

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 30 June 2020

CASE NO.: 2019-SOX-00015

In the Matter of:

SACHIN SHAH,
Complainant,

v.

ALBERT FRIED & COMPANY,

and

TD SECURITIES LLC,
Respondents.

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

This proceeding arises from a complaint of discrimination filed under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("SOX") and the procedural regulations found at 29 C.F.R. Part 1980.

I. PROCEDURAL HISTORY

Complainant alleges he was subject to an adverse action when he was terminated from employment on January 3, 2017. Following the termination, Complainant filed a timely complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA"). On November 27, 2018, the Regional Administrator for OSHA, acting as agent for the Secretary of Labor ("Secretary"), issued an order dismissing the complaint. On November 27, 2018, Complainant objected to the Secretary's preliminary order dismissing his complaint, and submitted his objection, along with approximately one thousand pages of allied papers, to the Chief Administrative Law Judge. Complainant's request for hearing was referred to the Office of Administrative Law Judges, Boston District.

Although Complainant was represented by legal counsel when he submitted the complaint to OSHA, he appeared before me in a *pro se* status. During an initial preliminary

conference call with the parties where I explained the process and procedures to be followed, and communicated my expectations, Complainant informed me he was seeking new counsel. I allowed him additional time to do so. Prior to a second conference call, he informed my office that his new counsel withdrew and would no longer be representing him. The case then proceeded with Complainant as a self-represented litigant.

On August 27, 2019, Respondent filed a *Motion for Summary Decision* (“Motion”) with supporting memorandum of law along with exhibits and affidavits from various employees of TD Securities. On September 6, 2019, Complainant filed his *Opposition to Respondent’s Motion for Summary Decision* with accompanying exhibits and his statement of disputed facts.

Respondent argues that summary decision is appropriate in this matter because Complainant cannot establish a *prima facie* case and show he engaged in protected activity under SOX, and even if he could, his termination was based on legitimate non-retaliatory business reasons. Even if Complainant is able to demonstrate a factual dispute and establish a *prima facie* case, Respondent contends it has presented clear and convincing evidence that his termination would have taken place in spite of any alleged protected activity.

In response, Complainant argues there are disputes as to material facts, and therefore, Respondent is not entitled to summary decision. I note that the vast majority of information Complainant submitted as his response to the Motion concerned his ongoing legal dispute and civil litigation with parties other than Respondents, Albert Fried and TD Securities. Complainant alleges Respondents have been co-opted by those other parties and are part of a larger scheme to harass and terrorize Complainant. In responding to the Motion, Complainant offers general denials and alleges the affidavits by TD Securities employees are not truthful.

II. BACKGROUND FACTS¹

Complainant worked for Respondent, Albert Fried & Company, LLC (“Albert Fried”) from June 17, 2013, until January 3, 2017, when his employment was terminated after Albert Fried was acquired by TD Securities.

TD Securities is the investment banking and capital markets subsidiary of the Toronto Dominion Bank, the sixth largest bank in North America with over 3,800 employees in offices worldwide. TD Securities provides a wide range of capital market products to corporate, government and institutional clients. Wallace² Affidavit (“Aff.”) ¶ 3.

¹ The background facts are largely adapted from Respondent’s Memorandum of Law since they were not seriously challenged by Complainant.

² Brad Wallace, Head of Human Resources, TD Securities.

A. TD Securities' Acquisition of Albert Fried

On or about September 13, 2016, TD Securities publicly announced that it would acquire Albert Fried to expand its presence in the United States prime brokerage sector. Wallace Aff. ¶ 4. Albert Fried was a New York City based broker dealer, founded in 1919, and a premier financial services organization, providing prime brokerage, clearing, securities lending, trading services and trading technology along with various other services. Katsingris³ Aff. ¶ 4.

TD Securities' acquisition was focused on Albert Fried's prime brokerage, self-clearing and securities lending services and capabilities, and its prime brokerage technology platform. These elements were expected to provide TD Securities an opportunity to expand services it offered to international clients, especially hedge fund clients. Wallace Aff. ¶ 5; Santina⁴ Aff. ¶ 3.

After becoming interested in Albert Fried as a potential acquisition target, TD Securities began conducting due diligence in 2015. Santina Aff. ¶ 4; Wallace Aff. ¶ 6; Schwartz⁵ Aff. ¶ 3. TD Securities had to maintain complete secrecy about the potential transaction in order to keep the business operation and workforce of Albert Fried intact and not put that company in a worse position should the acquisition not close for some reason. Wallace Aff. ¶ 8; Schwartz Aff. ¶ 4. If premature news of the possible acquisition of Albert Fried got out, it could have adversely affected Albert Fried's relationships with its clients and its employees, which could damage the assets TD Securities was seeking to acquire. Wallace Aff. ¶ 9.

TD Securities management and human resources personnel conducted due diligence and spent a significant amount of time determining which of Albert Fried's 47 employees would transition over to TD Securities along with those core businesses/services being targeted in the acquisition. Santina Aff. ¶ 5; Wallace Aff. ¶ 7.

A. Complainant's Termination

Complainant began working at Albert Fried in June 2013, as a Special Situations and Merger Arbitrage Strategist. In that role, he conducted research and "provided analysis to clients in the special situations, merger arbitrage and event driven space, which clients then used to trade equities." Katsingris Aff. ¶ 6. Complainant's work was highly specialized and distinct from Albert Fried's core businesses; he was the sole employee at Albert Fried conducting such merger arbitrage analysis. This function was not part of the core businesses that TD Securities was seeking to acquire. Santina Aff. ¶ 8; Katsingris Aff. ¶ 6

After review of the objectives and goals of the acquisition, TD Securities decided not to retain Complainant's position or those of ten other Albert Fried employees. Santina Aff. ¶ 8. TD Securities decided not to retain positions that included a research analyst focusing on

³ Anthony Katsingris, formerly Chief Operating Officer and Chief Compliance Officer, Albert Fried & Company, currently Managing Director of Sales and Trading, TD Securities.

⁴ David Santina, Managing Director of Sales and Trading, TD Securities.

⁵ Alicia Schwartz, Human Resources Director, TD Securities.

companies in bankruptcy, Albert Fried's proprietary trading, fixed income international sales, and other specialties. *Id.* ¶ 9; Due Diligence Report dated June 7, 2016, (Exhibit C to Schwartz Aff.).

By July of 2015, TD Securities identified that Complainant's "business function will likely not be transition over as part of the deal." Schwartz Aff. ¶ 6; Due Diligence Report dated July 14, 2015, (Exhibit A of the Schwartz Aff.). In that report, it was noted that:

"TD Securities' interest in Albert Fried is focused more on the business model, technology and licenses than on the human capital and we expect there to be a fair amount of non-key employee attrition, both voluntary and involuntary, over the next year or two. This is not a key concern to the leaders of the business as the intent of the acquisition is to capture the business model, technology and licenses."

The March 14, 2016, a draft of the Due Diligence report noted a decision would have to be made "around timing for communication for employees joining TD and employees being severed," and a deadline was set four weeks prior to the closing of the acquisition to finalize the list of employees being retained versus severed. Schwartz Aff. ¶ 7; Due Diligence Report dated March 14, 2016, (Exhibit B to Schwartz Aff.).

The decision to terminate 11 Albert Fried employees, including Complainant, was documented in the June 7, 2016, Due Diligence Report and the Staff Selection Worksheet dated November 21, 2016. Schwartz Aff. ¶ 8; (Exhibit D to Schwartz Aff.) Organizational charts showed that Complainant had been identified in September and October 2016, as one of the positions being severed. *See* Charts dated September 29, 2016, and October 15, 2016, (Exhibits E and F to Schwartz Aff.). Ultimately, 11 of the 47 Albert Fried employees were selected to be severed. Santana Aff. ¶10; Wallace Aff. ¶ 11; Severance Chart, (Exhibit G to Schwartz Aff.)

Although TD Securities documented its decision to terminate 11 Albert Fried employees that information was not immediately shared with Albert Fried management. Santana Aff. ¶11; Wallace Aff. ¶ 11. Albert Fried's Chief Operating Officer and Chief Compliance Officer, Anthony Katsingris, was not informed during the sale process of which Albert Fried employees would transition to TD Securities. Katsingris did not receive the final list of those Albert Fried employees being terminated until shortly before the January 3, 2017, acquisition closing date. Katsingris Aff. ¶ 18; Wallace Aff. ¶ 10.

All Albert Fried employees, were given an opportunity to meet with TD Securities staff to discuss their jobs at Albert Fried, and receive an onboarding form to be completed. The form was needed both to onboard those employees being retained and pay final wages and severance to employees being terminated.

Complainant stated he attended a scheduled Town Hall meeting on September 14, 2016, where he met with David Santana, Managing Director of Sales and Trading for TD Securities,

and Alicia Schwartz, Human Resources Director. Complainant said he met again with David Santina and other TD Securities members, Jeff Peacock, and Pat Dotson on December 7, 2016. *See Complainant's Response to Motion for Summary Decision: Relevant Facts*, pp. 7-13.

Katsingris notified Complainant on December 7, 2016, to report to the Albert Fried offices on January 3, 2017, as the acquisition by TD Securities would then be finalized. He also informed Complainant a workstation was being built for him at the office, since Complainant had been largely working from home since about 2014. Katsingris Aff. ¶ 8; Schwartz Aff. ¶ 11.

On the evening of January 2, 2017, Complainant and the 10 other Albert Fried employees were informed by Katsingris that their employment would be terminated the next day. Katsingris told them to report on January 3, 2017, to meet with Brad Wallace, the Head of Human Resources for TD Securities, to receive a severance agreement and learn about benefit options. Schwartz Aff. ¶ 5; Katsingris Aff. ¶ 18; Wallace Aff. ¶ 12.

Complainant met with Brad Wallace on January 3, 2017, where he complained about his past commission payments from Albert Fried. Complainant did not discuss securities violations or compliance issues. Wallace Aff. ¶ 13.

Complainant's employment with Albert Fried/TD Securities was terminated on January 3, 2017.

III. SUMMARY DECISION

An Administrative Law Judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. § 18.72(a); *see* FED. R. CIV. P. 56(c). The primary purpose of summary judgment is to isolate and promptly dispose of unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). In cases before the OALJ, the standard for summary decision is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB June 28, 2011).

In a motion for summary decision, the initial burden is on the moving party to demonstrate that there is no genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. Once this burden is met, the non-moving party must establish the existence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the action." *Fredrickson v. Home Depot U.S.A., Inc.*, ARB No. 07-100, ALJ No. 2007-SOX-13, slip op. at 5 (ARB May 27, 2010) (internal quotation marks deleted). In opposing a motion for summary decision, the non-moving party may not rest upon mere allegations or denials, but instead must cite to particular materials in the record or show that materials cited do not establish the absence of a genuine dispute. 29 C.F.R. § 18.72(c); *see*

Anderson, 477 U.S. at 250. In assessing a motion for summary decision, all evidence is viewed in a manner most favorable to the non-moving party. *Matsushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson*, 477 U.S. at 255; *Mara*, ARB. No. 10-051, slip op. at 5. If it is necessary to weigh evidence or to make credibility determinations, the judge cannot grant summary decision. *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574 (1986); see *Anderson*, 477 U.S. at 249 (“[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”).

IV. SARBANES-OXLEY

Congress enacted SOX on July 30, 2002, as part of a comprehensive effort to combat corporate fraud. *Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, slip op. at 8 (ARB May 25, 2011). The United States Supreme Court has said that SOX was enacted “to safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation.” *Lawson v. FMR LLC*, 571 U.S. 429 (2014). Included in SOX were whistleblower protection provisions, which were intended to respond to a “culture, supported by law, that discourage[d] employees from reporting fraudulent behavior not only to the proper authorities . . . but even internally.” S. Rep. No. 107-146, at 5 (2002).

A. Protected Activity

Under 18 U.S.C. §1514A(a)(1), protected activity is defined as:

any lawful act done by the employee – (1) to provide information . . . regarding any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C. §§] 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to . . . a person with supervisory authority over the employee.⁶

“[SOX] prohibits a publicly traded company from discharging an employee in retaliation for providing information to a supervisor about ‘any conduct which the employee reasonably believes constitutes a violation’” of the types listed in section 806 of SOX. *Beacom v. Oracle Am.*, 825 F.3d 376, 379 (8th Cir. 2015). SOX “requires the employee to hold a reasonable belief that the employer’s conduct amounts to fraud against shareholders, and the employee’s belief must be objectively reasonable.” *Beacom*, 825 F.3d at 380; *Sylvester*, ARB No. 07-123, slip op. at 14. A whistleblower’s report based upon a reasonable, but mistaken, belief that a company’s conduct constitutes a violation of the applicable law can constitute protected activity. *Van*

⁶A complainant would also engage in protected activity by reporting corporate malfeasance to a law enforcement agency or to a federal regulatory authority (18 U.S.C. § 1514A(a)(1)(A)), or to a Member of Congress or committee of Congress (18 U.S.C. § 1514A(a)(1)(B)).

Asdale v. Int'l Game Tech., 557 F.3d 989, 1002 (9th Cir. 2009).

A SOX whistleblower claim applies the same burden of proof found in other Department of Labor whistleblower cases, commonly referred to as the “AIR-21” standard.⁷ Application of this burden of proof was exhaustively discussed by the *en banc* decision of the Administrative Review Board in *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016). Under SOX, as interpreted by *Palmer*, Complainant must first prove by a preponderance of the evidence that: (1) he engaged in protected activity under the Act, (2) Respondent knew or suspected that Complainant had engaged in the protected activity, (3) Complainant suffered an adverse personnel action, and (4) the protected activity was a contributing factor in the adverse personnel taken action against Complainant. At this summary decision stage, the failure of Complainant to come forward with evidence as to each of these elements is fatal to his case.

If Complainant comes forward with evidence demonstrating these elements, the burden would then shift to Respondent to prove by clear and convincing evidence that it would have taken the same adverse action even if Complainant had not engaged in the protected activity. *Fordham*, ARB No. 12-061, slip op. at 10; *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011); *see* 29 C.F.R. § 1980.109(b).

1. Complainant's Alleged Protected Activity

Respondent argues the only evidence of record evidencing any complaints about securities violations is Complainant's December 27, 2017, communication to “DOJ, SEC, FINRA and NY AG Office.” A copy of that letter was forwarded by Complainant's then attorney, as a supplement to the original OSHA complaint.

In that letter, Complainant notes he “is a former whistleblower writing to request an in person meeting to discuss matters that concern multiple federal and securities violations over the past seven years.” My review shows that the overwhelming majority of the letter pertains to Complainant's long standing, ongoing disputes with Les Levy, Jr. and Les Levy, Sr., and the civil litigation they are all involved in. Complainant refers to reports he made of alleged illegal activities at other employers and against persons at those firms.

The focus of Complainant's December 27, 2017, letter appears to be his interactions with parties other than Albert Fried or TD Securities. He states the Levys are engaged in a “vendetta” against him that “morphed into a scorched earth policy.” He believes the Levys “enlisted my current employer Albert Fried and others to aid them in their efforts.” According to Complainant

⁷ The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century Act (“AIR-21”) was enacted in 2000. AIR-21 contains a whistleblower protection provision found at 49 U.S.C. § 42121. The whistleblower protection standard codified in AIR-21 has subsequently been incorporated into many other federal whistleblower statutes, including SOX. *See generally Palmer*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 39, n.166 (concluding SOX contains burden of proof scheme incorporated from AIR-21).

those efforts included the Levys intercepting Complainant's communications with his clients, his employer and with reporters. He believes they also recruited the local Mayor, vendors and the police department to continually harass him and his mother in an effort to force Complainant to move.

In one paragraph of the three page letter Complainant notes, "I have witnessed the illegal activities that [unnamed Albert Fried employees and Mr. Katsingris] have engaged in. The level of front running trade manipulation and intentional sabotaging my clients' trades has negatively impacted my job and my ability to retain clients." Complainant alleges Albert Fried employees were trying to drive him out of the company. Complainant did not provide any additional specific information in the letter.

I recognize Complainant is a self-represented litigant, and wanted to ensure he had an opportunity to put forth his legal arguments in his response to the pending *Motion for Summary Decision*. I note Complainant's filings are filled with conclusory statements, assumptions and his interpretation of facts and events. The filings are replete with supposed phone conversations Complainant claims to have recorded, and then transcribed. There is no way to know the authenticity, or accuracy of those supposed conversations. The filings also contain purported emails to and from various parties, also apparently transcribed by Complainant. Again, the authenticity, and accuracy is in question. Throughout the filings it was apparent to me some messages were not complete or ended in the middle of a sentence. As a result, the context is missing thus calling into question the accuracy of the document, as well as the actual time and date the messages may have been sent.

I searched through all his material to see if I could reasonably ascertain any other instance of protected activity that was documented. I was not successful. Complainant alleged other issues with his co-workers, such as them making prank phone calls, making loud noises, acting in a childlike manner, wasting time and failing to timely execute trades for Complainant's clients. Complainant also alleged he was not paid the proper amount of commissions for his work. While these incidents may be part of a working environment Complainant did not care for, they do not rise to the level of protected activity in reporting securities violations or other illegal activity. See *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, 115; ALJ Nos. 2004-SOX-020, 36, slip op. at 14 (ARB June 2, 2006) ("Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws . . . , standing alone, is not protected conduct under SOX.")

However, for purposes of this *Motion for Summary Decision*, I will assume *arguendo* that Complainant engaged in protected activity when he sent his letter to "DOJ, SEC, FINRA and NY AG Office."

B. Respondent's Knowledge of Protected Activity

Respondent argues that even if Complainant's letter to various government agencies was protected activity, there is indisputable proof that TD Securities decided to terminate Complainant's employment more than a month before he ever engaged in the alleged protected

activity. Thus, according to Respondent, the letter could not have been a contributing factor in the termination decision.

Respondent further contends Complainant cannot show that any decision maker at TD Securities knew about the letter before January 2, 2017, when Complainant was notified by Katsingris that his employment was being terminated on January 3, 2017.

If a securities violations complaint or a compliance complaint was filed at Albert Fried, the two employees responsible for getting involved were Anthony Katsingris and Ed Daniele, the Compliance Officer. Daniele stated in his affidavit he did not receive any complaints from Complainant about securities or compliance violations while Complainant worked at Albert Fried. Daniele Aff. ¶ 6. Daniele noted he was the sole Albert Fried employee responsible for conducting a compliance review of the Albert Fried email system. Daniele did not review any emails from Complainant during the week of December 27, 2016, because he was out of the office due to his wife's death on December 26, 2016. He did not return to the office until after January 3, 2017. Daniele Aff. ¶ 10.

In his affidavit Katsingris states he left the office on December 28, 2016, for a vacation in Las Vegas and did not return until January 2, 2017. Katsingris Aff. ¶ 7. He said he had no reason to search for emails or mail that Complainant might have filed during that time. He first became aware of the December 27, 2016, letter when Complainant filed his OSHA complaint. Katsingris Aff. ¶ 6.

Respondent also argues that even if Katsingris or Daniele were aware of the letter, Complainant cannot show that either had input into TD Securities' decision to eliminate Complainant's position and terminate his employment. Respondent argues Complainant's inability to show TD Securities knew about the letter is fatal to his argument that temporal proximity of the letter to his termination means his complaints were a contributing factor to his termination.

Throughout his filings, Complainant asserts that Katsingris and others at Albert Fried intercepted his emails and telephone calls in real time; and thus, were at all times aware of everything Complainant was doing. Based on this belief, Complainant insists Respondent knew he was engaging in protected activity.

Upon review of the file before me, I find that TD Securities was not aware of Complainant's letter of December 27, 2016. I further find that Complainant cannot show that letter contributed, in any way, to his termination. Therefore, I find that Complainant failed to establish a *prima facie* case of retaliation under SOX. Summary decision is appropriate, and the claim will be dismissed.

C. Affirmative Defense

For completeness and for any review by an appellate authority, I will address whether Respondent can show it would have taken the same termination action against Complainant in the absence of any purported protected activity.

There is ample evidence of the background work TD Securities engaged in when it decided to acquire the assets of Albert Fried. Affidavits from senior level TD Securities employees outlined their due diligence work that was done to understand the workings of Albert Fried and its employees. Those due diligence reports show a detailed effort by TD Securities to ensure the acquisition was successful and to ensure the appropriate business assets and employees would be part of the acquisition. I find the due diligence report of July 14, 2015, showed Complainant's position was identified as one that was likely not to make the transition when the acquisition was complete. Complainant's position also appeared on subsequent reports and organizational charts to be eliminated because his role at Albert Fried did not meet the goals and objectives of the acquisition.

Therefore, based on the information before me, I find that Respondent has also shown by clear and convincing evidence it would have taken the same unfavorable personnel action against Complainant in the absence of his alleged protected activity. Complainant's position, along with the positions of 10 other Albert Fried employees were being eliminated as part of the acquisition process by TD Securities, a legitimate business decision.

V. CONCLUSION

Even assuming *arguendo* that Complainant engaged in protected activity when he sent the December 27, 2016, letter, clear and convincing evidence shows Respondent was not aware of it, and it had no effect on his termination. Specifically, Respondent has shown by clear and convincing evidence that Complainant's position with Albert Fried was one of the 11 positions that would not be absorbed during the acquisition by TD Securities, and those positions were slated for termination as early as July 14, 2015. Complainant's termination on January 3, 2017, was the result of a legitimate business decision and had nothing to do with any report or filing with any regulatory agency. Since Complainant cannot show his termination was retaliation for engaging in protected activity, his claim will be denied.

ORDER

Accordingly, **IT IS ORDERED** that Respondent's *Motion for Summary Decision* is **GRANTED**. Therefore, Sachin Shah's claim under the Sarbanes-Oxley Act is **DENIED** and his complaint is **DISMISSED**.

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts