In the Matter of:

MICHAEL GALE, **ARB CASE NO. 06-083**

COMPLAINANT, **ALJ CASE NO. 2006-SOX-043**

v. **DATE: May 29, 2008**

WORLD FINANCIAL GROUP,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Lindsay R.M. Jones, Esq., *Lindsay R.M. Jones, LLC,* Decatur, Georgia

For the Respondent:
Kurt A. Powell, Esq., Kenneth L. Dobkin, Esq., Emily J. Burkhardt, Esq., *Hunton & Williams LLP,* Atlanta, Georgia

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Sarbanes-Oxley Act of 2002 (SOX)[1] and its implementing regulations.[2] Michael Gale filed a complaint alleging that his former employer, World Financial Group (WFG), violated the SOX by discharging him from employment. The Occupational Safety and Health Administration

[1] 18 U.S.C.A. § 1514A (West 2006).

[2] 29 C.F.R. Part 1980 (2007).

investigated the complaint and found that WFG did not violate the SOX. Gale thereafter requested a hearing before a Department of Labor Administrative Law Judge (ALJ).

On May 12, 2006, prior to a hearing, WFG filed a Motion for Summary Decision and Memorandum in Support (Motion). WFG argues that it is entitled to summary decision because it is not a covered employer under the whistleblower provision of the SOX, and because Gale did not engage in activity the SOX protects. Gale responded to the Motion. On June 9, 2006, the ALJ issued a Recommended Decision and Order Granting Respondent's Motion for Summary Decision (R. D. & O.). The ALJ held that, although a genuine issue of fact existed as to whether WFG was a covered employer under the SOX, WFG was entitled to summary decision on the issue of protected activity.[3] Gale appealed the ALJ's decision to this Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under SOX.[4] We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies also governs our review.[5] The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[6] Accordingly, summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.[7] A genuine issue of material fact is one, the resolution of which, "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[8]

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[9] "To prevail on a motion for summary judgment, the

---

3 R. D. & O. at 10-12.

4 Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

5 29 C.F.R. § 18.40 (2006).

6 Fed. R. Civ. P. 56.

7 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

8 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson*, 477 U.S. at 248.

9 *Anderson*, 477 U.S. at 255.

moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'"[10] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[11]

Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing."[12]

DISCUSSION

Coverage

WFG first argues that, because it is not a publicly traded company, it is not subject to the whistleblower provisions of the SOX.[13] But the SOX's whistleblower protection provision also prohibits "any officer, employee, contractor, subcontractor, or agent" of publicly traded companies from retaliating against employees.[14] Gale submitted evidence in support of his allegation that WFG is an agent of a publicly traded company and thus an employer covered under the SOX's whistleblower protection provision.[15] Accordingly, like the ALJ, we find that an issue of fact exists as to whether WFG is a covered employer. We therefore affirm the ALJ's denial of summary judgment of the grounds of coverage.

---

[10] *Celotex*, 477 U.S. at 322.

[11] *Nixon v. Stewart & Stevenson Servs., Inc*. ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 6 (ARB Sept. 28, 2007), citing *Celotex*, 477 U.S. at 322.

[12] 29 C.F.R. § 18.40(c).

[13] Motion at 3-5.

[14] *See* 18 U.S.C.A. § 1514A ("No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), 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… .").

[15] Gale submitted a copy of an United States Securities and Exchange Commission Form 20-F. It indicates that WFG is a part of AEGON N.V.'s Agency Group, which "offers a wide range of insurance products through agents dedicated to selling AEGON products … ." (Response, Exhibit 5 at 21).

Protected Activity

To prevail on his SOX complaint, Gale must prove by a preponderance of the evidence that: (1) he engaged in activity that the SOX protects; (2) WFG knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[16] Thus, protected activity is an essential, i.e., material element of Gale's case.

An employee engages in SOX-protected activity when he or she provides information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of the Federal statutes that address mail fraud, wire-radio-TV fraud, bank fraud, or securities fraud,[17] or any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against a covered company relating to any such alleged violation.[18]

The ALJ concluded that Gale failed to create a genuine issue of material fact regarding his alleged protected activity. We agree. Gale argued to the ALJ that he had expressed "concerns" about AEGON N.V.'s business operations, WFG's Associate Start-Up Acceleration Program, WFG's disclosure policies, and its assumption of losses resulting from the rescission of two sales transactions.[19] But to avoid summary decision, Gale must produce some evidence that he reasonably believed that AEGON N.V. or WFG was violating the fraud statutes, SEC rules or regulations, or a Federal law concerning fraud against shareholders. Gale did not produce this evidence. In fact, Gale's deposition testimony indicates that he did not believe WFG engaged in any illegal or fraudulent activity:

> Q. Well, did you, during the time that you were employed at – by World Financial Group or at World Group Securities, believe that the company was engaging in any kind of illegal, fraudulent or racketeering activity?

---

16 *See Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008 (ARB July 29, 2005).

17 18 U.S.C.A. §§ 1341, 1343, 1344, and 1348.

18 *See* 18 U.S.C.A. § 1514A(a).

19 *See* Response at 11, 13, 18, 24.

> A. I was uncomfortable with some of the practices that I observed.
> Q. That was not the question that I asked you. The question was, did you believe that the company was engaging in any kind of illegal or fraudulent activities?
> A. I did not believe that.[20]

CONCLUSION

Therefore, like the ALJ, we conclude that Gale has not presented sufficient evidence to create a genuine issue of fact that he engaged in SOX-protected activity, an essential element of his claim.[21] Accordingly, we **GRANT** WFG's Motion for Summary Decision and **DENY** Gale's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

---

20 Transcript of Video Deposition of Michael Gale at 205-06.

21 R. D. & O. at 10-12.