

**In the Matter of:**

**ROBERT T. EVANS,**

**ARB CASE NO. 15-037**

**COMPLAINANT,**

**ALJ CASE NO. 2012-SOX-036**

**v.**

**DATE: February 28, 2017**

**T-MOBILE USA, INC.,  
and DEUTSCHE TELEKOM, AG,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Stephani L. Ayers, Esq., *Law Offices of S. L. Ayers*, Medford, Oregon**

***For the Respondent:***

**Laurence A. Shapero, Esq.; *Riddell Williams, P.S.*; Seattle, Washington**

**Before: Paul Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Tanya L. Goldman, *Administrative Appeals Judge***

## **FINAL DECISION AND ORDER**

This case arose under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley Act or SOX),<sup>1</sup> and its implementing regulations.<sup>2</sup> Robert T. Evans filed a complaint alleging that his employer, Respondent T-Mobile USA, Inc., fired him in violation of the SOX. A Department of Labor Administrative Law Judge (ALJ) granted T-Mobile's motion for summary decision and dismissed Evans' complaint. The ALJ concluded that even though Evans had proof of each

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<sup>1</sup> 18 U.S.C.A. § 1514A (Thomson/West Supp. 2012).

<sup>2</sup> 29 C.F.R. Part 1980 (2012).

element of a SOX whistleblower protection claim, he failed to demonstrate a material dispute with the facts that T-Mobile offered in support of its motion for summary decision, thus establishing that Evans was entitled to no relief. On appeal to the Administrative Review Board (ARB or Board), the Board affirms the ALJ's decision for the reasons that follow.

### BACKGROUND<sup>3</sup>

Complainant Evans started work for Respondent T-Mobile on November 30, 2007, as a Partner Relationship Manager at a base salary of \$85,000.00 a year.<sup>4</sup> His position description, which included skill in complex problem solving, task prioritization, and minimal supervision, required him to analyze, negotiate, and manage international roaming agreements with other wireless telephone carriers whose networks were compatible with T-Mobile's.<sup>5</sup>

Evans worked in the Corporate Development and Wholesale (CDW) department. Initially, his supervisors were Chander Chawla and Jim Martinek. After three months at work, Evans took medical leave for back surgery, and returned to work on April 26, 2008. Evans struggled to perform his duties as a manager before and after his surgery. From the time he began his employment in November 2007 through April 2, 2008, when he went on medical leave, he only signed one deal—adding a Caribbean international wireless carrier, Orange Dominicana (also known as Orange DR) to the T-Mobile network.

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<sup>3</sup> The following facts are taken from Evans' complaint and declaration, and T-Mobile's depositions and exhibits filed with the ALJ. T-Mobile had requested a hearing before the ALJ prior to filing its motions to stay Evans' reinstatement and to request summary decision.

<sup>4</sup> T-Mobile partner relationship managers identify potential international partners (working in association with employees in T-Mobile's CDW group); negotiate discount agreements with some collaboration from T-Mobile's legal department; and implement the discount agreements. A partner relationship manager's work (according to T-Mobile's job description) has general, strategic, financial, and customer service components. An incumbent needs to be skilled in "complex problem solving," and have the "ability to prioritize tasks without [sic] minimal supervision and to work under ambiguity." Qualifications for the job include "excellent financial analysis and pattern recognition skills." An incumbent is expected to "negotiate long-term roaming agreements that include or incorporate technology evolution." To do so, the incumbent has to "prepare financial analyses as part of Preference/Service/Discount agreements to ensure [T-Mobile's] offers are financially sound and deliver the highest value to T-Mobile." *Evans v. T-Mobile USA & Deutsche Telekom, AG*, ALJ No. 2012-SOX-036, slip op. at 5-6 (ALJ Feb. 26, 2015) (D. & O.).

<sup>5</sup> The partnership agreement is reciprocal—both carriers can access the other's frequency spectrum network. T-Mobile bills its partner wholesale for calls the partner's subscribers made on T-Mobile's network and the partner then bills its customers retail for the same calls while T-Mobile pays wholesale for the calls its subscribers made on the partner's network and then bills its customers retail. A clearing house called Syniverse produces call-and-billing data for the wireless partners and sends a summary to each partner, which can then tally network usage and reach a financial settlement based on how much each owes the other.

In June 2008, Chawla gave Evans a poor performance review, 2.8 out of 5, because he had signed only the one deal with Orange DR, instead of at least three to add to the T-Mobile network. In his next quarterly review on September 30, 2008, his performance score dropped to 2.2 because he had signed no other roaming network deals. The two consecutive quarters of poor performance caused T-Mobile to impose a Performance Improvement Plan (PIP) on Evans in early October 2008, shortly after the second quarterly review.

That same month, Evans filed a written complaint with T-Mobile's human resources (HR) department alleging that his supervisors discriminated against him by setting unrealistic performance goals because of the medical leave he had taken earlier that year for his back surgery. He then took a second medical leave for chronic stress. While he was on leave, the HR department concluded that Evans had suffered no discrimination because of his medical leave. However, HR's investigation uncovered his supervisors' mismanagement of CDW staff, which resulted in T-Mobile firing Evans' two supervisors in November and appointing Ken Pazaki as Evans' new supervisor.

The week before he returned to work on March 2, 2009, Evans asked the HR department to transfer him to a new position. T-Mobile denied any transfer because he was still on a PIP from the previous fall. Meanwhile, T-Mobile had launched a new wireless feature known as Virtual Home Environment (VHE),<sup>6</sup> which resulted in billing problems for some "test" partners. That situation prompted a meeting of CDW staff on March 13, 2009, to discuss the matter.<sup>7</sup>

At the March 2009 meeting, Evans aggressively questioned VHE managers about implementing VHE without warning the partners that their roaming networks might not be compatible with the technical change. Orange DR, the one network customer Evans had signed, complained that it could not bill its subscribers for the VHE calls on T-Mobile's network because its call system was not compatible. Evans argued that T-Mobile should inform all its network partners—some 400—of a possible problem with compatibility and billing data, but T-Mobile managers instead assigned staffers to develop other methods of dealing with the issue and recommended that T-Mobile pay the \$198,000.00 credit Orange DR demanded.

After the meeting, Pazaski prepared a draft PIP dated March 26, 2009, to supplement the October 2008 PIP but never presented it to Evans. On March 27, Evans asked the HR department to relieve him of his PIP and transfer him to another department because he did not "feel comfortable or welcomed" in his current position. Following up on March 31, Evans complained that he was being "punished and harassed" for filing a discrimination and hostile work environment complaint, and requested a reasonable accommodation through a transfer to another position with T-Mobile.

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<sup>6</sup> This system apparently monitors and fixes incorrect calls so that a customer is not billed for misdialing.

<sup>7</sup> The VHE feature altered the data call records so that some of the test partners could not bill their own subscribers for calls VHE facilitated, even though the partners had paid T-Mobile wholesale rates for those calls.

HR's Kristen Hagan and Loretta Guerra met with Evans on April 2, 2009, to discuss his complaint. Evans told Hagan that he did not believe he had the analytical skills to do his job and that co-workers were harassing and retaliating against him over the firing of his previous supervisors. During the meeting, Evans also complained about the propriety of the VHE billing system. Hagan placed Evans on paid administrative leave and asked Christina Jones to investigate his complaint.

During the investigation, Evans informed Jones about his co-workers' retaliation and harassment and told her that a former T-Mobile employee, James Lai, had warned him not to return to work at CDW because staff were unhappy that he had gotten Chawla and Martinek fired. Jones interviewed Lai, then working in Hong Kong, who denied ever talking with Evans about a plan to retaliate against him and noted that he had left T-Mobile before the supervisors were fired. Lai told Jones that he had never told Evans he would suffer discrimination if he went back to work at CDW. Jones concluded that Evans had lied to her about being warned to get out of CDW and reported her conclusion to Hagan.

While on leave, Evans also obtained a medical opinion in support of his transfer request. His doctor stated that Evans lacked the analytical skills his job demanded, which caused him anxiety and chronic pain. The doctor recommended accommodating Evans by transferring him to a different job. Evans also sent e-mails to supervisor Pazaski, Hagan, Jones, and T-Mobile's chief financial officer reiterating that he was not a "highly analytical person" and therefore was unable to succeed at his job.

On April 23, 2009, T-Mobile fired Evans because: (1) he provided false information during the investigation of his discrimination complaint; and (2) he refused to return to his position in CDW.

Evans filed a complaint with the Occupational Safety and Health Administration (OSHA) on July 21, 2009. OSHA investigated, determined that Evans' discharge had violated the SOX, and ordered his reinstatement. T-Mobile requested a hearing with an ALJ and filed a motion to stay OSHA's reinstatement order, which the ALJ granted on May 21, 2013. Thereafter, T-Mobile filed a motion for summary decision. After the ALJ granted T-Mobile's motion and dismissed Evans' complaint, Evans appealed to the ARB.

#### **JURISDICTION AND STANDARD OF REVIEW**

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the SOX. The Secretary has delegated that authority to the ARB.<sup>8</sup> We review an ALJ's grant of summary decision *de novo*, applying the same standard the ALJ uses under 29 C.F.R. § 18.40.<sup>9</sup>

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<sup>8</sup> Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

<sup>9</sup> *Saporito v. Exelon Corp.*, ARB No. 10-049, ALJ No. 2009-ERA-010, slip op. at 2 (ARB Sept. 30, 2011).

An ALJ may issue summary decision if the pleadings, affidavits, and other evidence, or “matters officially noticed,” show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law.<sup>10</sup> Once the moving party has demonstrated an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.<sup>11</sup> Only if the record is “devoid of evidence that could reasonably be construed to support” the non-moving party’s claim should a motion for summary decision preclude an evidentiary hearing.<sup>12</sup>

## DISCUSSION

SOX Section 806 protects 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.

To prevail in a SOX complaint, an employee must prove by a preponderance of the evidence that he: (1) “engaged in activity or conduct that the SOX protects; (2) the respondent took an unfavorable personnel action against . . . him; and (3) the protected activity was a contributing factor in the adverse personnel action.”<sup>13</sup> If the employee proves these elements, the employer may avoid liability if it can prove “by clear and convincing evidence” that it “would have taken the same unfavorable personnel action in the absence of the [protected] behavior.”<sup>14</sup> That standard requires evidence “indicating that the thing to be proved is highly probable or reasonably certain.”<sup>15</sup>

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<sup>10</sup> 29 C.F.R. § 18.40(d). *Trammell v. New Prime, Inc.*, ARB No. 07-109, ALJ No. 2007-STA-018, slip op. at 4-5 (ARB Mar. 27, 2009) (noting that 29 C.F.R. § 18.40 generally incorporates into administrative proceedings the summary judgment procedure described in Rule 56 of the Federal Rules of Civil Procedure).

<sup>11</sup> *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037, slip op. at 3 (ARB Oct. 17, 2012).

<sup>12</sup> *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

<sup>13</sup> *Sylvester v. Paraxel Int’l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011).

<sup>14</sup> 29 C.F.R. § 1980.104(c); *Poli v. Jacobs Eng’g Grp., Inc.*, ARB No. 11-051, ALJ No. 2011-SOX-027, slip op. at 4 (ARB Aug. 31, 2012).

<sup>15</sup> *Peck v. Safe Air Int’l*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004).

The ALJ found that Evans engaged in protected activity when he complained to the HR department about the propriety of the VHE billing process on April 2, 2009.<sup>16</sup> As the ALJ correctly noted, it was not necessary that his disclosure to HR was “couched as one made under the Sarbanes Oxley Act. He objected to what he saw as unethical billing practices. He had reason to believe they involved large sums of money. They involved transaction by wire.”<sup>17</sup> The ALJ reasoned that, for purposes of the motion for summary decision, Evans’ claim that he expressed doubts about the propriety of T-Mobile’s billings was sufficient for a reasonable fact-finder to conclude that Evans engaged in protected activity by complaining to the HR Director, a corporate manager, about the VHE process on April 2, 2009.<sup>18</sup> We agree.<sup>19</sup>

The ALJ also found that T-Mobile, in the person of that same HR Director, knew of his complaint and that Evans’ discharge was “the quintessential adverse action.”<sup>20</sup> Finally, the ALJ found that the three-week period between his protected activity and his firing was sufficient temporal proximity to raise the inference that the protected disclosure played at least some role in the firing and thus constituted a “contributing factor” in his discharge.<sup>21</sup>

Ultimately, however, the ALJ determined that T-Mobile could meet its affirmative defense burden with clear and convincing evidence that it would have fired Evans absent his protected activity because Evans offered no evidence to dispute the reasons that T-Mobile offered for firing him. The ALJ stated: “It is undisputed that he lacked the skill his job required, not only because T-Mobile witnesses said it, but because he acknowledged it in writing and orally repeatedly before he was terminated.”<sup>22</sup> The ALJ added that Evans had made it clear to T-

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<sup>16</sup> D. & O. at 25.

<sup>17</sup> *Id.* at 27.

<sup>18</sup> *Id.* at 25.

<sup>19</sup> Before the ALJ, Evans argued that a hearing was required to determine whether he engaged in protected activity at the earlier, March 13, 2009, meeting because he and T-Mobile employees differ about events at that meeting, where Evans says he questioned the presenters at the meeting intensely about the VHE billing program. The Board agrees with the ALJ’s response that, “a hearing to resolve whether he first engaged in protected activity at the meeting on March 13 or two weeks or so later when he met with Human Resources Director Hagen on April 2 isn’t necessary. His proof adequately shows for purposes of this motion that he engaged in protected activity in what he told Hagen on April 2 as she met with him about his second discrimination complaint. A finding that his protected activity took place at the meeting of March 13 would add nothing of consequence to his claim.” D. & O. at 26-27.

<sup>20</sup> *Id.* at 27.

<sup>21</sup> *Id.* at 25-27.

<sup>22</sup> *Id.* at 28.

Mobile managers that he would not go back to CDW because he could not do the job and he would not work for Pazaski, who he did not trust.<sup>23</sup>

Further, the ALJ concluded that Evans offered no evidence disputing that Lai told Jones he had never warned Evans about returning to CDW. The ALJ noted “some discrepancy about the extent” to which Evans lied to HR investigator Jones about his conversation with Lai, but found that Evans offered no evidence to dispute Jones’ version of what Lai told her—that he never gave Evans any warning about CDW, he changed his phone number when he left T-Mobile in November 2008 so Evans could not have called him when he said he did, and he had not known at that time that the CDW supervisors had been fired.<sup>24</sup> The ALJ concluded: “T-Mobile’s undisputed proof qualifies as clear and convincing evidence.”<sup>25</sup>

Evans argues on appeal that the ALJ erred in simply accepting T-Mobile’s reasons for firing him because the company’s assertions rely on credibility determinations which are only appropriate after a hearing on the merits.<sup>26</sup> Evans also argues that the ALJ erred in failing to resolve whether (1) his paid administrative leave following his April 2 meeting with Hagan and Guerra was voluntary, (2) Pazaski’s “agitated manner” in questioning him after the March 13, 2009 meeting showed animus, and (3) Pazaski’s failure to deliver the memorandum extending his PIP revealed his intent to have Evans fired.<sup>27</sup>

The ALJ, however, found these incidents immaterial to the reasons T-Mobile’s managers fired him—his self-professed inability to do his job<sup>28</sup> and his admission that he was not wholly truthful about his interaction with Lai during Jones’ investigation of his discrimination complaint.<sup>29</sup> The ALJ concluded that Evans offered no evidence to contradict either reason

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<sup>23</sup> *Id.* at 28. The ALJ also relied on the medical report Evans submitted to T-Mobile during the investigation as evidence of Evans’ inability to do his job. D. & O. at 32.

<sup>24</sup> *Id.* at 28, 30-31.

<sup>25</sup> *Id.* at 32.

<sup>26</sup> Complainant’s Brief at 5. Evans’ arguments based on *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014) regarding the ALJ’s causation analysis have been superseded. See *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015).

<sup>27</sup> D. & O. at 14-24.

<sup>28</sup> In fact, Evans’ own doctor opined that he was medically unable to return to his position because he lacked the necessary analytical skills, which caused him anxiety and stress. Exhibit 3, Motion for Stay.

<sup>29</sup> D. & O. at 30-31. The ALJ noted that Evans had acknowledged his subterfuge with Lai by admitting that he had contacted Lai using a made-up name, Chris Hartung, and a fake Yahoo e-mail account. Exhibit 3A at 112. See *Anderson*, 477 U.S. at 256-257 (mere possibility that an ALJ

established by T-Mobile for firing Evans: (1) he lacked the substantive skills to do his job and refused to return to work under Pazaski; and (2) he lied to Jones to bolster his discrimination claim.<sup>30</sup> Because the material facts underlying T-Mobile's discharge of Evans are undisputed, there is no need for an evidentiary hearing. Accordingly, the ALJ properly dismissed Evans' complaint.

#### CONCLUSION

We agree with the reasons the ALJ articulated in his analysis of T-Mobile's affirmative defense. Accordingly, T-Mobile is entitled to summary decision, and we **AFFIRM** the dismissal of Evans' complaint.

**SO ORDERED.**

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**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

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**E. COOPER BROWN**  
**Administrative Appeals Judge**

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**TANYA L. GOLDMAN**  
**Administrative Appeals Judge**

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might, and legally could, disbelieve an employer's evidence at the hearing is not sufficient to establish a genuine issue of fact as to employer's state of mind at the summary decision stage).

<sup>30</sup> D. & O. at 32.