

**U.S. Department of Labor**

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**Issue Date: 13 October 2009**

**CASE NO.: 2009-SOX-50**

**IN THE MATTER OF**

**ABRAHAM AYOUBI**

**Complainant**

**v.**

**FUJITSU NETWORK COMMUNICATIONS**

**Respondent**

**ORDER GRANTING MOTION FOR SUMMARY DECISION**

This proceeding arises under the Sarbanes-Oxley Act of 2002, technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 U.S.C. § 1514A, *et seq.*, (herein SOX or the Act), and the regulations promulgated thereunder at 29 C.F.R. Part 1980, which are employee protective provisions.

On September 14, 2009, Respondent, Fujitsu Network Communications (herein Respondent) filed a Motion For Summary Decision with supportive exhibits and declarations seeking dismissal of Complainant's complaint. It is alleged that Complainant, Abraham Ayoubi, has failed to state a **prima facie** case since his employer, Respondent, is not a "company" within the meaning of 18 U.S.C. §1514A, in that it is not "any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934," and consequently Complainant is not an employee within the meaning of 18 U.S.C. § 1514A. See 29 C.F.R. § 1980.101.

On September 11, 2009, the undersigned issued an Order Granting Respondent's Rule 12 Motion To Dismiss Fujitsu Limited and Fujitsu Limited Corporate.

On September 21, 2009, an Order issued extending Complainant's Response to Respondent's Motion For Summary Decision relating to jurisdiction over named Respondent Fujitsu Network Communications.

On September 30, 2009, Complainant filed a letter response regarding the issue of jurisdiction. Therein, Complainant represents the "Complainant's other claims are subject to an arbitration agreement, at this time the Complainant has no objection of the motion for summary judgment on the jurisdiction issue alone." No further evidence or argument was presented in response to Respondent's motion.

### DISCUSSION

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d) (2001). See, e.g. Stauffer v. Wal Mart Stores, Inc., Case No. 1999-STA-21 (ARB Nov. 30, 1999) (under the Act and pursuant to 29 C.F.R. Part 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Rollins v. American Airlines, Inc., ARB Case No. 04-140, Case No. 2004-AIR-9 (ARB April 3, 2007); Webb v. Carolina Power & Light Co., Case No. 1993-ERA-42 @ 4-6 (Sec'y July 17, 1995). This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Complainant), and Respondent must be entitled to prevail as a matter of law. Gillilan v. Tennessee Valley Authority, Case Nos. 1991-ERA-31 and 1991-ERA-34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The non-moving party must present **affirmative evidence** in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in

opposition to the motion for summary decision. Id. at 324. Affidavits must be made on personal knowledge, set forth such facts as would be **admissible** in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. F.R.C.P. 56 (e).

A non-moving party who relies on conclusory allegations which are unsupported by factual data or sworn affidavit . . . cannot thereby create an issue of material fact. See Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993); Rockefeller v. U.S. Department of Energy, Case No. 1998-CAA-10 (Sept. 28, 1998); Lawrence v. City of Andalusia Waste Water Treatment Facility, Case No. 1995-WPC-6 (Dec. 13, 1995). Consequently, Complainant may not oppose Respondent's Motion for Summary Decision on mere allegations. Such responses must set forth specific facts showing that there is a genuine issue of fact for a hearing. 29 C.F.R. 18.40(c).

The determination of whether a genuine issue of material fact exists must be made by viewing all evidence and factual inferences in the light most favorable to Complainant. Trieber v. Tennessee Valley Authority, Case No. 1987-ERA-25 (Sec'y Sept. 9, 1993).

The purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Id. at 587.

Lastly, the U.S. Supreme Court has cautioned that "summary procedures should be used sparingly . . . where motive and intent play lead roles . . . It is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." Pollar v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962).

In the instant case, in order to withstand Respondent's motion, it is not necessary for Complainant to prove his allegations. Instead, he must only allege the material elements of his **prima facie** case that jurisdiction exists over Respondent. Bassett, @ 4.

Respondent represents that Fujitsu Network Communications is not publicly traded on any stock exchange, does not have any class of securities and certainly does not have any that are registered under Section 12 of the Securities Exchange Act of 1934. Moreover, it is also evident that Respondent is not required to file reports under Section 15(d) of the Securities Exchange Act of 1934. (See Sworn Affidavit of Melanie Wright, Exhibit A to Respondent's Motion).

Complainant has failed to present any countervailing evidence to rebut Respondent's assertions.

Thus, viewing the circumstances Respondent describes in its motion and supporting evidence and declarations in the light most favorable to Complainant's position, I conclude that Respondent has "set forth specific facts showing that there (are) . . . [no] genuine issue(s) for trial." Treiber v. Tennessee Valley Authority, @ 5. Respondent has provided sworn testimony and argument which Complainant has failed to address in any sufficient manner to convince me that there is a legitimate dispute regarding the factual and statutory circumstances involved herein such that summary disposition of this matter is inappropriate.

In light of the evidence presented regarding the non-employer status of Fujitsu Network Communications, and based on the foregoing jurisprudence, I find that Respondent is entitled to summary decision in this matter and its Motion For Summary Decision is hereby **GRANTED**.

Accordingly,

**IT IS HEREBY ORDERED** that Respondent's Motion for Summary Decision be, and it is, **GRANTED** and that Complainant's Complaint is hereby **DISMISSED** with prejudice.

**IT IS FURTHER ORDERED** that the formal hearing scheduled in this case on October 20, 2009, in Dallas, Texas, be, and it hereby is, **CANCELLED**.

**ORDERED** this 13th day of October, 2009, at Covington, Louisiana.

**A**

LEE J. ROMERO, JR.  
Administrative Law Judge

**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, Room S-4309, 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).