



In the Matter of:

KRISHNA REDDY,

ARB CASE NO. 04-123

COMPLAINANT,

ALJ CASE NO. 2004-SOX-35

v.

DATE: September 30, 2005

MEDQUIST, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Krishna Reddy, pro se, Redlands, California

For the Respondent:

Jason A. Weiss, Esq., Allen, Matkins, Leck, Gamble & Mallory, LLP, Irvine, California

FINAL DECISION AND ORDER

Krishna Reddy filed a whistleblower complaint in which she alleged that MedQuist, Inc. violated the employee protection provisions of the Sarbanes-Oxley Act (the Act or the SOX).¹ The principal issue we must decide is whether Reddy, in responding to

¹ 18 U.S.C.A. § 1514A (West Supp. 2005). Title VIII of Sarbanes-Oxley is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806 covers companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78l, and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such companies. Section 806 protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged

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MedQuist's motion to dismiss, adduced sufficient evidence that she engaged in protected activity, an essential element of her whistleblower claim. We find that Reddy did not carry this burden and therefore we deny her complaint.

BACKGROUND

MedQuist, Inc. is a New Jersey corporation based in Phoenix, Arizona that provides electronic medical transcription services to hospitals and healthcare providers. It is a publicly-traded company covered by the SOX. Krishna Reddy is a medical transcriptionist who, at all relevant times, worked for MedQuist's Monrovia, California branch.² MedQuist engaged Reddy to transcribe dictated medical records reports.³ Medical transcriptionists were paid by the number of lines they transcribed, each line consisting of 65 characters.

On September 16, 17, and 19, 2003, Reddy emailed Kathy Pinkstaff, MedQuist's Regional Manager in Monrovia. In the first two emails, Reddy complained that new managers had "zapped" the line count in her transcriptions. That is, they had increased the number of characters per line from 65 to 90 and, as a result, she was transcribing fewer lines and thus receiving less pay. In the third email, Reddy informed Pinkstaff that she was requesting a transfer because of the "zapped" line count.⁴ On September 19,

violations 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. In addition, employees are protected 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. 68 FR 31864 (May 28, 2003). Department of Labor implementing regulations are found at 29 C.F.R. Part 1980. (2005).

² Reddy Prehearing Statement at 1, 4.

³ In its Reply To Complainant's Opposition to Respondent's Motion To Dismiss, MedQuist argues that since Reddy was an independent contractor and not its employee, she lacks standing to pursue a SOX claim. The Act provides protection only for employees of publicly-traded companies. 18 U.S.C.A. § 1514A(a). The record demonstrates that Reddy was indeed an independent contractor, not a MedQuist employee. See Respondent's Reply To Complainant's Opposition To Respondent's Motion To Dismiss, Exh. 1. Perhaps because MedQuist raised this issue only in replying to Reddy's opposition to its motion to dismiss and thus Reddy did not have an opportunity to rebut it, the ALJ did not address this issue. Moreover, the parties have not briefed it to us. Therefore, we will decide this matter as if Reddy had been a MedQuist employee.

⁴ Reddy Prehearing Statement at A-15, C-17, E-20.

2003, Pinkstaff emailed Reddy and informed her that her MedQuist contract was cancelled “in light of your recent emails and based on past history.”⁵

Reddy filed a complaint with the United States Department of Labor (DOL) alleging that MedQuist violated SOX when it terminated her contract after she informed her supervisors about the “zapped” line counts.⁶ DOL’s Occupational Safety and Health Administration (OSHA) examined Reddy’s complaint but denied it because it found that the complaint only expressed concerns about MedQuist’s internal policy, not about violations of the federal fraud statutes, SEC rules or regulations, or shareholder fraud.⁷ Reddy requested a hearing before a DOL Administrative Law Judge (ALJ).⁸ Thereafter, MedQuist filed a Motion To Dismiss, principally arguing that Reddy’s complaint failed to state a claim under the SOX. After Reddy responded to the motion and MedQuist replied, the ALJ recommended that Reddy’s complaint be dismissed for failure to state a claim, failure to timely file the SOX complaint, and failure to timely file a request for hearing.⁹ Reddy petitioned us to review the ALJ’s recommended decision.¹⁰

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the Administrative Review Board (ARB or the Board).¹¹ Pursuant to regulation, the Board reviews the ALJ’s factual determinations under the substantial evidence standard.¹² Substantial evidence is that which is “more than a mere scintilla. It

⁵ Reddy Prehearing Statement at F-21.

⁶ Complaint, dated December 18, 2003, at 1.

⁷ January 16, 2004 letter from Christopher Lee, OSHA Deputy Regional Administrator, to Krishna Reddy. OSHA investigates SOX complaints. 29 C.F.R. § 1980.104.

⁸ 29 C.F.R. § 1980.106.

⁹ June 10, 2004 Recommended Order of Dismissal (R. O. D.) at 4.

¹⁰ *See* 29 C.F.R. § 1980.110.

¹¹ *See* Secretary’s Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1980.110.

¹² *See* 29 C.F.R. § 1980.110(b).

means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹³ The Board, however, reviews an ALJ’s conclusions of law de novo.¹⁴

Because the ALJ considered evidence outside the pleadings in deciding MedQuist’s Motion to Dismiss, the Board treats the motion as one for summary decision under 29 C.F.R. §18.40.¹⁵ The Board reviews an ALJ’s recommended grant of summary decision de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary decision governs our review.¹⁶ The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts.¹⁷ Thus, pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision “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 that a party is entitled to summary decision.” A “material fact” is one whose existence affects the outcome of the case.¹⁸ And a “genuine issue” exists when the nonmoving party produces sufficient evidence of a material fact so that a factfinder is required to resolve the parties’ differing versions at trial. Sufficient evidence is any significant probative evidence.¹⁹

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

¹³ *Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

¹⁴ *Cf. Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) (analogous provision of Surface Transportation Assistance Act); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991) (same).

¹⁵ *See Erickson v. United States Env’tl Prot. Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2, slip op. at 3 (ARB July 31, 2001); *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-075, ALJ No. 96-CAA-8, slip op. at 3-4 (ARB Mar. 13, 2001).

¹⁶ *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003).

¹⁷ *Hasan v. Burns & Roe Enters., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001).

¹⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹⁹ *Id.* at 249, citing *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-290 (1968).

existence of an issue of fact that could affect the outcome of the litigation.²⁰ The non-moving party may not rest upon mere allegations, speculation, or denials in his pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof.²¹ If the non-moving party fails to sufficiently show an essential element of his case, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.”²²

Accordingly, the Board will grant summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact.²³

DISCUSSION

Reddy Submitted Sufficient Evidence That She Timely Filed Both Her Complaint and Her Request for Hearing.

The ALJ found that Reddy did not timely file her SOX complaint and her request for a hearing. He concluded that these failures warranted dismissing Reddy’s complaint.²⁴ But we find sufficient record evidence that Reddy timely filed both her complaint and request for hearing.

The SOX requires that the complaint be filed within 90 days of the date the alleged retaliation occurred.²⁵ MedQuist terminated Reddy’s contract on September 19,

²⁰ *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

²¹ *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e).

²² *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

²³ *See Johnsen v. Houston Nana, Inc., JV*, ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003) (“[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.”) (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999).

²⁴ R. O. D. at 4.

²⁵ 18 U.S.C.A. § 1514A(b)(2)(D).

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2003. The ALJ found that since OSHA did not receive Reddy's complaint until December 30, 2003, it was not timely filed. But on page one of Reddy's complaint to the Secretary of Labor a handwritten notation indicates that the complaint was "originally submitted via email on 12/18/2003."²⁶ SOX complaints may be filed by email, and the date of the email is considered the date of filing.²⁷ Therefore, since on summary judgment we are required to view evidence in the light most favorable to Reddy, record evidence exists that Reddy timely filed her complaint.²⁸ Therefore, the ALJ erred in concluding that the complaint should be dismissed because it was untimely filed.

Likewise, the ALJ erred in concluding that Reddy's complaint should be dismissed because her request for a hearing was untimely filed. A party objecting to OSHA's findings and preliminary order must request a hearing before a DOL ALJ within 30 days of receiving the OSHA findings and preliminary order. Failing to do so results in OSHA's findings and preliminary order becoming the Secretary's final decision.²⁹ Therefore, to avoid the effect of OSHA's January 16, 2004 letter denying her complaint, Reddy had to file an objection and request for hearing within 30 days of receiving the OSHA letter. Reddy filed her objection and request with DOL's Chief Administrative Law Judge, "via fax and U.S. Mail," on March 4, 2004.³⁰ The ALJ found that Reddy "ignored the 30 day requirement as she mailed her request for hearing on March 4, 2004."³¹ But in Reddy's March 4 request she avers that she received OSHA's January 16, 2004 preliminary order letter on February 4, 2004.³² Thus, since at the summary judgment stage of proceedings we must accept Reddy's version of when she received the OSHA letter, we find that the record demonstrates that Reddy filed her objections and request for a hearing within 30 days of receiving the OSHA preliminary order.

²⁶ December 18, 2003 Complaint from Krishna Reddy to the Secretary of Labor.

²⁷ 29 C.F.R. § 1980.103(d).

²⁸ OSHA complaints "should be filed" with the OSHA Area Director in the area where the employee resides or was employed. 29 C.F.R. § 1980.103 (c). But complaints may be filed with "any OSHA officer or employee." *Id.* We find that when Reddy filed her complaint with the Secretary of Labor at the U.S. Department of Labor, where OSHA's headquarters are located, she filed with "any OSHA officer or employee."

²⁹ 29 C.F.R. § 1980.106.

³⁰ Opposition To Respondent's Motion To Dismiss at C-13.

³¹ R. D. & O. at 4.

³² Opposition To Respondent's Motion To Dismiss at C-13.

Reddy Did Not Adduce Sufficient Evidence That She Engaged in SOX-Protected Activity.

The legal burdens of proof set forth in 49 U.S.C.A. § 42121(b), the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), govern SOX actions.³³ Accordingly, to prevail, Reddy must prove that: (1) she engaged in a protected activity; (2) MedQuist knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.³⁴ Therefore, whether Reddy engaged in protected activity is an essential, material fact which she must show if challenged to do so on a motion for summary judgment. As previously noted, the SOX protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of the federal mail, wire/radio/TV, bank, and securities fraud statutes (18 U.S.C.A. §§ 1341, 1343, 1344, and 1348), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.³⁵

In its Motion to Dismiss, MedQuist argued that because Reddy's complaint merely stated a potential claim for breach of contract, her claim must fail because the SOX protects only employees who reasonably believe their employer committed corporate fraud.³⁶ Thus, to avoid summary judgment, Reddy must show that her September 16, 17 and 19, 2003 emails to Pinkstaff provided information that she reasonably believed constituted violations of the federal fraud statutes, or an SEC rule or regulation, or any federal law pertaining to shareholder fraud.

The ALJ found that, in the face of MedQuist's Motion to Dismiss, Reddy did not demonstrate that she engaged in protected activity.³⁷ This finding is conclusive if

³³ 18 U.S.C.A. § 1514A(b)(2)(C).

³⁴ See 49 U.S.C.A. § 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-3, slip op. at 6-10 (ARB Jan. 30, 2004).

³⁵ 18 U.S.C.A. § 1514A(a).

³⁶ Respondent's April 13, 2004 Motion To Dismiss at 3; Respondent's May 13, 2004 Reply To Complainant's Opposition To Respondent's Motion To Dismiss (Respondent's Reply) at 1-2.

³⁷ R. O. D. at 3.

substantial evidence on the record as a whole supports it.³⁸ We have examined the entire record to determine if Reddy has demonstrated protected activity. The relevant portions of her emails to Pinkstaff complain only that the line counts are being “zapped” and that the “zapping” is an “Enron-type” accounting practice.³⁹ Her subsequent pleadings do not explain or demonstrate how the emails constitute protected activity. For instance, in her SOX complaint Reddy merely alleges that when she complained about the line counts, her contract was terminated.⁴⁰ Similarly, her other submissions allege only that MedQuist violated SOX when it terminated her contract after she complained about the zapped lines.⁴¹

Reddy’s Brief contains the same argument she raised in opposing MedQuist’s motion. Reddy contends that when MedQuist “rerouted the sums owed to its transcriptionists to its ‘profits,’ as well as overcharging its clients, MedQuist violated the Securities Exchange Act by filing fraudulent income with the SEC, thus indulging in schemes to deceive investors.”⁴² Furthermore, she claims that MedQuist engaged in mail fraud when it carried out “its schemes by mailing out the pay stubs to its transcriptionists via U.S. Mail.”⁴³ And she also contends that “by reducing its expenses in employee compensation, thereby fraudulently inflating its net income, thereby manipulating/deceiving the prospective/current shareholders as to the real financial status of the Corporation,” MedQuist violated the Securities and Exchange Act.⁴⁴ But since Reddy did not submit evidence supporting these allegations, they are mere speculation. And more importantly, Reddy focused on *MedQuist’s* (alleged) conduct rather than demonstrating that *she* engaged in protected activity. That is, she did not show that her emails to Pinkstaff provided information about conduct she reasonably believed

³⁸ 29 C.F.R. § 1980.110(b).

³⁹ Prehearing Statement at A-15, C-17-18, E-20.

⁴⁰ Complaint at 1.

⁴¹ Prehearing Statement at 12; Opposition To Respondent’s Motion To Dismiss at 6. Thus, Reddy in effect admits that MedQuist terminated her contract for reasons other than SOX-protected activity.

⁴² Opening Brief at 12-13; Prehearing Statement at 12-13; Opposition To Respondent’s Motion To Dismiss at 6.

⁴³ *Id.*

⁴⁴ See March 4, 2004 Objections to Findings of the Regional Administrator at 3. Reddy incorporates this document by reference in both her Opposition To Respondent’s Motion To Dismiss and her Opening Brief.

constituted a violation of the federal fraud statutes, or an SEC rule or regulation, or any federal law relating to shareholder fraud.

Reddy also argues to us that the OSHA investigation “proceedings” did not comply with due process because she was not afforded a hearing and was not interviewed. She also claims that due process violations occurred when the Office of Administrative Law Judges did not properly serve her with notices. But since Reddy had the opportunity to argue these contentions to the ALJ but did not, she has waived this argument on appeal.⁴⁵

Finally, MedQuist argues, without citing any authority, that it is entitled to attorney’s fees and costs because Reddy’s SOX complaint and this appeal “constitute an abuse of the judicial process.”⁴⁶ The Act does permit the Board to award a successful litigant like MedQuist a reasonable attorney fee not exceeding \$1,000 where a SOX complaint is frivolous or brought in bad faith.⁴⁷ Even so, as we explained in *Allison v. Delta Air Lines, Inc.*:⁴⁸

A complaint is frivolous “if it lacks an arguable basis in law or fact.” *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998). “A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist.” *Harper v. Showers*, 174 F.3d 716, 718 (5th Cir.1999). “A complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless.” *Talib*, 138 F.3d at 213.

We find that Reddy’s complaint contains at least an arguable basis in law because it is based on her contention that MedQuist retaliated because of SOX-protected activity. And since we have not determined whether Reddy’s allegation that MedQuist breached its contract when it terminated her contract has validity, it is not necessarily baseless. It simply does not support a SOX claim. Nor has MedQuist convincingly

⁴⁵ See *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 01-CER-1, slip op. at 9 (ARB Apr. 30, 2004).

⁴⁶ Reply Brief at 17.

⁴⁷ 49 U.S.C.A. § 42121(b)(3)(C). See also 29 C.F.R. § 1980.110(e).

⁴⁸ ARB No. 03-150, ALJ No. 2003-AIR-00014, slip op. at 6 (ARB Sept. 30, 2004) citing *Berry v. Brady*, 192 F. 3d 504, 507 (5th Cir. 1999).

demonstrated that Reddy brought the complaint or appeal for vexatious reasons. Therefore, we deny MedQuist's request for attorney's fees.

CONCLUSION

We accept the ALJ's finding that Reddy did not demonstrate protected activity because substantial evidence in the record as a whole supports it. Therefore, since no genuine issue exists as to whether Reddy engaged in protected activity, a material fact, MedQuist is entitled to summary decision. As a result, we **DENY** Reddy's complaint. We also **DENY** MedQuist's request for attorney's fees because Reddy's complaint and appeal are not frivolous or brought in bad faith.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge