

**In the Matter of:**

**PATRICIA MICALLEF,**

**ARB CASE NO.16-095**

**COMPLAINANT,**

**ALJ CASE NO. 2015-SOX-025**

**v.**

**DATE: July 5, 2018**

**HARRAH'S RINCON CASINO & RESORT,  
HCAL, LLC, and CAESAR'S  
ENTERTAINMENT CORPORATION,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Patricia Micallef, *pro se*, La Jolla, California**

***For the Respondents:***

**Maria C. Roberts, Esq. and Ryan Blackstone-Gardner, Esq.; *Johnson Greene & Roberts*, San Diego, California**

**Before: Joanne Royce, *Administrative Appeals Judge*; and Leonard C. Howie III, *Administrative Appeals Judge***

## **FINAL DECISION AND ORDER**

Patricia Micallef filed a complaint with the United States Department of Labor alleging that her employer, Harrah's Rincon Casino and Resort, violated the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 of the Sarbanes-Oxley Act (SOX)<sup>1</sup> when it fired her in October 2012 after she failed to contact the company or return to work. Harrah's filed a motion for summary decision seeking

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<sup>1</sup> 18 U.S.C.A. § 1514A (Thomson/West 2016). The SOX's implementing regulations are at 29 C.F.R. Part 1980 (2016).

dismissal of the complaint.<sup>2</sup> An Administrative Law Judge (ALJ) dismissed Micallef's complaint concluding that Micallef failed to allege specific facts or present evidence to show her objectively reasonable belief that her disclosures related to the protected categories of law enumerated in SOX. We affirm.

### BACKGROUND

Micallef became a table games dealer for Harrah's<sup>3</sup> in November 2006. The following year, Harrah's implemented a credit-hour program in which employees could earn additional paid time off for perfect attendance, volunteerism, and overtime. Exhibit 4. In September 2009, Micallef was elected to a Toke Committee responsible for counting gratuities for all shifts of table dealers and delivering the money to the casino cage, which reported these earnings to the payroll department. On September 16, 2010, Micallef sent an email to members of the Employee Action Committee in which she discussed employee concerns about Harrah's incentive program. Micallef also alleges that in or around September 2010 she raised concerns with managers about misappropriation of employee tips.

In November 2010 she took an extended leave of absence. Nearly a year later, Micallef reported to Harrah's that she had suffered injuries to her hand while working as a dealer and filed a workers' compensation claim. She was released to return to work as of February 21, 2012, and submitted an accommodation assessment form that ruled out her return to work as a dealer due to restrictions on her ability to grip or grasp and limitation of repetitive motion. In the next few months, Harrah's and Micallef tried to find an alternative open position for which she qualified.

On August 27, 2012, Peggy Keers, vice-president for human resources, advised Micallef that if she did not contact Harrah's by September 15, 2012, the company would assume that she had decided not to continue with finding a suitable alternative position. On September 27, 2012, Harrah's sent Micallef a letter terminating her employment; she did not respond.

Micallef filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on October 18, 2012, alleging that Harrah's violated the SOX by terminating her employment because she reported: (1) a work injury; (2) occupational health and safety concerns, such as fire hazards near oxygen tanks and (3) misappropriation of tips owed to employees. OSHA dismissed the complaint on June 30,

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<sup>2</sup> See 29 C.F.R. § 18.72 (2016).

<sup>3</sup> Harrah's is located on tribal land owned by the Rincon Band of Luiseno Indians, a federally recognized sovereign tribe. On January 6, 2016, the ALJ properly dismissed the Rincon Band as a party. See *Stroud v. Mohegan Tribal Gaming Auth.*, ARB Nos. 13-079, 14-013; ALJ Nos. 2013-CFP-003, 2103-ACA-003 (ARB Nov. 26, 2014).

2015, and Micallef requested an ALJ hearing.<sup>4</sup> In response, Harrah's filed a motion for summary decision to which Micallef responded. On September 9, 2016, the ALJ granted Harrah's motion and dismissed Micallef's complaint.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to decide this matter to the Administrative Review Board (ARB).<sup>5</sup> The ARB reviews an ALJ's recommended decision granting summary decision de novo.<sup>6</sup> The same standard that the ALJ applies in initially evaluating a motion for summary decision governs our review.<sup>7</sup>

An ALJ may issue a summary decision if the pleadings, affidavits, and other evidence 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>8</sup> In deciding such a motion, the evidence is viewed in the light most favorable to the non-moving party; the evidence is not weighed to determine the truth of the matters asserted.<sup>9</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>10</sup>

### DISCUSSION

The SOX's employee protection provision prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain fraudulent acts. That provision provides in relevant part

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<sup>4</sup> CX 12.

<sup>5</sup> See Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378-69, 380 (Nov. 16, 2012).

<sup>6</sup> *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005).

<sup>7</sup> *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 2000-ERA-036, slip op. at 4 (ARB Mar. 25, 2003).

<sup>8</sup> 29 C.F.R. § 18.40(d); *Franchini v. Argonne Nat'l Lab.*, ARB No. 13-081, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept. 28, 2015) (citations omitted).

<sup>9</sup> *Franchini*, ARB No. 13-081, slip op. at 10 (citations omitted); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 9 (ARB Oct. 26, 2012).

<sup>10</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

that no covered employer may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . . .<sup>[11]</sup>

To prevail on a complaint, an employee must prove by a preponderance of the evidence that (1) she engaged in activity or conduct that section 1514A protects; (2) her employer took unfavorable personnel action against her; and (3) the protected activity was a contributing factor in the adverse personnel action.<sup>12</sup>

The only issue on appeal is whether Micallef demonstrated in her complaint and opposition that she engaged in conduct the SOX protects. After reviewing the evidence in the light most favorable to Micallef, we agree with the ALJ’s conclusion that Micallef failed to present sufficient evidence that she reasonably believed her disclosures comprised protected activity under SOX.

Initially, the ALJ addressed Harrah’s argument that SOX did not apply to HCAL because it is a privately held limited liability company in Nevada and acted exclusively under a management agreement with the Rincon Band in operating the casino. The ALJ denied summary decision on this point because Harrah’s failed to provide evidence supporting its assertion, and the Rincon Band could not confer sovereign immunity on a private party of its choosing.<sup>13</sup>

On appeal Micallef argued that her complaints about the distribution of employees’ tips in the workplace were “directly related to fraud.” She asserted that the “intentional act of misappropriating tips from dealers is not legal and is a form of embezzlement, ‘skimming’ as referred by the FBI.”<sup>14</sup>

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<sup>11</sup> 18 U.S.C.A. § 1514A.

<sup>12</sup> *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Nos. 07-021, 07-022; ALJ No. 2004-SOX-011, slip op. at 3-4, 6 (ARB Aug. 31, 2009).

<sup>13</sup> Neither Harrah’s nor Micallef raised any objection to the ALJ’s rulings on jurisdiction over the named parties, or lack thereof. We need not address the issue.

<sup>14</sup> Complainant’s Brief at 14.

The ALJ acknowledged that Micallef's complaints about Harrah's tip policy might have "some relevance" to its financial state; however, he ultimately found that she failed to present evidence that, they "relate[d] to any of the categories of fraud or securities violations" listed in the SOX. As the ALJ explained "SOX does not protect [an employee] from retaliation for reporting 'illegal' activities of any kind;" instead, a complainant must allege and support a reasonable belief that her disclosures relate to one of the enumerated categories of fraud or securities violation under the SOX.<sup>15</sup> Order at 6-7.

We agree with the ALJ that SOX protection does not extend to (1) Micallef's work injury for which she received compensation, (2) her complaints about fire hazards near oxygen tanks, or (3) her dispute with Harrah's over the distribution of employee tips. While Micallef asserted repeatedly that her actions were related to fraud and therefore SOX-protected, we agree with the ALJ that "[n]owhere in her Opposition [to Harrah's Motion for Summary Decision] is there any suggestion of any objectively reasonable belief" that supports her theory.

### CONCLUSION

Micallef failed to present evidence that could reasonably be construed to support her claim that she engaged in protected activity. Therefore, Harrah's is entitled to summary

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<sup>15</sup> The ALJ cited the "definitely and specifically" language of *Van Asdale v. Int'l Game Tech*, 577 F.3d 989, 996-97 (9th Cir. 2009) for the extent to which a complainant's communications must relate to one of the listed categories of fraud or securities violations under the SOX. The ARB has since rejected this standard and held that a complainant need have only a reasonable belief that the complained-of conduct constitutes a violation of securities law, and that the belief is objectively reasonable "for an individual in [the employee's] circumstances having his training and experience." *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 14 (ARB May 25, 2011). We uphold the ALJ's finding that Micallef's evidence failed to support "any suggestion of any objectively reasonable belief" that her disclosures were covered under SOX. Order at 7.

decision as a matter of law. Accordingly, we **AFFIRM** the ALJ's decision and **DISMISS** Micallef's complaint.<sup>16</sup>

**SO ORDERED.**

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**JOANNE ROYCE**  
**Administrative Appeals Judge**

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**LEONARD C. HOWIE III**  
**Administrative Appeals Judge**

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<sup>16</sup> Micallef submitted six exhibits to the ARB after filing her appeal and asked that her case be remanded to the ALJ. We reject Micallef's submission of these exhibits because she failed to show that the new evidence "was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c) (2017); *Kumar v. Nihaki Sys., Inc.*, ARB No. 11-025, ALJ No. 2010-LCA-035, slip op. at 3 n.2 (ARB May 9, 2012).