

**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
COVINGTON DISTRICT OFFICE**

Issue Date: 26 May 2023

In the Matter(s) of:

IRA MICHAEL BIRD,
Pro- Se Claimant,

v.

MILLIMAN SOLUTIONS, INC.,
Respondent.

CASE NO(S): 2023-CFP-00001

OSHA NO(S): 3-0100-19-04

PATRICK M. ROSENOW
District Chief Administrative Law Judge

ORDER ON RESPONDENT’S MOTION FOR SUMMARY DISMISSAL

This matter involves a complaint under the whistleblower protection provisions of (1) the Sarbanes-Oxley Act of 2002 (SOX)¹ and its implementing regulations² and (2) the Consumer Financial Protection Act of 2010 (CFP)³ and the regulations promulgated thereunder.⁴

Procedural Background

Complainant’s initial complaint was filed with the Occupation Safety and Health Administration (OSHA) on 28 Jul 22. OSHA denied the complaint on 12 Aug 22, finding Respondent was not covered by either statute.⁵ Complainant filed objections and the case was referred to the Office of Administrative Law Judges (OALJ). After an initial scheduling conference call, Complainant filed a Bill of Particulars and on 10 Mar 23 Respondent filed a Motion for Summary Decision, arguing that it is not subject to either

¹ 18 U.S.C. § 1514A.

² 29 C.F.R. § 1980.

³ 12 U.S.C. § 5567.

⁴ 29 C.F.R. Part 1985.

⁵ Complainant’s Bill of Particulars cited a number of other legal bases, none of which were properly raised before OSHA or within this jurisdiction.

act. Complainant failed to file a timely response and was instructed to file sworn affidavits or other documents that he believes are sufficient to show a genuine question of fact exists as to whether Respondent is subject to SOX or CFP. Complainant noted he was confused as to the procedural status and planned to clarify the proper response format/content/depth, review rules of judicial proceedings, and to notarize any personal affidavits and/or documents. I instructed him that he must at least submit affidavits, documents, or other materials from which a reasonable person, weighing all the evidence in his favor, could conclude that Respondent was an employer subject to the CFP and/or SOX. I reminded him my staff could not provide legal advice or help him decide what to say or submit but could assist him in formatting his submission.

Complainant then filed a 16-page responsive argument, but attached no responsive exhibits, statements, or documents. I again advised him that neither his Bill of Particulars, Motion to Preserve, nor his current response were the type of affidavits or documents sufficient to create a genuine issue of material fact and based on the current record, his complaint would be dismissed. However, since his lack of legal training entitled him to some accommodation, I afforded him one final opportunity to properly respond to the motion. I again explained that while he need not prove his case or address anything other than whether Respondent is subject to the acts, he must file an amended response, accompanied by the requisite type of documentary support and explaining how the exhibits would allow a reasonable person to find Respondent is subject to one or both of the acts. I cautioned him that if he failed to file the required exhibits/documents, his complaint would be dismissed.

In response, Complainant filed what he styled as a “Limitations of Evidentiary Inclusion and request for Specific Limited Discovery” accompanied by an affidavit that incorporated a timeline history of events, along with a couple of phone text message screen shots. None of those accompanying materials addressed the substance of Respondent’s motion. The filing itself was not entirely clear, but seemed to indicate he was hesitant to submit any documents. It was generally consistent with one of our conference calls, in which he had indicated he wanted Respondent to be ordered to submit evidence and I had advised him that I would not do so, since he could obtain it through discovery and offer it himself. He then indicated he already had the evidence, but did not want to be the one to submit it.

I issued yet another order explaining that I would not order Respondent to submit any evidence, but I would give him one final opportunity to file any materials and arguments in opposition to Respondent’s motion by 23 May 23. Complainant did not respond or seek additional time.

Applicable Law

SOX creates a private cause of action for employees of publicly traded companies who are retaliated against for engaging in certain protected activity. It protects employees who provide information regarding any conduct which the employee reasonably believes constitutes a violation of mail fraud,⁶ wire fraud,⁷ bank fraud,⁸ securities fraud,⁹ any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders.¹⁰

The CFP similarly protects employees who are performing tasks related to the offering or provision of a consumer financial product or service and terminated or discriminated against because they engaged in protected activity related to violations of any provision of the Act, provision of law that is subject to the jurisdiction of the CFP Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau.

The CFP Bureau's purpose is to enforce "Federal consumer financial law" for the purpose of ensuring access for consumers to markets for "consumer financial products and services," and ensuring that the markets are fair, transparent and competitive.¹¹ A consumer financial product or service includes extending credit and servicing loans and providing real estate settlement services.¹² "Federal consumer financial law" includes the provisions of Title X of the Dodd-Frank Act and the "enumerated consumer laws."¹³

Summary decision is a tool used to dispose of actions in which there is no genuine issue of material fact between the parties and which may be decided as a matter of law.¹⁴ An ALJ may grant a motion for summary decision if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact.¹⁵ In a motion for summary decision, the moving party has the burden of establishing the absence of evidence to support the nonmoving party's case.¹⁶ The evidence is then viewed in the light most favorable to the nonmoving party.¹⁷ To meet its burden, though, "the nonmovant must do more than simply show that

⁶ 18 U.S.C. § 1341.

⁷ 18 U.S.C. § 1343.

⁸ 18 U.S.C. § 1344.

⁹ 18 U.S.C. § 1348.

¹⁰ 18 U.S.C. § 1514A.

¹¹ 12 U.S.C. § 5511.

¹² 12 U.S.C. § 5481(5), (15).

¹³ 12 U.S.C. § 5481(14).

¹⁴ *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

¹⁵ 29 C.F.R. § 18.72.

¹⁶ *Wise v. E.I. DuPont de Nemours and Co.*, 58 F.3d 193, 195 (5th Cir. 1995), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

¹⁷ *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

there is some metaphysical doubt as to the material facts.”¹⁸ The nonmoving party may not rest solely upon his allegations or speculations, but must present specific facts that could support a finding in his favor at trial.¹⁹

The nonmoving party must “make a showing on every element that is essential to his or her case and on which the party will bear the burden of persuasion at trial.”²⁰ The ALJ will take all evidence presented by the nonmoving party as true, but “a properly crafted defense motion for summary judgment requires a Complainant to exhibit admissible proof of facts crucial to his or her claim for relief . . . [which] must be grounded in affidavits, declarations and answers to discovery[.]”²¹ The non-moving party must designate “specific facts showing that there is a genuine issue for trial.”²² “It is not the [] court’s job to sift through the record to find admissible evidence in support of a nonmoving party’s case.”²³ If the moving party presented admissible evidence in support of the motion for summary decision, the nonmoving party must also provide admissible evidence to raise a genuine issue of fact.²⁴ While a pro se litigant may be provided assistance on how to communicate his arguments or submit evidence, deciding what to say and what evidence to use to develop the record is not an appropriate role for the adjudicator.²⁵

Current Record

Bill of Particulars

In relevant part, Complainant alleged:

Respondent is a conglomerated multi-national corporation providing financial advice on international investments/trading, a nationally registered governmental financial advisor, and a direct governmental sub-contractor. He was hired as a Database Payment Analyst, responsible for assisting in the administration of pension payments. The pensions (and pension payments) are financial assets qualifying as “consumer financial products and/or services,” defined under 12 U.S.C. § 5481. Companies and/or employees administering these pensions are subject to federal regulation under the clear jurisdiction of the CFPB and its cited definitions of a “covered person or service provider” and/or “covered employee,” per 12 U.S.C. § 5567.

¹⁸ *Taita Chemical Co., Ltd. v. Westlake Styrene Corp.* 246 F.3d 377, 385 (5th Cir. 2001), quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

¹⁹ *Hasan v. Enercon Services, Inc.*, ARB No. 10-061, 2011 WL 3307579 at *3 (July 28, 2011); 29 C.F.R. § 1840(c).

²⁰ *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, 2007 WL 1578494 at 7 (May 24, 2007).

²¹ *Gallagher v. Granada Entertainment USA*, ALJ No. 2004-SOX-74 (April 1, 2005).

²² *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

²³ *Claar v. Burlington N. R.R.Co.*, 29 F.3d 499, 504 (9th Cir. 1994).

²⁴ *Hasan* at 3.

²⁵ *Cummings v. USA Trucking, Inc.*, ARB No. 04-043, slip op. at 2 n.2 (ARB Apr. 26, 2005).

Pensions and pension payments are also closely related to sensitive material, such as the recipients' personal health information ("PII"), e.g., death notices or social security numbers. As such, they are subject to a number of additional strict legal regulations, including but not limited to client "Business Associate Agreements" ("BAAs") and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Respondent discharged him in retaliation for reporting concerns regarding violations of bank account and data security related to HIPAA regulation.

Motion for Summary Decision

Respondent answered:

It provided payment processing services for pension plans sponsored by its clients. It is a privately held actuarial and consulting firm, is not publicly traded, does not have any class of securities registered under Section 12 of the '34 Act, and is not required to file reports under Section 15(d) of the '34 Act.²⁶ It does not offer any consumer financial products.

Respondent then moved for summary dismissal, arguing there was nothing to create a genuine issue of material fact that would allow a finding that it was subject to either SOX or CFP.

Rebuttal to Respondents Motion

Complainant argued that "[a]s Milliman has already been established as part of a much, much larger economic entity, it is well within reason to assume that the applicability of SOX laws in this application warrants further dispute, elaboration, and discovery."

In terms of the CFP, he noted that "there is direct precedent within the CFPB that the Complainant's *specific topics of concern and inquiry* are a covered subject matter." He also cited the CFPB's Regulation O, in observing that a consumer financial product or service is any financial product or service that is offered or provided to a consumer primarily for personal, family, or household purposes and includes, but is not limited to, loans, credit cards, deposit accounts, and financial advisory services. The regulation goes on to state that the term "consumer financial product or service" includes "other financial products or services that the Bureau may define by order, rule, or guidance."

He noted that mortgages qualify as a consumer financial product or service and the CFPB has broad authority to regulate a *wide* range of financial products and services, including

²⁶ Respondent submitted an affidavit by its Chief Compliance Officer in support of these statements.

those that are traditionally regulated by other federal agencies. He then concluded that pension plans (and their administration) would not be the only broad definition of “consumer financial product or service” applicable in his case, but would include financial advisory services, which he alleges Respondent does on a national, government scale for these related retirement plans. He alleged “bank accounts,” “prepaid cards,” “credit reporting services”, and engaging in direct internal profit-sharing as further examples. He added an allegation that he “was specifically demonstrated the administration of pension determinations for *specific* and *individual* consumer(s) and their respective account(s).”

Complainant attached no responsive exhibits, statements, or documents.

Limitations of Evidentiary Inclusion and Request for Specific Limited Discovery

After I once again explained to Complainant he could not simply make bare allegations but needed to file some materials to create a genuine issue of material fact, he filed what he styled as a “Limitations of Evidentiary Inclusion and request for Specific Limited Discovery.” In the document he:

- Expresses concerns about privacy issue related to some documents:
 - “Redaction of this sensitive information is required here, in any inclusion of evidence. In fact, this is even specified in the documentation provided by the Respondent. For the Complainant, this is generally a large, costly, voluminous, timely hurdle to overcome. Additionally – regardless of the legality of *possessing* this evidence - his inclusion of this evidence *without* redaction could be misconstrued as a violation of contractual terms.”
- Notes the existence of recordings of communications between him and Respondent:
 - “The Complainant himself recorded these meetings, as a professional habit, on his personally issued Milliman computer.”
- Appears to request an order requiring Respondent to submit this evidence:
 - ”Complainant seeks (for the Respondent to share) any and all meeting recording(s) shared between the Complainant and the Respondent, to assuage the Judge’s request for further evidence in a manner that attempts to maintain the Complainant’s contractual and ethical compliance.”
- Offers to submit the evidence, but only if directed to do so:
 - “I am willing to testify to the possession of – and eventually to produce -additional evidence supporting my claims. As I feel bound by numerous contractual and ethical obligations, I am initially hesitant to do so without specific instruction, request, and/or clarifications.”

He also submitted an affidavit that incorporated a timeline history of events, along with a couple of phone text message screen shots, neither of which are relevant to the issue of coverage.

Discussion

In order to defeat Respondent's motion, Complainant only needed to submit affidavits, documents, records or other materials that, with all inferences and credibility assessments taken in his favor, would show a genuine issue of material fact that would allow a finding that Respondent was subject to the SOX or CFP. However, mere allegations or conclusory statements are insufficient to carry even that minimal burden. Complainant was repeatedly warned that he had failed to submit the type of material that would carry his burden. His response was to allege the existence of the evidence and seek an order from me ordering Respondent to submit it into the record. I denied that request, explaining he could obtain the materials through discovery and offer them himself. He explained he already had the materials and could offer them, but did not want to. I then gave him a final deadline to submit the materials, but he has failed to respond in any fashion.²⁷

The few compliant materials Complainant submitted²⁸ fail to create a genuine issue of material fact that would allow a finding that Respondent is subject to either SOX or CFP. Complainant was told that. He was also told I would not order Respondent to submit any documents, but he could obtain them from Respondent. He replied that he already had them. I gave him one final opportunity to submit something to create a genuine issue of material fact. He failed to respond at all.

Respondent's Motion to Dismiss is granted as Complainant has failed to show a genuine issue of material fact that would allow a finding that Respondent was subject to either SOX or CFP. The complaints are dismissed.²⁹

So ORDERED in Covington, Louisiana, on May 26, 2023.

PATRICK M. ROSENOW
District Chief Administrative Law Judge

²⁷ Given Complainant's failure to respond, Respondent waived its reply.

²⁸ E.g., the affidavit, timeline, and screen shots.

²⁹ They are in the alternative dismissed for Complainant's failure to respond to my order. It is the second time he failed to meet a deadline and there is no indication that Complainant will change his mind and submit any responsive materials.

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board (“the Board”) within 10 business days of the date of this decision.

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards.

If no timely petition for review is filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing will become mandatory for parties represented by counsel on April 12, 2021. Parties represented by counsel after this date must file an appeal by accessing the eFile/eServe system (EFS) at <https://efile.dol.gov/> **EFILE.DOL.GOV. Before April 12, 2021, all parties may elect to file by mail rather than by e-filing.**

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>. Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at <https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf> and/or the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>. If you file your appeal online, no paper copies need be filed. During this transition period, **you are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

Self-represented litigants (and all litigants prior to April 12, 2021) may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

<https://efile.dol.gov/support/boards/request-access-an-appeal>

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.