U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 October 2009

CASE NO.: 2009-SOX-00018

In the Matter of:

KENNON MARA
Complainant

v.

SEMPRA ENERGY TRADING, LLC
Respondent

Appearances:

John F. Geida, Esq., Law Offices of Norman A. Pattis, LLC, Bethany, CT for the Complainant

Kathleen M. McKenna, Esq. and Thomas A. McKinney, Esq., Proskauer Rose LLP, New York, NY for the Respondent

Before: Jonathan C. Calianos, Administrative Law Judge

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. Procedural Background

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 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 a letter dated November 19, 2008, the Regional Administrator for OSHA, acting as an agent for the Secretary of Labor ("Secretary"), found that Mara was not a covered employee under SOX. OSHA No. 1-0080-08-027 (November 19, 2008).

On December 22, 2008, Mara filed a timely notice of appeal objecting to the Secretary's findings, and requested a *de novo* hearing before an Administrative Law Judge ("ALJ") pursuant to 29 C.F.R. § 1980.106. On January 13, 2009, I issued a Notice of Hearing and Pre-Hearing Order ("Pre-Hearing Order") setting various deadlines and scheduling the matter for a formal hearing in New York on March 18, 2009. On February 23, 2009, the Respondent filed a Motion for Summary Decision ("Mot. Sum. Dec."), requesting, *inter alia*, that all deadlines contained in the Pre-Hearing Order be suspended. On February 26, 2009, I received a motion from Mara seeking additional time to respond to SET's motion and a continuance of the formal hearing. On February 27, 2009, I held an off-the-record telephone conference on Mara's motion. Her counsel indicated that he was just assigned the file because her prior attorney left the law firm and he needed additional time to become familiar with the issues in dispute. On March 3, 2009, I issued an order granting Mara an extension until March 20, 2009 to respond to SET's motion. I also cancelled the hearing and suspended all deadlines in the Pre-Hearing Order until further order. On March 12, 2009, Mara filed a waiver pursuant to 18 U.S.C. §1514A(b)(1)(B). On March 20, 2009, Mara filed a Response in Opposition ("Mara Resp."), and on April 7, 2009, SET filed a Reply Memorandum ("Mem. in Resp.").

For the reasons set forth below, I find that there is no genuine issue as to any material fact and SET is entitled to judgment as a matter of law. Because SET is not a covered employer and Mara did not engage in protected activity under SOX, the complaint is DISMISSED WITH PREJUDICE.

II. Background[1]

A. The Business of SET

SET is a limited liability company with its principal place of business in Stamford, Connecticut. Mot. Sum. Dec. at 3 (Feb. 17, 2009). SET is a full-service energy trading company that markets and trades physical and financial energy and metal products, including electric power, natural gas, crude oil, base metals, and associated commodities. *Id.* SET is not a publicly-traded company with securities registered under the Securities Exchange Act of 1934, and SET is not required to file reports under Section 15(d) of the Securities Exchange Act of 1934. Beaury Aff. ¶ 9 (Feb. 12, 2009).

Prior to April 1, 2008, SET was a wholly-owned, indirect subsidiary of Sempra Energy. Mot. Sum. Dec. at 3. Sempra Energy is a public utility holding company headquartered in San Diego, California and traded on the New York Stock Exchange. *Id.* As of April 1, 2008, SET became a wholly-owned subsidiary of RBS Sempra Commodities LLP, a United Kingdom limited liability partnership. *Id.* RBS Sempra Commodities is owned by The Royal Bank of

[1] The majority of the Background is taken from Michael Beaury's Affidavit cited in SET's Motion for Summary Decision. Mara did not provide a factual background in her response. However, I have added information from Mara's affidavit filed with the State of Connecticut Commission on Human Rights and Opportunities. The affidavit is entitled: Complainant's Affidavit of Illegal Discriminatory Practices and was attached to her response to the summary judgment motion.

Scotland ("RBS"). *Id.* at 3-4. RBS, a public limited company registered in Scotland, is a financial holding company under the U.S. Bank Holding Company Act of 1956, registered with, and subject to examination by the Board of Governors of the Federal Reserve System, and is engaged in a full range of banking, capital markets, and asset management activities. *Id.* at 4. RBS is a wholly-owned subsidiary of The Royal Bank of Scotland Group ("RBS Group"), a public company registered in Scotland. *Id.* RBS Group is headquartered in Edinburgh, Scotland, and is traded on the London Stock Exchange. *Id.*

SET at all times relevant to this matter has maintained its own offices, made all employment-related decisions independent of its parents, Sempra Energy and RBS, and maintained a separate human resources department, as well as its own employment policies, procedures, handbook, and payroll. Beaury Aff. ¶ 11. SET's parents generally were not involved in any SET decision concerning the hiring, firing, discipline, compensation, or bonuses of SET employees. *Id.* at 12. No decision concerning the Complainant was ever made by Sempra Energy or RBS. *Id.* at 13.

B. The Complainant's Tenure at SET

i. The Complainant's Retention and Nature of Her Relationship with SET

Michael Beaury is the Controller of SET and is responsible for the majority of SET's accounting functions. Mot. Sum. Dec. at 4. Brian McGowan was a consultant hired by SET in 2003 to draft and implement policies and procedures relating to FAS 133.[2] *Id.* In 2007, McGowan had more work than he could handle. *Id.* at 5. He recommended that SET retain Kennon Mara Associates, and its principle, Kennon Mara - the Complainant, on a contract basis to assist with the FAS 133 work until RBS's purchase of SET was complete, which was anticipated to occur by the end of 2007. *Id.* at 4-5. On April 2, 2007, Beaury retained Kennon Mara Associates to provide FAS 133 accounting services to SET. Beaury Aff. ¶ 20. Mara was engaged as an independent contractor and was to assume the task of preparing certain monthly FAS 133 oil hedge documentation until such time as the need for the documents was obviated by the transition to international accounting standards, which was expected to occur shortly after the acquisition of SET by RBS. Beaury Aff. ¶ 22, 24; Mot. Sum. Dec. at 5 (*citing* Compl. at 2). To perform these services, Mara was given access to SET's financial records for testing and analysis of the data contained in the hedge ineffectiveness footnote of SET's financial statements. Mot. Sum. Dec. at 4.

In October 2007, outside the confines of an employee review process or normal compensation evaluation cycle, Mara met with Beaury to negotiate a higher hourly rate for her

[2] FAS 133 establishes accounting and reporting standards for derivative instruments and hedging activities. Mot. Sum. Dec. at 4 n.5. For example, a company that owns a quantity of physical oil may reduce its risk (or hedge) against price fluctuations by buying or selling contracts for oil in the future at a fixed price today. The contract to buy or sell oil in the future is considered a derivative. *Id.* FAS 133 establishes standards for companies engaged in hedging to allow them to account for the value of both the underlying asset and the derivative hedge, and any changes in value over the reporting period. FAS 133 also provides guidance for disclosing "hedge ineffectiveness" -- a measurement reflecting how well the hedge worked in offsetting price fluctuations in the underlying asset. To the extent the price fluctuations of the asset were not offset by purchasing the derivatives, the hedge was ineffective. *Id.*

services. Mot. Sum. Dec. at 5. Mara informed Beaury that she intended to raise her hourly rate from $50 to $85, and that if she did not get the higher rate, she would terminate her services with SET. *Id.* Because the RBS acquisition of SET was very close to completion, Beaury agreed to pay Mara a higher hourly rate rather than risk losing her services. *Id.* The parties settled on an increased rate of $65/hour. *Id.*

Kennon Mara Associates submitted invoices to SET for all the work performed by Mara on an hourly basis. Mot. Sum. Dec. at 5. SET paid the invoices without withholding any sums for taxes pursuant to a W-9 form provided by Mara listing the tax identification number for her business. *Id.* At the end of 2007, SET issued Kennon Mara Associates a form 1099-MISC setting forth all the sums paid by SET to Mara's company. *Id.* During the time in question, SET did not deduct employee taxes for Mara, did not cover Mara under its workers' compensation policy, and Mara did not participate in any employee benefit programs or receive any bonuses. *Id.* Mara's work was performed with little supervision and oversight and she set her own work schedule with little input from SET. *Id.* at 5. She often would arrive at work later than SET employees and she would also work later. *Id.*; *see* Beaury Aff. Exhibits 2, 3, and 6.

ii. The Complainant's Conversation with Beaury and the Aftermath

Shortly after Mara started working for SET, she was informed about a "backlog" regarding FAS 133 reporting and she was asked to "fill in" the backlog. Mara Aff. ¶ 12. This "filling in" required running regressions for six months worth of hedges and creating hedge documents for every hedge dating back to December 2005. *Id.* According to Mara, the "backlog" she was asked to "fill in" consisted of revising most of the quarterly published hedge ineffectiveness numbers that had been incorrect. *Id.* In her Affidavit of Illegal Discriminatory Practices that she filed with the State of Connecticut Commission on Human Rights and Opportunities,[3] Mara states that she was disturbed with directions "to essentially cook the books in order to make the records look legitimate." *Id.* Without much elaboration, she apparently viewed this "filling in" as equivalent to "cooking the books."

Uncomfortable with her assignment and believing that she had a duty to bring the footnote inaccuracies to the attention of her supervisors, in October of 2007, Mara met with Beaury. Mara Aff. ¶ 13. According to Beaury, Mara told him that she was finding mistakes in documentation regarding the ineffectiveness numbers in the footnote and she complained that certain documentation was not prepared on a timely basis. Beaury Aff. ¶ 35. Beaury was confused by Mara's statements and asked her several questions about FAS 133 accounting practices to which Mara responded: "I don't know, I didn't do that part." Beaury Aff. ¶ 36. At the conclusion of the meeting, Beaury believed that Mara lacked a sufficient basis to question the validly of the footnote and the financial reporting of SET. *Id.* From Mara's perspective, Beaury had no knowledge about the backlog and she was shocked by "his lack of concern regarding the

[3] It is important to note that the record before me contains very little from Mara in the way of substantive facts to support a SOX complaint. Instead, Mara photocopied an affidavit submitted in a state employment discrimination proceeding and filed it here in support of her SOX claim. While certainly some facts may be relevant to both proceedings, many are not and Mara has provided little else to serve as a foundation for her Complaint and opposition to summary judgment.

flaws in record-keeping and the unethical, as well as illegal, nature of the assignment she had been given." Mara Aff. ¶ 13.

Following the meeting, Beaury states that he investigated Mara's concerns regarding the hedge ineffectiveness footnote and the alleged calculation errors. Mot. Sum. Dec. at 6. Specifically, he called Margie Carlacci, the Controller for the Oil Accounting Group, and McGowan in separately to discuss the footnote and Mara's concerns. *Id.* Both Carlacci and McGowan explained how the ineffectiveness footnote was calculated and assured Beaury that there were no problems with SET or Sempra's financial reporting. *Id.*; Beaury Aff. ¶ 38.

Following his independent meetings, Beaury met again with Mara, explaining to her that she did not have a full grasp of FAS 133 accounting, and that based upon his conversations with Carlacci and McGowan, he was confident that there were no calculation errors in the footnote and there was no implication for SET's earnings. Mot. Sum. Dec. at 6. Beaury stated that his conversation with Mara concerned only alleged inaccuracies in the hedge ineffectiveness backup documentation, and at no point did Mara mention fraud or indicate that any type of fraud was occurring with regard to the hedge ineffectiveness footnote or otherwise. Beaury Aff. ¶ 40.

In December 2007, shortly after disclosing her concerns to Beaury, Mara alleges that she became aware of false rumors circulating among her coworkers and supervisors. Mara Aff. ¶ 14. She believes that these rumors were spread intentionally to intimidate, humiliate, and harass her into leaving SET. *Id.* According to Mara, the rumors stated that she had various illnesses, she was sexually promiscuous, and engaged in "sex acts" with a coworker. *Id.* Mara alleges that these rumors were started and publicized by various SET employees including Carlacci. *Id.*

According to Mara, the rumors continued into the spring of 2008 and were being published on a website known as pickhoops.com, where an SET employee ran an office "March madness pool" and moderated a related blog. Mara Aff. ¶ 16. Mara brought her concerns to Andrea Elder-Howell, an attorney for the Respondent. *Id.* Mara states that Attorney Elder-Howell did nothing in response and merely told her that she was being paranoid. *Id.* Thereafter, Mara alleges that SET had members of its IT department access her computer and invade her personal email accounts. Mara Aff. ¶ 17. As a result, Mara claims that personal medical information was obtained and disseminated among her coworkers who then used this information to cause further harassment. *Id.*

iii. The Complainant's Departure

On April 7, 2008, Mara alleges that she went to work at SET and was called a "slut" by coworkers. Mara Aff. ¶ 19. She states that SET employees went through her personal belongings and continued disseminating rumors. *Id.* Overwhelmed, she left that day at about 3:10 p.m., and called McGowan later to inform him that she was resigning because of the hostile work environment and the ongoing harassment. *Id.*

III. Discussion

A. Motion for Summary Decision

i. Summary of the Arguments

SET seeks summary decision on three grounds: (1) Mara is an independent contractor and not an employee covered under SOX; (2) SET is not a publically-traded company and therefore is not a covered employer under SOX; and (3) Mara does not allege that she engaged in protected activity, and thus cannot establish a *prima facie* case of prohibited retaliation. Mot. Sum. Dec. at 1, 7.

Mara argues that the matter is not ripe for summary disposition because there are unresolved factual issues in dispute and there has been no discovery, making SET's motion premature. Mara Resp. at 1-2. Mara asserts that: (1) the issue of whether she is an employee covered under SOX is a fact-specific inquiry which precludes summary judgment and dismissal; (2) She cannot adequately addressed whether SET is a covered employer under SOX because discovery has been stayed; and (3) her original SOX complaint alleged that she engaged in protected activity by reporting SET's poor accounting practices to her supervisors and she believed this activity contained "an element of fraud". *Id.* at 2, 5-6

ii. Availability of Summary Decision

"One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses. . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). "Any party may . . . move with or without supporting affidavits for a summary decision on all or any part of the proceeding." 29 C.F.R. § 18.40(a). "[An] administrative law judge may enter summary judgment for either party if . . . there is no genuine issue as to any material fact and [the] party is entitled to summary decision." 29 C.F.R. § 18.40(d). A "material fact" is one whose existence affects the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The party moving for summary judgment always bears the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met its burden, its opponent must do more than simply show that there is some doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party opposing the motion must set forth specific facts showing there is a genuine issue of fact for the hearing. *Id.* at 587 (citations omitted); 29 C.F.R. § 18.40(c).

In ruling on a motion for summary decision, "[t]here is no requirement that the [ALJ] make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial. . . ." *Anderson*, 477 U.S. at 250. In making this determination, the ALJ is to view all the evidence and factual inferences in the light most favorable to the nonmoving party. *Reddy v. Medquist, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 04-123, ALJ No. 2004-SOX-

35 at 5 (ARB Sept. 30, 2005) (citation omitted). However, if the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact and the moving party is entitled to summary decision. *Celotex*, 477 U.S. at 322-23.

iii. Mara's Objection to Summary Decision Before Discovery

Initially, Mara argues that SET's Motion for Summary Decision is premature because there has been no discovery, and most summary judgment motions are filed after discovery is complete. Mara Resp. at 2. By Order dated March 3, 2009, the original deadlines in the Pre-Hearing Order were suspended and Mara asserts that because of the suspension, the automatic disclosure provisions contained in the Pre-Hearing Order were negated and no discovery was conducted in this matter. *Id.* at 6. Given the lack of discovery, Mara asserts that she cannot adequately address the issues raised by SET because the facts relevant to the issues are in the exclusive possession of SET. *Id.* at 2. Mara concludes that it would be unjust to allow the Respondent to escape disclosure of relevant fact by hiding behind a Motion for Summary Decision. *Id.*

SET counters that the matter is ripe for summary disposition, pointing out that the Pre-Hearing Order established a deadline of February 16, 2009 to file such motions, including motions seeking dismissal of the complaint. Mem. in Resp. at 5 n.3; Notice of Hearing and Pre-Hearing Order (Jan. 13, 2009). SET correctly states that if it had not filed its motion for summary judgment by the deadline, it would have been in violation of the Pre-Hearing Order. Mem. in Resp. at 5 n.3.

I find that the Complainant has failed to adequately explain why she did not conduct discovery in this matter. The January 13, 2009 Pre-Hearing Order required the parties to have a conference regarding discovery within ten days of the order and within five days thereafter, automatically produce to opposing counsel various documentation regarding alleged claims or defenses. SET's counsel asserts that he timely complied with the Pre-Hearing Order by calling Mara's counsel within the initial ten day period to confer on discovery matters, but was unable to reach him. Mem. in Resp. at 7. He left a voicemail message informing Mara's counsel that he believed all witnesses and documents in his defense had already been disclosed and that he would be seeking summary decision on the Complaint. *Id.* SET claims that Mara never responded, and during the ensuing weeks, she never provided initial disclosures or served any discovery requests. *Id.* Even after being served with SET's Motion for Summary Decision dated February 17, 2009, Mara still did not seek discovery. *Id.* In her response, Mara has not disputed any of these facts and it is unclear to me how the March 3, 2009 Order could possibly justify Mara's failure to take discovery during the preceding seven weeks if she thought discovery was necessary.

I find that Mara had ample opportunity to conduct discovery prior to my March 3, 2009 Order, but she chose not to, and she cannot now use this argument as a basis to defeat summary judgment. While an ALJ may deny a motion for summary judgment when "the moving party denies access to information by means of discovery to a party opposing the motion," 29 C.F.R. 18.40(d), there is no evidence in this record that SET denied Mara access to any information.

Simply stated, Mara did not comply with the Pre-Hearing Order by taking part in the initial conference or providing any initial disclosures. Furthermore, she failed to engage in any discovery right up until my March 3, 2009 Order. While SET's conduct during discovery does not seem to be at issue in this matter, if there was any lack of cooperation on the part of SET, Mara could have alerted the court by filing an appropriate motion.

Furthermore, the information relating to Mara's status as an employee versus an independent contractor, as well as her alleged protected activity, is all within her control. It is unclear why she would need any discovery from SET on either of those issues. If Mara needed information regarding SET and whether it is a covered employer under SOX, she could have served appropriate discovery requests on SET. On February 26, 2009, Mara requested an extension of time to reply to the summary judgment motion, yet she never suggested that additional time was necessary to conduct discovery in either her motion or during the telephone conference held on February 27, 2009 concerning her motion. For the foregoing reasons, Mara's argument that a motion for summary decision is premature at this stage of the litigation is rejected.

B. SOX Whistleblower Complaint

i. The Elements of a SOX Whistleblower Complaint

SOX encompasses many statutes and schemes aimed at investor protection goals, and the whistleblower protections found at 18 U.S.C.A. § 1514A are a relatively small portion of the Act. *See Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 5 (1st Cir. 2006), *cert. denied* 548 U.S. 906 (2006). The statute which controls the instant proceeding protects "employees of publically traded companies" who lawfully "provide information … or otherwise assist in an investigation regarding any conduct which the employee believes constitutes a violation" of federal statutes prohibiting various frauds (specifically bank, mail, securities, and wire frauds), any rule or regulation of the Securities and Exchange Commission ("SEC"), or any other provision of federal law relating to fraud against shareholders. 18 U.S.C.A. § 1514A[4]; *see also Carnero*, 433

[4] 18 U.S.C.A. § 1514A(a) provides in relevant part:

> 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 discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--
>
> **(1)** to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of … [18 U.S.C. §§] 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
>
> **(A)** a Federal regulatory or law enforcement agency;
>
> **(B)** any Member of Congress or any committee of Congress; or
>
> **(C)** a person with supervisory authority over the employee…; or
>
> **(2)** to file, cause to be filed…or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of [18 U.S.C. §§] 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any

F.3d at 5; *Klopfenstein v. PCC Flow Technologies Holdings, Inc*., USDOL/OALJ Reporter (PDF), ARB No. 04-149, ALJ No. 2004-SOX-11 at 1 n.1 (ARB May 31, 2006). "The § 1514A whistleblower provision … serves to 'encourage and protect [employees] who report fraudulent activity that can damage innocent investors in publicly traded companies.'" *Day v. Staples, Inc.*, 555 F.3d 42, 52 (1st Cir. 2009) (quoting S. Rep. No. 107-146, at 19); *see also* 148 Cong. Rec. S7420, 2002 WL 1731002 (daily ed. July 26, 2002).

A complaint under SOX shall be dismissed unless the complainant makes a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. 29 C.F.R. § 1980.104(b). In order to do so, the employee must prove by a preponderance of the evidence that: (1) she engaged in protected activity; (2) the employer knew or suspected that the employee engaged in protected activity; (3) the employee suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the decision to take action that adversely affected the complainant. 29 C.F.R. § 1980.104(b)(1)(i)-(iv). If the employee makes a *prima facie* showing of discrimination, the employer may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct. 29 C.F.R. § 1980.104(c).

ii. Mara's Coverage Under SOX

SOX provides protection for "employees" of publicly traded companies. 18 U.S.C.A. § 1514A(a). An employee under SOX 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. The definition of employee includes officers, contractors, subcontractors and agents of any covered company. 18 U.S.C.A. § 1514A(a).

SET argues that Mara is not protected under SOX because she was not an employee of SET. Mot. Sum. Dec. at 8-10; Mem. in Resp. at 4. Instead, SET asserts that Mara was an independent contractor and SOX does not cover independent contractors. *Id.* When a statute uses the term "employee" and it does not provide a helpful definition, the court must infer that Congress meant to describe the conventional master-servant relationship under common law agency doctrine. *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322-23 (1993) (citations omitted). The court must consider the following factors to determine whether a complainant is an employee under the common law of agency:

> the hiring party's right to control the manner and means by which the product is accomplished[;] . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long

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rule or regulation of the Securities and Exchange Commission, or any provision of Federal Law relating to fraud against shareholders.

> to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of the employee benefits; and the tax treatment of the hired party.

Id. at 323-24 (citation omitted). This analysis has been applied to whistleblower cases. *See Bothwell v. American Income Life*, 2005-SOX-00057, slip op. at 4 (A.L.J. Sept. 19, 2005) (evidence that company had control over complainant's work product was sufficient to infer that complainant was an employee); *Peck v. Safe Air International, Inc.*, 2001-AIR-00003 (A.L.J. Dec. 19, 2001); *Plumlee v. Dow Chemical Co.*, 1998-TSC-00008 (A.L.J. Feb. 25, 1999); *Reid v. Methodist Medical Center of Oak Ridge*, 93-CAA-00004 (Sec'y Apr. 3, 1995). The fact that Mara called herself an independent contractor does not end the inquiry and I still must look at the applicable hallmarks. *See Bothwell*, slip op. at 4.

A number of factors indicate that Mara was an independent contractor and not an "employee." Mara markets herself as an accounting consultant and maintains a separate business identity. She was not hired by SET directly and her compensation rate and job description were negotiated by McGowan, a consultant for SET. While providing accounting services to SET, she retained discretion over when and how long she worked, often setting her own schedule. Mara's company, Kennon Mara Associates, invoiced and was paid by SET for all of the work performed by Mara. At the end of 2007, Mara received a Form 1099-MISC from SET, reporting the total sums paid to Kennon Mara Associates that were not subject to income tax withholding. SET did not withhold or pay any taxes associated with the hours worked by Mara, it did not cover her under its workers' compensation policy, and Mara did not participate in any employee benefit programs or receive any bonuses.

On the other hand, applying agency principles, I also find that there is some evidence indicating that Mara was an "employee" of SET. Mara was physically present at SET's location in Stamford, Connecticut; she received instruction on how to perform certain tasks; SET assigned an additional project to her during her tenure; and she continued to work longer than originally anticipated. Mara Resp. at 4-5. Based on the foregoing, I find that there exists a genuine issue of material fact in dispute regarding whether Mara was an employee of SET. Accordingly, SET is not entitled to summary decision on this issue.[5]

iii. SET's Coverage Under SOX

SET states that it is not a covered employer under SOX because it is not a publicly-traded company. Mot. Sum. Dec. at 1, 7-8. A "company" under SOX is defined as "any company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*) and any company required to file reports under Section 15(d) of the Securities

[5] While not raised as an argument by Mara, I question whether she would qualify as an employee of SET for purposes of SOX because she may be "an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.101; *see also Deremer v.Gulfmark Offshore, Inc.*, 2006-SOX-00002, slip op. at 43-44 (A.L.J. June 29, 2007) (finding that an independent contractor qualified as an individual whose employment could be affected by a company or company representative).

Exchange Act of 1934 (15 U.S.C. § 78o(d))." 29 C.F.R. § 1980.101. "These registration and reporting provisions apply to U.S. and foreign companies listed on U.S. securities exchanges." *Carnero*, 433 F.3d at 5. There has been no showing that SET fits within this narrow definition. Therefore, I must examine SET's relationship with its parent companies to determine whether SET comes within the confines of SOX.

SET correctly notes that SOX does not expressly include subsidiaries of publicly-traded companies within its grasp. Furthermore, it is a general principle of corporate law that a parent corporation is not automatically liable for the acts of its subsidiaries. *United States v. Bestfoods, et al.*, 524 U.S. 51, 61 (1998); *Rao v. DaimlerChrysler Corp.*, No. 06-13723, 2007 U.S. Dist. LEXIS 34922, at *7, 8-9 (E.D. Mich. May 14, 2007) (citing *Lowe v. Terminix Int'l Co.*, 2006-SOX-00089 (A.L.J. Sept. 15, 2006) & *Bothwell v. Am. Income Life*, 2005-SOX-00057 (A.L.J. Sept. 19, 2005)). However, a publicly-held company does not have to be named as a respondent in a SOX case "so long as the complainant names at least one respondent who is covered under the Act as an 'officer, employee, contractor, subcontractor, or agent' of such company." *Klopfenstein*, ARB No. 04-149, ALJ No. 2004-SOX-11 at 13. A privately-held subsidiary of a publicly-traded parent company is bound by SOX when an agency relationship exists between the subsidiary and the parent. *Id.* at 13-14; 18 U.S.C.A. § 1514A(a). *See Carnero*, 433 F.3d at 6 (an employee of a non-publicly-traded subsidiary may be covered under SOX when the subsidiary is actually an agent of the publically-traded parent, even if the parent company has no role in affecting the employment of the subsidiary's employee); *compare Brady v. Calyon Sec. (USA) Inc.*, 406 F. Supp. 2d 307, 318-19 (S.D.N.Y. 2005) (dismissing SOX claim where employer's status as "agents and/or underwriters of numerous public companies" was insufficient basis for SOX application and employer was neither publicly-traded nor issued securities). "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*, ARB No. 04-149, ALJ No. 2004-SOX-11 at 14-15 (quoting Rest. 2d Agen. 1(1), comment b). The agency at issue must relate to employment matters in order to be covered under SOX. *Rao*, 2007 U.S. Dist. LEXIS 34922, at *15; *Brady*, 406 F.Supp.2d at 318 n.6.

SET denies that it acted as an agent of its publicly-traded parents. Mot. Sum. Dec. at 7. It argues that a parent company can only be liable when it "controlled or influenced the work environment of, or termination decision about, an employee of its subsidiary company." *Id.* at 8 (quoting *Neuer v. Besselieu*, 2006-SOX-00132, slip op. at 4 (A.L.J. Dec. 5, 2006)). SET cites a number of ALJ decisions where it was found that a private subsidiary was not acting as an agent for its public parent. Mot. Sum. Dec. at 7 (citing *Savastano v. WPP Group, PLC*, 2007-SOX-00034 (A.L.J. July 18, 2007) (granting respondent's motion for summary decision in favor of non-publicly traded subsidiary); *Bothwell*, 2005-SOX-00057 (granting respondent's motion for summary decision on jurisdictional grounds where there was no evidence that the subsidiary was acting as an agent of the parent with respect to employment practices toward the complainant); *Hughart v. Raymond James & Assoc., Inc.*, 2004-SOX-00009, slip op. at 43-45 (A.L.J. Dec. 17, 2004) (finding no SOX jurisdiction over a subsidiary).

SET was a wholly-owned, indirect subsidiary of Sempra Energy during all but the final seven days at issue in the instant Complaint (until April 1, 2008). SET highlights the following facts to establish that it did not act as Sempra Energy's agent: SET at all times relevant to this matter maintained its own offices, made all relevant employment-related decisions independent of its parents, and maintained a separate human resources department with its own employment policies, procedures, handbook, and payroll. Beaury Aff. ¶ 11. Additionally, it was very uncommon for SET's parents to get involved with any decisions concerning hiring, firing, discipline, compensation, or bonuses of its employees. Beaury Aff. ¶ 12. SET asserts that it was the only entity involved in the decision to hire Mara and negotiate her rate of compensation and it contends that neither Sempra Energy nor RBS even knew of Mara's existence until after she filed her SOX complaint with OSHA. Beaury Aff. ¶ 13; Mot. Sum. Dec. at 8.

Mara raises no issues of fact to negate SET's contention that an agency relationship was lacking with its public parents. Rather, Mara rests on her argument that summary judgment is premature because she did not have the opportunity to conduct discovery on the matter. Mara Resp. at 6. While I have addressed (and rejected) the majority of Mara's argument *supra*, I will add the following: In order for Mara to have filed the instant Complaint, she should have had some information available to establish a *prima facie* case that SET acted as an agent of its public parent. She has presented nothing to counter the facts set forth in SET's motion and accompanying affidavits. She makes no allegation that anyone at Sempra Energy or RBS knew or took part in any of the decisions regarding her employment or compensation, or that they had any involvement in employment related decisions at SET. In order to defeat a motion for summary judgment, Mara must set forth *specific facts* showing there is a genuine issue for trial. *See Lowe v. Terminix International Co.*, 2006-SOX-00089, slip op. at 7 (A.L.J. Sept. 15, 2006) (granting summary decision to non-publically-traded subsidiary before discovery on agency issue because complainant never addressed the theory of agency in his complaint or pointed to anything in the record that would create a genuine issue of material fact that an agency relationship existed between the respondent and the parent). Mara has neither alleged nor set forth any specific facts to establish that an agency relationship existed between SET and its publically traded parents.

Based upon the foregoing, I find that SET is not a covered employer under SOX because SET is not a publicly-traded company and it did not act an agent on employment matters for either Sempra Energy or RBS. Consequently, SET is entitled to summary decision in its favor because the Complainant can not establish that SET is an employer coved by SOX.

iv. Mara's Protected Activity

While my findings above are dispositive, for completeness of the record and possible appellate purposes, I will address SET's final argument that Mara did not engage in protected activity under SOX. Mot. Sum. Dec. at 1, 7, 10-13. Protected activity under SOX occurs when an employee "provide[s] information … regarding any conduct which the employee reasonably believes constitutes a violation" of three broad categories: (1) a violation of specified federal criminal fraud statutes: mail fraud, wire fraud, bank fraud, or securities fraud; (2) a violation of any rule or regulation of the SEC; and/or (3) a violation of any provision of federal law relating to fraud against shareholders. 18 U.S.C.A. § 1514A(a)(1); *Day*, 555 F.3d at 54-55. "[A]n

employee's protected communications must relate "definitively and specifically" to the subject matter of the particular statute under which protection is afforded." *Platone v. FLYI, Inc.*, ARB No. 04-154, 2006 WL 3246910, at *8 (ARB Sept. 29, 2006). *See also Harvey v. Home Depot USA, Inc.*, ARB No. 04-114, 2006 WL 3246905, at *11 (ARB June 2, 2006) ("[A]n employee's complaint must be directly related to the listed categories ....").

"[SOX] requires that the employee "reasonably" believe in the unlawfulness of the employer's actions. . . . [T]he reasonableness must be scrutinized under both a subjective and objective standard. . . ." *Harp v. Charter Communications, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009) (citing *Day*, 555 F.3d at 54); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008); *Allen v. Administrative Review Board*, 514 F.3d 468, 477 (5th Cir. 2008). Subjective reasonableness requires that the employee "actually believed the conduct complained of constituted a violation of pertinent law." *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008). Objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Allen*, 514 F.3d at 477. The employee must have "an objectively reasonable belief that conduct complained of constituted a violation of the relevant law set out in the statute." *Day*, 555 F.3d at 55. As long as the employee reasonably believes the contested activities are unlawful, the employee does not have to provide the employer with specific citations to laws or regulations she believes were violated nor does she need to show an actual violation of the provision involved. *Day*, 555 F.3d at 55. However, the employee must show that her communication with the employer specifically related to one of the laws listed in SOX. *Id.*; *see Fraser v. Fiduciary Trust Co. Int'l*, 417 F.Supp.2d 310, 322 (S.D.N.Y. 2006) ("While a plaintiff need not show an actual violation of law, or cite a code section he believes was violated, 'general inquiries' … do not constitute protected activity."). "The reasonableness of [the complainant's] belief [under SOX] must be measured against the basic elements of the laws specified in the statute. 'Fraud' itself has defined legal meanings and is not, in the context of SOX, a colloquial term. 'The hallmarks of fraud are misrepresentation or deceit.'" *Day*, 555 F.3d at 55 (citations omitted).

In reviewing what transpired between the parties, I find that there is no indication that Mara engaged in any protected activity. In her affidavit, Mara states that she met with Beaury regarding inaccuracies in the hedge ineffectiveness documentation and the fact that her assigned task required revising most of the quarterly published hedge ineffectiveness numbers. She went to Beaury "hoping to alert him to the problem and thereby resolve it. However, Beaury's response was simply that he did not know about the backlog." Mara Aff. ¶ 13. Mara does not describe her conversation with Beaury in great detail nor does she reveal much about what she communicated to him. She does state that she told Beaury that the reporting could trigger an SEC investigation given her knowledge about bad accounting practices. Mara. Resp. at 6 (citing Compl. at 3, first full paragraph). Beaury states in his affidavit that Mara never mentioned in any conversation the word "fraud" or indicated that any type of fraud was occurring regarding the hedge ineffectiveness footnote or otherwise. Surprisingly, Mara does not refute this contention.

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., USDOL/OALJ Reporter (PDF), 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). The fact that she alleges in her Complaint that she "believe[s] there is an element of fraud, with the refusal to start implementing better controls because one wants to cover-up the past mess" will not save the day. Mara Resp. at 5-6 (citing Compl. at 2, ¶3). Her belief regarding fraud after the alleged retaliation is irrelevant and cannot be used as a basis for establishing protected activity because Mara never conveyed this belief to SET prior to the alleged retaliation. At best, Mara made mention of accounting irregularities and that is not sufficient to establish protected activity under SOX. *See Stone v. Instrumentation Laboratory SpA*, 2007-SOX-00021 (A.L.J. Sept. 6, 2007) (granting summary judgment because complaints about "internal controls" are not protected complaints). Because Mara cannot establish the *prima facie* element that she engaged in activity protected under Section 806, SET is entitled to summary decision in its favor on this issue as well, and the Complaint must be dismissed.

IV. CONCLUSION

Based upon the foregoing and viewing all the evidence and factual inferences in the light most favorable to the Complainant, I find that she is unable to establish that SET is a covered employer under SOX. Furthermore, the Complainant has failed to allege, let alone establish, any facts sufficient to show that she engaged in protected activity. Because there is no genuine issue as to any material fact with regard to these issues, SET is entitled to judgment in its favor. Accordingly, the Complaint is DISMISSED WITH PREJUDICE.

V. ORDER

SET's Motion for Summary Decision is **GRANTED** and the Complaint is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

A

JONATHAN C. CALIANOS
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).