

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of November, two thousand nine.

PRESENT:

BARRINGTON D. PARKER,
PETER W. HALL,
GERARD E. LYNCH,
Circuit Judges.

Karen K. Gattegno,

Petitioner,

v.

08-3297-ag

Administrative Review Board, Prospect Energy Corporation, Prospect Administration, LLC,
Prospect Capital Management LLC, John F. Barry, M. Grier Eliasek, Michael E. Basham, Robert
A. Davidson, Walter Parker, Eugene Stark, Daria Becker,

Respondents.

FOR PETITIONER: Karen K. Gattegno, *pro se*, Scarsdale, N.Y.

FOR RESPONDENTS: Joan Brenner, Attorney, United States Department of Labor, Office of the Solicitor, Washington, D.C. (Carol A. De Deo, Deputy Solicitor for National Operations; Steven J. Mandel, Associate Solicitor; Ellen R. Edmond, Counsel for Whistleblower Programs, *on the brief*)

UPON DUE CONSIDERATION of this petition for review of a decision by the United States Department of Labor, Administrative Review Board (the “ARB”), it is hereby **ORDERED, ADJUDGED, AND DECREED**, that the petition for review is **DENIED**.

Petitioner Karen K. Gattegno seeks review of a May 29, 2008 decision of the ARB, affirming an administrative law judge’s (the “ALJ”) grant of the Respondents’ motion for summary judgment, which resulted in the dismissal of her complaint alleging retaliation under the Sarbanes-Oxley Act, 18 U.S.C. § 1514A. We assume the parties’ familiarity with the underlying facts and procedural history of the case.

We review a petition of review from agency decisions regarding claims brought under the Sarbanes-Oxley Act pursuant to the rules and procedures set forth in the Administrative Procedure Act (the “APA”). *See* 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4)(A). Thus, we will uphold a decision by the ARB—which represents a final agency decision by the Department of Labor—if it is not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see Green Island Power Auth. v. F.E.R.C.*, 577 F.3d 148, 158 (2d Cir. 2009) (holding that review of an agency decision pursuant to the APA is subject to an abuse of discretion standard under 5 U.S.C. § 706); *see also Welch v. Chao*, 536 F.3d 269, 275-76 (4th Cir. 2008) (ARB’s denial of complainant’s claims under Sarbanes-Oxley are reviewed under the APA for abuse of discretion). We consider, therefore, “whether the decision was based on a consideration of the relevant factors and whether there has been a clear

error of judgment,” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989), and we will set aside the agency determination only if we conclude that its decision “runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,” *LaFleur v. Whitman*, 300 F.3d 256, 267 (2d Cir. 2002) (citation omitted).

Pursuant to regulations promulgated by the Department of Labor, an ALJ may grant summary judgment to a party “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact.” 29 C.F.R. § 18.40(d). This standard is analogous to the rules governing motions for summary judgment in federal court. *See* Fed. R. Civ. P. 56; *see also* *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994) (“[T]he concept of administrative summary judgment has been linked inextricably to Fed. R. Civ. P. 56.”). Moreover, to state a *prima facie* case under the Sarbanes-Oxley Act, an employee must show that: (1) she engaged in a protected activity or conduct; (2) the employer knew or suspected, actually or constructively, that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) “[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.” 29 C.F.R. § 1980.104(b)(1). Here, the agency’s determination that Gattegno failed to satisfy the third prong of this test, and its consequent award of summary judgment, was not a clear error of judgment.

In her complaint, Gattegno identified two unfavorable personnel actions: (1) constructive discharge, and (2) damage to her professional reputation and future work prospects. As to the first claim, the agency’s determination, based on undisputed facts, that Gattegno had constructively resigned from Prospect Energy Corporation by accepting another position before

the actions claimed to constitute a constructive termination, was well within the bounds of the agency's expert discretion. As to the second claim, the agency did not clearly err in determining that Gattegno did not produce any specific evidence, apart from mere conclusory assertions, in support of her allegation that the February 2005 press release was more adverse to her future employment prospects than any of the company's prior releases, which she conceded were not adverse, nor did she otherwise demonstrate that the February release constituted an unfavorable personnel action.

The agency's grant of summary judgment and dismissal of Gattegno's complaint was not an abuse of its discretion. We have considered all of Gattegno's remaining arguments and have determined them to be without merit.

For the foregoing reasons, the petition for review is **DENIED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____