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Office of Administrative Law Judges
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Issue Date: 01 April 2005

CASE NO. 2004-SOX-00074

In the Matter of:

Sean Gallagher,
Complainant,

vs.

Granada Entertainment USA, ITV plc,
Paul Jackson, Jane Turton and Stephen Davis,
Respondents.

Recommended Decision and Order Granting Summary Dismissal of Complaint

A. Introduction

Sean Gallagher (Complainant or Gallagher) filed a complaint of employment discrimination against Respondents Granada Entertainment USA (Granada); ITV plc; and three individual corporate officers[1] under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (West Supp. 2004) (the Act). He says that as an in-house attorney for Granada, he voiced objections internally about how Granada's earnings were treated in financial documents as it merged with another entity. He claims that in retaliation he was denied a promotion, and his employment contract was allowed to expire.

Respondents moved for a summary decision on two grounds. First, Granada claims it was not an employer subject to the Act at the time the decision not to promote Gallagher was made, and second, the undisputed evidence shows that the non-promotion and termination had nothing to do with whistle blowing. He was

[1] Gallagher had sought to make claims against a larger number of individuals. *See,* Order Partially Granting Complainant's Motion to Add Individual Respondents, dated October 19, 2004.

not regarded as qualified for the more senior position he desired and demanded in the corporate restructuring the merger caused (although the job offered carried the same title, duties and remuneration he already enjoyed) and he adamantly refused to report to the person designated to become his superior. Both contentions are factually uncontradicted and legally dispositive, so the complaint is dismissed.

The cross motion for summary judgment Complainant filed is not well supported factually, so it is denied.

B. Legal Standard for Granting A Summary Adjudication

This forum's rule on summary dispositions at 29 C.F.R. § 18.40(d) is essentially identical to Rule 56, Fed. R. Civ. P. *Mehen v. Delta Air Lines*, Case No. 03-070 (ARB Feb. 24, 2005). Motions to dismiss focus on the sufficiency of a complainant's allegations. A properly crafted defense motion for summary judgment requires a complainant to exhibit admissible proof[2] of facts crucial to his or her claim for relief. The motion tests whether the Act provides a remedy when the admissible evidence is assumed to be true. The proof must be grounded in affidavits, declarations and answers to discovery (answers to requests for admissions, interrogatories, or deposition testimony) from the complainant and (or) other witnesses. The judge weighs none of this evidence, and indulges reasonable inferences in the complainant's favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (only legally permissible inferences are drawn); *see generally*, *Stauffer v. Wal Mart Stores, Inc.*, Case No. 99-STA-21 (ARB Nov. 30,1999) ; *Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42 4-6 (Sec'y July 17, 1995). But if a complainant adduces insufficient facts, the proceeding can be concluded without subjecting all parties to the expense of a trial that only could produce a foreordained result. *Orr v. Bank of America,* 285 F.3d 764, 781-783 (9th Cir. 2002) (affirming summary dismissal of common law tort claims and statutory claims for failure to presented admissible evidence to substantiate them).

The moving party first must explain why there is no genuine issue of material fact for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Respondents' motion conformed to *Celotex*, for their statement of uncontroverted

[2] Affidavits must be made on personal knowledge, setting forth facts that "would be admissible in evidence," and show affirmatively that the witness "is competent to testify" to the matters stated. 29 C.F.R. § 18.40(c) and Rule 56(e), Fed. R. Civ. P. *See also, Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002).

facts[3] identified "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which they believe demonstrate the absence of a genuine issue of material fact." *Id.,* at 323 [quoting Fed.R.Civ.P. 56(c)]. The Respondents' declarations and other proof have demonstrated (1) that Granada was not an entity the Act covered, negating a jurisdictional element essential for Gallagher to obtain relief, and (2) that his insubordination in adamantly refusing to accept his place in the post-merger hierarchy constituted valid grounds not to renew his employment contract.

Once the Respondents met this initial burden, the Complainant had to produce evidence to show that a genuine issue of material fact remains for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49 (1986). An issue is "genuine" only when there is sufficient evidence for a reasonable fact finder to find in the non-moving party's favor. *Jespersen v. Harrah's Operating Co.,* 392 F.3d 1076, 1079 (9th Cir. 2004); *Far Out Productions, Inc. v. Oskar,* 247 F.3d 986, 992 (9th Cir. 2001) (citing *Anderson,* 477 U.S. at 248-49). When the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co., supra,* 475 U.S. at 587; *First National Bank of Az. v. Cities Service Co.*, 391 U.S. 253, 289 (1968). A fact is material (and precludes summary judgment) if it would establish or refute an essential element of a claim or defense that one of the parties asserted.

C. *Record facts not disputed*

The undisputed facts set out below come from the Respondents' Statement of Uncontroverted Facts[4] (Respondents' Statement), and the supplementing declaration attached to the Respondents' Reply. Some come from the assertions made in the "declaration" Gallagher filed in opposition to the summary judgment

[3] The local rule 56-1 of the U. S. District Court for the Central District of California (the place where the claim arose and would be tried in the Article III courts) requires that such statements accompany motions for summary judgment. Procedural rules of this forum impose no similar requirement, but the statement is quite useful. Through it Respondents detailed the record basis for all facts they relied on, so the Complainant could controvert them with a responsive affidavit, declaration or other admissible evidence. Yet the Complainant's opposition has sidestepped those pertinent facts by failing to counter them with admissible proof. *Cf., Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1102, 1105 (9th Cir. 2000) (analyzing how burdens of production and persuasion shift in disposing of summary judgment motions).

[4] The source for the facts is Respondents' Statement unless another attribution is given. The record citations provided in it are not repeated here.

motion on February 7, 2005. The “declaration” includes no jurat — one of several shortcomings the Respondents pointed out in their Reply dated Feb. 2, 2005, along with the failure to have attached the documents it referenced as Exhibits B and C. None of these deficiencies were corrected after the Reply pointed them out. This could have been done, for Respondents’ Reply was docketed *before* Gallagher’s opposition to the summary judgment motion. The opposition had not been filed with the Office of Administrative Law Judges when it was served on the Respondents, as 29 C.F.R. § 18.40(b) requires.

1. Granada’s corporate status

Granada was a U.S. subsidiary of Granada plc, an entity chartered in the U.K. Granada plc merged with another U. K. entity, Carlton Communications plc. Both became parts of Respondent IVT plc when the transaction closed on February 2, 2004. Granada plc thereafter became Granada Limited, and Carlton Communications plc became Carlton Communications Limited; both have continued to operate as components of IVT plc.

Granada was not a company with a class of securities registered under section 12 of the Securities and Exchange Act of 1934, or required to file reports under section 15(d) of that act. Granada was not affiliated with any company required to comply with the registration obligations of Section 12 or the reporting obligations of section 15(d). Only after the merger of Granada plc and Carlton Communications plc did Granada become affiliated with an entity required to comply with the Securities and Exchange Act (*viz*., Carlton America, discussed below).

2. Officers of Granada and other entities

Respondent Paul Jackson was the head of International Production of Granada plc. In that role he ultimately was responsible for Granada’s subsidiary in the U.S., which reported to him. He became President of Granada America on January 14, 2004, shortly before the merger of Granada plc and Carlton Communications plc closed.

Respondent V. Jane Turton was the Commercial Director for Entertainment, Formats and International Production for Granada plc, with managerial authority and responsibility for personnel and business issues for Granada subsidiaries in the U.K and the U.S. (Declaration of V. Jane Turton).

Respondent Stephen Davis had been the President and Chief Executive Officer of the U.S.-based production operation of Carlton Communications plc, known as Carlton America. In that role he reported directly to London.

Before the merger, in August 2003, Carlton America began to rent space at Granada's corporate offices in Sherman Oaks, CA. Davis met many of Granada's employees socially once his office was down the hallway from them, and dealt with them on business matters, including the rent Carlton America paid to lease its space, and plans for what would happen after the merger (assuming it went forward). Before February 2, 2004 Davis had no authority to act on behalf of Granada. After the February 2, 2004 merger he became second in command at Granada America, reporting to Paul Jackson. He accepted his demotion.

3. Gallagher's work at Granada in the U.S.

Granada hired Gallagher in November 2000 as an in-house California attorney. An experienced trial lawyer[5] admitted to the bar in the states of California and Florida, he initially assumed the title of a senior director, business and legal affairs. He advanced to function as Granada's head of U. S. Business and Legal Affairs, with the title of Vice-President, Business and Legal Affairs (Gallagher's declaration in opposition to the summary judgment at ¶ 9). He worked mostly in the Los Angeles area, but sometimes in New York. His annual employment contract, due for renewal on November 20, 2003, was renewed that day for a six month period (with an option to renew), so it would expire on May 20, 2004. His annual compensation then was $164,800.00. (Declaration of V. Jane Turton, Exhibit E).

4. Ivan Garel-Jones' work for Granada in London

Jackson and Turton were impressed with the performance and experience of Ivan Garel-Jones, a U.K. lawyer. He had worked on legal matters pertaining to television production when he joined Granada plc's London subsidiary London Weekend Television in October 2000 as a Business Affairs Manager. He had advanced to work directly for Turton as one of the three lawyers in the Entertainment department of Granada plc in London. He negotiated format agreements, contracts with actors, and handled a variety of Granada's European co-production deals in France, Belgium, the Netherlands, Spain, Scandinavia, and Italy.

[5] He testified he has taken nearly a thousand depositions (Gallagher depo. at pg. 5).

Garel-Jones also had handled sale and leaseback transactions for Granada plc under U. K. tax laws, which were of critical importance to the business. This responsibility required a thorough understanding of that legislation, the ability to work under time pressure, a good grasp of the business and financing of television productions, and of the law of ownership rights.

While he worked for Turton as Business Affairs Manager for the Entertainment department of Granada plc, it was substantially larger than the combined California and New York business of the Granada U.S. subsidiary, and more profitable. Garel-Jones managed matters of larger scope and greater significance to the overall profitability of the business than those Gallagher managed in the U. S. (Declarations of V. Jane Turton and Paul Jackson).

5. <u>Gallagher's role in the merged entity</u>

On January 22, 2004 Paul Jackson met with Gallagher to discuss the new organizational structure for the merged Granada/Carlton entity. While his counterpart at Carlton America would be laid off,[6] Gallagher learned he would continue in his role as Vice President, Business and Legal Affairs, reporting to Ivan Garel-Jones, who was coming to the U.S. from the U.K.

Jackson and Turton had decided that after the merger and the expansion of business across a broader range of activities,[7] the business affairs unit would be led by a Senior Vice President. They believed Gallagher was not ready to fill that role, and that Garel-Jones was the better candidate.

The immigration paperwork for Garel-Jones showed he was to work on a variety of business issues, with the assistance of U.S. lawyer. As a California bar member, Gallagher would be that U.S. lawyer.

The next day (January 23, 2004) Gallagher told Jackson in a telephone conversation that he would not report to Garel-Jones. He informed Turton he believed there could be legal issues involved if Garel-Jones practiced law in the U.S.

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[6] This layoff actually occurred. Declaration of Stephen Davis of June 10, 2004 at ¶ 21.

[7] This included the addition of Carlton's TV movie business. *See,* Declaration of Paul Jackson, Exhibit C.

On January 28, 2004 Gallagher, who was highly agitated about the post-merger structure at Granada, confronted Davis about why he was not to be a Senior Vice President in the new organization. Davis suggested Gallagher to go home and get some rest. The following day, January 29, 2004 (about a week after his meeting with Jackson about his role in the merged entity), Gallagher wrote an e-mail message to Jackson and Turton saying he "will not report to" Garel-Jones, and that he would not "be demoted to any level less that Ivan's current[ly]-proposed position as well as everyone else on that line." In a second e-mail that day Gallagher referred to his six-month employment agreement from November 2003, but said this was "no longer acceptable" to him. He demanded a "year contract starting retroactively to November 21, 2003" with specific employment terms, including that he be placed at the "same reporting level and level as other SVPs [senior vice presidents]," and that all "corporate and public announcements will …[make] mention of both myself as SVP BALA [business and legal affairs] and Ivan on temporary assignment as SVP CA." A few days later on February 2, 2004 Gallagher addressed another e-mail to Jackson, Turton and Stephen Davis in which he set out 13 requirements, including that he be given the title of SVP of Business and Legal Affairs." (Declaration of V. Jane Turton, Exhibit B).

Gallagher confirmed at his deposition that he found his post-merger position unacceptable, for he understood when his contract was last extended in November 2003 that he would become "head of all U.S. business and legal operations for the combined companies and that, therefore, this was a change of the terms on their part of the contract to which I was not in agreement and that was not acceptable. They could not now go back and change the material terms of my employment contract as they were proposing, and that was not – that was not acceptable." (Gallagher depo. at p. 144). He believed his title and responsibilities had changed, because he now was to report to Ivan Garel-Jones, while before he made his own decisions and had staff that reported to him. (*Id.* at pg. 145-146). He confirmed at his deposition that his title did not change, his duties did not change, and his compensation did not change. The aspect he objected to was the requirement to report to Garel-Jones. (Gallagher depo. at pg. 144 to 146).

6. Gallagher's termination

Turton replied on January 29, 2004 with an e-mail asking Gallagher to meet with her and Jackson to talk about his concerns. Turton spoke by telephone to Gallagher on or about January 30, and that day Jackson sent Gallagher a letter. Gallagher responded in writing to Jackson reiterating that he expected to be "SVP of Business and Legal Affairs."

The next day, acting on behalf of Granada, when Jackson and Turton spoke by telephone they discussed either terminating Gallagher or not renewing his contract when it expired due to his ongoing rejection of his position as a vice president reporting to Garel-Jones as a senior vice president. Their discussions continued into the first week of February 2004, culminating in their decision on February 6, 2004 not to renew Gallagher's contract when it expired for his refusal to work within the new corporate structure.

A meeting occurred on February 9, 2004 where Gallagher and Davis were present in California (Jackson being unavailable) and Turton participated by telephone from London. Turton told Gallagher that his contract would not be renewed after it expired on May 20, 2004, that he would continue to be paid his full salary until that time, but he should no longer come to the office; she confirmed this decision in a letter the next day. (Declaration of V. Jane Turton, Exhibit E). Davis, who was not Gallagher's direct supervisor, had no role in the decision not to renew Gallagher's contract.

Eleven of Gallagher's former colleagues have testified that he did not complain to them of wrongdoing prior to February 9, 2004, when Gallagher was told his employment contract would not be renewed.

Gallagher alleges he complained that $60 million in earnings of Granada were mischaracterized in the merger documents to offset operating costs of the U.K. division, and that he complained to Turton about this. (Gallagher declaration, ¶ 4.3) He also says that Turton and Jackson misrepresented to outside auditors in December 2003 that Andrew Baker, another U. K. lawyer, was the head of U.S. Business and Legal Affairs in an effort to keep his objections from being aired.

D. Conclusions of Law

The Act protects employees of certain corporations in these terms:

> (a) 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)), or any officer, employee, contractor, subcontractor, or agent of such company, 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, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct);

(b) ENFORCEMENT ACTION

* * * * * * * * * * * * *

(2) PROCEDURE-

(A) IN GENERAL- An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION- Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF- An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

18 U.S.C. § 1514A(a), (b) and 29 C.F.R. Part 1980

1. Jurisdiction over the non-promotion claim

An aggrieved employee's first responsibility is to show that the Act covered his employer. There is a complete absence of proof that on January 22, 2004 Granada was a company with a class of securities registered under section 12 of the Securities and Exchange Act of 1934, or required to file reports under section 15(d). That only happened after February 2, 2004 when the Granada/Carlton merger closed.

There is no liability when an adverse employment action occurs before the employer becomes subject to the Sarbanes-Oxley Act. *Roulett v. American Capital Access*, 2004-SOX-78 (ALJ Dec. 22, 2004) (employee could not bring a claim for relief when his employer was not subject to the requirements of sections 12 or 15(d) of the Securities and Exchange Act on the date he was terminated); *Lerbs v. Bucca di Beppo Inc.,* 2004-SOX-8 at 10 (ALJ June 15, 2004) (the date of the employer's retaliatory act determines whether the Act applies). *Cf.*, *Gilmore v. Parametric Tech, Corp.,* 2003-SOX-1 (ALJ February 6, 2003) (the Act has no retroactive effect); *Kunkler v. Global Futures & Forex Ltd.*, 2003-SOX 6 (ALJ April 24, 2003) (same); *McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 2003-SOX 23 (ALJ January 16, 2004) (same). The failure to promote him to be a senior vice-president is not actionable.

This does not insulate ITV plc from potential post-merger liability under the Act for the decision Jackson and Turton reached not to renew Gallagher's employment. Turton informed Gallagher that his employment contract would not be renewed on February 9, 2004, after the merger. *Klopfenstein v. PCC Flow Technologies Holdings, Inc.,* 2004-SOX -11 (ALJ July 6, 2004) (corporations subject to the Act are liable for actions taken by their subsidiaries).

2. The termination claim

The parties' burdens of proof at trial are set out in the implementing final regulation the Secretary published at 29 C.F.R. § 1980.109(a). 69 Fed. Reg. 52104 *et seq*. (Aug. 24, 2004). They are not unique to the Act – the regulation restates the traditional burdens of proof in whistle blower retaliation analysis used in other employee protection statutes, such as the Energy Reorganization Act[8] and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.[9] *See*

[8] 42 U.S.C. § 5851(b)(3).

the comment in the final regulation at 69 Fed. Reg. at 52105. The relevant portion reads:

> A [judge's] determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.
>
> 29 C.F.R. § 1980.109.

Gallagher has produced no direct evidence of discriminatory retaliation, as is typical in these claims.[10] Like most complainants he must rely on inferences of retaliation. Gallagher must demonstrate that (1) he engaged in a protected activity, (2) the employer was aware of the protected activity, (3) he suffered an adverse employment action, and (4) the circumstances support an inference that the protected activity contributed to the adverse employment activity. *Macktal v. U. S. Dep't of Labor*, 171 F.3d 323, 327 (5th Cir. 1999).

The Respondents and Gallagher do not agree about whether he engaged in protected activity by complaining to senior corporate officers such as Jackson and Turton about financial matters relating to the merger, and whether such complaints influenced them not to promote him to senior vice president, or not to renew his employment contract on its expiration in May 2004. For purposes of this motion I presume Gallagher complained internally to Jackson, Turton or others about the ways Granada's earnings were handled in financial statements involved in the merger, as he alleges. I harbor grave reservations about my authority to do so,

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[9] 49 U.S.C. § 42121(b), the statute explicitly incorporated by reference in the whistle blower protection portions of the Sarbanes-Oxley Act. *See* the portions of the Sarbanes-Oxley Act with the catchlines "in general" and "burden of proof" quoted above. 18 U.S.C. § 1514A, (b)(2)(A) and (C).

[10] The observation the Fifth Circuit made in an Age Discrimination in Employment Act decision is equally applicable to a whistle blower protection claim. "Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree. [citation omitted]. Employers are rarely so cooperative as to include a notation in the personnel file, "fired due to age," or to inform a dismissed employee candidly that he is too old for the job. *Thornbrough v. Columbus & Greenville RR. Co.,* 760 F.2d 633, 638 (5th Cir. 1985).

however. Gallagher has failed to ground his allegations that he engaged in "protected activity or conduct" in an affidavit or declaration, or to point to specific deposition testimony or discovery responses to support his claim. On summary judgment allegations unsupported by admissible evidence are insufficient, as 29 C.F.R. § 18.40(a) and (c) and Rule 56, Fed. R. Civ. P make clear.

His claims for relief nevertheless founder on the two grounds the Respondents urge, that he has failed to show that his Employer Granada was covered by the Act when he was denied promotion to the position of senior vice president on January 22, 2004, and that his refusal to report to Ivan Garel-Jones was a wholly independent and adequate reason to have "take[n] the same unfavorable personnel action in the absence of any protected behavior." 29 C.F.R. § 1980.109(a).

a) Inference of retaliation

Claims for relief under federal laws that prohibit retaliation against whistle blowers are analyzed similarly. This is strikingly illustrated in the Seventh Circuit's recent decision in *Hasan v. U.S. Dept. of Labor*, __F.3d __, 2005 WL 578791 (7th Cir. March 14, 2005) in which the court chose to dispose of three quite different retaliation claims in a single opinion. All involved some aspect of whether the plaintiff had presented a prima facie case of retaliation based on inferences, and whether it had been rebutted. Applying standards derived from Title VII employment discrimination actions, all the claims failed because there was no basis to infer retaliation.

The first arose under the Energy Reorganization Act[11]; the complainant Hasan alleged an employer refused to hire him in retaliation for having reported that the firm covered up safety problems on a project where he had been working for another firm. There was no direct proof of retaliation. The Department's Administrative Review Board found the employer Hasan applied to had legitimate reasons for refusing to hire him that were not pretextual. The court found Mr. Hasan had to show that after he reported the safety problem that he claimed provoked retaliation "only he and not any similarly situated job applicant who did not file [a safety complaint], was not hired even though he was qualified for the job for which he was applying." __ F.3d at __, 2005 WL 578791 at *1. In the second case the Seventh Circuit rejected a prisoner's claim that he had suffered retaliatory

[11] 42 U.S.C. § 5851, one of that statutes that served as the template for the implementing regulation governing burdens of proof in Sarbanes-Oxley claims. 69 Fed. Reg. at 52105.

discipline forbidden by the First Amendment[12] for having filed a prison grievance that claimed a guard had tampered with his typewriter. The district court found prison officials disciplined him for violating a state regulation by lying about prison staff in the course of his grievance proceeding, not for bringing it. Thus, there was no retaliatory discrimination. In the third, a district court had entered summary judgment for an employer in a Title VII discrimination action. A female instructor at a school said the nominal reason for her dismissal, that she had taken food meant for students, was a pretext for retaliation because of a sexual harassment charge she had filed four months earlier. The dismissal was affirmed due to the absence of direct proof of retaliation, and the school's uncontradicted proof that the instructor already had been reprimanded for taking food. She presented no proof that other food thieves who had not filed sexual harassment charges were treated more leniently. On that record "no reasonable jury could infer that her filing the [harassment] charge was responsible for her being fired." *Hasan,* __F.3d at__, 2005 WL 578791 at *2.

Under the *Hasan* decision, the inference of retaliatory discrimination Gallagher would have the fact-finder draw is legally unwarranted. Gallagher has no evidence that only he, who had complained about violations of laws relating to fraud against shareholders, failed to be promoted or suffered a non-renewal of his employment. His counterpart on the legal staff of Carlton America was not made a senior vice president, but was laid off. Stephen Davis, a more senior executive than Gallagher, was demoted in the reorganization as compared to his pre-merger status. Neither had made any whistle blower complaints.

Moreover, had Jackson and Turton meant to retaliate against Gallagher, he would have been the obvious layoff candidate. But his counterpart at Carlton America was the lawyer laid off.

There is insufficient evidence in the record as a whole to support a factual or legal inference of retaliatory discrimination. In other words, Gallagher failed to make out a triable issue of fact on the causation element of his claim, *Macktal's* fourth factor. *Macktal*, *supra*, 171 F.3d at 327.

[12] The prisoner relied on the text of the First Amendment, insuring the right "to petition the Government for a redress of grievances."

b) Respondents' Affirmative Defense

But there is a stronger reason to reject this whistle blower claim. The proof the Respondents have offered, and which Gallagher has confirmed at his deposition, make out a complete defense for ITV plc and the individual Respondents. His oft-repeated refusal to report to Garel-Jones was insubordination that justified the decision Jackson and Turton made to separate Gallagher from employment. This is so even if they also harbored improper reasons to contemplate a retaliatory termination. Reframed in terms similar to those Judge Posner used in the *Hasan* decision:

> The improper reason may have been present in the defendant's mind as something favoring the action he took, but have weighed so lightly in comparison with other factors that it exerted no influence at all in his decision. . . . . In . . . [this] case the defendant has a good rebuttal: he would for sure have acted even if he had not had an improper motive. *Hasan*, __ F.3d at __, 2005 WL 578791 at *4.

There is no reason to engage in any pretext analysis. Gallagher offered no proof that employees who had not engaged in protected activity were permitted to report to supervisors other than the persons initially designated. Gallagher does not contend he would have worked under the supervision of Garel-Jones — based on the e-mails and letters he authored, the telephone conversations he initiated, and his deposition testimony, he could not. He repeatedly told Jackson and Turton orally and in writing that he refused to do so. Such undisputed proof can fairly be characterized as "clear and convincing" evidence. 29 C.F.R. § 1980.109(a). Any reasonable fact finder would conclude that he would have been fired for the non-invidious reason of insubordination. That insubordination trumped any claim he might have had to whistle blower protection. A trial would simply be fruitless; the only possible outcome on this record is the dismissal of Gallagher's claim for protection under the Act.

3. <u>Dismissal of the claim against Stephen Davis</u>

Although superfluous, the individual liability of Davis will be addressed for completeness. The declarations of Jackson and Turton show they were the ones who decided to reject Gallagher's demands to be a senior vice president, and not to renew his employment. Gallagher submitted nothing in his "declaration" showing

that Davis should be liable individually for any violation of the Act. The mere presence of Davis in the room in California on February 9, 2004 when Turton told Gallagher by telephone that his employment would not be renewed carries no liability, nor does his status as Granada's post-merger President.

Order

It is ordered that the Respondents' motion for summary judgment on Gallagher's claims for whistle blower protection under § 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, is granted, and the claims are dismissed in their entirety.

A

William Dorsey
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the Board issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).