U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

MICHAEL FELDMAN, **ARB CASE NO. 2020-0068**

COMPLAINANT, **ALJ CASE NO. 2019-SOX-00052**

v. **DATE: September 29, 2021**

RISK PLACEMENT SERVICES, INC.,

RESPONDENT.

Appearances:

For the Complainant:
Michael Feldman; *pro se*; North Hollywood, California

For the Respondent:
Margaret H. Campbell, Esq. and Amy E. Jensen, Esq.; *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*; Atlanta, Georgia

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX or Section 806), as amended, and its implementing regulations.[1] Complainant Michael Feldman (Feldman) filed a complaint against Respondent Risk Placement Services, Inc. (RPS), alleging that

[1] 18 U.S.C. § 1514A (2010); 29 C.F.R. Part 1980 (2021).

RPS terminated its contract with Feldman's company because he engaged in conduct protected by SOX. On August 31, 2020, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) granting RPS's motion for summary decision and dismissing Feldman's complaint. For the reasons that follow, we affirm the ALJ's decision.

BACKGROUND

Feldman is a licensed insurance agent based in California.[2] Feldman owns and operates Michael Feldman Insurance Services (MFIS), an incorporated insurance broker whose core business is selling errors and omissions (E. & O.) insurance to other insurance agents and brokers.[3] MFIS does so, in large part, by connecting its clients with managing general agents (MGAs) or insurance wholesalers.[4] MGAs and wholesalers have authority to underwrite and sell insurance policies on behalf of the insurance companies with which they contract.[5] MFIS has contracts with a dozen different MGAs or wholesalers to be able to offer the products of more than 100 insurance companies to its clients.[6]

RPS is an MGA and insurance wholesaler, and is one of the MGAs with which MFIS contracted to sell insurance.[7] As relevant to this case, RPS sold E. & O. policies in California for two insurance companies: XL Group, which offered its policies under the name Greenwich Insurance Company (Greenwich), and QBE Insurance Group Limited (QBE).[8] RPS works with hundreds of independent

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[2] Deposition of Michael Feldman (Feldman Dep.) at 43.

[3] *Id.* at 43-44, 49, 51

[4] *Id.* at 49-50.

[5] *See* Declaration of Adrienne Woodhull (Woodhull Decl.) at ¶¶4-5; Feldman Dep. at 91.

[6] Feldman Dep. at 50, 58-59.

[7] Woodhull Decl. ¶¶5-6. MFIS originally contracted with The Plus Companies in 2011. Deposition of Michael Feldman Exhibit (Feldman Dep. Ex.) 4; Feldman Dep. at 60-62. RPS acquired the assets of The Plus Companies in 2014, including its contract with MFIS. Woodhull Decl. ¶¶3, 6.

[8] Feldman Dep. at 95.

insurance agents and brokers, like MFIS, to sell policies for the insurance companies for which it serves as an MGA.[9]

RPS terminated MFIS's contract on August 25, 2017.[10] Feldman asserts that RPS terminated his company's contract because he made numerous complaints regarding conduct that he believed constituted a discriminatory scheme in which RPS refused to offer less expensive QBE policies to ethnic customers, even when they qualified for coverage with QBE. Instead, Feldman alleges that RPS only offered these clients more expensive Greenwich policies, in violation of federal and state anti-discrimination laws and state insurance laws.[11] RPS disputes Feldman's claims. RPS argues that it made coverage decisions based on legitimate underwriting guidelines provided by Greenwich and QBE and that it terminated MFIS's contract because Feldman offered an illegal rebate to a client as an inducement to purchase a policy through RPS.[12]

Feldman filed a complaint against RPS with the Occupational Safety and Health Administration (OSHA) on November 3, 2017, alleging that RPS's termination of its contract with MFIS constituted unlawful retaliation in violation of SOX. OSHA dismissed Feldman's complaint, finding that he was not a covered employee under the statute. Feldman objected to OSHA's finding and requested a formal hearing with the U.S. Department of Labor's Office of Administrative Law Judges.

RPS filed a motion for summary decision on March 2, 2020, arguing that Feldman could not establish that: 1) he was a covered employee under SOX; 2) he engaged in protected activity; 3) he complained to a supervisor or a person with authority to correct the alleged misconduct; 4) he suffered adverse action; and 5) his alleged protected activity contributed to the termination of his company's contract.

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9 Woodhull Decl. ¶6.

10 *Id.* at ¶25.

11 Complainant's Brief in Support of Petition for Review (Comp. Br.) at 5-6; Feldman Dep. Ex. 39. Feldman testified that "ethnic" meant "non-Caucasian." Feldman Dep. at 260.

12 *See* Respondent's Response in Opposition to Complainant's Petition for Review at 8-11, 13-15. We do not need to resolve this dispute to resolve this appeal.

Finally, RPS argued that it was undisputed that RPS would have terminated MFIS's contract, even in the absence of Feldman's alleged protected activity, because he offered an illegal rebate to induce a client to purchase a policy through RPS. The ALJ granted RPS's motion for summary decision on August 31, 2020, based on his conclusion that Feldman did not engage in SOX-protected activity. Feldman now appeals.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (the ARB or the Board) the authority to review ALJ decisions under SOX.[13] The ARB reviews an ALJ's grant of summary decision de novo under the same standard the ALJ applies.[14] Summary decision is permitted where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."[15] In considering a motion for summary decision, the ARB views the record on the whole in the light most favorable to the non-moving party.[16] If 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.[17] The non-moving party may not rest upon mere allegations, speculation, or denials, but must instead set forth specific facts on each issue upon which he would bear the ultimate burden of proof.[18] If the non-moving party fails to show an essential element of his case, there

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[13] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[14] *Neff v. Keybank Nat'l Assoc.*, ARB No. 2019-0035, ALJ No. 2018-SOX-00013, slip op. at 3 (ARB Feb. 5, 2020).

[15] 29 C.F.R. § 18.72(a).

[16] *Micallef v. Harrah's Rincon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015-SOX-00025, slip op. at 3 (ARB July 5, 2018).

[17] *Kersten v. Lagard, Inc.*, ARB No. 2006-0111, ALJ No. 2005-LCA-00017, slip op. at 6 (ARB Oct. 17, 2008).

[18] *Id.*

can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element necessarily renders all other facts immaterial.[19]

DISCUSSION

SOX provides that a covered employer may not discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because the employee provides information to a supervisor "regarding any conduct which the employee reasonably believes constitutes a violation of section 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 . . . ."[20] Thus, to prevail on his SOX claim, Feldman must prove by a preponderance of the evidence that: 1) he engaged in activity that SOX protects; 2) RPS discriminated against him in the terms and conditions of his employment; and 3) the protected activity was a contributing factor in the adverse action.[21]

To prove that he engaged in protected activity under SOX, Feldman must demonstrate that he subjectively believed that a violation of one of the laws listed in Section 806 occurred and that his belief was objectively reasonable.[22] To satisfy the subjective component, Feldman must show he actually believed that the conduct about which he complained constituted a violation of one of the protected categories

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[19] *Id.*

[20] 18 U.S.C. § 1514A(a)(1). Covered employers include publicly traded companies, as well as subsidiaries or affiliates whose financial information is included in the consolidated financial statements of such a company. *Id.* § 1514A(a). RPS is a wholly owned subsidiary of a publicly traded company, Arthur J. Gallagher & Co. Woodhull Decl. at ¶5.

[21] *See* 29 C.F.R. § 1980.109(a); *see also* 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)); *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 9-10 (ARB May 25, 2011).

[22] *See Sylvester*, ARB No. 2007-0123, slip op. at 14 (citing *Melendez v. Exxon Chems.*, ARB No. 1996-0051, ALJ No. 1993-ERA-00006, slip op. at 28 (ARB July 14, 2000)).

of law enumerated in the statute.[23] To satisfy the objective component, Feldman must show a reasonable person in the same factual circumstances, and with the same training and experience, would have believed that the conduct constituted a violation of a SOX-protected activity.[24] Although Feldman need not prove an actual violation of law occurred, he must do more than speculate, argue theoretical scenarios, or share mere beliefs that some corporate activity is wrongful and, therefore, may theoretically affect the corporation's financial statements and its shareholders.[25]

As set forth above, Feldman asserts that he engaged in protected activity when he complained about RPS's discriminatory practice of allegedly directing "ethnic" clients to more expensive Greenwich insurance policies, even when they qualified for less expensive alternatives with QBE. In addition to constituting discrimination and insurance fraud, Feldman alleges RPS's practice also amounted to mail fraud because the insurance quotes and policies were delivered in the mail.[26]

Upon review of the ALJ's order, the record, and the parties' arguments, we agree with the ALJ that Feldman could not establish it was objectively reasonable for him to believe that RPS was committing mail fraud. Viewing the record in the light most favorable to Feldman, we hold Feldman failed to present evidence that could support a finding that a reasonable person in Feldman's circumstances would

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[23] *See id.* at 14 (citing *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009)).

[24] *See id.* at 15 (citing *Harp*, 558 F.3d at 723).

[25] *Leviege v. Vodafone US, Inc.*, ARB No. 2019-0058, ALJ No. 2016-SOX-00001, slip op. at 4 (ARB Mar. 19, 2021).

[26] Complainant's Opposition to Respondent's Motion for Summary Decision (Comp. Opp. to Summ. Dec.) at 3. Mail fraud is a federal crime: "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier . . . shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. § 1341.

have believed that RPS was making insurance coverage decisions based on solely the ethnicities of Feldman's clients. To the extent that Feldman's discrimination claim constitutes the basis of his SOX protected activity claim, he has also failed to establish a genuine issue of material fact that his complaints about RPS's discriminatory insurance practices fell into one of the protected categories of law enumerated by SOX.

Here, the record reflects that MFIS had seventeen clients with policies issued through RPS at the time RPS terminated its contract with MFIS.[27] Of those seventeen clients, only six were sold the supposedly higher-priced Greenwich policies, while the sizeable majority—eleven of seventeen—were sold the supposedly less expensive QBE policies.[28] Although Feldman generally asserts that "ethnic" clients were directed to Greenwich, Feldman only identified two "ethnic" clients—one African-American and one "of a middle Eastern and of the Ethnic Decent"—that RPS actually sold the higher-priced Greenwich policies.[29] Feldman has not explained why it was reasonable for him to conclude that RPS was engaging in a discriminatory scheme as he describes based on such a small sample size.

Feldman has also failed to proffer any evidence that could establish it was objectively reasonable for him to believe RPS knew the ethnicities of his clients when making decisions as to which insurance it would offer them. It is undisputed that the applications Feldman submitted on behalf of his clients did not include the clients' race or ethnicity. For example, RPS never asked Feldman for the race or ethnicity of any of his clients, and RPS never met any of Feldman's clients in person.[30] Feldman admitted that he did not know the race or ethnicities of all of his own clients, nor did he have any "barometer" to know the ethnicity of potential clients when he solicited them.[31] If neither Feldman nor RPS knew the ethnicities of Feldman's clients, it is not reasonable for us to conclude that RPS could have made insurance decisions based on the ethnicities of MFIS's clients.

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27 Woodhull Decl. ¶27; Feldman Dep. Ex. 40.

28 Feldman Dep. at 269; Feldman Dep. Ex. 40.

29 Comp. Opp. to Summ. Dec. at 2; Feldman Dep. at 257, 320-21.

30 Feldman Dep. at 123-24; *see also* Feldman Dep. Ex. 5

31 Feldman Dep. at 257, 259.

Absent evidence that RPS actually knew, or reasonably could have known, about the ethnicities of MFIS's clients, Feldman asserts that RPS directed clients with "ethnic names" to more expensive insurance than those with what he calls "traditional names."[32] However, Feldman has not explained what an "ethnic name" is, what a "traditional name" is, or how he (or RPS) could have discerned one from the other.[33] Feldman also failed to identify which, or how many, of his seventeen clients he thought did have "ethnic names."

Similarly, Feldman asserts that RPS directed clients in "ethnic locations" to more expensive insurance.[34] Although Feldman provided the zip codes of each of his seventeen clients, he failed to identify which zip codes he believes fall into "ethnic locations," what basis he had to conclude any location is in fact "ethnic," or why it would be reasonable for him to label a location as "ethnic."[35] Even if Feldman had a

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[32] Feldman Dep. Ex. 39.

[33] During his deposition, Feldman provided "John Smith" as an example of a traditional name, but otherwise failed to elaborate on how to discern a "traditional" name from an "ethnic name." Feldman Dep. at 319-20.

[34] Feldman Dep. Ex. 39.

[35] Publicly available and easily accessible census data also undermines Feldman's assertions as to the ethnic and racial makeups of the areas where his clients were located. Four of the six towns or cities where clients were issued Greenwich policies (i.e., the supposedly "ethnic locations") have populations that are reported as at least 71% "white, alone." For comparison, the national figure, according to the Census Bureau, is 76.3% "white, alone," and the figure for California is 71.9% "white, alone." Furthermore, these four towns or cities reported a greater percentage of "white, alone" residents than at least four of the eleven areas where clients were placed with QBE (i.e., the supposedly "non-ethnic" locations). *See* Feldman Dep. Ex. 40; U.S. CENSUS BUREAU, *Quick Facts*, https://www.census.gov/quickfacts (last visited Sept. 20, 2021). Although this census data was not in the record, we may take judicial notice of it. *William J. Lang Land Clearing, Inc.*, ARB Nos. 2001-0072, -0079, ALJ Nos. 1998-DBA-00001 to -00006, slip op. at 23 (ARB Sept. 28, 2004); *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571-72 (5th Cir. 2011). While there are other categories in the census data which upon analysis may produce varying results, we note that we do not rely on this data in making our decision, and in any event, Complainant has failed to utilize census or any other data, to show that RPS directed clients in "ethnic locations" to more expensive insurance.

reasonable basis to believe that certain locations in California were "ethnic," he has not presented evidence that RPS similarly had a reasonable basis to have done the same. Although MFIS's clients were located in California, RPS's office and its underwriters were located in New Jersey.[36] Furthermore, the underwriters identified by Feldman averred that they were not familiar with California's demographics.[37] Feldman has not proffered evidence countering the sworn declarations of RPS's underwriters, other than to assert that at least one of RPS's underwriters had years of experience issuing insurance policies in California.[38] However, Feldman did not explain why or how the experience of this individual would make the underwriter familiar with the demographics of the entire state of California. This is especially true when there is no evidence that demographic, race, or ethnicity information was ever provided to this individual in connection with the underwriting of RPS's insurance policies.

In an attempt to explain the basis for him to conclude that RPS was directing clients in "ethnic locations" to Greenwich, Feldman also asserted during his deposition that RPS was placing clients in Northern California and "affluent" areas with QBE, whereas it was placing clients around Los Angeles in Southern California and other "less affluent" areas with Greenwich.[39] However, Feldman failed to explain what reasonable basis he, or RPS, had to believe that certain areas

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[36] Feldman Dep. Ex. 40; Feldman Dep. at 261; Woodhull Decl. ¶2; Mcdevitt Decl. ¶2; Declaration of Mike Silvestri (Silvestri Decl.) ¶2

[37] Feldman Dep. Ex. 40; Mcdevitt Decl. ¶17; Silvestri Decl. ¶15.

[38] Feldman Dep. at 324.

[39] Comp. Br. at 7-8.

in California were affluent or not, to link affluence with ethnicity or race, or to link California's different cities or regions with any ethnicity or race.[40]

It is also reasonable for us to infer that Feldman had no objectively legitimate basis to assert that his clients in Northern California were being driven to QBE, while clients around Los Angeles or in Southern California were being driven to Greenwich. The client list Feldman prepared reflects that three of the six clients RPS placed with Greenwich were located near or north of San Francisco in Northern California, while the other three were located near Los Angeles in Southern California. Similarly, six of the eleven clients placed with QBE were based in the areas surrounding Los Angeles, while just four were based in Northern California.[41] Thus, Feldman's own evidence shows that MFIS's clients were essentially evenly split between Northern and Southern California for both QBE and Greenwich, which is contrary to Feldman's assertions in this case.

For these reasons, we agree with the ALJ that Feldman has not presented evidence that could support a finding that a reasonable person in these circumstances would have objectively believed RPS was making insurance coverage decisions based on the ethnicity of his clients. We also agree with the ALJ's determination that there was no evidence that Feldman's complaints about discrimination and insurance law violations fell into one of the protected categories

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[40] Once again, publicly available and easily accessible census data undermines Feldman's assertion. Feldman asserts that clients in "affluent" areas were directed to QBE while clients in "less affluent" areas were directed to Greenwich. However, three of the six towns or cities where clients were placed with Greenwich (i.e., supposedly "less affluent" areas) are reported as having median household incomes of $99,666 or more, with one having a median household income of $154,915. For comparison, the national median household income is reported as $62,843. In addition, these three towns or cities are reported as having a higher median household income than at least six of the eleven towns or cities where clients were placed with QBE. *See* Feldman Dep. Ex. 40; U.S. CENSUS BUREAU, *Quick Facts*, https://www.census.gov/quickfacts (last visited Sept. 20, 2021); *see also William J. Lang Land Clearing, Inc.*, ARB Nos. 2001-0072, -0079, slip op. at 23; *Hollinger*, 654 F.3d at 571-72.

[41] *See* Feldman Dep. Ex. 40. The eleventh QBE client was located in Clovis, California, in the central part of the state.

of law enumerated by SOX.[42] Even if Feldman's discrimination claims did have a reasonably objective basis, Feldman failed to establish the existence of a genuine issue of material fact that it constitutes protected activity under SOX.[43] Therefore, we affirm the ALJ's entry of summary decision in RPS's favor.

CONCLUSION

For the foregoing reasons, the ALJ's D. & O. is **AFFIRMED**, and the complaint is **DISMISSED**.

SO ORDERED.

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[42] D. & O. at 20-21.

[43] *Denneny v. MBDA, Inc.*, ARB No. 2018-0027, ALJ No. 2016-SOX-00032, slip op. at 10 (ARB Jan. 8, 2021) ("General assertions of wrongdoing untethered from these enumerated categories [in SOX] are not protected . . . ."); *Thibodeau v. Wal-Mart Stores, Inc.*, ARB No. 2017-0078, ALJ No. 2015-SOX-00036, slip op. at 14 (ARB Dec. 17, 2020) ("SOX is not a general anti-retaliation statute. . . . A complainant complaining about . . . race discrimination . . . [is] not covered under SOX."); *Gallas v. The Med. Ctr. of Aurora*, ARB Nos. 2015-0076, 2016-0012, ALJ Nos. 2015-SOX-00013, 2015-ACA-00005, slip op. at 8 (ARB Apr. 28, 2017) ("[A]n assertion that violations of other statutes could adversely affect the employer's financial condition is insufficient to trigger protection under SOX.").