motion, p. 3).

Yet at her deposition, Attorney James B. James introduced himself to Ms. Micallef by saying “I represent Harrah’s Rincon on your Workers’ Compensation claim” (Exhibit 14, p. 2, internal page 5, lines 24-25). If Ms. Micallef was confused about the identity of her employer, it would appear Mr. James was equally confused about the identity of his client.⁶ And, just as Movants acknowledge, it is quite clear that some entity calling itself “Harrah’s Rincon” or “Harrah’s Rincon Casino & Resort” held itself out as Ms. Micallef’s employer repeatedly (Motion, Exhibits 1, 2, 7, 8, 9, 10, 11), as did, on at least one occasion, Harrah’s Entertainment, Inc. (Motion, Exhibit 5).⁷

⁶ Curiously, Movants also argue elsewhere in their Motion that Ms. Micallef was “hired and employed . . . by the Rincon Band” (Motion, pp. 3, 7). Since the court has already dismissed the Rincon Band from this case on the grounds it is not subject to SOX, why would Movants not base their Motion for Summary Decision on *that* point, if they could prove it? On the other hand, if she were employed by the Rincon Band, what business would she have being questioned in a Workers’ Compensation proceeding by a lawyer for “Harrah’s Rincon?” What Movants’ evidence strongly suggests is that one or more entities are hiding behind the alleged trade name “Harrah’s Rincon,” and that Movants are unwilling clearly to identify them.

⁷ To add to the confusion, Ms. Micallef possesses W-2 forms from Harrahs Operating Co. and Harrahs Operating Co., Inc. (Opposition, Exhibit C3, pp. 1-4); and from Caesars Operating Company, Inc. (Exhibit C3, p. 5)

Movants have not demonstrated that Ms. Micallef was not an employee of Caesars Entertainment Corporation. On this point, too, their motion fails.

4. MS. MICALLEF’S COMPLAINTS DO NOT COMPRISE
“PROTECTED ACTIVITY” UNDER 18 U.S.C. §1514A

Finally, Movants argue Ms. Micallef cannot establish a *prima facie* claim under SOX because “there is no evidence that [Ms.] Micallef either engaged in ‘protected activity’ or that . . . HCAL knew or suspected she was engaging in protected activity” because Ms. Micallef never reported any conduct to which SOX applies (Motion, p. 15).

In their Motion, Movants acknowledge three complaints from Ms. Micallef. First, she claimed she was injured on the job (Motion, p. 4). Second, she complained about the distribution of tips in the workplace (Motion, p. 6). Third, in addition to her complaints about tips, she complained of “occupational health and safety concerns, such as fire hazards in proximity to oxygen tanks” (Motion, p. 7). Movants argue that none of these complaints relate to mail fraud, wire fraud, bank fraud, securities fraud, any rule of the SEC, or fraud against shareholders (Motion, p. 15), and accordingly do not, as a matter of law, comprise “protected activity” under SOX.

Under *Van Asdale v. International Game Technology, supra*, 577 F.3d at 996-997:

. . . to constitute protected activity under Sarbanes-Oxley, an “employee’s communications must ‘definitively and specifically’ relate to [one] of the listed categories of fraud or securities violations under 18 U.S.C. [] §1514A(1).

Complaints about injury to one’s person, or of health and safety violations in the workplace, do not relate the any of the categories of fraud or securities violation listed in 18 U.S.C. §1514A. Whatever rights a complaining employee may have under other laws, SOX does not provide a remedy for employer retaliation in response to such complaints.

Additionally, for a disclosure to comprise “protected activity” under SOX, the person making the disclosure must “reasonably believe” the disclosed information constitutes a violation of fraud or securities laws. 18 U.S.C. §1514A, subsection (a)(1). The complaining employee’s theory of such fraud “must at least approximate the basic elements of a claim of securities fraud.” *Van Asdale v. International Game Technology, supra*, 577 F.3d. at 1001, citing *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st. Cir. 2009). While Ms. Micallef’s complaints of irregularities in the distribution of tips to employees has some relevance to the financial state of her employer – whoever her employer may be – it does not support a reasonable belief that the employer is defrauding its shareholders, if any, or anyone else.

Thus, for the first time, I must turn to Ms. Micallef's Opposition to determine whether she contests any of Movants' assertions about her disclosures. She asserts she made two disclosures: 1) she sent an e-mail "to all Employee Action members about the use of EE credits used as PTO earned from employer incentive raffles and employee volunteering" (Opposition, pp. 18-19; Exhibit C6, p. 2); and 2) she claimed her employer was misappropriating tips (Opposition, p. 19).⁸

With respect to the first disclosure, Exhibit C6, p. 2, shows only that the issue of "EE credits used as PTO" was a subject of discussion between casino employees and management. Ms. Micallef declares under penalty of perjury that she considers both her employer's use of "EE credits . . . for their benefit" and "misappropriation of tips" as "illegal;"⁹ and her reporting of those "illegal" activities as "protected activity" (Opposition, Exhibit C35, ¶¶ 1-2). But SOX does not protect her from retaliation for reporting "illegal" activities of any kind. Nowhere in her Opposition is there any suggestion of any objectively-reasonable belief that either of these activities was in any way related to fraud or a securities violation.

CONCLUSION

The Motion for Summary Decision is granted. Ms. Micallef's disclosures, based on the undisputed issues of fact, do not comprise "protected activity" under SOX as a matter of law. Therefore, SOX does not provide her a remedy in this case.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issu-

⁸ She also mentions complaints about safety issues and her employer's failure to provide treatment for her alleged on-the-job injury (Opposition, p. 19), but, as discussed above, such complaints do not comprise "protected activity" under SOX.

⁹ Elsewhere she argues her employer's appropriation of dealer tips violated a general criminal statute, 18 U.S.C. §641. I make no finding regarding this theory, but 18 U.S.C. §641 is not one of the statutes listed in 18 U.S.C. §1514A.

ance 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 should identify the legal 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).

When 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, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been tak-

en, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).