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**Issue Date: 07 August 2009**

CASE NO. 2009-SOX-00046

*In the Matter of*

**BRUCE FIELD,**
Complainant,

v.

**BKD, LLP**
Respondent,

and

**BKD CORPORATE FINANCE, LLC,**[1]
Respondent.

Appearances: Bruce Field, *in pro per*,
For the Complainant

Michaela M. Warden, Esq.
Warden Law Firm, LLC
For the Respondents

Before: Steven B. Berlin
Administrative Law Judge

## DECISION AND ORDER GRANTING SUMMARY DECISION AND MODIFYING CAPTION

### Introduction, Procedural History, and Related Case

This case arises under the whistleblower protection provision of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (the "Act"). The Act and its implementing regulations, *see* C.F.R. Part 1980, protect employees who blow the whistle on violations of U.S. Security and Exchange Commission rules

[1] In his filings, Complainant identified the second respondent as BKD Corporate Finance, LLP. According to respondents, the correct name is BKD Corporate Finance, LLC, and the entity is a corporation organized under Missouri law and wholly-owned by BKD, LLP. The caption is hereby amended to include the correct corporate name.

and regulations and other laws aimed at preventing securities fraud, mail fraud, and certain other fraud.

This is the second case Complainant has initiated in this forum relating to his former employment with the City and County of Denver, acting through its Board of Water Commissioners ("Denver Water"). In the first action, Complainant named Denver Water as the respondent. OALJ Case No. 2009-SOX-00022. On May 8, 2009, I granted Denver Water's motion for summary decision, finding that Denver Water did not come within the scope of SOX's whistleblower protection provision because it neither registered securities under section 12 of the Securities Act of 1934 nor filed (or was required to file) reports under section 15(d) of that Act. Denver Water issues only municipal bonds, which are expressly exempted from those requirements of the 1934 Act. Complainant appealed; the appeal is pending. *See* ARB Case No. 09-100.

Prior to the first case's being decided, Complainant initiated this second action with the Occupational Safety & Health Administration on January 2, 2009. He named as respondents Denver Water's outside accounting firm BKD, LLP and a company that it wholly owns, BKD Corporate Finance, LLC. Complainant refers to the Respondents jointly as "BKD."[2]

The gravamen of Complainant's complaint is that when he was working for Denver Water as a construction project manager, he discovered waste and fraud, which he reported to Denver Water, demanding an audit. Denver Water referred the matter to their accountants BKD. According to Complainant, BKD "ignored this problem and apparently worked with the Denver Water corrupt managers to suppress and stifle this issue . . . ." Complainant alleges that later he was "harassed, threatened and then illegally terminated on October 13, 2008 for this and other 'whistleblower' actions and also for refusing to sign off on questionable contractor pay applications." Finally, he alleges that BDK "condoned" Denver Water's senior managers' illegal conduct and "cover-up." Complainant offers no detail about what in particular BKD did or failed to do or how it affected his employment relationship with Denver Water.

On March 30, 2009, OSHA issued findings. It concluded that among Denver Water and the two BDK respondents, SOX's whistleblower provision extends to none of them because none has a class of securities registered under section 12 nor one that requires reporting under section 15 of the 1934 Act.

Complainant timely requested a formal hearing. In the request, he added more allegations. He alleged that BDK is a public accounting firm that falls within SOX as is evidenced by its registration, as SOX requires, with the Public Company Accounting Oversight Board. He alleges that BDK has failed to follow certain unspecified "guidelines and failed to investigate fraud." As he states: "Ignoring these valid issues lead to Mr. James Phillips's and my own termination for reporting this corruption." He argues that BDK is subject to SOX because it "is

[2] In his complaint, Complainant did not specify any allegation against either respondent in particular; he simply referred to both entities as "BKD." BKD Corporate Finance, LLC's services include mergers and acquisitions, sales, management buyouts, employee stock option plans, recapitalizations, and financing services. Blumreich, ¶4.

the acknowledged public accounting firm supposedly overseeing [Denver Water's] accounting practices."[3]

On June 15, 2009, Complainant filed a "Justification for change of ALJ due to conflict with existing pending case before the Administrative Review Board." I took this as a motion to recuse. It was based largely on the fact that I decided against Complainant in his case against Denver Water. Respondents opposed. I denied the motion in a written order on June 29, 2009.

Meanwhile, on June 26, 2009, Respondents moved for summary decision, arguing essentially that OSHA's analysis was correct: (1) they do not fall within SOX's whistleblower provision because neither registers securities under section 12 nor is required to (or does) report under section 15(d) of the 1934 Act; and (2) Complainant is not a covered employee.

On July 13, 2009, Complainant filed a "Dispute of dismissal request by BKD and dispute of order denying motion to disqualify of ALJ."[4] Addressing summary decision, Complainant stated:

> I will not further address the issues of this case, the questionable decisions by ALJ Berlin or the activity at the BKD Denver office (or at Denver Water) at this level of hearing process. I will await the expected dismissal decision by ALJ Berlin to pursue further corrective action.

Complainant offered no declaration, no other evidence, and no argument on summary decision. I take his filing as a non-opposition to the motion for summary decision; apparently, Complainant prefers that I grant the motion and allow him to appeal the denial of his motion to recuse.

## Undisputed Facts[5]

Complainant previously worked as an architectural engineer for Denver Water. He believes that while working for Denver Water he discovered fraud and waste extending to more than $40 millions on Denver Water contracts. He reported his belief to Denver Water, which referred the matter to its auditors, BDK, LLP. BDK, LLP essentially "ignored" the allegations.

Neither Respondent has employed Complainant at any relevant time. Rafferty, ¶10; Blumreich, ¶8. Respondent BKD, LLP is a public accounting firm organized under Missouri law as a limited liability partnership. Rafferty, ¶4. According to one of its partners, "BKD does not have a class of securities registered under section 12 of the Securities Exchange Act of 1934"; "BKD is not required to, and does not, file reports under section 15(d) of the Securities Exchange Act of 1934"; and BKD, LLP has no subsidiary with a class of securities registered under Section 12, or

[3] Complainant raises some grievances with OSHA's Regional Administrator's handling of the initial investigation. As the present case is here for *de novo* hearing, Complainant can present all of his evidence and obtain any discoverable material in this forum, thereby addressing these grievances.

[4] To the extent this was a motion to reconsider on the recusal, it presents no new facts or law and is denied.

[5] My factual findings are for purposes of this motion only. The parties could have other and different evidence now or discovered by the time of trial that they might wish to offer at that time. Respondents' evidence consists of the affidavits of Steven B. Rafferty (a partner with BKD, LLP) and Steven D. Blumreich (President of BKD Corporate Finance, LLC).

that is required to file reports under Section 15(d). *Id.*, ¶¶5-8. Effective October 31, 2006 and continuing, BKD, LLP has had an agreement with the City and County of Denver to provide audit services to Denver Water.[6] *Id.*, ¶9.

BKD, LLP wholly owns BKD Corporate Finance, LLC. Blumreich, ¶3. BKD Corporate Finance, LLC's president states that "BKD Corporate Finance does not have a class of securities registered under section 12 of the Securities Exchange Act of 1934," and "BKD Corporate Finance is not required to, and does not, file reports under section 15(d) of the Securities Exchange Act of 1934." *Id.*, ¶¶5-6. The company has provided no services to Denver Water or the City or County of Denver. *Id.*, ¶7.

Discussion

On a motion for summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 1905.40(c) (1994); F.R.Civ.P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under F.R.Civ.P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson* at 252.

In the SOX legislation, Congress created whistleblower protection as follows:

> **Whistleblower protection for employees of publicly traded companies –** No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may [take certain adverse employment actions, including discharge, against] an employee . . . because of any lawful act done by the employee . . . [to] assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [certain statutory provisions], any rule or regulations of the Securities and Exchange Commission, or any provision of Federal law related to fraud against shareholders . . . .

18 U.S.C. § 1514A(a).

[6] Although Mr. Rafferty states in his affidavit that he has attached the most recent audit agreement with Denver Water, it was not attached. The record is silent as to the particulars of BKD, LLP's contractual obligations when it audits Denver Water.

*Respondents are not "companies" within SOX because they have not registered securities under section 12, nor are they required to report under section 15(d).* Complainant does not allege that either Respondent comes within the registration requirements of section 12 or the reporting requirements of section 15(d). Rather, he argues that Respondents must fall within SOX's ambit because BKD, LLP registers with the Public Company Accounting Oversight Board. BKD, LLP does not dispute that it registers with that Board, but Complainant's argument fails on the law.

Congress has established as a non-governmental District of Columbia non-profit corporation the Public Company Accounting Oversight Board "to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors . . . ." 15 U.S.C. §7211(a), (b). The Board registers accounting firms that audit issuers of securities; establishes rules for auditing, independence, and other standards for audit reports; inspects firms for compliance; conducts investigations and disciplinary proceedings; and imposes sanctions for violations of its rules or professional standards. 15 U.S.C. §§7211-15.

From Respondents' registration with the Board, I infer that they either perform audits of publicly-traded corporations or hope to do so. But that does nothing to bring them within SOX's whistleblower provision: the fact that an accounting firm audits publicly-traded corporations does not make the accounting firm itself a publicly-traded company; it does nothing to show that the accounting firm registers under section 12 or reports (or is required to report) under section 15(d) of the Securities Act of 1934. The firm's registration with the Board arguably subjects it to the Board's inspections, investigations, and impositions of sanctions related to the quality of the audits it performs, but it does not subject the firm to SOX's whistleblower provision. Congress explicitly defined the ambit of that provision, and it is limited to companies falling within the requirements of sections 12 or 15(d) of the Securities Act of 1934.

As Complainant never alleged that either Respondent issued securities bringing either as a company within the whistleblower provision, Respondents arguably can rely on this deficiency in the pleadings for the present motion. But Complainant is representing himself, and I construe his pleading liberally. I will therefore consider Respondent's proof that they do not fall within either section 12 or 15(d) of the Securities Act of 1934.

That proof is somewhat thin. Respondents first offer the testimony of a partner for BKD, LLP and an officer for BKD Corporate Finance, LLC that neither entity has registered securities under section 12, nor is either required to or does report under section 15(d).

I accept the representations that the companies do not register under section 12. Those are statements of fact, and they are undisputed.

But as to section 15(d), the representatives' statements that the companies are not required to report are legal conclusions, not statements of fact. Standing alone, these representations would be insufficient.

Section 15(d) of the Securities Exchange Act of 1934 requires the filing of supplementary and periodic reports for any security for which an issuer is required to file a registration statement under the 1933 Securities Act or "as may be required under section 78m of this title in respect of

a security registered pursuant to section 78*l* [section 12 of the 1934 Act] of this title."[7] 15 U.S.C. § 78o(d).

Here, Respondents need not file based on having registered securities under section 12 of the 1934 Act; they have established that each has no registered securities. But as to securities registered under the 1933 Act, they offer no facts. Rather, they offer no more than a conclusion of law that they are not required to report. They fail to recite facts showing no obligation to register under the 1933 Act.

Conclusory statements without supporting facts are inadequate support for summary decision. *See Conner v. Sakai,* 994 F.2d 1408, 1415 (9th Cir. 1992) (rejecting conclusory affidavit without supporting facts). At best, the statements at issue here are legal opinions by persons without established legal expertise, and thus inadmissible. *See* Fed.R.Civ.P. 56(e) (affidavit must "set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated").

But Respondents' representatives' statements about the section 15(d) obligations are not the only evidence of record relevant to that question. Respondents have also established the forms in which each was organized: BKD, LLP is a Missouri Limited Liability Partnership, and BKD Corporate Finance, LLC is a Missouri Limited Liability Company, wholly-owned by what is now known as BKD, LLP. Under Missouri law, neither form may issue securities.

Specifically, a Missouri partnership is "an association of two or more persons to carry on as co-owners a business for profit and includes, for all purposes of the laws of [Missouri], a registered limited liability partnership." Mo. Ann. Stat. 358.060. The partnership can buy, own, and sell property, and the partners each have rights to the partnership property. *Id.* §§358.080, 358.250. A partner has a personal property interest in the partnership's profits and surplus. *Id.* §358.260. When acting for ordinary business purposes, the partners are each agents of the others; their acts and admissions bind the others; and notice to one partner is notice to the partnership. *Id.* §§358.090, 358.110, 358.120. Every partner has access to the books at all times and to an accounting under certain circumstances. *Id.* §§358.190, 358.220. Each partner has a fiduciary duty to the others. *Id.* §358.210. A court may dissolve a partnership if, for example, one of the partners is mentally incapacitated. *Id.* §358.320.

A limited liability partnership is formed by registration with the secretary of state, including a list of the number of partners and signed by a majority of them (or someone the majority authorizes to sign for them). Mo. Ann. Stat. §358.440. The partnership name must include the designator "LLP." *Id.* §358.450. Unlike ordinary partnerships, the partners generally are not personally liable for the debts and obligations of the partnership. *Id.* §358.150.

The Missouri Limited Liability Company Act, Mo. Ann. Stat. §§347.010, *et seq.*, creates a business entity owned by "members," each of whom owns a "member's interest," which defines

[7] Section 78m generally refers to updates of registration information and annual reports. *See* 15 U.S.C. §78m. The duty to file under section 15(d) is automatically suspended in any fiscal year at the beginning of which the company was registered under section 12 of the 1934 Act. *Id.* Here, of course, Respondents are not registered under section 12.

that member's share of the business' profits and losses and entitlement to distributions. *Id.* §§347.015, 347.111. Entities formed in this manner must include in their name a designator such as "LLC" and may not include such designators as "corporation" or "Ltd." *Id.* §347.020. Members are agents of the company and act on its behalf unless the articles of organization vest that authority in "managers," in which case the managers act on behalf of the company. *Id.* §347.065. The agreement of all members is required to admit a new member; ordinary business decisions require a majority vote of the members. *Id.* §§347.079, 374.113. Any member is entitled to an accounting of the business' affairs "whenever circumstances render it just and reasonable." *Id.* §347.091. A member can assign her interest in the business, but the assignee does not become a member unless made one under the usual procedure. *Id.* §374.115. A partnership can be a member. *See id.*, §347.117. Under its organizing agreement, the members may establish a right to expel other members. *Id.* §347.123.

Neither of these businesses is authorized under Missouri law to issue securities. Neither operates with shareholder owners. In the case of the partnership, the partners, and in the case of the company, the members, have powers and obligations substantially different from the shareholders of corporations.[8] In addition, the fact that BKD Corporate Finance, LLC is wholly-owned indicates that its shares (if it had any) are not being traded: BKD, LLP is the sole member of BKD Corporate Finance, LLC. Together with the affidavits Respondents submitted, and in the absence of any contrary evidence from Complainant, I conclude that neither Respondent issues securities, and thus neither registers securities under section 12 nor is required to (or does) make reports under section 15(d) of the Securities Act of 1934. They are therefore not companies within the ambit of SOX's whistleblower provision.

Although this is a sufficient determination to grant the motion, I will address in the alternative Respondents' argument that Complainant is not a covered employee.

*Complainant is not a covered employee of BKD Corporate Finance, LLC.* SOX's whistleblower provision makes unlawful a covered company's retaliatory adverse action against an "employee." In the applicable language, Congress refers, not to the conduct of an "employer," but rather to that of a "company."

The Secretary of Labor construes SOX broadly, enlarging the notion of what is an "employee" of a "company" beyond the common law meaning. An "employee" is "an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.101.

Respondents do not and did not employ Complainant. There is no suggestion that Complainant applied for employment with either. That leaves open only the possibility that Complainant's

[8] "Partners" and "members" are not "shareholders" by another name; there are substantive differences. For example, shareholders do not act for the corporation, they generally do not have fiduciary obligations to one another, they are not empowered to speak for the corporation, they are not empowered to conduct ordinary business for the corporation, they do not directly own any of the corporation's property, their incapacity will not result in a dissolution of the corporation, and they do not have the power to determine who may buy shares (except corporations with certain kinds of restricted stock).

"employment could be affected" by one or both Respondents. Here, Complainant's allegation is that Respondents "condoned" Denver Water's actions and that their ignoring the problem led to his termination from employment.

No appellate body has construed SOX's regulatory language about "affecting" employment. On its face, the language would seem to be very broad, extending to any company that, not simply *did affect* a complainant's employment, but also a company that *could affect* the employment.

Construing a substantially identical regulation under the Aviation and Investment Reform Act's ("AIR 21") whistleblower provision,[9] the Administrative Review Board read the language as referring to cases in which the company exercised control over the employment decision. *Fullington v. AVSEC Services., LLC*, ARB No. 04-019, at *6-7 (ARB October 26, 2005). But it recited as indicia of control, not just customary factors such as the power to hire, transfer, promote, reprimand, or discharge the complainant, but also the ability to influence an employer to take such actions. *Id.* at 7.[10]

As for BKD Corporate Finance, LLC, that company has done no work for Denver Water and had no obligation to do any. There is no evidence that it did or failed to do anything or in any way affected or influenced Complainant's employment relationship with Denver Water. BKD Corporate Finance, LLC therefore is entitled to summary decision for this additional reason.

*BKD, LLP failed to demonstrate that Complainant was not an employee for these purposes.* The analysis as to BKD, LLP differs, and I reach the opposite conclusion. Denver Water referred to BKD, LLP Complainant's allegations for audit and review. BKD, LLP had a contractual obligation to perform independent audit services and thus had an obligation to report any fraud made known to them or reflected in Denver Water's books and records. For purposes of this motion, I accept that BKD, LLP found evidence to support Complainant's allegations and remained silent. I accept this because, for purposes of this motion, BKD, LLP does not dispute this allegation with any evidence to the contrary. From this, I readily infer that BKD, LLP's failure to report could have affected Complainant's employment with Denver Water and influenced the decision to terminate: had BDK, LLP concluded and reported to Denver Water that Complainant had accurately revealed that Denver Water had lost millions through fraud and waste, Denver Water might have decided not to terminate. BKD, LLP's status of being in a position where it could have affected Complainant's employment or influenced the decision to terminate make Complainant a covered employee as to BKD, LLP for purposes of SOX's whistleblower provision. I therefore reject BKD, LLP's argument on this point.

[9] The AIR 21 regulations define an "employee" as: "an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or *an individual whose employment could be affected by* an air carrier or contractor or subcontractor of an air carrier." 29 C.F.R. 1079.101 (emphasis added).

[10] This relationship appears close to the better established "joint employer" status. A "joint employer" is "a company that is unrelated to the employer-in-fact but which exercises sufficient day-to-day control over a complainant's work to be treated as a co-employer of the complainant." *Williams v. Lockheed Martin Energy Systems, Inc.*, No. 98-059 (ARB Jan. 31, 2001).

## Conclusion and Order

Respondents have each shown, based on undisputed facts, that neither has a class of securities that must be registered under section 12 or reported under section 15(d) of the Securities Act of 1934. BKD Corporate Finance, LLC has also shown in addition (and in the alternative) that Complainant was not an employee. Accordingly,

Respondents' motion for summary decision is GRANTED as to each of them respectively, and the Complainant is DISMISSED.

The caption is modified to reflect BKD Corporate Finance, LLC's correct name.

SO ORDERED

**A**

STEVEN B. BERLIN
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, 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).