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Issue Date: 14 January 2010

CASE NO.: 2009-SOX-00018

In the Matter of:

KENNON MARA
Complainant

v.

SEMPRA ENERGY TRADING, LLC
Respondent

ORDER DENYING MOTION TO RECONSIDER

This case arises from a complaint of discrimination filed by Kennon Mara ("the Complainant" or "Mara") against Sempra Energy Trading, LLC ("SET" or "the Respondent") pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A ("Sarbanes-Oxley" or "SOX"). Mara filed a complaint with the Occupational Safety and Health Administration of the U.S. Department of Labor ("OSHA") alleging that she was harassed and humiliated at work by employees of the Respondent in retaliation for blowing the whistle about inaccurate accounting practices at SET. In an Order dated October 5, 2009, I granted SET's Motion for Summary Decision, finding *inter alia* that SET was not a covered employer under SOX and that Mara failed to establish that she engaged in protected activity.[1] On October 20, 2009, Mara filed via facsimile a Motion to Reconsider along with a Supplemental Affidavit of Kennon Mara. SET objects, arguing that: (1) The motion is untimely; (2) The motion merely reiterates arguments that were previously made and rejected; (3) The motion fails to meet the reconsideration standard by identifying laws or facts that were overlooked in the prior decision; and (4) The motion includes an improper affidavit chock full of irrelevant facts, all of which were known and available to Mara prior to the time the summary judgment motion was decided. For the reasons set forth below, I find that while the motion is timely, reconsideration is **DENIED** because Mara has failed to meet her burden on reconsideration.

[1] The background of this matter will not be restated herein as that has been set forth in detail in the Order of October 5, 2009.

Discussion

Proceedings under the Act are conducted "in accordance with the rules of practice and procedure for administrative hearing before the Office of Administrative Law Judges" ("OALJ"). 29 C.F.R. § 1980.107(a). Any situation not provided for under the rules of practice and procedure, statute, or executive order are governed by the Rules of Civil Procedure for the District Courts of the United States. 29 C.F.R. § 18.1(a). Motions for reconsideration are not covered under the rules of practice and procedure before the OALJ, and I must therefore look to the Federal Rules of Civil Procedure to fill the gap. *Id*., *see also Getman v. Southwest Securities, Inc.*, ARB No. 04-00059, ALJ No. 2003-SOX-00008 (ARB March 7, 2006).

Applying the Federal Rules, it has been determined that reconsideration by an Administrative Law Judge ("ALJ") is appropriate in four limited circumstances:

(1) When there are material differences in fact or law from that presented to the court of which the moving party could not have known through reasonable diligence;

(2) When there are new material facts that occurred after the judge's decision;

(3) When there is a change in the law after the judge's decision; and

(4) When there was a failure to consider material facts presented to the judge before his or her decision.

Id. at 1-2. Because I am using the Federal Rules to resolve the reconsideration motion, it is also appropriate to apply the time limits imposed by those rules for filing such motions. *Henrich v. Ecolab, Inc.*, ARB No. 05-00030, ALJ No. 2004-SOX-00051 at 6 (ARB May 30, 2007) ("ALJs – who are subject to the ALJ procedural rules, including the injunction to refer to the Rules of Civil Procedure when necessary – must observe the timeliness provisions in those Rules, and we should review ALJ decisions for compliance with those provisions."); *see also Prime Roofing, Inc.*, WAB No. 92-15 (July 16, 1993) (affirming ALJ decision denying motion for new trial because motion did not conform to timeliness and substantive requirements contained in Fed. R. Civ. P. 59(e) & 60(b)).

When the motion to reconsider was filed on October 20, 2009, the time limit for filing such motions under the Federal Rules was ten business days from the date of entry of judgment.[2] Fed. R. Civ. P. 59(e) & 6(a). When calculating the ten day period, the day of the entry of the order and intervening weekends and legal holidays are not counted. Fed. R. Civ. P. 6(a). In the instant case, my order granting summary judgment entered on October 5, 2009, and the tenth day, excluding weekends and the Columbus Day holiday, falls on October 20, 2009. Because the motion was filed on that day, it is timely.

[2] Effective December 1, 2009, the Federal Rules were amended expanding the deadline to 28 calendar days from entry of judgment.

Turning to the merits of the motion, I agree that Mara has not met her burden under the reconsideration standard. In reviewing the supplemental affidavit, it is clear that all of the facts contained therein were readily available to Mara prior to my decision on summary judgment. A motion for reconsideration based upon new evidence will be denied if that evidence "in the exercise of due diligence, could have been presented earlier." *Emmanuel v. Int'l Bhd. of Teamsters, Local Union No. 25*, 426 F.3d 416, 422 (1st Cir. 2005). Mara chose to proceed on summary judgment, providing little factual background, standing primarily on a photocopied affidavit submitted in a state employment discrimination proceeding. She cannot now have a second bite at the apple.

Even if I were to consider the supplemental affidavit on the merits, there is nothing new in the affidavit that would require me to change course from my earlier decision. To boost her argument that she engaged in protected activity under SOX, she continues to state in the supplemental affidavit that she believed the hedge ineffectiveness backup documentation was "incorrect" or "false," and she communicated to her supervisor, Mr. Beaury, that it was "reckless" to publish the SET ineffectiveness numbers without running the regressions. Supp. Aff. at ¶¶13-18. The supplemental affidavit provides nothing new as it still devoid of specific allegations of fraud. The relevant inquiry is what was actually communicated to the employer prior to the alleged retaliation, and if Mara failed to inform SET that she believed the company was violating some federal rule or law relating to fraud against shareholders, there is no protected activity. *See Platone v. FLYI, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-00027 (ARB Sept. 29, 2006); *Allen v. Stewart Enter., Inc.*, 2004-SOX-00060/61/62 (A.L.J. Aug. 17, 2004), *aff'd* ARB No. 06-081 (ARB July 27, 2006) (complainants did not engage in protected activity by reporting accounting irregularities because they did not believe the respondent had acted intentionally; complainant must reasonably believe reported activity was fraudulent). There is simply no new evidence that demonstrates Mara engaged in any protected activity.

Turning to whether SET is a covered employer under SOX by virtue of its agency relationship with its publically traded parent, Sempra Energy, Mara makes the following arguments: (1) Sempra Energy's compliance plan establishes that an agency relationship exists with SET; (2) The CFO for SET who signed Mara's pay checks was "known as being associated with Sempra Energy;" and (3) On a daily basis when Mara went to work at SET, she walked passed the office the Chairman of Sempra Commodities, "a subsidiary of Sempra Global." These conclusory, self-serving statements do little to advance her cause. The compliance plan attached as Exhibit 2 to her motion does not establish the agency relationship and veil piercing required under SOX. "Whether a particular subsidiary or its employee is an agent of a public parent for purposes of [Sarbanes-Oxley] should be determined according to principles of general common law agency . . . [which] 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 v. PCC Flow Technologies Holdings, Inc*., ARB No. 04-149, ALJ No. 2004-SOX-11 at 14-15 (ARB May 31, 2006) (quoting Rest. 2d Agency 1(1), comment b). The agency at issue must relate to employment matters in order to be covered under SOX. *Rao v. DaimlerChrysler Corp.*, No. 06-13723, 2007 U.S. Dist. LEXIS 34922, at *15 (E.D. Mich. May 14, 2007); *Brady v. Calyon Sec. (USA) Inc*., 406 F. Supp. 2d 307, 318 n.6 (S.D.N.Y. 2005). None of these new points raised by Mara meet this requirement.

In considering the merits of Mara's motion, I have gone beyond what is required. The motion merely rehashes arguments previously made and attempts to present new facts that were well known to Mara at the inception of this matter. The summary decision motion, with the supporting affidavits and briefs previously submitted, is not a dress rehearsal for reconsideration. "Arguments which counsel did not present the first time or which counsel elects to hold in abeyance until the next time will not be considered. Arguments which were fully considered and rejected by the court the first time will not be considered when repeated by counsel the second time." *In re Armstrong Fixtures Corp*., 139 B.R. 347, 350 (Bankr. W.D. Penn. 1992). For the foregoing reasons, the motion to reconsider is **DENIED**.

SO ORDERED.

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JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts