In the Matter of:

KRISTEN LEWANDOWSKI,	**ARB CASE NO. 08-026**
COMPLAINANT,	**ALJ CASE NO. 2007-SOX-088**
v.	**DATE: October 30, 2009**

VIACOM INC.,
PARAMOUNT PICTURES CORPORATION,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Noah A. Kinigstein, Esq., New York, New York

For the Respondents:
Laura Sack, Esq. and Roy P. Salins, Esq., *Kauff McClain & McGuire LLP*, New York, New York.

FINAL DECISION AND ORDER

Kristen Lewandowski complains that Paramount Pictures, Inc. violated the whistleblower protection provision of the Sarbanes-Oxley Act of 2002 (the SOX)[1] when it fired her after she engaged in protected activity. Paramount and its parent company, Viacom, Inc. (jointly "the Respondents"), filed a motion to dismiss. A United States

[1] 18 U.S.C.A. § 1514A (West Supp. 2008). Implementing regulations appear at 29 C.F.R. Part 1980 (2009).

Department of Labor (DOL) Administrative Law Judge (ALJ) granted dismissal on the ground that Lewandowski's complaint that her supervisor was providing confidential information to competitors was not an allegation of wire or securities fraud under the SOX. As we now explain, we affirm.

BACKGROUND

We take the undisputed facts primarily from Lewandowski's complaint and the attached exhibits. Paramount hired Lewandowski in May 2005 as a Story Editor in its Literary Affairs Department in New York City.[2] Lewandowski was responsible for reading books and attending theater productions and then advising Paramount executives through memos on the desirability of developing those books and plays into motion pictures.[3]

Lewandowski initially submitted her advisory memos to Patricia Burke, Vice President of the Literary Affairs Department and Lewandowski's direct supervisor.[4] When she later became concerned that Burke was leaking the content of her memos to other production companies, Lewandowski sent Burke her memos without her comments while she sent Paramount executives the same memos but with her comments.[5] When Burke discovered what Lewandowski had been doing, she told her, on January 27, 2007, to send her memos at the same time she sent them to Paramount executives.[6]

The next day, January 28, Lewandowski sent an e-mail to Brad Weston, Paramount's Co-President of Production, with copy to Paul Richardson, Paramount's Senior Vice President of Human Resources,[7] in which she documented her concerns. We reproduce a large portion of her e-mail because it is the keystone of her complaint. Lewandowski contended Burke was leaking confidential information to competitors:

> When I began doing my own daily book memos over a year ago it was just a matter of taking the information and material I had been gathering through my professional network and hard work and putting it down on paper in

---

2 Complaint at 2.

3 *Id.* at 4.

4 *Id.*

5 *See* Complaint Exhibit F.

6 *Id.*

7 Complaint Exhibit F; Respondents' Memorandum of Law in Opposition to Complainant's Appeal of the Dismissal of her Complaint at 5.

> order to distribute to the creative group. Prior to that, I had done the same thing, only, I presented what I gathered to Patricia Burke and she would be the one to distribute to the group.
>
> I ran into some trouble because the books and info I gathered, which was highly confidential and meant for Paramount only, was leaked to people outside the studio. It was Patricia who leaked this information and material. For example, she would speak daily with John Delaney, an employee of Disney based producer Scott Rudin. Often, she would read my book memos word for word. She would also offer books I brought in to Delaney before the Paramount executives in LA (or I) had a chance to read and evaluate. Under her tutelage, her new assistant began to do the same. That is, he began to share confidential Paramount information and property with our competitors. All this damage they did without ever contributing or adding to my memos. At that time, I explained to her and Robby that I had lost one of my best book sources because of their actions. They did not change their behavior.[8]

To circumvent what she perceived as Burke's disloyalty, Lewandowski began to send daily memos with her opinions to Los Angeles (LA). With a week's delay, she sent her memos to Burke, but without her comments. Then Burke found out:

> To work around this, and to avoid conflict, I began to send my daily memos to LA exclusively to give Paramount executives the first crack at hot material in NY in order to give them time to pass on or pursue before Patricia disseminated the material to our competitors. I continued to give Patricia and Robby my memo but on a delay. They would get it a week after I sent to the execs in LA. Because neither Patricia nor Robby were getting in the same, fresh material they didn't know the difference. Per Alli Shearmur's request, I started adding on comments about the material's potential for film after I had read and evaluated. I got a positive response from LA, but not a positive response from Patricia. She asked me to stop expressing my opinions. Instead she asked I tell her [sic] and she would tell LA. Since this went against what Alli had asked, I tried to make them both happy by giving LA the memo with comments, and Patricia the memo without. This worked for a long time. All was peaceful.

---

[8] Complaint Exhibit F.

> Yesterday, I received an e-mail from Patricia asking that I send her my book memo, the same sensitive information and material I sent to LA, to her simultaneously. Since I believe she will begin confiding this highly confidential information and property to people outside of Paramount, I am very concerned.[9]

Lewandowski then wrote that Burke also "mishandles my information and material" within Paramount, by "pitch[ing]" projects to multiple producers simultaneously and giving material to a producer without working with Paramount's corporate executives "to target the right producer."[10] Lewandowski expressed worry that Burke's request for memo copies would be a "detriment to Paramount," and concern that Burke's conduct was "erratic and unprofessional."[11] Weston replied that same day. Weston wrote in an e-mail, "This is a very disturbing email and I will speak with HR immediately and we will be in touch w[ith] both you and [P]atricia to determine how to proceed."[12]

Lewandowski met January 30 with Matthew Saly, an in-house attorney. She explained to Saly that she had overheard Burke divulge confidential information regarding potential projects to competitors and to the media. This, she claimed, was a breach of Viacom's Business Conduct Statement's requirement that all communications with the media go through corporate communications.[13] Lewandowski supplied Saly handwritten "Faxed Coverage" sheets to corroborate her contention that Burke was faxing confidential Paramount projects to both competitors and the media.

Paramount terminated Lewandowski's employment on February 14, 2007.[14] In pleadings, it asserted that Burke fired Lewandowski for insubordination and attempts to

---

9 *Id.*

10 *Id.*

11 *Id.*

12 Complaint Exhibit G.

13 Complaint at 9-10; Memorandum of Law in Opposition to Respondent's Motion to Dismiss at 11-12; *see* Complaint Exhibit C (Viacom Business Conduct Statement). *See* Respondents' Memorandum of Law in Opposition to Complainant's Appeal of the Dismissal of her Complaint at 5 (Respondents' account of Lewandowski's meeting with Saly.)

14 Complaint at 10; Respondents' June 26, 2007 letter in response to Complaint at 6.

cover it up.[15] Paramount also argued that the firing could not have been in retaliation for the January 28 e-mail, since Burke requested prior to January 28 that she be fired.[16]

Lewandowski filed her SOX whistleblower retaliation complaint with the Occupational Safety and Health Administration (OSHA) on May 8, 2007. OSHA investigated, but determined that Lewandowski's complaints to management about Burke's violation of company policy did not constitute fraud against shareholders that would bring her under the protection of the SOX.[17] Accordingly, on August 8, 2007, an OSHA Regional Administrator dismissed the complaint.[18] Lewandowski objected to the Administrator's findings and requested a hearing before a DOL ALJ.

The ALJ issued a Notice of Hearing and Pre-Hearing Order on September 11, 2007. The ALJ scheduled the hearing for January 8 and 9, 2008, and ordered the parties to exchange documents by December 14, 2007. She also asked the parties to set forth their positions, including "[t]he discrete acts performed by Employer for which the employee asserts subject matter jurisdiction under the Act." Lewandowski responded that she "relies on the facts that are stated in her complaint for a description of the acts committed by the Employer which give rise to subject matter jurisdiction under the Act." The Respondents also responded to the order.

On October 3, 2007, the Respondents moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(1) or Fed. R. Civ. P. 12(b)(6). The Respondents argued that Lewandowski's complaints to Weston alleging that Burke disclosed confidential information to competitors and to the media was an internal complaint unrelated to the fraud violations enumerated in the SOX. Lewandowski's counsel requested an extension of time in which to respond to the Respondents' Motion to Dismiss but did not request discovery. The Complainant later filed an opposition to the Motion, arguing that her complaint about Burke's conduct was protected under the SOX because Burke's conduct constituted both wire fraud and fraud against shareholders. She did not allege other violations. But Lewandowski asserted that she had been an employee of both Paramount and Viacom.

On November 20, 2007, the ALJ issued a Recommended Decision and Order Granting Respondents' Motion for Summary Decision (R. D. & O.). The ALJ considered Lewandowski's Complaint and accompanying exhibits, Respondents' Response and accompanying exhibit (the January 28 e-mail), and Respondents' Motion to Dismiss and Complainant's Opposition thereto, in conjunction with the relevant statutory and regulatory provisions and Administrative Review Board (the ARB or Board) precedent.

---

15 Respondents' June 26, 2007 letter in response to Complaint at 2.

16 *Id.*

17 OSHA Determination Letter dated August 8, 2007, at 2.

18 *Id.*

Citing 29 C.F.R. § 18.40, the ALJ stated that he construed the Respondents' Motion to Dismiss as a Motion for Summary Decision.[19]

The ALJ concluded on undisputed facts that Lewandowski did not communicate in her e-mail to Weston or in her meeting with Saly, that Burke was engaged in wire fraud, a violation of 18 U.S.C.A. § 1343, or any of the other violations enumerated in Section 806 of the SOX.[20] Therefore, the ALJ granted Respondents' Motion to Dismiss, and denied Lewandowski's Complaint. Lewandowski petitioned the ARB for review of the ALJ's R. D. & O, and the matter is now before us.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX.[21] We review a decision granting summary decision de novo. The standard the ALJ applies also governs our review.[22] An ALJ "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and the moving party is entitled to summary judgment."[23]

DISCUSSION

1. The Legal Standard

The SOX's employee protection provision protects employees against retaliation by companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934,[24] and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934,[25] or any officer, employee, contractor, subcontractor, or

---

19 R. D. & O. at 3.

20 *Id.* at 10-11.

21 Secretary's Order No. 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

22 29 C.F.R. § 18.40 (2009).

23 29 C.F.R. § 18.40(d).

24 15 U.S.C.A. § 781 (Thompson/West 2007).

25 15 U.S.C.A. § 780(d) (Thompson/West 2007).

agent of such companies because the employee provided information to the employer, a Federal agency, or Congress which the employee reasonably believes constitutes a violation of 18 U.S.C. sections 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (fraud "in connection" with "any security" or the "purchase or sale of any security), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.[26] In addition, the SOX protects employees against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such violation or alleged violation.[27]

Actions brought pursuant to the SOX 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, (AIR 21).[28] Accordingly, to prevail on a SOX claim, Lewandowski would have to prove by a preponderance of the evidence that: (1) she engaged in activity or conduct that the SOX protects; (2) her employer knew of the protected activity; (3) her employer took adverse personnel action against her; and (4) the protected activity was a contributing factor in the adverse personnel action.[29] If Lewandowski established by a preponderance of the evidence that her protected activity was a contributing factor in the adverse action, her employer could 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.[30]

This case turns on whether Lewandowski made a SOX-protected complaint.[31] Not all employee complaints to management are covered by the SOX. The ARB has said that complaints to management of racial and employment discrimination, personnel actions, and executive decisions and corporate expenditures with which the complainant

---

[26] 18 U.S.C.A. § 1514A.

[27] *Id.*

[28] 49 U.S.C.A. § 42121 (West Supp. 2005). 18 U.S.C.A. § 1514A(b)(2)(C).

[29] *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-SOX-008, slip op. at 7 (ARB July 29, 2005).

[30] *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).

[31] Because we deny the Complaint on the ground that Lewandowski did not engage in protected activity, we do not reach the issue of whether Paramount, a non-publically held company, is a covered employer for purposes of her SOX complaint. 18 U.S.C.A. § 1514A; 29 C.F.R. § 1980.101.

disagrees are not protected activity under the SOX because they do not directly implicate the categories of fraud listed in the statute or securities violations.[32] "A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough."[33]

Thus, to come under the protection of the SOX, the whistleblower must ordinarily complain about a material, misstatement of fact (or omission) about a corporation's financial condition on which an investor would reasonably rely.[34] The protected complaint must "definitively and specifically" relate to the SOX subject matter, be specific enough to permit compliance, and support a complainant's reasonable belief that there is a violation.[35]

2. Lewandowski Failed to Proffer Evidence of Protected Activity

As the sole evidence of her protected activity, Lewandowski cites to her January 28 e-mail to Weston and her January 30 meeting with Saly. Of the enumerated violations under the SOX, Lewandowski claims only that Burke's alleged disclosure of confidential information "constituted both a wire fraud and a fraud against shareholders."[36]

The wire fraud statute, 18 U.S.C. § 1343, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

---

[32] *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 2005-SOX-088, -092, slip op. at 9 (ARB Apr. 29, 2008), citing *Harvey*, slip op. at 14-15.

[33] *Smith*, slip op. at 9, citing *Harvey*, slip op. at 15.

[34] *Smith*, slip op. at 9.

[35] *Id.*, citing *Harvey*, slip op. at 14-15.

[36] Petitioner's Brief at 19-22; Memorandum of Law in Opposition to Respondent's Motion to Dismiss at 18.

For a protected complaint based on wire fraud, Lewandowski must have had a reasonable belief that Burke was engaged in wire fraud and Lewandowski must have conveyed that complaint "definitively and specifically" to her employer. Lewandowski did not convey to Paramount either in her e-mail to Weston or in her meeting with Saly her belief that Burke's alleged disclosure of confidential information amounted to wire fraud. Specifically, she did not contend that Burke was devising or intending to devise "any scheme or artifice to defraud" or was obtaining money or property through "false or fraudulent pretences." Rather, Lewandowski stated to Weston and to Saly that Burke's alleged disclosure of confidential information to competitors and to the media was a breach of Viacom's Business Conduct Statement and showed disloyalty to Paramount. These complaints raising a breach of corporate standards and alleging disloyalty do not "definitively and specifically" relate to the use of electronic means to defraud Viacom shareholders or others.

Similarly, for a protected complaint based on fraud against shareholders, Lewandowski must have had a reasonable belief that Burke was engaged in shareholder fraud and Lewandowski must have conveyed that complaint "definitively and specifically" to her employer. The elements of a cause of action for securities fraud are rooted in common law tort actions for deceit and misrepresentation.[37] The basic elements include a material misrepresentation (or omission); scienter; a connection with the purchase or sale of a security; reliance; economic loss; and causation – a causal connection between the material misrepresentation and the loss.[38] A fact is material if the reasonable investor would consider it significant to his trading decision.[39] With respect to omissions of fact, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.[40]

Lewandowski's complaints raising a breach of corporate standards and alleging disloyalty do not "definitively and specifically" relate to defrauding Viacom shareholders or others. Moreover, a mere possibility that Burke's alleged disclosure of confidential information to competitors could affect the value of Viacom stock to investors is too attenuated to state a claim for relief under the SOX whistleblower protection provision.

---

[37] *Platone*, slip op. at 16 (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005)).

[38] *Dura Pharm.*, 544 U.S. at 341-342.

[39] *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1998); *see Platone*, slip op. at 16.

[40] *Basic*, 485 U.S. at 231-232 (citing *TSC Indus., Inc. v. Northway Inc.*, 426 U.S. 438, 449 (1976)).

We therefore conclude, as did the ALJ, that Lewandowski failed to proffer evidence that she engaged in SOX-protected activity, an essential element of her whistleblower retaliation case. And on that basis, her entire claim must fail.

3. Lewandowski's Arguments on Appeal

On appeal to the Board, Lewandowski makes three arguments. First, she seeks our review of the ALJ's decision to grant Summary Decision where the Respondents filed a Motion to Dismiss. The ALJ "construe[d]" the Motion as a Motion for Summary Decision, citing 29 C.F.R. § 18.40.[41] Lewandowski argues that the ALJ "erred in deeming the motion one for summary decision prior to discovery and under either standard for a motion to dismiss or for summary decision/judgment the court erred in applying the relevant law and facts."[42] Lewandowski contends that to grant summary decision without notice and without discovery is reversible error.[43]

The Respondents note that Lewandowski did not raise this issue in opposing their Motion and argue that she is not permitted to raise it now. Alternatively, the Respondents argue that the conduct Lewandowski complained of does not "definitively and specifically relate to the listed categories of fraud or securities violations to implicate the Act" and thus, "[n]o amount of discovery or further briefing will ever change those dispositive facts – and these are the very facts she asserted in her Complaint (including the attachments thereto), and that [the ALJ] relied on in dismissing the Complaint."[44]

In opposing the Respondents' Motion, Lewandowski did not raise the issue of the propriety of granting a dispositive motion prior to discovery.[45] Under ARB precedent, we decline to consider arguments that a party raises for the first time on appeal.[46]

---

[41] R. D. & O. at 3.

[42] Complainant's Brief at 14.

[43] *Id.* at 16.

[44] Memorandum of Law in Opposition to Complainant's Petition for Review at 3.

[45] *See* Complainant's Memorandum of Law in Opposition to Respondent's Motion to Dismiss.

[46] *Harris v. Allstates Freight Sys.*, ARB No. 05-146, ALJ No. 2004-STA-017, slip op. at 3 (ARB Dec. 29, 2005); *Farmer v. Alaska Dep't of Trans. & Pub. Facilities,* ARB No. 04-002, ALJ No. 2003-ERA-011, slip op. at 6 (ARB Dec. 17, 2004); *Honardoost v. PECO Energy Co.*, ARB No. 01-030, ALJ No. 2000-ERA-036, slip op. at 6 n.3 (ARB Mar. 25, 2003). We previously noted that when Lewandowski's counsel asked for additional time within which to respond to the Respondents' Motion, counsel did not cite discovery as a reason for his request.

Moreover, the issue of whether Lewandowski engaged in protected activity does not turn on disputed facts. The ALJ accepted the facts as Lewandowski alleged them in her complaint and accompanying attachments. The facts relating to Lewandowski's protected activity were within her knowledge and control, and she has not articulated how additional discovery would have avoided denial of her complaint.[47]

Second, Lewandowski argues that the complaint cannot be dismissed under the Motion to Dismiss standard because she has alleged facts sufficient to support her claim of protected activity.[48] But the issue is not whether Lewandowski met the notice pleading requirements of a SOX complaint, but whether undisputed facts show that she engaged in protected activity, i.e., whether Lewandowski reasonably believed that Burke's conduct violated the enumerated categories in the SOX and whether she conveyed that belief to her employer prior to its termination of her employment. The relevant inquiry is what a complainant actually communicated to his or her employer prior to the termination of his or her employment.[49]

In this case, the ALJ fully considered Lewandowski's only proffer of protected activity, her January 28 e-mail to Weston and what she said in her complaint that occurred at the January 30 meeting with Saly, in the light most favorable to her. She ruled as a matter of law that Lewandowski had not engaged in SOX-protected activity.

Third, Lewandowski argues that, even if the ALJ did not err in deeming the Motion to Dismiss a Motion for Summary Decision, she asserts that the ALJ erred because there were genuine issues of fact.[50] As her only example, Lewandowski notes that the ALJ contradicted herself, at one point saying Lewandowski did not provide the specific manner in which Burke committed fraud, but in another stating she faxed documents. This minor point does not create a genuine issue of material fact entitling Lewandowski to an evidentiary hearing. As addressed above, the ALJ accepted Lewandowski's version of the facts, and correctly ruled as a matter of law that she had not engaged in activity that is protected under the anti-retaliation provisions of the SOX.

---

47 *High v. Lockheed Martin Energy Sys.*, ARB No. 98-075, ALJ No. 1996-CAA-008, slip op. at 6 (ARB Sept. 29, 2004).

48 Complainant's Brief at 16.

49 *Smith,* slip at 12, citing *Platone,* slip op. at 17.

50 Complainant's Brief at 22.

CONCLUSION

Lewandowski did not, on undisputed facts, engaged in SOX-protected activity. Therefore, the Respondents are entitled to Summary Decision as a matter of law. Accordingly, we **GRANT** Summary Decision and **DENY** the Complaint.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge