U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 19 February 2009

CASE NO.: 2008-SOX-00012

In the Matter Of:

JOHN J. CARCIERO
Complainant

v.

SODEXHO ALLIANCE, S.A.
SODEXHO, INC.
SODEXO OPERATIONS, LLC
Respondents

DECISION AND ORDER GRANTING SUMMARY DECISION AND DISMISSING COMPLAINT

This cases arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 USC § 1514A ("Sarbanes-Oxley" "SOX" or "the Act") enacted on July 30, 2002. Sarbanes-Oxley affords protection from employment discrimination to employees of companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 USC § 781) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 USC § 780[d]). The law protects "whistleblower" employees from retaliatory or discriminatory actions by the employer based on the employee having provided information to the employer, a Federal agency, or Congress relating to alleged violations of 18 USC §§ 1341 (mail fraud or swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of federal law related to fraud against shareholders.

John J. Carciero ("Complainant") filed a complaint of discrimination against Sodexho Alliance, S.A., Sodexho, Inc., and Sodexho Operations, LLC ("Respondent'") under the employee protection provisions of Section 806 of the Sarbanes-Oxley Act and the procedural regulations found at 29 C.F.R. Part 1980 (2004), alleging that he was terminated in violation of

the Act.[1] The Regional Administrator for the Department of Labor's Occupational Safety and Health Administration (OSHA) investigated the complaint. OSHA determined that Sodexho Alliance, Sodexho Inc. and Sodexho Operations were an integrated enterprise but that Complainant failed to establish he engaged in activity protected by the Act, thereby dismissing the complaint. Thereafter, the Complainant filed objections to OSHA's findings and requested a hearing before the Department of Labor's Office of Administrative Law Judges. The matter was assigned to the undersigned. On December 22, 2008, the Respondents filed a Motion for Summary Decision ("Mot. SD") accompanied by a Statement of Undisputed Material Facts and Evidentiary Appendix In Support of Respondents' Motion for Summary Decision. When Complainant's response was not forthcoming, on January 9, 2009, I issued an Order to Show Cause why the motion for summary decision dismissing his SOX complaint should not be granted.[2] On January 15, 2009, the Complainant filed his opposition to the Motion for Summary Decision (Opp. to SD). Respondents filed a Motion for Leave to Reply and a Reply in Support of Motion for Summary Decision on January 26, 2009. (R. Reply to Opp. to SD).

I. Facts

Respondent Sodexho Alliance, S.A. ("Sodexho Alliance") is a foreign company organized pursuant to the laws of France and its headquarters are located in France. (Stmt Undisp. Facts - Evidentiary Appendix EX G - Decl. of Alison Lazerwitz ¶¶ 3, 12).[3] Respondent Sodexho, Inc. is a subsidiary of Sodexho Alliance and Respondent Sodexho Operations, LLC ("Sodexho Operations") is a subsidiary of Sodexho, Inc. *Id*. at ¶4. Sodexho Inc. and Sodexho Operations are not publicly traded companies and do not have a class of securities under Section 12 of the Securities Exchange Act of 1934, nor do the companies file reports under Section 15(d) of the Securities Exchange Act of 1934. (Stmt Undisp. Facts - Evidentiary Appen EX H - Declaration of Thomas Morse ¶¶ 4, 5).[4]

Sodexho Alliance owns several subsidiaries which are engaged in various businesses. EX G- Lazerwitz Decl. at ¶ 12. Subsidiaries Sodexho Inc. and Sodexho Operations provide management services, including food and facilities management in the United States. EX H -

[1] Mr. Carciero proceeded with his claim on a *pro se* basis until August 18, 2008, when his current counsel entered an appearance. (Entry of Appearance).

[2] On January 23, 2009, Complainant's counsel in a letter to the undersigned offered a surprising explanation for the failure to timely respond to the Motion For Summary Decision. While Counsel does not provide an acceptable excuse for failing to timely respond to the motion for summary decision, I decline to penalize his client by dismissing his claim on this ground. In view of the unusual and uncommon circumstances presented, I will consider and address the merits of the parties' arguments on the Motion For Summary Decision.

[3] Respondents' numerous evidentiary submissions accompanying its motion for summary decision fail to explicitly acknowledge that Sodexho Alliance is a publicly traded company. However, Respondent Sodexho Alliance's response to the Second Amended Complaint admits Sodexho Alliance is publicly traded on the New York Stock Exchange. (Ans. And Affirmative Defense to Complainant's Second Amended Complaint on Behalf of Respondent Sodexho S.A. (Alliance) at ¶6 pg 4) (July 16, 2008).

[4] Hereafter references to Respondents' documentary evidence will be referred to by its Exhibit letter and/or Tab number.

Morse Decl. at ¶ 6. Sodexho Inc. and Sodexho Operations headquarters are located in Gaithersburg, Maryland. Morse Decl. at ¶11. Sodexho Operations has contracts in which its employees are assigned to manage certain departments or functions for its clients/customers. EX D - Dutton Deposition at 56. Sodexho Operations has a contract with Lowell General Hospital to provide contract management services in facilities, food services and environmental services (housekeeping). EX H – Morse Decl. at ¶ 7.

In 1998 Sodexho Inc. issued and currently administers an ethics policy titled CP-101 which applies to Sodexho Inc. and its subsidiaries. EX H -Morse Decl. ¶12 and Tab 1. Sodexho Alliance did not direct Sodexho Inc. to implement the ethics policy nor is Sodexho Alliance involved in administration of this policy. *Id.*

On February 16, 2007, Sodexho Alliance announced a Statement of Business Integrity indicating that its subsidiaries were to operate in an ethical business manner. Each subsidiary was permitted to implement its own policy to achieve these overarching principles. EX H-Morse Decl. ¶12 and Tab 2. As Sodexho Inc. had the CP-101 ethics policy in place, it did not enact any new policy in response to the Statement of Business Ethics issued by Sodexho Alliance. *Id.*

Sodexho Operations and Sodexho Inc. create their own corporate and financial records. EX H - Morse Decl. ¶10; EX J Wilson Decl. ¶20. The financial statements of Sodexho Inc. are incorporated into the financial statements of its parent corporation, Sodexho Alliance. EX H - Morse Decl. ¶10.

Sodexho Operations and Sodexho Inc. have their own Employee Handbook and personnel policies separate from Sodexho Alliance. EX J – Wilson Decl. ¶ 20. Sodexho Alliance was not involved in drafting or administering the personnel policies of Sodexho Inc. or Sodexho Operations. EX G - Lazerwitz Decl. at ¶ 5. Sodexho Alliance is not involved in the creation or implementation of the personnel policies or the Employee Handbook policies at Sodexho Inc. or Sodexho Operations. EX J – Wilson Decl. ¶ 20. Sodexho Alliance did not provide pay or benefits for employees of Sodexho Operations or Sodexho, Inc. *Id*. at ¶10.

John Carciero began working for Sodexho Operations Health Care Division on or about September 17, 2001 as General Manager, Engineering at Melrose-Wakefield Hospital. EX B - John Carciero Dep. at 29 and Tab 5; EX D – Dutton Dep. at 57. Complainant was an employee of Sodexho Operations. EX J- Wilson Declaration at ¶ 19; EX G -Lazerwitz Decl. at ¶9; EX B - Carciero Dep. at 29; EX C – Carciero Dep. at 434. He was not an employee of Sodexho Alliance. *Id*. On or about September 20, 2004, he was assigned to the position of Director of Facilities (also referred to as General Manager of Facilities) at Lowell General Hospital ("LGH") after the previous general manager was removed at the client's, LGH's, request.[5] EX A – Armas Dep. at 126; EX B - Carciero Dep. at 36-37 and Tab 7; EX D -Dutton Dep. at 57. At LGH, Complainant was responsible for managing the engineering operations of the Hospital which included overseeing construction and maintenance work. EX D - Dutton Dep. at 7; EX I – Scimeca Dep. at 9; EX B - Carciero Dep. at 37-39, 65, and Tab 10. As part of his job duties, Complainant was

[5] Complainant testified that he worked in only the health care division of Sodexho. EX B - Carciero Dep. at 48.

responsible for ensuring that the facilities department at LGH was in compliance with Joint Commission, or JCAHO standards. EX I - Scimeca Dep. at 56; EX B - Carciero Dep. at 37-38, 53. JCAHO is a regulatory organization responsible for accrediting hospitals. EX I - Scimeca Dep. at 56.

JCAHO periodically conducts unannounced audits of hospitals to assess compliance with the JCAHO regulations and standards. EX B - Carciero Dep. at 53-56. Based upon the results of a JCAHO survey, JCAHO may accredit the hospital, may award conditional accreditation, or deny accreditation. *Id*. A hospital that fails to maintain JCAHO accreditation can lose Medicare reimbursement. EX B - Carciero Dep. at 52-53, 55-56; EX I - Scimeca Dep. at 56. Complainant explained that in preparation for the unannounced JCAHO audit, Sodexho periodically conducted its own audit to identify any deficiencies and get them corrected before the actual JCAHO audit or survey. EX B - Carciero Dep. at 57. In addition to his responsibility for compliance with JCAHO standards, Complainant was also the Safety Officer and Chair of the Safety Committee at LGH. *Id.* at 49.

When he was assigned to LGH, the Complainant began reporting to Paul Armas, District Manager for the Engineering Services Division.[6] EX B - Carciero Dep. at 38; EX A - Armas Dep. at 19. The client liaison at LGH was Joseph (Jody) White. EX B - Carciero Dep. at 38. In April 2005, John Carciero raised several concerns with supervisors. He made a call to the employee hotline raising a concern related to Sodexho Operations Asset Management group contending the group was "strong-arming a vendor who had been providing services to LGH directly, to provide his services through the Asset Management group, and he complained other actions of the group constituted "bid rigging." EX H - Morse Decl. at ¶13; EX A - Armas Dep. at Tab 6; EX B - Carciero Dep. at 90-93, 94-98, 201-203, 208 and Tab 17. He also complained that the Horizontal Bonus Plan created a conflict of interest and he claimed Sodexho Operations was not acting in the interest of its clients as he alleged the company was not informing clients of money available as a result of an agreement between the company and VHA, Inc. EX B - Carciero Dep. at 90-92, 94-107, 137, 156, 157, 162, 170 and Tab 17; Morse Decl. at ¶13. The Complainant continued to raise these concerns to his supervisor and the human resources director, Ms. Dutton. EX B - Carciero Dep. at Tab 17 and 25; EX E - Dutton Decl. at Tab 2; EX A - Armas Dep. at 38, 107 and Tab 6.[7]

---

[6] Mr. Armas reported to Cheryl Eagan, who reported to Dick Desrochers. EX B - Carciero Dep. at 40-41. Ms. Eagan was not involved in the daily operations at LGH and the Complainant had e-mail contact with her on an irregular basis. *Id.*

[7] The Complainant and Respondents agree the Complainant raised several complaints during his employment with Sodexho Operations which he asserts led to his discharge. EX B - Carciero Dep. at 89-90, and Tab 18 and 25; EX C – Carciero Dep. at 423-424; Respondents' Statement of Undisputed Facts at ¶ 76. The Complainant alleges retaliation for several complaints regarding conflict of interest and lack of transparency to clients including (1) complaints associated with the bonus structure for Asset Management projects [EX B - Carciero Dep. at 90-92, 94-95, 98, 102 Tab 18 nos. 1-3]; (2) complaint alleging "strong arming" of vendors, [EX B - Carciero Dep. at 105-106, 124-125, Tab 18 no. 4]; (3) allegations of fabrication of an alleged incident of swearing at a female employee [EX B - Carciero Dep. at 125-127, and Tab 18 no. 5]; (4) allegations of bid rigging by the Asset Management group related to a contract involving Trane [EX B - Carciero Dep. at 201-202 and Tab 18 nos. 6-9]; and (5) Company's alleged retention of money received from VHA, Inc. and Company's alleged failure to disclose these monies to LGH [EX B - Carciero Dep. at 170, 274 and Tab 18 nos. 10-11].

In late 2005 and early 2006, the Complainant renewed the complaint regarding the Horizontal Bonus Program, the bonus plan for the Asset Management Program, which he had initially made to the employee hotline in April 2005. EX B - Carciero Dep. at 91-92 and Tab 18; EX E - Dutton Decl. ¶ 10; EX H - Morse Decl. ¶ 13. His complaint was that Sodexho's failure to disclose to the client that under the bonus plan a general manager of a Sodexho Operations account and his supervisor and his supervisor's supervisor were eligible to receive a bonus if they cross-sold additional management services to an existing client created a conflict of interest between the general manager and his client. EX B - Carciero Dep. at 91-95; EX H - Morse Decl. ¶ 15. Complainant also stated that the bonus structure created an incentive for the managers to act in a manner inconsistent with the client's/customer's best interests. EX B - Carciero Dep. at 92, 97-98, 100, 102 and Tab 17. Complainant testified that during the period of his employment he did not view the Horizontal Bonus Plan as a violation of law. EX B - Carciero Dep. at 364. The Complainant acknowledged that he was not aware of and never reported a specific instance in which a General Manager acted contrary to the client's interest because of the potential financial incentive in the Bonus Program. EX B -Carciero Dep. at 134-135; EX H - Morse Decl. ¶ 16. Thomas Morse, the Deputy General Counsel for Sodexho Inc., Sodexho Operations parent, addressed Complainant's concern with the bonus plan. EX H - Morse Decl. ¶ 13, 15, 16. He stated that although he did not view the bonus plan as originally structured illegal, he recommended, and the Company adopted, a change to the bonus plan to require that a General Manager's bonus eligibility be disclosed to the client where the General Manager participates in a meaningful way in the client's decision to contract for additional services. EX H - Morse Decl. ¶16. The Complainant testified that as a general proposition if the bonus program was revised to make it transparent to the client that the General Manager/Asset Management was eligible for a bonus if the client purchased additional services his concern would be alleviated. EX B - Carciero Dep. at 103-104.

In terms of the alleged "strong-arming" of vendors, Complainant's April 2005 hotline report included an allegation that Sodexho was requiring a vendor who had provided boiler cleaning and replacement services directly to LGH, prior to Sodexho's contract with the hospital, to offer his services through Sodexho resulting in greater cost to the hospital. EX B - Carciero Dep. at 105, 115-117 and Tab 17. Complainant did not complain about any other specific vendors being "strong-armed." *Id*. at 119, 123-125. At his deposition he asserts that by "strong-arming" vendors he meant money back to Sodexho in rebates or kickbacks and that Sodexho's relationships with its vendors was improper as it was not disclosed to the client. *Id*. at 119. Mr. Morse explained that Sodexho Operations and Sodexho Inc. have purchasing arrangements with a large number of vendors and suppliers. EX H - Morse Decl. ¶ 20. As a component of those arrangements the Company negotiates certain rebates and allowances to offset expenses, reduce management fees, and help ensure the Company provides competitively priced goods and services. *Id*. Where Sodexho Operations retains allowances, it discloses that to the client. The contract between Sodexho Operations and client hospitals discloses to the hospital that any rebates would be kept by Sodexho. EX H - Morse Decl. ¶ 21 and Tab 4. The Complainant acknowledged that the contracts disclose the rebates and that the Company would retain any such rebates. But the Claimant testified that the amount of any rebate was not disclosed to the hospital. EX B - Carciero Dep. at 162.

The Complainant's relationship with Mr. Armas, his direct supervisor, deteriorated over time. In October 2005, Mr. Armas attempted to counsel the Complainant on his tone and communication with Ken Centazzo, a Vice President of Sales Sodexho Operations Asset Management group who was attempting to set up a survey at LGH for an Asset Management project and win addition business at LGH. EX E - Dutton Decl. at ¶¶ 6, 7 and Tab 1. Complainant was upset that Mr. Centazzo had contacted Jody White, the client contact at LGH, directly about the survey. *Id*. The tone of his e-mail communications to Mr. Centazzo was intemperate. EX E - Dutton Decl. at ¶¶ 6, 7 and Tab 1. In response to Mr. Armas' attempt at counseling, Mr. Carciero wrote his supervisor that "this will be done at my direction. You need to lay this out for them….if you are doing something in this building….you report to me." *Id*.

In the period December 2005 through January 2006, the Complainant continued to express his concerns of possible "bid rigging" in resisting Mr. Armas' requests for a copy of the contract Complainant had signed with Trane, another company, for work at LGH. In 2005 Sodexho Operations Asset Management group had the opportunity to compete for a facility improvement project at LGH. EX B - Carciero Dep. at 201. The Complainant decided to go ahead with Trane for the project and he entered into a series of contracts for the project with Trane on behalf of LGH. EX B - Carciero Dep. at 203, 206 and Tabs 21-22. On July 14, 2005, the Complainant and Richard Jeffcote, the CFO of LGH, signed the first contract, a Letter to Proceed, with Trane which contained no financial commitment by LGH. On November 30, 2005, Complainant signed contracts with Trane that financially committed LGH to the project with Trane. EX B - Carciero Dep. at 207 and Tabs 21-22. Complainant acknowledged that neither Mr. Jeffcote nor anyone else from LGH signed the second contract committing the hospital financially to the project with Trane. *Id*. at 208-209. However, Complainant testified that he met with LGH officials Mr. Jeffcote, the CFO, Jody White and Trane representatives. *Id*. Complainant said that Mr. Jeffcote and Mr. White verbally authorized him to move forward with the Trane project. *Id*. Complainant explained that he did not obtain authorization from anyone at Sodexho to sign the contract with Trane on behalf of LGH because Sodexho was not part of any approval process at LGH with respect to construction. *Id*.

In December 2005, Mr. Carciero's supervisor, Mr. Armas, asked him for a copy of the contract he had entered with Trane on behalf of LGH. EX B - Carciero Dep. at 210, 213-214, 219-220; EX A - Armas Dep. at 38 and Tab 6. The Complainant refused to provide a copy of the Trane contract to his supervisor because he felt it was improper for Sodexho to have a copy of a competitor's contract and see what the competitor put together. EX B - Carciero Dep. at 210-211, 213-214, 219-220. Complainant viewed the request for the Trane contract as Sodexho's Asset Management's group's attempt to obtain confidential information from a competitor for work at LGH. *Id*. The Complainant continued to resist even after Mr. Armas told him the request for the Trane contract was coming from Cheryl Egan, Facilities Senior Vice President, and her supervisor, Steve Dunmore, Facilities Division Vice President. EX A - Armas Dep. Tab 6 at 01221. At some point in late December 2005, Complainant entered his office on a day he was scheduled to be off and observed Sodexho employees in his office. EX A - Armas Dep. Tab 6 at 01221, 01220. In an e-mail to Mr. Armas, Complainant complained that he entered his office to see two employees there who told to him that they were asked to enter his office and

obtain the Trane contract. EX A - Armas Dep. at Tab 6 at 01221, 01220.[8] Mr. Armas denied obtaining the Trane Contract from Complainant or asking anyone other than the Complainant to provide it to him. Mr. Armas was removed from his position in February 2006. EX A - Armas Dep. at 114.

In February 2006, Ben Scimeca was appointed District Manager of Engineering Services for LGH, replacing Mr. Armas as the Complainant's direct supervisor. EX B - Carciero Dep. at 38-39; EX I - Scimeca Dep. at 10. Mr. Scimeca was not an employee of Sodexho Alliance. EX I - Scimeca Dep. at 99-100. Mr. Scimeca testified that over time as he managed the Complainant he came to believe Complainant was preoccupied with proving that Sodexho was out to get him or to do something wrong to the client, LGH. *Id.* at 54-55. Mr. Scimeca believed this preoccupation distracted the Complainant from his job duties. *Id*. After he was initially appointed District Manager of Engineering for LGH, Mr. Scimeca went to the hospital to assess the situation and realized Sodexho was behind in its regulatory responsibilities at the hospital. *Id*. at 55. He stated that he attempted to address performance issues with the Complainant related to the hospital's compliance with regulatory, or JACHO, issues. *Id*. He explained that shortly before he was assigned District Manager, the Company had provided the Complainant some additional support to address the issues and that a plan was in place. *Id*. However, he did not see much action on the plan. *Id*. at 55, 62-63.

In a May 2006 e-mail to Mr. Morse, Deputy General Counsel for Sodexho, Inc., Complainant also sought an investigation alleging improper money coming to Sodexho from VHA. EX H - Morse Decl. ¶¶ 17-18 and Tab 3 at D0413, D0414. At that time, Mr. Morse explained to Complainant that VHA, Inc. was a group purchasing organization (GPO) with whom Sodexho has a contractual relationship. *Id*. Mr. Morse informed Complainant that under that contract Sodexho pays certain fees to VHA and Mr. Morse told Complainant those payments were consistent with federal regulations governing GPOs. *Id*. Mr. Morse informed Complainant that he did not understand that Sodexho received payments from VHA and he told Complainant that if Complainant was aware of payments by VHA that he would "be happy to review the circumstances to determine if they were/are appropriate." EX H - Morse Decl. Tab 3. Mr. Morse also indicated that if there were no such payments he did not believe there was anything to investigate. Mr. Morse finished the e-mail message by stating "[i]f you believe there is some other type of inappropriate conduct by Sodexho in relation to VIA (sic) you need to provide me the specifics of such conduct so I can determine if an investigation is warranted." *Id.* Complainant responded that he expected Morse to investigate with the Finance Dept, said he had no further information, and when asked by Morse to clarify his concern replied check with Finance on money coming from VHA and "ask 'why are we receiving this money?'"[9] *Id*. In his

[8] Robert Kennedy testified that in late December 2005 he observed what he described as "highly unusual" event. EX F- Kennedy Dep. at 35-36. He saw Brad Balon in the Complainant's office looking over Complainant's desk. EX F- Kennedy Dep. at 35-36. Mr. Kennedy stated that the Complainant walked into his office at that point. *Id.*

[9] Mr. Morse appeared to be unaware of Sodexho's rebate program, or to misunderstand Complainant's e-mail reference to monies coming to Sodexho, when he responded to Complainant's request that an investigation of funds coming to the company from VHA should be initiated. However, in his statement Mr. Morse explained the rebate program and attached a copy of Sodexho Operation's contract with a client hospital. The contract explicitly informs the hospital of the potential for rebates and that Sodexho Operations would retain any rebates. EX H – Morse Decl. ¶ 21 and Tab 4. The Complainant's concern related to the rebate program has been addressed *infra* at 5.

sworn statement Morse reported that Sodexho Operations District Managers are provided with reports detailing the amount of VHA Capital Incentive dollars a client account has available to it and the District Managers are instructed to discuss that information with the clients. EX H - Morse Decl. ¶20. When Mr. Carciero was presented with an e-mail Sodexho sent to District Managers instructing them to confer with clients about how best to use the VHA Capital Incentive funds, he stated that was not what was going on, but admitted that he would not have received such an e-mail as he was not a District Manager. EX B - Carciero Dep. at 185-190 and Tab 20. He conceded that he would not be concerned with the VHA Capital Incentive Program if Sodexho District Managers were informed of the amount of VHA Capital Incentive funds available to clients and were directed to share that information with clients and actually did so. *Id*. at 189. [10]

Based on his ongoing concern with the LGH's JCAHO compliance status, in July Mr. Scimeca assigned Malcolm Field, a Technical Support Manager employed by Sodexho Operations, to evaluate the Facilities Department's JACHO readiness at LGH. EX B – Carciero Dep. at 57-60; EX C - Carciero Dep. at 389. Mr. Field's report found several deficiencies leading Mr. Scimeca to conclude things were worse than he thought at LGH. EX I - Scimeca Dep. at 59-62, 65. As a result, Mr. Scimeca assigned two additional employees to assist with the corrective action plan to bring the Facilities Department at LGH up to the expected JACHO requirements. *Id.*

In addition to the issues related to meeting the JACHO standards, Mr. Scimeca also counseled the Complainant on the tone and demeanor of his communications, specifically with regard to his communications with a manager at LGH who construed the Complainant's communications as threatening, and with communications to Karen Dutton, the Director of Human Resources for accounts in the New England region of Sodexho Operation's Health Care Division, including the account at LGH. EX I - Scimeca Dep. at 68, 71-72, 101; EX E - Dutton Decl. at ¶2; EX B - Carciero Dep. Tab 25. Mr. Scimeca indicated that the Complaint's e-mail correspondence with Ms. Dutton was inappropriate. EX I - Scimeca Dep. at 71-73.[11] However Mr. Scimeca did not initially respond to Complainant's e-mail to Ms. Dutton because the e-mail message had been forwarded to Peter Gerard. Mr. Gerard is Sodexho Operations Human Resources Director Facilities Technical Services based out of Texas, and Ms. Dutton's

---

[10] Mr. Morse stated that at some point in 2006, the Company hired a third-party investigator, Richard Neureuther, to investigate the allegations of "bid-rigging" and conflict of interest. Mr. Morse reported that Mr. Neureuther's investigation concluded that Sodexho operations and its managers had not engaged in wrongdoing and the allegations of bid-rigging and conflict of interest could not be substantiated. EX H - Morse Decl. ¶ 14. There is no evidence that Mr. Neureuther's report was provided to the Complainant. EX B - Carciero Dep. at 175.

[11] Ms. Dutton had requested the Complainant complete a form necessary for the company to conduct a CORI background check which was required by LGH, the client, for all employees hired since 2001. EX D - Dutton Dep. at 12; EX I - Scimeca Dep. at 71-72. The Complainant acknowledged that Ms. Dutton had informed him that the request for a CORI check was coming from LGH and not from Sodexho, but he viewed the request as a further effort to harass him as he had already complied with the client's request for a CORI background investigation when he was initially hired. EX B - Carciero Dep. at 298-300 and Tab 25. In this e-mail Complainant told Ms. Dutton 'If you would like to further harass me, please channel it through my DM [district manager]. *Id*. He also told Ms. Dutton "I will not ever lift [a] finger for you ever." *Id*.

supervisor. *Id*. Mr. Gerard had a telephone conference with the Complainant on May 18, and memorialized the call in a letter to the Complainant dated May 22, 2006. EX B - Carciero Dep. at Tab 27. Mr. Gerard's letter informs Complainant that his e-mail communication to Ms. Dutton was inappropriate, reiterates that the request for the CORI check was coming from LGH, and states Complainant's claims of retaliation on Ms. Dutton's part were not substantiated by the Company. *Id*. Mr. Gerard told the Complainant that he would be the Complainant's human resource contact going forward as Complainant had made clear his unwillingness to work with Ms. Dutton. *Id*. Mr. Gerard also informed Complainant this was an opportunity for him to begin building collegial relationships with those he must work with to effectively perform his job duties. *Id*.[12]

Mr. Scimeca and Mr. Gerard later met with the Complainant on July 12, 2006 to deliver a written warning for his e-mail communication to Ms. Dutton. EX I - Scimeca Dep. at 74-77 and Tab 3 and 4; EX B - Carciero Dep. at 308-311. Mr. Scimeca described Complainant's conduct at the meeting as disrespectful and demeaning in that he did not remove his sunglasses, would not permit the warning to be read and decided the meeting was over and left. EX I - Scimeca Dep. at 75-77; *see also* EX B - Carciero Dep. Tab 30. Mr. Carciero acknowledged that he expected leaving his sunglasses on during the meeting would be viewed as disrespectful by Sodexho managers. EX B - Carciero Dep. at 309-311. He also stated that by that time he knew he was a marked man and was so frustrated by what he perceived as Sodexho's attempts to wear him down and get him to quit, that it "was irrelevant to [him] what people thought of him at Sodexho…." *Id*. at 310-311.

On July 11, the day before Complainant was to meet with Mr. Scimeca and Mr. Gerard, Complainant sent an e-mail message to Jody White, the Executive Vice President/Chief Operating Officer and client liaison at LGH, telling Mr. White that he was to be written up or terminated the next day and, if terminated, Complainant sought a final meeting with Mr. White. EX I - Scimeca Dep. Tab 5. Mr. White forwarded this e-mail to Chris Karski, who was within the Sodexho account at LGH, noting the e-mail was unusual and asking him if he could shed light on it. *Id*. Mr. Karski forwarded the message to Mr. Scimeca and told him that he was limited in knowledge. EX I - Scimeca Dep. at 78-78 and Tab 5.

Mr. Scimeca testified that because of the issues related to JACHO compliance including lack of progress in preparing for the JACHO survey, as well as unprofessional interactions Complainant had with others he was required to work with, by early August 2006 the Company had decided to transition to a new Director of Facilities at LGH. EX I - Scimeca Dep. at 80. Initially, the Company planned to move the Complainant to another position after the transition was completed.

[12] A few days later Mr. Gerard followed up with the Complainant on the forms required for the CORI check and forwarded the e-mail request for the CORI checks which Ms. Dutton had received from LGH. EX B - Carciero Dep. at Tab 26. Ms. Dutton admitted that she later learned a CORI background check of the Complainant had been completed in 2001 when he was hired, but she said it was in the Corporate Security Department and not in his personnel file. EX E - Dutton Decl. ¶ 22.

On August 8, 2006, Mr. Scimeca met with Jody White to discuss Sodexho's progress on its plan to get the hospital ready for the JACHO evaluation and to inform him that Sodexho was making a management change and the Complainant would be transitioned out of his position at LGH, but would assist in the transition. EX I - Scimeca Dep. at 80-83 and Tab 6. At this meeting, Mr. White told Mr. Scimeca that over the last week the Complainant had given several Sodexho documents to Richard Jeffcote, the Chief Financial Officer at LGH, and that Complainant suggested to Jeffcote that Sodexho was cheating LGH. EX I - Scimeca Dep. at 83-85 and Tab 6; EX B - Carciero Dep. at 174-175, 191, 193-195, 214-215, 232-235.[13] Mr. White also stated that if Sodexho was going to make a management change, the Complainant would have to be removed as soon as he was informed of the change, because Complainant would not be effective and would be counterproductive. EX I – Scimeca Dep. at 82-83.

Following the meeting with Mr. White, in which he learned the Complainant turned over internal and proprietary documents to Mr. Jeffcote, Mr. Scimeca believed Complainant needed to be removed from the account. EX I - Scimeca Dep. at 83-85. Mr. Scimeca stated he would have discussed this recommendation with his supervisor, Cheryl Eagan, and with Peter Gerard from human resources that same day. EX I - Scimeca Dep. at 85-87. Mr. Scimeca said the decision to place the Complainant on administrative leave was made by Mr. Gerard, Ms. Eagan and himself. *Id.* at 86. Geoffrey Wilson, Vice President Human Resources, Sodexho Health Care Services division of Sodexho Inc., has acknowledged that in addition to Ms. Eagan and Mr. Gerard he was also involved in the decision to remove the Complainant from his assignment at LGH and place him on administrative leave in August 2006. EX J- Wilson Decl. at ¶¶ 2, 3, 4, 5.

Once the decision was made, Mr. Scimeca along with Mr. Karski, met with the Complainant late in the afternoon of August 8. They informed Complainant that he was being placed on administrative leave for several reasons including the Client's concerns over the JACHO issues, Sodexho's analysis of the engineering department and its conclusion that Complainant had not prepared for the JACHO evaluation, and finally for turning over internal and proprietary documents to the hospital CFO in an attempt to impede the Company's business relationship with LGH. EX I - Scimeca Dep. at 86-88 and Tab 6; *see also* EX J - Wilson Decl. at ¶ 5.

The JCAHO survey at LGH was performed soon after Complainant was placed on administrative leave. Mr. Scimeca testified that the survey results for the Facilities Department Complainant had overseen were poor. EX I - Scimeca Dep. at 90-91 and Tab 7. Mr. White at LGH was unhappy with the JCAHO results and sought and received monetary concessions because LGH believed they had not received full service from the Company based upon the survey results. EX I - Scimeca Dep. at 90-92, 98-99 and Tab 7.

At some point after placing the Complainant on administrative leave, Mr. Wilson learned that LGH had received a letter from Complainant's then-attorney alleging that LGH had not sufficiently investigated the allegations Complainant made against Sodexho Operations before he

[13] Complainant acknowledged that he met with Mr. Jeffcote and gave him internal Sodexho documents in an effort to support his claims of improper activity by Sodexho vis-à-vis its client, LGH. EX B - Carciero Dep. at 174-175, 190-195, 214-215, 232-235.

was removed from the account. EX J - Wilson Decl. ¶ 9. Mr. Wilson stated that the Complainant remained on administrative leave for a period of time to afford LGH the opportunity to investigate Mr. Carciero's claims. *Id*. After a few months time, Mr. Wilson learned that the Complainant had not cooperated with LGH's investigation, and that the investigation revealed no wrongdoing by the Company. EX J - Wilson Decl. ¶10.

Once the LGH investigation was concluded, the Company evaluated Complainant's employment status. The Company concluded that termination was appropriate given Complainant's efforts to undermine the Company's relationship with its client, LGH, his poor performance and what the Company considered his insubordinate attitude toward supervisors, managers and client employees. EX J - Wilson Decl. ¶¶ 8, 10-11. Mr. Wilson, Vice President, Human Resources, Sodexho Health Care Services Division of Sodexho Inc., reported the termination decision was made by him and by Steve Dunmore, Division Vice President, Facility Solutions. *Id*. at ¶ 11. On May 9, 2007, J. Victor Waye, Associate General Counsel of Sodexho USA, e-mailed Complainant informing him that Sodexho was prepared to terminate his employment effective May 14, 2007, unless the parties were able to reach agreement on a severance package outlined in the e-mail message. EX B - Carciero Dep. at Tab 11.[14] On June 21, 2007, Complainant received a letter from Kim Mullahey, Senior Director, Human Resources, stating it was a follow-up to Mr. Waye's e-mail to the Complainant terminating his employment effective June 20, 2007. (Ex B - Carciero Dep. Tab 15).

Alison Lazerwitz, Senior Vice President, International Development of Sodexho S.A. f/k/a Sodexho Alliance who had previously served as Group Chief Legal Officer for Sodexho S.A., stated that Sodexho Alliance employees or officers were not involved in Sodexho Operations personnel decisions or actions with regard to the Complainant including the decision to remove him from LGH in August 2006. EX G- Lazerwitz Decl. at ¶¶ at 6, 7. Sodexho Alliance was not involved in the decision to terminate the Complainant's employment with Sodexho Operations in 2007. *Id*. at ¶ 8. Sodexho Alliance was not involved in, nor did it direct any actions related to CORI checks, or any comments regarding the Trane bid or the effort to obtain a copy of the Trane bid from Complainant, or comments by Mr. Armas to Complainant related to his time sheets and the Sarbanes-Oxley Act. *Id*. at ¶ 11. The individuals involved in the decision to remove Complainant from his position at LGH and place him on administrative leave were not employees or officers of Sodexho Alliance. EX J - Wilson Decl. at ¶ 4.

Following his discharge in June 2007, the Complainant worked as an independent contractor for a consulting company until October 2007 and earned between $20,000 – 30,000. EX B - Carciero Dep. at 71. On or about October 1, 2007 he began working at Holy Family Hospital as Director of Facilities at a salary of $105,000 per year. *Id*. at 68. His current salary is more than the $86,000 salary he was earning at Sodexho Operations when his employment was terminated. *Id*. at 68-69.

[14] Mr. Wilson stated that the decision to terminate Complainant was communicated by the Sodexho Operations Legal Counsel because the Company learned Complainant had filed a SOX claim in October 2006 and decided to direct all communications with Complainant through its legal department. EX J – Wilson Decl. ¶ 14-16.

II. Standard of Review - Summary Decision

The standard for granting summary judgment or decision is set forth at 20 C.F.R. §18.40(d) which is derived from Federal Rules of Civil Procedure (FRCP) 56.[15] Section 18.40(d) permits an Administrative Law Judge to enter summary decision, "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." 20 C.F.R**.** §18.40(d) (1994). A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And, a genuine issue exists when the non-movant produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. *Id*. at 249.

In deciding a Rule 56 motion for summary decision, the Court must consider all the material submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-movant. *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 158-159 (1970); *Day v. Staples*, 2009 WL 294804 (1st Cir. Feb. 9, 2009) slip op. at 1, 8. In other words, the Court must look at the record as a whole and determine whether a fact-finder could rule in the non-movant's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324; *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998). If the non-movant fails to sufficiently show an essential element of his case, there can be "'no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 322-323.[16]

Respondents have moved for summary decision on multiple grounds. First Respondents assert that Sodexho Alliance, the publicly traded company, was not Complainant's employer and thus Complainant is not a covered employee. Second, Respondents contend that the Sodexho Alliance's subsidiaries Sodexho Inc. and Sodexho Operations were not agents of Sodexho Alliance and therefore are not covered employers. The third ground is that the three Respondent companies are not an integrated enterprise. The fourth basis is that the Complainant did not

[15] Rule 56(c) provides that summary decision shall be rendered "if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c).

[16] Consistent with this principle, the Notice of Hearing issued on November 26, 2007, specifically instructs "[p]ursuant to the Code of Federal Regulations, Part 29, Section 18.40, when a motion for summary decision is made and properly supported, your opposition to that motion for summary decision cannot simply rest upon your own allegations or denials of the opposing party's allegations." NOH at 2-3. The opposition must set forth specific facts showing that there is a genuine issue of fact that can only be reconciled at the hearing. 29 C.F.R. § 18.40. Factual assertions in the opposing party's documentary evidence will be accepted by the Administrative Law Judge as being true unless you submit affidavits or other documentary evidence to contradict such assertions.

engage in activity protected by Section 806 of the Act. Finally, Respondents states it would have taken the same adverse action in the absence of any alleged protected activity.

III. Coverage Under Section 806 of Sarbanes Oxley

A. Statutory Provision

Section 806 of Sarbanes-Oxley provides that no publicly traded company,[17] "or any officer, employee, contractor, subcontractor or agent of such company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" for (1) providing information the employee reasonably believes constitutes a violation of section 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders or for (2) participating in a proceeding alleging such violations. 18 U.S.C.A. § 1514A(a). *Day v. Staples*, 2009 WL 294804 (1st Cir. Feb. 9, 2009) slip op. at 7 citing *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008). The initial issue presented in this matter is whether the Complainant is a covered employee or whether Respondents are covered employers under Section 806 of the Act.

There is no dispute that Sodexho Alliance is a publicly traded corporation and the parent corporation of Sodexho Inc. The undisputed facts also establish that Sodexho Operations is a subsidiary of Sodexho Inc. and that both Sodexho Operations and its parent Sodexho Inc. are non-public subsidiaries of Sodexho Alliance. Respondents have submitted evidence showing that Complainant was not employed by the public parent corporation Sodexho Alliance, but was an employee of Sodexho Operations a non public subsidiary. Therefore, in order for the Complainant to prevail in establishing coverage under SOX he must show that Respondents Sodexho Alliance, Sodexho Inc. and Sodexho Operations are an integrated enterprise or that Respondents Sodexho Inc. and Sodexho Operations were acting as agents of the parent company Sodexho Alliance.

In his opposition to the motion for summary decision, the Complainant argues that Sodexho Alliance, Sodexho Inc. and Sodexho Operations are an integrated enterprise, making him an employee of Sodexho Alliance, and a covered employee under the Act. Opp SD at 7-8. In addition, Complainant contends that Sodexho Operations and Sodexho, Inc. are covered employers under the Sarbanes-Oxley Act as agents of Sodexho Alliance, the public company. Opp SD at 10-12. In contrast, Respondents contend that the claims against Sodexho Operations and Sodexho, Inc. must be dismissed as Complainant has not established that the two companies acted as "agents" of the publicly traded parent company. Resp. Mot. S.D. at 5-9. Respondents also contend that the integrated enterprise analysis applied by the OSHA Regional Administrator is not the proper analysis under the Sarbanes-Oxley Act and, even if it were, Complainant has failed to make the required showing. R. Reply to Opp. to SD at 4-6.

[17] Publicly traded companies are companies with a "class of securities registered under Section 12 of the Securities Exchange Act of 1934," or a company that "is required to file reports under Section 15(d) of the Securities Exchange Act of 1934…" 18 U.S.C.A. §1514A.

B. Are Respondents an Integrated Enterprise?

The United States Department of Labor's Administrative Review Board ("ARB") has not ruled on whether the integrated enterprise analysis used in labor and employment cases, to determine whether two companies may be considered so interrelated as to constitute a single employer subject to liability under the specific statute, is appropriate for determining coverage under the Section 806's whistleblower protection provision.[18] There is nothing inherently improper in applying the integrated enterprise analysis to a SOX claim, if otherwise appropriate. In determining whether there is an integrated enterprise Courts evaluate four factors: (1) functional integration of operations; (2) centralized control of labor or employment decisions; (3) common management; and (4) common ownership or financial control. *Radio and Television Broadcasting Tech. Local Union 1264 v. Broadcast Serv. Of Mobile, Inc*., 380 U.S. 255 (1965); *Pearson v. Component Tech Corp*., 247 F. 3d 471, 486 (3d Cir. 2001); *Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814, 820 (1st Cir. 1991). The most important factor in employment cases is control or influence over employment matters. Courts have found centralized control where "entities share policies concerning hiring, firing, and training employees, and in developing and implementing personnel policies and procedures." *Lenoble v. Best Temps, Inc*., 352 F. Supp. 2d 237, 244 (D. Conn. 2005); *see also, Romano v. U-Haul International*, 233 F.3d 655, 666 (1st Cir. 2000).

In evaluating whether Sodexho Alliance, Sodexho Inc. and Sodexho Operations exercise centralized control of employment decisions, the Respondents have submitted sworn statements establishing that Sodexho Alliance does not share offices with Sodexho Inc. or Sodexho Operations. These sworn statements also establish that Sodexho Alliance was not involved in drafting, administering or implementing the personnel policies of Sodexho Inc. or Sodexho Operations, including policies related to counseling, discipline and termination. Respondents' factual submissions also demonstrate Sodexho Alliance does not provide compensation, medical, or pension benefits to employees of Sodexho, Inc. and Sodexho Operations and Sodexho Operations and Sodexho Inc. maintain separate corporate and financial records.[19] The statements and deposition evidence submitted by Respondents demonstrates that the individuals involved in all of the allegedly retaliatory decisions including the decisions to place Complainant on administrative leave and then later to terminate his employment included Paul Armas, Ben Scimeca, Karen Dutton, Peter Gerard, Jeffery Wilson and Steve Dunmore, all of whom were employees of either Sodexho Operations or its parent company, Sodexho, Inc. No evidence was

[18] In an amicus brief to the ARB in *Ambrose v. U.S. Foodservice, Inc*. ARB No. 06-096, ALJ No. 2005-SOX-105, the Assistant Secretary of Labor for the Occupational Safety and Health Administration argued that the Board should apply the integrated enterprise doctrine in determining Section 806 coverage of private subsidiaries of publicly-traded companies. The parties settled the matter before the ARB issued a decision on the merits. ARB No. 06-096, ALJ No. 2005-SOX-105 (ARB Sept. 28, 2007).

[19] Sodexho Alliance issued and implemented a Statement of Business Integrity in February 2007 directing that its subsidiaries operate in an ethical business manner. The announcement provided subsidiaries flexibility in implementation. Sodexho Inc. already had an ethics policy in CP- 101 and therefore it did not initiate any new policies as a result of the Statement of Business Integrity. While this indicates Sodexho Alliance established broad overarching ethical and integrity goals for its subsidiaries, the evidence does not show that Sodexho Alliance controlled personnel, payroll or human resources functions at Sodexho Inc. or Sodexho Operations.

submitted showing that officers or employees of Sodexho Alliance were involved in decisions by Sodexho Inc. or Sodexho Operations officials regarding Complainant's employment, including the decision to terminate his employment.

In support of his argument that he was an employee of the public parent company Sodexho Alliance under an integrated enterprise theory, Complainant points to the findings of the Regional Administrator of the United States Department of Labor's Occupational Safety and Health Administration who concluded that Sodexho Operations, Sodexho, Inc. and Sodexho Alliance were an integrated enterprise seemingly based upon Sodexho Alliance's Form 20F filed in 2007 and material appearing in the www.sodexho.com website. Opp. to SD at 7-8, 10-14 and Ex. A.[20] SOX proceedings before the Office of Administrative Law Judges are *de novo* and the findings of the OSHA administrator are not controlling. 29 C.F.R. § 1980.107 (b). Moreover, the OSHA finding is not evidence and reliance on the finding does not raise a genuine issue of material fact. Although Complainant states the issue of integrated enterprise is in dispute, he has presented no evidence to counter the evidence submitted by Respondents. Complainant has not provided statements, documents, or other evidence showing the existence of an integrated enterprise, and specifically, centralized control of employment decisions.[21] Accordingly, the Complainant failed to present evidence sufficient to demonstrate a genuine issue of fact as to whether Sodexho Alliance exercised centralized control of employment matters at Sodexho Inc. and Sodexho Operations, such that the companies are an integrated enterprise.[22] The evidence before me shows that Respondents Sodexho Alliance, Sodexho Inc., and Sodexho Operations are not an integrated enterprise.

C. Are Respondents Sodexho Inc. and Sodexho Operations Agents of the Publicly Traded Respondent Sodexho Alliance?

Alternatively Complainant contends that Sodexho Inc. and Sodexho Operations are agents of Sodexho Alliance and thus subject to coverage under Section 806 of the Act citing the ARB's *Klopfenstein v. PCC Flow Technologies Holdings, Inc.* decision ARB 04-149, ALJ No. 2004-SOX-11 (ARB May 31, 2006). In *Klopfenstein*, the ARB rejected an interpretation of Section 806 that would "require a complainant to name a corporate respondent that is itself 'registered under §12 or…required to file reports under §15(d),' so long as the complainant names at least one respondent who is covered under the Act as an 'officer, employee, contractor,

[20] Complainant has not submitted the Form 20 F with his Opposition. Nor has he submitted any information from the website he cites. Indeed Complainant submitted only an affidavit, an excerpt from the OSHA Regional Administrator's finding and an e-mail Complainant sent to Ms. Lazerwitz, Mr. Morse and the OSHA investigator on November 2, 2006 noting a recent example of corporate fraud involving an unrelated independent company. Opp. SD, EX A and B.

[21] As noted, Complainant has not submitted any evidence that an official or employee of Sodexho Alliance was involved in any decision regarding his employment. Nor did he offer any evidence that individuals other than those acknowledged by Respondent as employees of Sodexho Inc. or Sodexho Operations were involved in decisions related to his employment including, coaching, warnings, discipline, placement on administrative leave and termination.

[22] Neither Respondents nor Complainant addressed the other factors courts consider in determining whether an integrated enterprise exists.

subcontractor or agent' of such a company." *Klopfenstein*, ARB No. 04-149 at 13. The ARB went on to hold that a non public subsidiary of a publicly-traded parent company may be subject to the whistleblower provision of the Act if it acted as an agent of the public parent company in employment matters. *Id*. at 13-14.[23]

The general corporate law principle holds that parent companies are not *ipso facto* liable for the actions of their subsidiaries. *United States v. Bestfoods*, 524 U.S. 51, 61, 63 (1998) (liability will only be extended in an area where the parent has exerted its influence or control); *Rao v. Daimler Chrysler Corp.* 2007 WL 1424220 (E.D. Mich) (May 14, 2007) slip op. at 8-9. Nonetheless, as *Klopfenstein* directs, a parent corporation may be liable for the actions of its subsidiary if the subsidiary is acting as the agent of the parent with regard to the allegedly retaliatory employment action.

In determining whether a particular subsidiary is an agent of a public parent for purposes of the Sarbanes-Oxley Act's anti-discrimination provision, the ARB instructs that principles of general common law of agency are applied. *Klopfenstein,* ARB 04-149, slip op. at 14. The ARB stated "[a]lthough [agency] is a legal concept, 'agency depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control.'" *Klopfenstein,* ARB 04-149 at 14, citing Rest. 2d Agen. §1(1), comment b.[24] Factors relevant in assessing whether an agency relationship exists include whether there are overlapping officers between the two companies and whether the principal was involved in decisions relating to the complainant's employment. *Id*. at 15; *see also, Rao*, 2007 WL 1424220 slip op. at 5 (granting summary decision dismissing SOX complaint as plaintiff failed to allege anyone at parent corporation knew of or participated in decisions regarding his employment). However, the ARB has also recognized that "to be covered under the Act, of course, an individual must not only be an agent of a public company, but also must "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." *Klopfenstein,* ARB 04-149 at 16, citing 18 U.S.C.A. § 15.14A(a). *See als*o,

---

[23] The ARB remanded the matter to the administrative law judge to assess whether the privately-held subsidiary was an agent of the public parent company.

[24] Restatement (Third) completely replaced Restatement (Second) of Agency which was first published in 1958. The definition of agency referenced above by the ARB also appears in Restatement (Third) (§ 1.01 Agency Defined) along with comments providing:

> Comments: (c) Elements of agency: As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has the right to control the actions of the agent. Agency thus entails inward-looking consequences, operative as between the agent and the principal, as well as outward-looking consequences, operative as among the agent, the principal, and third-parties with whom the agent interacts. Only interactions that are within the scope of an agency relationship affect the principal's legal position.
>
> * * * *

Not all relationships in which one person provides services to another satisfy the definition of agency. It has been said that a relationship of agency always "contemplates three parties - the principal, the agent, and the third party with whom the agent is to deal." 1 Floyd R. Mechem, A Treatise on the Law of Agency § 27 (2d ed. 1914).

Carnero v. Boston Scientific Corp., 433 F.3d 1, 6 (1st Cir. 2006) (an employee of a subsidiary is a covered employee for § 1514A of SOX purposes where the officers of the publicly-traded parent company have the authority to affect the employment of the subsidiaries' personnel); *Su v. Alliant Energy Corp*., 2008-SOX-00034 (ALJ Dec. June 16, 2008) slip op. at 9 (in employment discrimination case parent company held liable only where it controlled or influenced the work environment of, or termination decision about an employee of its subsidiary company) citing *Hughart v. Raymond James and Assoc.*, 2004-SOX-00009 (ALJ Dec. 17, 2007).

Respondents submitted evidence that Sodexho Alliance officials or employees were not involved in any of the allegedly retaliatory employment decisions at issue in this matter, including the decision to remove the Complainant from LGH and place him on administrative leave, or the decision to terminate his employment. Complainant did not proffer any evidence from which an inference of influence or participation by Sodexho Alliance over his work environment or Sodexho Inc.'s and Sodexho Operations' decisions to place him on administrative leave and to discharge him could be drawn. Respondents' showing that Sodexho Alliance officials did not participate in the allegedly retaliatory employment decisions made by employees and officials of Sodexho Operations and Sodexho Inc. is unchallenged. Nor did Complainant offer any evidence showing an overlap of officers between Sodexho Alliance and the two subsidiaries. In sum, Complainant failed to offer any evidence supporting a finding that the subsidiaries, Sodexho Inc. and Sodexho Operations, were operating and acting as agents of Sodexho Alliance with regard to the conditions of his employment including coaching incidents, written disciplinary warnings, or the decisions to place him on administrative leave and to terminate his employment. There is no evidence supporting the Complainant's contention that Sodexho Operations and Sodexho Inc. acted as agents of Sodexho Alliance in employment actions and therefore no genuine issue of material fact exists on that allegation.

In summary, viewing all of the evidence and the factual inferences in the light most favorable to the Complainant, I find that Complainant has failed to show there is a question of material fact in dispute as to whether Respondent Sodexho Alliance exercised control over, participated in, or influenced the decisions of Respondents Sodexho Inc. and Sodexho Operations related to Complainant's employment with Sodexho Operations. Since Respondents Sodexho Alliance, Sodexho Inc. and Sodexho Operations are not an integrated enterprise nor are Sodexho Inc. and Sodexho Operations agents of Sodexho Alliance, Complainant is unable to establish that he is a covered employee or that his employer was a covered employer under the whistleblower protection provisions of Section 806 of the Act. Accordingly, on this basis, the complaint must be dismissed.

In the interest of completeness, I will address Respondents' additional arguments for dismissal, that is, Complainant failed to establish that he engaged in activity protected under the Sarbanes-Oxley Act and that Respondents would have discharged Complainant absent protected activity.

IV. Protected Activity

To establish a claim under Section 1514A of the Sarbanes-Oxley Act, the plaintiff must show: (1) he engaged in a protected activity as defined by [Sarbanes-Oxley]; (2) the employer was aware of the protected activity; (3) the employee suffered an adverse employment action; and (4) circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. *Day*, 2009 WL 294804, slip op. at 7; *Welch*, 536 F. 3d at 275; *Mozingo v. South Financial Group, Inc.*, 520 F. Supp. 2d 733, 740 (D.S.C. 2007); *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 705, 711 (E.D. Va. 2007); *Sussberg v. K-Mart Holding Corp.*, 463 F. Supp. 2d 704, 711 (E.D. Mich. 2006).

In order to establish he engaged in protected activity, an employee must show he had a subjective and objectively reasonable belief that the conduct complained of constituted a violation of relevant law. *Day*, 2009 WL 294804 slip op. at 10-11; *Welch* 536 F. 3d at 278-79. Protected activity for purposes of Section 1514A includes providing information regarding any "conduct which the employee reasonably believes constitutes a violation" of Sarbanes-Oxley, any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of Federal law relating to fraud against shareholders. *See* 18 U.S.C. § 1514A; *Day*, 2009 WL 294804 slip op. at 10.

The employee must demonstrate that his communications to his employer definitively and specifically relate to one of the laws listed in Section 1514A of the Act. *Day*, 2009 WL 294804 slip op. at 10-11; *Welch* 536 F. 3d 278-79; *Platone v. FLYi, Inc*., 04-154, slip op. 15-17 (ARB Sept. 29, 2006) aff'd sub nom. *Platone v. US DOL*, No. 07-1635, 2008 U.S. Dist. LEXIS 24378 (4th Cir. Dec. 3, 2008). Generalized or vague complaints not specifically related to shareholder fraud are not covered under the Sarbanes-Oxley Act. *Skidmore v. ACI Worldwide, Inc*. NO. 8:0CV1, 2008 WL 2497442 at 9 (D. Neb. June 18, 2008) (complaint alleging accounting dispute dismissed as there were no allegations of fraud against shareholders); *Welch*; 536 F. 3d at 279 (dismissal upheld where claimant failed to show how alleged conduct could be reasonably regarded as violating any law listed in Section 1514A). The First Circuit has recently held that "fraud" has a defined legal meaning and in the context of SOX is not a "colloquial term" and that the "hallmarks of fraud are misrepresentation and deceit." *Day*, 2009 WL 294804 at 11 quoting *Ed Peters Jewelry Co., v. C.J. Jewelry C*o., 215 F. 3d 182, 189 (1st Cir. 2000). The Court stated further that "[t]he employee need not reference a specific statute, or prove actual harm, but he must have an objectively reasonable belief that the company intentionally misrepresented or omitted certain facts to investors, which were material and which risked loss." *Day* 2009 WL 294804 at 11.

Respondents argue that the undisputed facts establish that the Complainant did not engage in activity protected by SOX. Mot. SD at 9-19; R. Reply to Opp. to SD at 6-11. In his opposition to the motion, the Complainant contends he engaged in protected activity in an e-mail message sent in November 2006 to Alison Lazerwitz and Mr. Morse. Opp. SD at 14-16.

The Complainant's primary concern which he expressed in regard to several of his complaints to supervisors, human resources personnel and client officials was that Sodexho's

actions were not transparent to the client hospital to which he was assigned and/or that the company's action created a conflict of interest with the hospital. In response to discovery requests, the Complainant produced a chart at his deposition, of allegedly protected activity and he stated the incidents included on the chart were the totality of actions he alleged were protected. The chart does not allege a violation of any law outlined in the Act nor does it allege that any of the matters complained of involve fraud against shareholders of Sodexho Alliance. In fact in Complainant's opposition to summary decision, he concedes that he did not raise concerns during his employment using the words "shareholder interest." Opp. SD at 13. Nevertheless, I will review each of the actions the Complainant argues were protected activities under SOX.

With regard to the Bonus Plan, Complainant alleged on numerous occasions and in his deposition testimony that the plan created a conflict of interest in that it could encourage a manager to act in a manner not in the client's best interest, where a Sodexho Operations general manager participated in the client's decision to award Sodexho Operations Asset management group a project and the general manager was eligible for a bonus based upon the new project or business. Complainant has not complained that the bonus plan was a fraud against shareholders of Sodexho Alliance, nor did he allege the bonus plan had any impact on Sodexho Alliance's financial records or required reports to the Securities and Exchange Commission, nor did he alleged the bonus plan violated any of the laws specified in Section 1514A of the Act.[25] The bonus plan was later modified so that clients were notified if a manager was eligible for a bonus for any potential new project with the client hospital. The Complainant testified that this change would have alleviated his concern over the bonus program. This testimony confirms that the Complainant's bonus plan concern was unrelated to any fraud against shareholders, or violation of any law specifically identified in the Act. Accordingly, Complainant has not shown a genuine issue of material fact exists as to whether his complaint on the bonus plan was protected activity under SOX.

Complainant also alleges protected activity when he complained to the business hotline and to his supervisor that Sodexho was pressuring vendors to provide services through the Company rather than directly to the client hospital. Complainant believed this increased costs of the services to the client. Complainant contends that this practice creates a conflict of interest, is not transparent to the client and that Sodexho was not acting in the best interest of its client hospital. Complainant does not allege that this practice is some sort of fraud against shareholders or a violation of any of the statutes referred to in Section 1514A. Therefore, even if accepted, his report that the Company was strong-arming vendors is not protected activity under SOX.

With regard to his complaint of "bid-rigging" by the Asset Management group, Complainant claims his supervisor requested a copy of a competitors bid so that Sodexho Operations Asset management Group could use the information in presenting its bid for the work. He did not state that any alleged "bid rigging" was fraud against Sodexho Alliance shareholders, or involved a misrepresentation of Sodexho Alliance's financial records, or

[25] Complainant's opposition to the motion for summary decision does not address his alleged protected activity regarding complaints over the bonus plan.

violated any law enumerated in Section 1514A of SOX. Accordingly, Complainant has not demonstrated that there is a genuine issue of fact that the claim of alleged "bid rigging" is protected under SOX.

Complainant's complaint regarding the VHA funds was that Sodexho was receiving funds from VHA, a Group Purchasing Organization (GPO) creating a conflict of interest as Sodexho was putting its interests ahead of its client, and that Sodexho was not informing its client about the funds available to them under the VHA Capital Incentive Program. Under the program the clients who purchased goods and equipment through the GPO could earn funds from the Sodexho subsidiary to be used by the clients for improvements at the client facility. Mr. Morse, the deputy general counsel for Sodexho Inc., explained to the Complainant that under this Capital Incentive Program Sodexho did not receive funds from VHA and that the Sodexho District Managers were directed to inform the client hospitals of the amount of funds in the client's account for use by the client. Complainant has acknowledged that if the Clients were informed of the amount of funds in the VHA incentive accounts, his concerns with the VHA program would be resolved. At no point did Complainant state that his concerns regarding the VHA program related to a fraud against shareholders.

Nonetheless, he now argues that his e-mail to Ms. Lazerwitz and Mr. Morse addressing rebates and in which he referred to "corporate fraud" was intended to mean "shareholder fraud." Opp SD at 15. The e-mail to Lazerwitz and Morse sent in November 2006 after Complainant was placed on administrative leave, but prior to his termination, describes issues related to US Foodservice, a competitor of Sodexho. Opp. SD, Tab B. The e-mail message stated it was being sent to cite a recent example of corporate fraud at US Foodservice. The e-mail represented that US Foodservice had experienced an accounting fraud which resulted in jail sentences for executives and a significant fine for the company. The e-mail also states that the US Foodservice issues mentioned in the e-mail "are unrelated to our current issues" and "different in nature to the rebate scheme we have complained about with the GPOs." The e-mail explicitly states that the issue at US Foodservice is not the same issue he had raised about the VHA/GPO relationships at Sodexho. An objective reading of this e-mail does not reflect a concern that any rebate program Sodexho had in place was a fraud against shareholders or a violation of laws set forth in Section 1514A of SOX. The mention of corporate fraud in the e-mail does not constitute protected activity under SOX in light of Complainant's e-mails and testimony explaining that his concern was a lack of disclosure to the clients/customers of the amount of the rebate.[26]

[26] The Complainant appears to allege in footnote 2 of his opposition that the VHA/GPO rebate program violated anti-kickback laws. He does not allege or offer evidence that he informed Respondents that the rebate program violated anti-kickback laws when he was employed, nor did he testify that he raised any such concerns at his recent deposition. An employee's communication must "definitively and specifically relate to" one of the enumerated statutes and "at least be of a type that would be adverse to investor's interests." *Platone*, No. 07-1635, 2008 U.S. Dist. LEXIS 24378. Courts have held that vague, generalized complaints that do not definitively and specifically relate to shareholder fraud are simply not covered under the Act. *Id.* at 17; *Skidmore*, NO. 8:0CV1, 2008 WL 2497442 at 9. The evidence submitted shows that during his employment with Sodexho Operations, Complainant did not allege that his concerns with the VHA/GPO program involved a concern for shareholder fraud or a violation of any of the statutes specifically included in Section 1514A of the Act. His belated effort to tie his VHA/GPO concern to shareholder fraud fails.

Viewing all of the evidence and the factual inferences in the light most favorable to the Complainant, I find that Complainant has failed to counter Respondents' evidence showing that Complainant did not engage in activity protected under SOX . Therefore Complaint has not shown there is a question of material fact in dispute as to whether he engaged in activity protected under SOX. Respondents motion for summary decision on this ground is granted.

V. Reason for Termination

The Respondents also seek summary judgment on the ground that it would have terminated Complainant's employment absent any protected activity. In support of this assertion, Respondents submitted sworn statements, deposition testimony, e-mails, and written warnings issued to Complainant supporting its claim that he was terminated for numerous instances of insubordinate or inappropriate actions, for poor performance and for providing confidential and proprietary company information to the CFO of LGH with the intent of adversely affecting the Company's business relationship with LGH. The Complainant did not dispute the instances of insubordinate, disrespectful or inappropriate conduct. Opp SD at 2, 17. Nor did he dispute that he turned over confidential and proprietary company information to an official at LGH, the client hospital. Instead he argues that he had good cause for his actions. However, an "employee's decision to report discriminatory behavior cannot immunize that employee" from adverse action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2415 (2006).

In addition, although he states that other employees were treated less harshly when they received poor JCAHO inspection results, he offers no evidence to support this bald assertion. The ARB has stated that a complainant attempting to defend a motion for summary decision is required to submit facts – through affidavit, depositions, or other evidence that refutes, disputes or otherwise challenges respondent's proof and may not simply rely upon "mere allegations, bare denials," or speculation to overcome summary judgment. *See Seetharaman v. General Electric Co*., ARB No. 03-029, 2004 DOL Ad. Rev. Bd. Lexis 62, at 4 (May 28, 2004).

Because the Respondents' undisputed evidence shows the Complainant engaged in several instances of unprofessional, disrespectful and insubordinate actions, had performance issues, and disclosed confidential company information in violation of company policy Respondents have established that Complainant would have been discharged regardless of any allegedly protected activity.[27] The Complainant has not met its burden to counter the Respondents evidence.

[27] In view of my decision with regard to the issues of coverage under SOX, protected activity, and whether Respondents would have terminated Complainant in any event, it is not necessary for me to address the remaining issues raised in the motion.

ORDER

Respondents' Motion for Summary Decision is GRANTED and the complaint is DISMISSED.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS:

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time 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. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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(c). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).