

In the Matter of:

BRUCE NORTELL,

COMPLAINANT,

v.

NORTH CENTRAL COLLEGE,

RESPONDENT.

ARB CASE NO. 16-071

ALJ CASE NO. 2016-SOX-013

DATE: February 12, 2018

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Bruce Nortell, Esq.; Lisle, Illinois

For the Respondent:

**Jody Wilner Moran, Esq.; Joseph C. Toris, Esq.; Jackson Lewis P.C., Morristown,
New Jersey**

**Before: Joanne Royce, Administrative Appeals Judge; Leonard J. Howie III, Administrative
Appeals Judge; and Tanya L. Goldman, Administrative Appeals Judge**

FINAL DECISION AND ORDER

This case arises under the whistleblower provision of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (Thomson Reuters 2015) and its implementing regulations at 29 C.F.R. Part 1980 (2017).

Bruce Nortell filed a complaint on September 14, 2015, with the Occupational Safety and Health Administration (OSHA) claiming that North Central College (College) retaliated against him in violation of SOX when it terminated his employment for reporting what he believed to be fraudulent conduct in the College's charitable gift annuity and donation accounting practices. Prior to termination, Nortell had been the Director of Planned Giving.

OSHA dismissed Nortell's complaint for lack of coverage. Nortell objected, and the case was assigned to an Administrative Law Judge (ALJ) for hearing. Nortell filed a motion for summary decision, arguing, among other things, that the College was a covered entity under SOX. The College responded and also filed its own motion for summary decision, averring that the College was not a covered entity.

On June 2, 2016, the ALJ denied Nortell's motion and granted the College's motion. Order Denying Complainant's Motion for Summary Decision and Granting Respondent's Motion for Summary Decision and Dismissing Complaint (D. & O.) In granting Respondent's motion, the ALJ held that Nortell had not demonstrated a genuine issue of material fact that the College was a covered entity. Nortell appealed to the Administrative Review Board (ARB or Board). We summarily affirm the ALJ's decision.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's SOX decision pursuant to Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. Part 1980. The ARB reviews an ALJ's grant of summary decision de novo, applying the same standard that the ALJ employed under 29 C.F.R. Part 18 (2017). *Siemaszko v. FirstEnergy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012). Pursuant to 29 C.F.R. § 18.72, an ALJ may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. In assessing this summary decision, we view the evidence, along with all reasonable inferences, in the light most favorable to the non-moving party.

DISCUSSION

The sole issue on appeal is whether the College is a covered entity under the SOX whistleblower provisions. SOX's whistleblower provisions are predicated on the employer having a class of securities registered under Section 12 of the 1934 Act, 15 U.S.C.A. § 78l (Thomson Reuters 2016), or being required to file periodic reports under Section 15(d) of the 1934 Act, 15 U.S.C.A. § 78o(d) (Thomson Reuters 2016). SOX's whistleblower provision provides in relevant part:

(a) Whistleblower Protection for Employees of Publicly Traded Companies.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in

section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), . . . may discharge, demote suspend, threaten, harass, or in any other manner discriminate against an employee....

18 U.S.C.A. § 1514A(a). Coverage under SOX’s whistleblower provisions is therefore limited to companies registered under Section 12 and those required to file reports under Section 15(d) of the Securities Exchange Act (Exchange Act). *Fleszar v. Am. Med. Ass’n*, ARB Nos. 07-091, 08-061; ALJ Nos. 2007-SOX-030, 2008-SOX-006; slip op. at 4 (ARB Mar. 31, 2009); *Flake v. New World Pasta Co.*, ARB No. 03-126, ALJ No. 2003-SOX-018, slip op. at 4 (ARB Feb. 25, 2004).

Under Section 12 of the Exchange Act it is unlawful for “any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange.” 15 U.S.C.A. § 78l(a). Section 12(b) of the Exchange Act requires registration for securities traded on an exchange. Section 12(g) of the Exchange Act requires that an issuer with \$10,000,000 in assets register if it has a class of securities held by a specified number of shareholders. Section 15(d) of the Exchange Act requires that issuers registered prior to 1964 or registered under the Securities Act of 1933 file supplementary reports.¹

To avoid summary decision, the non-moving party must rebut the moving party’s motion and evidence with contrary evidence sufficient to create a genuine issue of material fact. The opposing party “may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Siemaszko*, ARB No. 09-123, slip op. at 3.

We agree with the ALJ that Nortell failed to point to evidence in the record that could support a factual finding that the College is covered under the SOX whistleblower provisions. D. & O. at 6. The College provides several affidavits stating that it is not registered under Section 12, and is not required to file reports under Section 15(d). D. & O. at 6; Respondent’s

¹ Section 15(d) provides:

Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to August 20, 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security registered pursuant to section 78l of this title.

Appendix (RA) at 15-16, 27. Nortell does not offer registration statements, reports, or documentation showing that the College is registered or required to file reports under Section 15(d). Nortell alleges in a February 27, 2016 affidavit, p.4, para. 10, that the College “has issued securities under Section 12 of the Securities Exchange Act of 1934 and under the Securities Act of 1933,” citing to Ex. A. Exhibit A appears to be a personal tabulation of financial payables and receivables that Nortell identified for purposes of supporting his protected activity claims. Exhibit A does not identify College securities registered under Section 12 or the 1933 Securities Act or that it is required to file under Section 15(d). Nortell’s conclusory statements are not sufficient to rebut the College’s motion or support his own motion in the absence of evidence to generate a genuine issue of material fact that it is a covered entity.

Instead of providing evidence that the College *is* registered or required to file reports, Nortell asserts that the College *should* be registered because it fails to satisfy an exemption for charitable entities.² But, as the ALJ found, it is undisputed that the College has been granted § 501(c)(3) tax-exempt status as a charitable organization. Nortell nevertheless argues that for a variety of reasons the College does not qualify for the charitable organization exemption from registration. For example, Nortell asserts that, because the College pays a commission to employees engaged in fund-raising activities, the College does not qualify for the registration exemption. D. & O. at 10. These conclusory allegations are misplaced, and we affirm the ALJ’s finding that Nortell “has provided no evidence, outside of his unsupported assertions, that the Respondent is not entitled to the charitable exemptions in the regulations.” *Id.* at 9.

In conclusion, Nortell has failed to provide any evidence to support his motion or survive the College’s motion for summary decision. *See Fleszar*, ARB Nos. 07-091, 08-061; slip op. at 4 (no SOX coverage where AMA is a not-for-profit organization not registered under

² *See* Nortell’s Discussion Supporting his Mot. for Summ. Dec. para. 22 (arguing that the College has issued securities which should be registered because they fail to satisfy exemptions). Federal securities laws exempt charitable, educational, religious, or otherwise benevolent organizations, and the securities issued by these organizations, from registration requirements. Section 12 provides an exemption for:

[a]ny security of an issuer organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any private shareholder or individual . . .

15 U.S.C.A. § 78l(g)(2)(d); *see also* 15 U.S.C.A. § 77c(a)(4) (similar exemption for charitable entities under the Exchange Act).

Section 12 or required to file reports under Section 15(d) despite having filed certain other reports with SEC). Accordingly, we **AFFIRM** the ALJ's grant of summary decision.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge

TANYA L. GOLDMAN
Administrative Appeals Judge