In the Matter of:

KAREN K. GATTEGNO,

COMPLAINANT,

v.

PROSPECT ENERGY CORPORATION; PROSPECT ADMINISTRATION, LLC; PROSPECT CAPITAL MANAGEMENT, LLC; JOHN F. BARRY, III; GRIER ELIASEK; MICHAEL E. BASHAM; ROBERT A. DAVIDSON; WALTER V. PARKER; EUGENE STARK; and DARIA BECKER,

RESPONDENTS.

ARB CASE NO. 06-118

ALJ CASE NO. 2006-SOX-008

DATE: May 29, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Karen K. Gattegno, *pro se*, Scarsdale, New York

For the Respondent:
Jay S. Berke, Esq., Edward L. Sample, II, Esq., *Skadden, Arps, Slate, Meagher & Flom LLP*, New York, New York

FINAL DECISION AND ORDER

The Complainant, Karen K. Gattegno, filed a complaint alleging that the Respondents, Prospect Energy Corporation, et al.,[1] retaliated against her in violation of the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act (SOX),[2] and its implementing regulations.[3] On May 5, 2006, a Department of Labor Administrative Law Judge (ALJ) issued a [Recommended] Decision and Order Granting Respondents' Motion for Summary Decision and Dismissing Complaint (R. D. & O.) finding that Gattegno failed to demonstrate the existence of a genuine issue of material fact relevant to the issues whether Prospect took any adverse action against her within ninety days of the date on which she filed her complaint and whether Prospect constructively discharged her from her employment. Upon review, we conclude that Gattegno failed in her burden to demonstrate the existence of genuine issues of material fact sufficient to defeat Prospect's Motion for Summary Decision. Accordingly, we accept the ALJ's recommendation and we deny Gattegno's complaint.

BACKGROUND

On October 21, 2004, Martin Shellist, representing Mark Witt, Prospect Energy Corporation's former Chief Financial Officer (CFO), wrote to Prospect and alleged, "[w]e understand that certain improprieties may have occurred, and may continue to occur, at one or more of the Prospect Entities, some of which improprieties have directly affected Mr. Witt. Accordingly, Mr. Witt may possess claims against one or more of the Prospect Entities for breach of contract, fraud, as well as other claims."[4] Following the termination of Witt's employment, the Complainant, Karen Gattegno, served in two capacities at Prospect Energy Corporation – acting Chief Financial Officer and as the

---

[1] We refer here to the Respondents, as identified in the caption, jointly, as "Prospect Energy Corporation" or "Prospect."

[2] 18 U.S.C.A. § 1514(A)(West 2007). SOX's section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. Employees are also protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed relating to a violation of the aforesaid fraud statutes, SEC rules, or federal law.

[3] 29 C.F.R. Part 1980 (2007).

[4] Compendium of Attachments to Motion for Summary Decision (R. Att.) 12; R. D. & O. at 1.

Chief Compliance Officer (CCO).[5] As CCO, Gattegno was responsible for monitoring compliance with "the relevant statutes and regulations and reporting to the independent directors."[6] Gattegno was aware that Prospect was conducting a search for a new CFO to replace Witt.[7]

On October 22, 2004, Prospect's Board of Directors authorized Kenton Alexander, Esq., of Porter & Hedges LLP, outside counsel, to investigate the alleged improprieties Witt alleged in the October 21st letter.[8] On November 11, Prospect's Audit Committee[9] held a quarterly meeting, which was attended by all the Independent Directors on the Audit Committee: Thomas J. Friedman, Esq., of Shearman and Sterling LLP (Shearman), outside corporate counsel to Prospect; John F. Barry, III, Prospect's Chief Executive Officer (CEO); M. Grier Eliasek, Prospect's President; Gattegno; and others.[10] At this meeting Claudia Holz, a partner of KPMG LLP, which was then the company's outside auditor, reported to the Audit Committee on the Witt letter and her communication with Alexander, in which he informed her that he had spoken to Shellist, Witt's counsel, and had concluded that Witt's allegations were based entirely on hearsay and lacked any evidentiary support. Although the investigation was not fully completed, at the time of the meeting, the inquiry suggested that Witt's allegations were unsubstantiated.[11]

At this meeting, Gattegno submitted an oral "Report of the Chief Compliance Officer" to the Audit Committee.[12] Among other things, Gattegno raised the issue whether it would be appropriate to add certain disclosures concerning the Witt allegations

---

5 R. D. & O. at 1.

6 Gattegno Deposition Transcript (Dep. Tr.) at 194.

7 *Id.* at 311.

8 R. Att. 14 at 5.

9 Each member of the Audit Committee is an independent director and is not an "interested person" of Prospect, as the Investment Company Act of 1940 defines that term. R. Att. 48 at 1. The CCO position is unique in that the Audit Committee must approve the designation and compensation of that person. In effect, the Audit Committee acts as the CCO's employer, along with the company and its officers. The Audit Committee also has the responsibility to oversee the financial reporting and related public issuances of the company. R. Att. 11 at 2.

10 R. Att. 14 at 5.

11 *Id.* at 5-6.

12 *Id.* at 6.

to the Securities and Exchange Commission's Quarterly Report on Form 10-Q for the fiscal quarter ended September 30, 2004, which was due to be filed the next day.[13] Based on Gattegno's proposal, the Audit Committee decided to disclose in the report the receipt of the Witt letter.[14] Accordingly, Prospect's management, after consultation with the Audit Committee, included the following disclosure in the SEC Form 10-Q Quarterly Report dated November 12, 2004:

> We have received a letter from a former officer of Prospect Energy following his separation from the Company suggesting, among other things, that improprieties may have occurred. We have investigated these statements and are not aware at this time of any fact substantiating these vague assertions. We believe that any actions that may arise as a result of this matter are without merit, and we intend to vigorously defend ourselves in connection with any such actions.[[15]]

On November 16, 2004, Gattegno sent an e-mail to two Shearman attorneys complaining that Barry, Prospect's CEO, was conducting the investigation into the improprieties Witt had alleged and stating that as a result of her complaints regarding the manner in which the investigation was proceeding that she had been told that she should not communicate directly with the Audit Committee, but only through Shearman.[16] Gattegno also stated, "I am now informed that the CEO has said that any new CFO will fire me. Given that no new CFO has been hired, this to me represents a retaliatory measure on the part of the CEO."[17]

On November 19, 2004, the Audit Committee held a special telephonic meeting to address Gattegno's and Witt's concerns.[18] The Audit Committee decided to retain Willkie Farr & Gallagher LLP (Willkie) to conduct an investigation into Gattegno's allegations[19] and to report back to the Committee.[20] Burton M. Leibert, Esq., Tariq

---

13 *Id.*

14 *Id.*

15 R. Att. 13 at 24.

16 R. Att. 18; R. D. & O. at 1.

17 R. Att. 18.

18 R. Att. 48 at 1-2.

19 Gattegno, in the SOX complaint she filed with the Department of Labor's Occupational Safety and Health Administration (OSHA), identified four broad categories of alleged improprieties that she communicated to the Audit Committee: issues relating to (1)

Mundiya, Esq., and their associates were charged with conducting the investigation.[21] During the course of the investigation, Willkie interviewed several Prospect representatives, Shearman attorneys, and KPMG LLP accountants.[22] Willkie also reviewed thousands of pages of company documents, including financial records; employment and other contracts; correspondence; public disclosure documents; documents relating to facts about actual or potential company transactions; documents relating to the interests, if any, that company executives had in other business ventures; e-mail communications on the company's e-mail system; and printed reports of employee instant messages.[23]

At a December 17, 2004 Audit Committee meeting, Willkie reported that it had preliminarily concluded that Gattegno's allegations of improprieties at Prospect were meritless.[24] But Willkie did discover documentary evidence in the form of instant messages and e-mails establishing that Gattegno had engaged in serious misconduct totally incompatible with her role as CCO and that Gattegno had made statements in the course of Willkie's interviews that were demonstrated by the documentary evidence to be false.[25] Based on the evidence of Gattegno's misconduct, false statements and poor

---

investment professionals, (2) portfolio companies, (3) investments which when disclosed were allegedly no longer subject to investment, and (4) alleged ventures/conflicts of Barry and Eliasek. R. Att. 48 at 3; R. Att. 11. Willkie also investigated these alleged improprieties during the course of its investigation. R. Att. 48 at 3-9.

[20] *Id.* at 2.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* Some of the "issues" Gattegno had raised had already been resolved to her satisfaction. *Id.*; R. Att. 11 at 3.

[25] R. Att. 48 at 9-16. Gattegno admitted in her deposition that she had made "mistakes of judgment," Dep. Tr. at 270, 336, 364, and had intentionally decided to put her interests above those of the company, *id.* at 345, 348. These "mistakes" included colluding with Michael McCall, a managing director at Prospect Capital, to encourage Witt's attorney to delay producing, what Gattegno believed was evidence of wrongdoing by Prospect concerning Witt's employment contract, until both Barry and she had signed the November 12th 10-Q indicating that they were not aware of any fact substantiating Witt's allegation. Dep. Tr. at 249-50, 267-68; R. Att. 15 at 2-3. Gattegno stated to McCall that "if jb [John Barry] signs Q [10-Q], which he and I must, I think he is committing fraud." R. Att. 15 at 1 (Gattegno expressed no concern that as CCO, she also would be committing fraud by signing the 10-Q). When McCall later informed Gattegno that someone had alerted Prospect that Witt believed that there were two versions of the contract and Prospect was subsequently able

performance, Willkie preliminarily concluded that Gattegno should not continue in her position as Prospect's CCO or as its acting CFO.[26] Consequently, Willkie recommended to the Committee, among other things that: (1) the Audit Committee immediately place Gattegno on administrative leave pending finalization of Willkie's investigation or that the Committee terminate her employment; (2) the Committee promptly undertake to find a new permanent CCO (the process for recruiting a new CFO was already underway); (3) Willkie and Shearman meet with the SEC to discuss Willkie's preliminary report, and (4) after, or contemporaneously with, the SEC meeting, and subject to Sherman's consideration and agreement, the company should file a Form 8-K with the SEC to disclose the change in the CCO and CFO.[27] Following Willkie's recommendation, the Audit Committee resolved that Gattegno would be placed on administrative leave from her employment as Prospect's CCO and CFO for a period of ninety days pending finalization of Willkie's report.[28]

At the Committee's direction Willkie met with Gattegno on December 23, 2004, and informed her that the Committee had placed her on administrative leave for ninety days.[29] Willkie also told Gattegno that it had found no evidence to support her allegations of improprieties at Prospect, but that her electronic communications had raised serious concerns for the Audit Committee.[30] Gattegno did not consider the decision to place her on administrative leave to be retaliatory, nor did she believe that she suffered any adverse consequence as a result.[31] On December 23rd, Prospect also filed a Form 8-K Report with the SEC. The Report stated:

---

to show that one of the versions had been a draft and not a final, Gattegno protested, "I did not squeal." R. Att. 16.

In addition, while serving as acting CFO, Gattegno sent Eugene Stark's resume to headhunters after she knew that Stark had accepted the CFO job at Prospect, subject to the Audit Committee's approval, and that if she was successful in having Stark hired away by another company, the appointment of a CFO would be delayed and Prospect would incur greater costs. Dep. Tr. at 348-366; R. Att. 20, 21.

[26] R. Att. 48 at 16.

[27] *Id.* at 17.

[28] *Id.*

[29] *Id.* at 18.

[30] *Id.;* R. D. & O. at 2.

[31] Dep. Tr. at 423.

> Concluding a thorough screening process, Prospect Energy has identified a candidate for chief financial officer and plans to announce an appointment within the next two weeks. Prospect Energy's chief financial and compliance officer was placed on administrative leave as of December 23, 2004. Prospect Energy expects to engage an outsourced compliance consulting firm to provide compliance-related services.[32]

On January 7, 2005, Willkie and Shearman representatives met with SEC staff to brief them on these matters. They requested the meeting because the SEC had only recently imposed the requirement that regulated investment management companies have a CCO who would function pursuant to SEC Rules.[33] Given the importance that the SEC had placed on the CCO position, Willkie concluded that Prospect should explain to the SEC the reasons for placing Gattegno on administrative leave.[34]

The same day, Prospect filed a Form 8-K report with the SEC, attaching a press release (Exhibit 99.1) dated January 7, 2005.[35] This press release announced that Prospect had hired Eugene Stark to serve as CFO effective January 3, 2005, and that the company had retained William E. Vastardis to serve as CCO effective January 4, 2005.[36] The press release also stated:

> As previously disclosed by the Company in its quarterly report on Form 10-Q filed on November 12, 2004, the Company received a letter from Mark Witt, the former CFO of the Company, and subsequently an investment professional of Prospect Capital Management, alleging unspecified "improprieties." The Audit Committee directed the Company's outside counsel handling Mr. Witt's earlier termination to look into his claims and also retained the law firm of Willkie Farr & Gallagher LLP to investigate his and any other claims, including the allegations being raised by Mr. Witt and the Company's previous CCO and any other claims arising in the course of their investigation. The Audit Committee has preliminarily

---

32 R. Att. 25 at 1.

33 R. Att. 48 at 18.

34 *Id.* at 18-19.

35 R. Att. 26.

36 *Id.* (Exhibit 99.1).

> concluded that none of the allegations made by Mr. Witt or the Company's CCO, or the information subsequently learned in the course of this internal investigation, reflects adverse on the fairness or reliability of the financial statements of the Company. The Audit Committee has further concluded that, on a preliminary basis, in connection with those allegations investigated by Willkie Farr, there is no evidence of fraud by management or material deficiencies in connection with the Company's public disclosure practices.[37]

As early as November or December 2004 and certainly by January 2005, Gattegno was searching for new employment.[38] In discovery, Gattegno produced a torn and coffee-stained cover page from a letter from Eisner LLP acknowledging her acceptance of a position as Director in their corporate tax group, with a starting date of February 14, 2005.[39] The letter indicates that Gattegno's initial base salary would be $160,000 per annum and that she would be eligible to receive a $10,000 signing bonus.[40] The date of this letter is unreadable due to a puncture through the date, however Gattegno believed that it was dated as early as February 2 or 3 and was sure that it was dated no later than the last day of the week ending February 5, 2005.[41] Gattegno testified that even before receiving the Eisner letter, she had told her contact at Eisner in late January or not later than the week ending February 5 that she "was confident [that she] was going to take his offer."[42]

Gattegno testified that it was "unfathomable" for her to believe that any prospective employer in the finance field would not have reviewed the December and January 8-K filings before hiring her.[43] Furthermore, she conceded that given that Prospect had previously filed SEC reports identifying her by name as Prospect's CCO, with "a little more work" any diligent person or subsequent employer in the industry researching her history would know that Willkie's investigation was based on complaints

---

37 *Id.*

38 Dep. Tr. at 129-130.

39 R. Att. 8.

40 *Id.* Gattegno was earning $150,000 per annum at Prospect. Dep. Tr. at 97.

41 Dep. Tr. at 143.

42 *Id.* at 141.

43 *Id.* at 135.

that Gattegno had made.[44] Nevertheless, she did not believe either report was retaliatory or had adversely affected her.[45]

At the end of each quarter, Prospect was required to disclose its earnings through a press release, which was filed with the SEC under cover of a Report on a Form 8-K. This filing would be followed closely by a public Earnings Call attended by investors and investment analysts. Shortly thereafter, Prospect would file its Quarterly Report with the SEC on a Form 10-Q, which would include as exhibits or in summary form the information previously reported on the Form 8-K.[46]

Pursuant to this regular cycle of disclosure, on February 9, 2005, Prospect issued its press release for the quarter that ended December 31, 2004.[47] Among other things, the press release stated:

> At the request of the Audit Committee of the Board of Directors, Willkie Farr & Gallagher, a major New York City law firm and counsel to the Independent Directors, conducted an independent investigation from mid-November to mid-December 2004, into the performance of and allegations made by Mark Witt and Karen Gattegno, the former chief financial and chief compliance officers of Prospect Energy, respectively. After an extensive investigation, which is now complete, Willkie found that the allegations of improprieties were meritless. Mr. Witt had already been terminated before the investigation, and after the investigation Ms. Gattegno was put on 90 day administrative leave.[48]

Gattegno testified that after reading this press release she "went nuts."[49] She found the entire paragraph to be unduly "harsh and vindictive," but was particularly bothered by the fact that the paragraph included her name, rather than just referring to her as the former CCO, and indicated that Willkie investigated her performance as well as the

---

44 *Id.* at 189-190.

45 *Id.* at 414, 430.

46 R. Att. 14 at 8.

47 *Id.*

48 R. Att. 9 at 5.

49 Dep. Tr. at 158.

allegations of impropriety.[50] She testified that as a result of Prospect's actions she has "lost the opportunity to work in a financial institution that pays bonuses rather than – substantial bonuses rather than accounting firms that pay, if any, modest bonuses."[51]

On February 10, 2005, Michael Basham, Chairman of the Audit Committee replied in an e-mail to Gattegno's voice and e-mails stating, "[o]n a personal note, while I am sure you still feel a strong sense of personal frustration and anger about the situation at PCM during your tenure there, I would encourage you to put that behind you and move ahead with the next phase of your career."[52] Prospect paid Gattegno's salary through March 23, 2005.[53]

Gattegno filed a complaint with OSHA on April 29, 2005, alleging that Prospect had retaliated against her in violation of the SOX whistleblower protection provisions.[54] In a letter dated September 15, 2005, OSHA informed Gattegno that it found "no reasonable cause to believe that Respondent violated SOX . . . .[55]

On October 17, 2005, Gattegno filed a hearing request with the Department of Labor's Office of Administrative Law Judges.[56] After deposing Gattegno, Prospect filed a Motion for Summary Judgment and a Memorandum of Law in support of the Motion (Resp. Mem.) with attachments. Among other things, the Respondents argued that given her admission that the December and January releases were not adverse, Gattegno had failed to raise a material question of material fact regarding her contention that that the February 9th release was an adverse action from which a timely complaint had been

---

50 *Id.* at 187. Subsequent to the February 9th press release, Prospect held an Earnings Conference Call. During the call, Barry issued a statement speaking in general of the effect of the Willkie investigation on Prospect's earnings and answered questions about the effects of the investigation. R. Att. 47 at 7-8, 14, 21-22. Gattegno stated at her deposition that she was also "complaining about" this earnings call. Dep. Tr. at 114-119. Gattegno did not rely on the Earnings Call in opposing Prospect's Motion for Summary Judgment, the ALJ did not discuss the Earnings Call in his decision and Gattegno has not raised this omission as an issue in her petition for review before the Board. Accordingly, we will not address it in our decision. *See* 29 C.F.R. 1980.110(a)("Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.").

51 Dep. Tr. at 99.

52 R. Att. 27.

53 Dep. Tr. at 98.

54 O. A. T. at 3.

55 R. Att. 38.

56 R. D. & O. at 3.

filed.[57] Gattegno filed a Memorandum in Opposition to Respondents' Motion with exhibits (Op. Mem.) The ALJ held oral argument on the Motion on March 16, 2006. After hearing argument on the Motion, given her pro se status, the ALJ gave Gattegno twenty additional days to supplement the record with an offer of proof in an effort to establish that she could demonstrate at trial that the addition of her name and the word "performance" in the February 9, 2005 press release converted that release into an adverse action.[58] The ALJ gave Gattegno very specific instructions as to what she needed to show that she could prove at trial to avoid summary judgment. [59]

Prospect's counsel voiced his concern that Gattegno would simply submit the testimony of a friend who is a headhunter who was willing to state that Gattegno's reputation was damaged and questioned whether a headhunter was going to be able to say that he or she submitted her resume for a job and the prospective employer told the headhunter that he or she read the February 5th[60] account and would not hire her.[61] In response to this concern, the ALJ replied that he wanted to see "specifics" and he again instructed Gattegno that he wanted her to tell him what she was going to do at trial, the witness's identity and what he or she is going to say on this issue.[62]

In response to the ALJ's direction, Gattegno filed an affidavit from Michael J. Franchino. Franchino is neither an employer from whom Gattegno sought employment, nor a headhunter who could testify on the effect of the use of her name and the word "performance" in the February 9th disclosure on Gattegno's job prospects. Franchino is a Store Human Resources Manager at a Home Depot Store in Mahwah, New Jersey, although he asserted that prior to 2002 he had "29 years of comprehensive experience in all facets of human resources, including matters of compensation and employment/recruitment of senior level employees for Fortune 500 companies in the New York metro area."[63]

Franchino opined that Gattegno could have expected to earn more from a financial institution than an accounting firm because financial firms paid more in bonuses

---

57 Resp. Mem. at 50-52.

58 Oral Argument Transcript (O.A.T.) at 59-63.

59 *Id.* at 45-46, 61-62.

60 Although counsel referred to the February 5th account, it appears he intended to refer to the February 9th account.

61 *Id.* at 64-65.

62 *Id.* at 65.

63 Franchino Affidavit at 1-2.

and, "[s]ince the demise of Arthur Anderson, it is not unusual that the more selective employers, such as the Big 4 accounting firms and multinational financial institutions would regard the disclosure of February 9th as extremely negative and would not look favorably on a job candidate discussed in such context."[64] He did not explain how given that the December and January releases were not adverse, the use of her name as opposed to just her title and the addition of the word "performance" in the February release adversely affected her job prospects.

The ALJ issued his Decision and Order Granting Respondents' Motion for Summary Decision and Dismissing Complaint on May 5, 2006. He concluded that Gattegno had failed to show that there was an issue of material fact regarding whether the February 9th press release was an adverse employment action, a prerequisite to recovery under the SOX's whistleblower provisions.[65] He also found that there was no issue of material fact regarding constructive discharge because she had already accepted a new job before Prospect issued the February press release that she claimed had effected the constructive discharge, i.e., Gattegno could not be discharged from a job from which she had already constructively resigned.[66]

Gattegno filed a Motion for Reconsideration on May 17, 2006. Although the time for filing an additional response to the Respondents' Motion for Summary Judgment that the ALJ had given her at the hearing had expired, she included, without seeking the ALJ's permission, an addendum to Franchino's affidavit. The addendum repeated Gattegno's claims that the inclusion of the word "performance" and her name, in addition to her title, was much more damaging than the January press release, but he did not explain why this was so given Gattegno's admission that any diligent potential employer would have read the January release and would, with a little effort, have found her name, even before the February release was issued. Furthermore this addendum was devoid of the specifics as to evidence of employment opportunities lost that the ALJ felt was necessary to demonstrate a material question of fact and that Gattegno had stated she could provide, when the ALJ permitted her to supplement her response to Prospect's Motion for Summary Judgment.[67] Upon due consideration, the ALJ denied Gattegno's Motion to Reconsider.[68]

---

64 *Id.* at 2.

65 R. D. & O. at 4.

66 *Id.* at 5.

67 Motion to Reconsider, Addendum A (May 12, 2006)(Add. A).

68 Order (June 6, 2006).

Gattegno filed a Petition requesting the Administrative Review Board to review the ALJ's R. D. & O.[69] Gattegno asserted that the ALJ erred when he required her to show how she would demonstrate at trial that the February 9th release was more adverse than the January release. She also objected to the ALJ's finding that

> by Complainant accepting, but not starting, alternative employment while on administrative leave, precludes Respondent [sic] from being regarded as being **constructively** terminated by the actions that Respondents took in February of 2005. As Complainant was not instructed while on administrative leave that she could not work at any other employment, the acceptance of any other employment should not be regarded as her terminating her employment, and thus the employers' **constructive** termination in February of 2005 would be within the statutory time period to file a complaint.[70]

The Respondents filed an opposition to the petition arguing that the Board should refuse to accept it because it was not filed within ten days of the date on which the ALJ issued his original R. D. & O.[71] The Board carried this objection with the case and issued a briefing order.

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.[72] We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies, also governs our review.[73] The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[74] 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

---

69 *See* 29 C.F.R. § 1980.110(a).

70 Grounds for appeal #5 at 4 (emphasis added).

71 *See* 29 C.F.R. § 1980.110(a).

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

73 29 C.F.R. § 18.40 (2007).

74 Fed. R. Civ. P. 56.

which each claim is based.[75] 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."[76]

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.[77] "To prevail on a motion for summary judgment, the 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.'"[78] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[79] 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."[80]

DISCUSSION

1. **Timeliness of appeal**

The SOX regulations provide, "To be effective, a petition must be filed within 10 business days of the date of the decision of the administrative law judge."[81] In this case the ALJ filed his R. D. & O. on May 5, 2006, Gattegno requested reconsideration on May 17, 2005 (within ten business days of May 5th), the ALJ issued his Order denying reconsideration on June 6, 2006, and Gattegno filed her Petition for Review with the Board on June 19, 2006 (within ten business days of the date on which the ALJ issued his Order denying reconsideration). The Respondents object to the timeliness of the Petition

---

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

76 *Bobreski v. United States EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

77 *Lee v. Schneider Nat'l, Inc.,* ARB No. 02-102, ALJ No. 2002- STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.,* ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (Dec. 13, 2002).

78 *Bobreski,* 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)).

79 *Bobreski,* 284 F. Supp. 2d at 73.

80 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co*., No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 17, 1995).

81 29 C.F.R. § 1980.110(a).

for Review because it was not filed within ten days of the date on which the ALJ issued the R. D. & O. and the SOX regulations do not provide for the tolling of the limitations period while a motion for reconsideration is pending.[82]

Although the SOX regulations do not provide for reconsideration by the Board of its own decisions, the Board has recently held in *Henrich v. Ecolab, Inc.* [83] that its authority to reconsider its SOX decisions is inherent because the authority has not been limited by statute or regulation. The Seventh Circuit Court of Appeals has recently confirmed that the timely filing of a motion for reconsideration of a Board decision tolls the limitations period for filing a notice of appeal with the federal courts of appeals.[84]

The Respondents have not pointed to any statute or regulation that limits an administrative law judge's reconsideration of his or her own decisions. Thus, guided by *Henrich* and the Seventh Circuit's decision in *Saban*, we find that Gattegno's motion for reconsideration, filed within ten business days of the date of the ALJ's R. D. & O., tolled the limitations period for filing her petition for review with the Board, and that her petition for review, filed within ten business days of the ALJ's Order denying reconsideration was timely filed.

2. <u>Effect of February Release on Future Employment Prospects</u>

Neither a company covered by the SOX's whistleblower provisions, nor 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 the employee engaged in protected activity as defined by the SOX.[85] In December 2004, the Respondents filed an

---

[82] Brief of Respondents in Opposition to Complainant's Appeal (Resp. Br.) at 21-22. In fact, as Respondents assert, the regulations do not provide for reconsideration at all. *Id.*

[83] ARB No. 05-036, ALJ No. 2004-SOX-051, slip op. at 2 (ARB May 30, 2007)(Order Denying Reconsideration).

[84] *Saban v. United States Dep't of Labor*, 509 F.3d 376, 377-379 (2007).

[85] 18 U.S.C.A. § 1514A. SOX complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (West Supp. 2005) (AIR 21). 18 U.S.C.A. § 1514A(b)(2)(C). To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he or she engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew of the protected activity; (3) he or she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *See Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at 14-16 (ARB Sept. 29, 2006); *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-020, 36, slip op. at 9-10 (ARB June 2, 2006); *Getman v. Southwest Sec., Inc*., ARB No. 04-059, ALJ No. 2003-

8-K report stating in pertinent part, "**Prospect Energy's chief financial and compliance officer** was placed on administrative leave as of December 23, 2004."[86] A January 7th press release stated in relevant part that "allegations being raised by Mr. Witt **and the Company's previous CCO**" had been investigated and that although the investigation was ongoing, "none of the allegations made by Mr. Witt **or the Company's CCO**," . . . "reflects adversely on the fairness or reliability of the financial statements of the Company."[87] Gattegno testified that it was "unfathomable" for her to believe that any prospective employer in the finance field would not have reviewed the December and January 8-K filings before hiring her[88] and that given that Prospect had previously filed SEC reports identifying her by name as Prospect's CCO, with "a little more work" any diligent person or subsequent employer in the industry researching her history would know that Willkie's investigation was based on complaints that Gattegno had made.[89] Therefore according to Gattegno's own testimony any prospective employer in the finance field would have reviewed the December and January statements and any diligent person or prospective employer with "a little more work" would have known, based on the December and January releases, that Prospect had put Gattegno on administrative leave, that it had replaced her in both her CFO and CCO positions, and that an independent investigator had found that none of her allegations reflected adversely or unfairly on Prospect's financial statements. Nevertheless, Gattegno conceded that neither of these reports were harmful, nor retaliatory.[90]

On February 9, 2006, Prospect issued a release that differed from the December and January releases only in that Prospect's former CCO was specifically identified as Gattegno and it mentioned that her performance as well as her allegations of impropriety had been investigated.

SOX-008, slip op. at 7 (ARB July 29, 2005). *Cf.* 29 C.F.R. §§ 1980.104(b), 1980.109(a). *See* AIR 21, § 42121(a)-(b)(2)(B)(iii)-(iv). *See also Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004).

If the complainant establishes by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse action, then the respondent can still avoid liability by providing by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Platone*, slip op. at 16; *Harvey*, slip op. at 10; *Getman*, slip op. at 8. *Cf.* 29 C.F.R. § 1980.104(c). *See* § 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv). *See also Peck*, slip op. at 10.

86 R. Att. 25 at 1 (emphasis added).

87 R. Att. 26 (Exhibit 99.1).

88 Dep. Tr. at 135.

89 *Id.* at 189-190.

90 *Id.* at 414, 430-31.

To prevail in her SOX complaint, Gattegno must establish that she suffered an adverse action, i.e., that Prospect had discriminated against her in the terms and conditions of her employment.[91] Thus to establish her claim of retaliation she must ultimately prove by a preponderance of the evidence that the February 9th release was adverse (i.e., harmed her future job prospects), and in response to the Respondents' motion for summary judgment, she must show that there was a material question of fact regarding whether that release was adverse.

In response to the Respondents' Motion for Summary Judgment, Gattegno relied on her own deposition testimony that "the February disclosures were appreciable [sic] different that [sic] the earlier ones, in that the earlier ones did not mention her by name, rather just [sic] title, and the February disclosures were the first in which performance was brought forth as an issue."[92] Thus, while Gattegno identified what she considered to be material differences between the earlier releases and the February release, given her admission that the earlier releases were not adverse, she failed to identify how these differences caused the February release to be adverse and how she would show at hearing that the February release was adverse, when the earlier releases were not. Obviously, just because the releases were different does not mean that one was adverse, while the others were not.

The ALJ could simply have granted the Respondent's Motion for Summary Judgment based on Gattegno's failure to demonstrate a material question of fact regarding whether the February release was adverse. Instead the ALJ scheduled a hearing on the Respondents' Motion. Then, over the Respondents' strenuous objections, the ALJ explained at length to Gattegno precisely the demonstration she must make to refute the Motion and gave her 20 additional days to do so. Gattegno assured the ALJ that providing the specific evidence necessary would be no problem:

> **JUDGE ROMANO:** – you have got to submit proof, or give me what we call a proffer of proof, how would you prove this point at trial, that this thing – that this February 9th item damaged your reputation, that you were actually damaged, that you suffered real damage as a result of the wording of this February 9th [release] . . . that you

---

91 In particular Gattegno argues, "There may be future cases where the courts must decide if the **Burlington Northern** [*& Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006)] standard of retaliation [the materially adverse standard] is to apply to Sarbanes Oxley [sic] retaliation, but this is not one – the acts of Respondents are discriminatory in the terms and conditions of employment." Brief of the Complainant in Rebuttal of Respondents [sic] Brief in Opposition to Complainant's Appeal (Reb. Br.) at 4-5.

92 Op. Mem. at 21.

have to at least say, . . . I'm going to present so-and-so, . . . who is going to –

MS GATTEGNO: That's fine. I'm certain I could find any number of headhunters.

JUDGE ROMANO: Well, talk to me about it.

MS GATTEGNO: I'm certain –

JUDGE ROMANO: Who are you going to bring, what are they going to say, et cetera, about this February 9th and the damage to your reputation, your future work.

MS GATTEGNO: But they would say, with this [the reference to her name and "performance"], they couldn't even send me out on an interview anywhere.

JUDGE ROMANO: Do you have a headhunter –

MS GATTEGNO: I don't have it now. **I will have within a month.**

JUDGE ROMANO: You will produce a headhunter?

MS GATTEGNO: Yes, yes.

JUDGE ROMANO: Who will testify?

MS GATTEGNO: That, with this type of thing said about someone, she would not send that person on a client, regardless of any of the facts.

JUDGE ROMANO: She would not send out your resume, is that what you're saying?

MS GATTEGNO: Yes, to a prospective client.

JUDGE ROMANO: Because of that?

MS GATTEGNO: Yes.

* * * *

JUDGE ROMANO: [Gattegno's] not going to speculate with me, I don't think.

MS. GATTEGNO: Yes, no.

JUDGE ROMANO: I think she's going to say, Jane Doe –

MS. GATTEGNO: Right.

JUDGE ROMANO: – is going to sit in that chair, that witness chair –

MS. GATTEGNO: And say this.

JUDGE ROMANO: – a month from now, or whenever the trial is set –

MS. GATTEGNO: Right.

JUDGE ROMANO: – and she's going to say, I would have given Ms. Gattegno that job – I'm just saying for instance.

> **MS. GATTEGNO**: Or as a headhunter, I would have sent Ms. Gattegno on these interviews, I don't think I can do that anymore.
>
> **JUDGE ROMANO:** Now that she has been named?
>
> **MS. GATTEGNO:** Yes, yes.
>
> **JUDGE ROMANO:** Now that her performance is called in.
>
> **MS. GATTEGNO:** Right.[93]

Nevertheless, after agreeing that she would identify witnesses such as a headhunter or prospective employer who could testify to the specific affects that the additional words in the February releases had on her employment prospects, Gattegno failed to do so. Furthermore the one witness she did identify made no offer of proof on the crucial issue specifically identified by the ALJ when he permitted Gattegno to supplement her response.[94]

Gattegno argues in her opening brief to the Board that the ALJ improperly concluded that for Gattegno to prevail the February release must be more damaging than the December and January releases.[95] But because Gattegno conceded that the December and January releases were not damaging, the only way that she could carry her burden of establishing that the February release was harmful, i.e., that it adversely affected the terms and conditions of her employment, was to demonstrate that the addition of her name and the word "performance" rendered the February release more adverse than the previous non-adverse releases. Logically, if the February release was not more adverse than the non-adverse December and January releases, than the February release was not adverse.

---

93 O.A.T. at 45-46, 61-62 (emphasis added).

94 I.e., why, given the December and January releases (which Gattegno conceded were not adverse) that indicated that Prospect's former CCO had been put on administrative leave, that the name of the former CCO could be accessed with a little effort and would be accessed by a diligent employer, that new employees had been hired for the positions she had previously held, and that an independent investigation of her allegations against Prospect had revealed no evidence of fraud by management or material deficiencies in connection with the Company's public disclosure practices, employers would be less likely to employ her after the February release repeated the same basic information, but also identified her by name, rather than as Prospect's former CCO, and indicated that her performance was investigated (although the results of this investigation were not revealed).

95 Brief of the Complainant Requesting that the Decision and Orders of the Administrative Law Judge be Overturned and that Respondents' Motion for Summary Decision Be Denied (Op. br.) at 6.

In addition, Gattegno asserts that maligning a former employee adversely affects the terms and conditions of employment and analogizes to poor references, which she argues constitute adverse action regardless whether the employee shows that the reference affected decisions of future employers.[96] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "malign," as relevant here as: "to utter injuriously misleading or deliberately and injuriously false reports about; induce misunderstanding of and lower regard for by falsehood or misrepresentation."[97] Since neither Gattegno's name nor the fact that her performance was investigated was false, she has created no fact question regarding whether the February release maligned her. Furthermore, her analogy to a poor reference fails since the February release includes no comment, good or bad, regarding the quality of her performance and the prior releases had already established the fact that she had been first placed on administrative leave and then terminated from her positions.

Finally, Gattegno argues that she did provide an affidavit "supporting that the February statements were more retaliatory than the January statements . . . with her motion for reconsideration."[98] This affidavit was simply too little, too late. The ALJ, cognizant of Gattegno's pro se status, permitted her to file an additional response 20 days after the close of the hearing.[99] The ALJ, in granting her the additional time to respond, described very specifically the nature of the offer of proof he expected and Gattegno asserted readily that she could provide it. She did not.[100] Furthermore, she did not request, nor did the ALJ grant her permission to file a third response in an attempt to meet her burden to establish that there was a question of material fact regarding whether the February release was adverse. It was fully within the ALJ's discretion to refuse to consider this belated "Addendum." But even considering it, Gattegno does not carry her burden. When the ALJ permitted Gattegno to file an additional response to the Motion for Summary Judgment, she agreed that she would provide an offer of proof from a headhunter or employer who would have circulated her resume or considered her for employment before the February release, but would not do so after the release was published. Gattegno did not produce an offer of proof from such an individual. Instead she produced an affidavit from a Store Human Resources Manager at a Home Depot Store. The affidavit states that the February release made "baseless and unfounded specific and negative reference to her performance."[101] This statement is undeniably

---

96 Reb. Br. at 3-5.

97 1,367 (1993).

98 Op. br. at 11.

99 O.A.T. at 59.

100 R. D. & O. at 4.

101 Add. A.

false and completely undermines the entire basis for his opinion. Finally his conclusion that "that the February release was much more damaging to Ms. Gattegno's character and unduly, irrevocably and severely tarnishes her reputation as an employee in the industry,"[102] merely parrots Gattegno's unsupported allegations and fails to set forth **specific facts** showing that there is a issue of material fact for the hearing. Accordingly, the ALJ would have been fully justified in refusing to consider Gattegno's belated addendum and if he did consider it, he was fully justified in finding that she still did not establish an issue of material fact.

Ultimately given Gattegno's own testimony, she simply failed to raise an issue of material fact regarding her contention that the February release was an adverse action, when the December and January releases admittedly were not adverse. Gattegno's complaint is based upon an assumption that the February release was adverse, but when required to respond to a Motion for Summary Judgment, mere speculation is not sufficient.[103] As the ALJ concluded, she was unable to take advantage of the opportunity "to submit a specific offer of proof in respect of overcoming the notion, viewed by the [ALJ] as very nearly compelling, that the January 7, 2005 press release . . . is indistinguishable from the February 9 release, vis a vis adverse action.[104]

3. Constructive Discharge

Gattegno, in her petition for review, took issue with the ALJ's finding that she failed to show that there was a genuine issue of fact regarding whether Prospect constructively terminated her employment when it issued the February 9th release.[105] To prevail on a constructive discharge claim, "the complainant must prove that working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have found continued employment intolerable and would have been compelled to resign."[106] The ALJ found that Gattegno failed to demonstrate a material question of fact regarding constructive termination due to the February 9th release for two reasons.[107] First, by accepting an offer of employment with Eisner LLP before

---

102 *Id.*

103 *Muino v. Florida Power & Light,* ARB Nos. 06-092, 06-143; ALJ Nos. 2006-ERA-002, 2006-ERA-008, slip op. at 6 (ARB April 2, 2008).

104 R. D. & O. at 4.

105 Request for Review at 4.

106 *Hooker v. Westinghouse Savannah River, Co.,* ARB No. 03-036, ALJ No. 2001-ERA-016, slip op. at 7 (ARB Aug. 26, 2004).

107 R. D. & O. at 5.

February 9, she either realized that she had already been discharged or she had constructively resigned. Thus, the ALJ found that she could not establish a question of fact regarding constructive discharge from a job from which she had previously constructively resigned. Secondly, the ALJ found that Gattegno failed to raise an issue of material fact regarding whether the February 9th release compelled her to resign given that it conveyed essentially the same information as the January release.

Without explanation, Gattegno, in her briefs to the Board abandoned her contention that February 10th Basham e-mail was a **constructive** discharge and argued instead:

> Respondents' response [sic] that Complainant's termination was not actionable as the termination did not reach the level of constructive termination. This response ignores Complainant's contention that Respondents made the decision to terminate Complainant in December 2004 or January of 2005, and then communicated the decision to Respondent in February of 2005. **This was not a constructive termination.** Respondents made a decision to terminate Complainant – which is consistent with Respondents' statement to OSHA that complainant should have known she was terminated and which they do not now deny. Accordingly, a termination is an adverse action, and the date it was communicated to complainant (February of 2005) governs whether the original complaint was timely filed.[108]

A petition requesting review of an administrative law judge's recommended decision under the SOX, "must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties."[109] Before the ALJ, Gattegno argued that the February release resulted in a constructive termination of her employment and Gattegno's petition for review identified no findings or conclusions, or lack thereof, with regard to actual termination; thus we deem her exception waived. Furthermore, the Board generally will not consider an argument raised for the first time on appeal, and declines to do so here.[110]

---

108 Reb. Br. at 6 (emphasis added).

109 29 C.F.R. § 1980.110(a).

110 *Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 4 n.11 (ARB Apr. 3, 2007 (corrected)).

In any event, an argument based on actual termination would fail on the same grounds as the original argument based on constructive termination. As the ALJ found, Gattegno raised no question of material fact regarding whether Prospect adversely affected the terms and conditions of her employment when they "terminated" her employment, either constructively or actually, because she had already constructively resigned by accepting employment with Eisner. Therefore, the termination had no effect on the terms or conditions of her employment with Prospect, even if Gattegno did not have unequivocal knowledge of Prospect's intention to "terminate" her employment until February 2005.[111]

CONCLUSION

Having considered the record below and the parties' pleadings before us, we conclude that the ALJ properly found that Gattegno failed to raise an issue of material fact regarding whether Prospect took an action that adversely affected the terms and conditions of Gattegno's employment. Accordingly we accept the ALJ's recommendation and **DENY** Gattegno's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

---

[111] The date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences. *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 39 (ARB Apr. 30, 2001). *See Chardon v. Fernandez,* 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Delaware State Coll. v. Ricks,* 449 U.S. 250, 258 (1980) (limitations period began to run when the tenure decision was made and communicated rather than on the date his employment terminated). Thus even if we accepted as true for purposes of summary judgment that Prospect decided to terminate Gattegno's employment before she accepted the Eisner job, the occurrence of the alleged violation, i.e., the 'termination" of her employment, occurred after she had already constructively resigned from Prospect.