



**Issue Date: 14 August 2006**

CASE NUMBER 2005-SOX-00077

In the Matter of

**MICHAEL RIEDELL,**  
Complainant,

v.

**VERIZON COMMUNICATONS,**  
Respondent.

**RECOMMENDED ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

The above-captioned matter arises from a complaint Michael Riedell (“the Complainant”) filed on April 6, 2005 against Verizon Communications (“the Respondent” or “Verizon”) under the provisions of section 806 of the Sarbanes-Oxley Act (SOX), 18 U.S.C. §1514A, and implementing regulations published at 29 C.F.R. Part 1980. The Complainant is a telecommunications technician and security investigator who worked for Verizon for approximately 25 years. The Respondent is a large corporation that provides telecommunications services throughout the United States.

Under the provisions of section 806 of the SOX, it is unlawful for companies subject to certain provisions of the Securities Exchange Act of 1934, their officers, employees, contractors, subcontractors, or agents to discriminate against any employee because such employee has provided information to Federal agencies, members of Congress, or supervisors concerning “conduct which the employee reasonably believes” constitutes a violation of section 1341, 1343, 1344, or 1348 of Title 18 of the United States Code, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. In addition, section 806 also makes it unlawful to discriminate against any employee who has filed, caused to be filed, testified, participated in or otherwise assisted in a proceeding that has been filed or is about to be filed if the proceeding relates to alleged violations of any of the aforementioned statutes and regulations.

**PROCEDURAL BACKGROUND**

According to the Complainant’s April 6, 2005 complaint, which was filed with the San Francisco, California office of the Occupational Safety and Health Administration (OSHA), during 2004 he uncovered “a major breach” of Verizon’s “National ATM/Frame Network” and also discovered that several Verizon employees with fake identifications had been accessing an

inordinate number of bank circuits and credit agencies. The complaint further alleged that when the Complainant reported these discoveries his supervisors, they took control of the investigation away from him and placed him on administrative leave.

On May 8, 2005, the Complainant supplemented his initial complaint by faxing a memorandum to OSHA's Director of Investigations in Washington, D. C. In the memorandum, the Complainant asserted that while he was shopping on May 7 he had been followed by "numerous cars" and was "even followed into every store, [and] up and down each isle [sic]." The fax also contained the license numbers of 12 vehicles that had allegedly taken part in this surveillance. Likewise, on May 10, 2005, the Complainant sent an OSHA investigator in San Francisco a fax in which he alleged that on May 9 and 10, 2005, he had been harassed by various individuals who had followed him, stared at him, and driven their vehicles up to him "real fast." The Complainant's fax also listed the license numbers of 17 vehicles that he had identified on May 9 and an additional nine vehicles that he had observed on May 10.

On May 18, 2005, Verizon terminated the Complainant's employment on various grounds, including his failure to attend an interview concerning his work activities, his unauthorized interruption in telephone service to Verizon's facility in Thousand Oaks, California, and his unauthorized disclosure of private information about Verizon employees. On May 23, 2005, the Complainant sent a fax to OSHA's Director of Investigations in which he indicated that he had been terminated and wished to file an additional complaint. On that same day, the Complainant also sent a fax to Alison Pauly, OSHA's Regional Supervisor Investigator in San Francisco, in which he complained that the OSHA investigator assigned to his case had an undisclosed conflict of interest. On the following day, the Complainant sent a fax to OSHA's San Francisco office in which he reported that during the preceding five days he had been "followed, harassed and intimidated by Verizon and/or agents of Verizon." In particular, he asserted, on the previous Friday he had been followed by someone driving a Verizon van and that during the previous weekend he had been "able to document numerous license plate numbers" that he had already "forwarded to Law Enforcement."

In a report dated June 8, 2005, OSHA's Regional Administrator in San Francisco informed the Complainant that OSHA had completed its investigation and had concluded that his complaint was without merit.

On June 29, 2005, the Complainant sent the Office of Administrative Law Judges a letter objecting to the OSHA findings and requesting a hearing. In his letter, the Complainant alleged that his supervisors had interfered with his efforts to investigate improper bidding practices by a vendor known as AllPro and asserted that in January of 2006 someone had attempted to break into a safe in his office. Thereafter, he recounted, he made arrangements to have a security camera placed over the safe, but was involuntarily put on administrative leave only an hour and 40 minutes before the camera was to be installed. The Complainant's letter also asserted that after he filed his complaint, someone had attempted to ram a vehicle into his car, drivers of other vehicles had tried to cut him off while he was driving on a freeway, and he had on "several occasions" been followed by an individual he identified as "Mr. Boyajian."<sup>1</sup>

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<sup>1</sup> It is noted that the investigator OSHA assigned to this case is named Maral Boyadjian.

After the Complainant's letter was received by the Office of Administrative Law Judges, this matter was assigned to the undersigned Administrative Law Judge and the parties were notified that a trial would be commence in Long Beach, California, on October 17, 2005. However, the trial date was later postponed so that the parties could conduct settlement negotiations. After those negotiations proved unsuccessful, the trial was rescheduled to begin on December 13, 2005.

On November 8, 2005, the Complainant sent the Department of Labor's Chief Administrative Law Judge a letter in which he asserted: (1) that "Verizon (GTE/Bell Atlantic) is using its funds to **build, operate and control** an extremely large government entity without the knowledge and concurrence of its stakeholders, stockholders, and the public in general," (2) that "members of the California DOL and the Phoenix DOL are, affiliated with or part of, an entity [that] may have a severe conflict of interest in a case involving Verizon Communications," (3) that the Jones Day law firm, which represents Verizon in this proceeding, "is a law firm where members, and members of the DOL have relationships that are in possible conflict with my case," and (4) that there has been a pattern of assigning dates in this case that are "of importance to the entity described above" as well as to the "Nazi socialist movement that was defeated in part by the United States of America in World War II" [emphasis original]. In addition, on the tenth unnumbered page of a Pre-Trial Statement the Complainant filed on November 16, 2005, he stated an intention to send "recuse letters" to various individuals involved in this case, including this Administrative Law Judge, because such individuals "are also members past/present of a government entity which will remain unnamed at this time and in this correspondence." Finally, in two letters that were both dated November 22, 2005, the Complainant alleged that the dates that this judge has selected for various procedural purposes "all reference a sympathy to Germany Nazi ideology" and he thus requested that the undersigned judge recuse himself from presiding over this proceeding.

On November 22, 2005, the Complainant failed to appear at a deposition that the Respondent had been previously scheduled. Accordingly, the trial that had been set to commence on December 13, 2005 was cancelled. In addition, on November 23, 2005 the undersigned Administrative Law Judge sent the Complainant a letter explaining that this proceeding could not go forward until the allegations underlying his request for the recusal of this judge and the disqualification of the Respondent's law firm had been properly evaluated. The Complainant was therefore directed to submit certain specific information concerning his allegations by December 30, 2005. The Complainant's only substantive response to that request was set forth in a letter dated November 30, 2005. In that letter, the Complainant replied:

And yes I did assert to the fact of an "entity" that does have a conflict of interest to my case as affiliation of DOL members named, Jones Day, Verizon, and named in SOX case. Specifics of this entity and information to such entity are not meant to be elusive, they are meant to be private and confidential. I will though, in the proper setting, and with the proper authority discuss such information. I'm not completely sure, but I beleive [sic] there are several "Departments" that can assist the court in this matter. For obvious reasons, I again refrain from any further

discussion and I put the responsibility on to each individual, and the court at large to properly proceed at this point [emphasis in original].

In letters dated in March and April of 2006, the Complainant made inquiries concerning the status of this case. In a reply letter dated April 28, 2006, the undersigned Administrative Law Judge informed the Complainant that proceedings in this matter had been temporarily suspended pending his submission of the information requested on November 23, 2005. In addition, the reply letter explicitly directed the Complainant to submit substantive responses to those information requests to the Office of Administrative Law Judges and to Verizon's attorneys by May 19, 2006. The Complainant was further warned that his "failure to submit full and proper responses to these requests will be deemed to be an abandonment" of his recusal requests. In a reply letter dated May 10, 2006, the Complainant asserted that he requires a "secure location" to present the requested information and asserted that the request for evidence supporting his allegations of conflicts of interest could be "in itself a veiled admission of a conflict of interest." For reasons set forth in a separate Order, the Complainant's request for the recusal of the undersigned Administrative Law Judge and for disqualification of the Jones Day law firm has been denied.

#### **VERIZON'S MOTION TO DISMISS OR FOR SUMMARY DECISION**

On November 25, 2005, the Respondent filed a motion asking that the complaint in this proceeding be dismissed based on the Complainant's failure to appear for a deposition on November 22, 2005. In the alternative, the motion asked for the issuance of an order granting summary judgment in favor of the Respondent. In arguing that summary judgment should be granted, the Respondent contended that the Complainant has failed to show that he has engaged in conduct protected under the provisions of the Sarbanes Oxley Act and that, in any event, there is "clear and convincing evidence" that the Complainant would have been placed on administrative leave and terminated from his job, even if he had not engaged in any protected activities. The Respondent's motion is supported by the declarations of four of the Complainant's co-workers and by 12 exhibits.

According to the declarations and exhibits submitted with the Verizon motion, during 2004 the Complainant's performance as a security specialist began to deteriorate to such an extent that in August of 2004 he was verbally counseled by his supervisor, Tim Murphy, and then given written counseling in October and again in December. Declaration of Tim Murphy, Exhibits 1 and 2. In addition, the evidence submitted by the Respondent shows that the Complainant was given an "IN" (improvement needed) rating in his year-end performance assessment for 2004. Exhibit 3. In January of 2005, Mr. Murphy placed the Complainant on a Performance Improvement Plan that directed the Complainant to increase his productivity and cure other alleged deficiencies in his performance. Exhibit 4.

Mr. Murphy's declaration further indicates that on January 26, 2005, one of the Complainant's co-workers, Douglas Duckson, reported that the Complainant was "acting strangely." For example, the declaration asserts, Mr. Duckson reported that the Complainant had placed a safe in his work cubicle and had posted various hand-written signs containing cryptic messages such as: "Can you look them straight in the eyes? I can." and "The United States are

at War. Please Act Accordingly.” Exhibit 5. Other materials submitted with Verizon’s motion show that the Complainant’s signs also included various hand-written proverbs from the Bible concerning the consequences of being “wicked,” including proverbs saying: “The wages of righteous bring them life, but the income of the wicked brings them punishment” and “The righteous man is rescued from trouble, and it comes on the wicked instead.” Exhibit 5. Two other signs submitted by Verizon warned others to stay out of the Complainant’s cubicle and one of them proclaimed that the cubicle had been equipped with a “very loud alarm.” Exhibit 5. According to Mr. Murphy’s declaration, Mr. Duckson also reported that he believed that the Complainant had become “a significant security risk.” Mr. Murphy’s declaration also represents that another of the Complainant’s co-workers, Joe Corral, had told him that the Complainant had installed a motion detector in his cubicle. These representations are corroborated by the simultaneously submitted declarations of Mr. Duckson and Mr. Corral.

Mr. Murphy’s declaration also represents that the reports from Mr. Duckson and Mr. Corral caused him to consult with various other Verizon managers and to conclude that the Complainant should be placed on administrative leave pending the outcome of an independent medical examination concerning the Complainant’s fitness for duty. At approximately the same time, according to Mr. Murphy, he inspected the Complainant’s cubicle and found unspecified evidence of potential violations of Verizon’s Code of Business Conduct and Security Department policies. For this reason, Mr. Murphy reported, he decided to request an interview with the Complainant to discuss the potential violations and scheduled the interview to occur on March 16, 2005. However, according to Mr. Murphy’s declaration, on March 15 the Complainant sent him a fax asking that the interview be postponed until the following week and cautioned Mr. Murphy that he did not believe that he could discuss the contents of his safe with him or any other “non-secured personnel.” These representations are corroborated by a copy of the fax from the Complainant, which also indicates that the Complainant was then working on some “paper work” concerning “the Federal Disability Act.” Exhibit 6.

According to Mr. Murphy’s declaration, he later left the Complainant a voice mail message re-scheduling the interview for March 29, 2005. In a reply that was faxed to Mr. Murphy on March 21, 2005, the Complainant asserted that he could not discuss the material in the safe with anyone who lacked a security clearance and asked for a letter affirming that the interview would not include a discussion of the contents of the safe. Exhibit 8. In addition, on March 23, 2005, the Complainant sent Mr. Murphy another fax in which he claimed that he had filed an ethics complaint concerning a possible discussion of the items in the safe and would not “feel comfortable” meeting with Mr. Murphy until the complaint was “addressed.” Exhibit 8. Two days later, the Complainant sent Mr. Murphy a third fax in which he complained that he had still not been given a sufficient assurance that there would be no discussion of the items in the safe and reported that he filed a second ethics complaint in which he was alleging that the meeting was clearly an attempt to prevent him from returning to work with a “disabled status.” Exhibit 8. On that same day, the Complainant sent a fourth fax in which he reiterated his earlier assertion that he considered the meeting to be “on hold” until his ethics complaints were resolved. Exhibit 8. According to one of the Verizon exhibits, on March 25, 2005 Mr. Murphy responded by faxing and mailing the Complainant a letter confirming that the meeting was not for the purpose of determining the contents of his safe or discussing any classified materials that were within the safe. The letter also warned the Complainant that he had a duty to cooperate in

the investigation and that his failure to appear for the meeting might have an effect on his employment status. Exhibit 7. In addition, the letter informed the Complainant that he could not be accompanied by a co-worker or tape record the interview. Exhibit 7.

According to Mr. Murphy's declaration, the Complainant failed to appear for the March 29, 2005 interview. As result, on April 1, 2005, Mr. Murphy sent the Complainant a second letter that gave him another opportunity to participate in an interview, if the Complainant would agree to confirm his intent to participate in such a meeting by April 5. Exhibit 9. In addition, the letter informed the Complainant that his failure to appear for an interview on March 29 constituted insubordination and that he had learned that Verizon's Ethics Office had told the Complainant that he should attend the meeting. Exhibit 9. Nonetheless, according to Mr. Murphy's declaration, the Complainant failed to agree to participate in an interview and, as a result, on April 13, 2005 Mr. Murphy sent the Complainant a letter informing him that the investigation of his job performance would be concluded without considering his "input." Exhibit 10.

According to Mr. Murphy's declaration, Verizon terminated the Complainant's employment on May 18, 2005 because he had failed to attend an interview concerning the investigation of his on-the-job activities and because the Complainant had allegedly interrupted telephone services to a Verizon office and released information concerning Verizon employees without proper authorization. The decision to terminate the Complainant and the reasons for the termination are memorialized in a letter sent to the Complainant on May 18, 2005. Exhibit 11.

On December 9, 2005, Verizon supplemented its motion with a declaration signed by Verizon's Director of Security Operations, James Kramarsic. In his declaration, Mr. Kramarsic represented that in August of 2003 a Verizon contract manager had reported that one of Verizon's management employees was instructing subordinates to exclusively use a company named AllPro for certain cabling work and that the management employee's son was an employee of AllPro. The declaration further indicates that after Verizon's Security Department completed its investigation of the allegation, he was informed that "appropriate action" had been taken by "local management" and by the Verizon Corrective Action Committee.

### **THE COMPLAINANT'S REPLY TO VERIZON'S MOTION**

The Complainant's response to the Respondent's motion is set forth in a letter dated December 20, 2005. In the letter, the Complainant generally alleges that persons involved in this proceeding have unspecified conflicts of interest and then sets forth nine enumerated objections to Verizon's motion.

In his first objection, the Complainat alleged that Mr. Kramarsic's representations are "false" and contended that both Mr. Kramarsic and unspecified "DOL members" involved in this case have "affiliations" with the same unnamed "government entity." The Complainant's second objection alleged that "it is highly probable" that Mr. Corral also has "affiliations" with the previously mentioned, unnamed "government entity." In his third objection, the Complainant asserted that Mr. Duckson's declaration failed to mention that the Complainant had conducted an inquiry concerning his suspicions that cleaning people had attempted to get access

to his office safe on the weekend of January 7-10, 2005 and had thereby determined that someone using keycards assigned to the cleaning crew had in fact been in the security department for almost 70 minutes on the evening of January 7, 2005, even though other records showed that the cleaning crew normally took only 15 to 20 minutes to complete its work in that area.

The Complainant's fourth objection appears to contend that Mr. Corral's statement fails to demonstrate "beyond a preponderance of the evidence" that Verizon would have taken the appropriate action concerning AllPro. In this regard, the Complainant also asserted that he told Mr. Corral that "the financial fraud aspect" of AllPro was "getting huge" and that Mr. Corral responded that the Verizon manager who was allegedly favoring AllPro was "going to get discipline for the sexual harassment" and that the Complainant's "case doesn't matter according to management."

In his fifth objection, the Complainant pointed out that Verizon's motion doesn't contain any declarations from persons not employed by the Security Department and that the motion also failed to include a declaration from the Security Department employee to whom he gave his "Sarbanes Whistleblower protection paperwork."

The Complainant's sixth objection appears to assert that he completely cooperated with his EAP [Employee Assistance Program] counselor and with the "well respected" Beverly Hills psychiatrist that Verizon had chosen to conduct an examination of the Complainant. The objection also noted that Verizon had failed to provide any "testimony" from those individuals and went on to assert that all of them had concluded that he was "fine."

In the seventh objection, the Complainant asserted that he had never been asked to remove the various signs posted in his cubicle and pointed out that numerous other workers in the Security Department had military, religious, and patriotic items in their cubicles and offices. The eighth objection alleges that Mr. Murphy did not place the Complainant on a performance improvement plan until after he had informed Mr. Murphy that he was "going to report severe fraud and ethics issue" caused by employees who were allegedly accessing customer's circuits, including government circuits, in an illegal and fraudulent manner." In addition, the Complainant further contended that the illegal access was being accomplished by "no less than six Verizon employees (contractors), five of which have multiple aliases, one having 34 aliases." In his ninth and final objection, the Complainant described Verizon's motion as a "flimsy attempt" and noted that he had not contacted any Verizon employees since being placed on administrative leave or made any attempt to solicit any kind of testimony.

### **The Respondent's Reply**

In a reply submitted on January 12, 2006, the Respondent contended, *inter alia*, that the Complainant has failed to offer evidence indicating that any of his alleged protected activities fall within the scope of section 806 of the Sarbanes Oxley Act or even that he had the "reasonable" basis for his allegations that is explicitly required in section 806. In addition, the Respondent asserted that even if the Complainant had provided sufficient evidence of a *prima facie* violation, he has failed to provide evidence to rebut what the Respondent characterizes as

its “clear and convincing evidence” that the Complainant would have been placed on administrative leave and terminated from his job even if he not engaged in any protected activities. The Respondent’s reply also includes a copy of a November 28, 2005 letter in which the Complainant apologized for failing to appear for a deposition on November 22, 2005 and suggested that the Respondent reschedule the deposition for a new date. In the letter, the Complainant asserted that he had failed to appear for November 22 deposition because he had misplaced the deposition notice.

## ANALYSIS

### **Burdens of Proof and Production of Evidence in Whistleblower Cases**

The procedures for considering alleged violations of federal whistleblower statutes are nearly identical to the procedures for considering allegations under federal civil rights statutes. Thus, a complainant under such a whistleblower statute generally needs only to present evidence sufficient to raise an inference of discrimination in order to establish a *prima facie* case of unlawful discrimination. See *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004). As the Secretary of Labor (Secretary) and the Administrative Review Board (ARB) have noted, a preponderance of the evidence is not required in order to establish a *prima facie* case. See *Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 1 n. 7 (ARB May 30, 2003). Rather, a complainant can make a *prima facie* case merely by making an initial showing that the defendant is subject to the applicable whistleblower statute, that the defendant was aware that the complainant had engaged in activity protected under the statute, that the complainant suffered adverse employment action, and that a nexus existed between the protected activity and the adverse action. See *Reddy v. Medquist* ARB No. 02-123, 2004-SOX-35, slip op. at 7; *Jenkins v United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 16-17 (ARB Feb. 28, 2003); *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995). Once a complainant establishes a *prima facie* case, the burden shifts to the defendant to articulate one or more legitimate non-discriminatory reasons for the adverse action, but this is only a burden of production, not a burden of proof. See *Manatt v. Bank of America, N.A.*, 339 F.3d 792, 800 (9th Cir. 2003). When a defendant produces evidence that a complainant was subjected to the adverse action for a legitimate, non-discriminatory reason, the rebuttable presumption created by the complainant's *prima facie* showing "drops from the case." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Jenkins*, slip op. at 18. Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

As in civil rights cases, there are two possible ways of weighing the evidence in cases involving unlawful retaliation. First, the evidence can be weighed to determine if the defendant’s explanation for an adverse action is the actual reason the defendant’s conduct or merely a pretext to conceal unlawful motives. See *Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066-67 (9th Cir. 2004). In such so-called “pretext” cases, an inference that a defendant was motivated by unlawful purposes can be based on a conclusion that the unlawful



motive was the more likely cause for the conduct or on a conclusion that the explanation proffered by the defendant is unworthy of belief. *Id.* Alternatively, the evidence can be weighed to determine if the defendant had both lawful and unlawful motives for the adverse action against the employee plaintiff. *Id.* at 1067-68. In such a “mixed motive” case, it must be determined if an unlawful motive was one of two or more motives for the challenged conduct. *Id.* If it is concluded that it is more likely than not that an unlawful motive was one of the actual motives for the defendant’s actions, the burden of proof shifts to the defendant to prove an affirmative defense, i.e., that the adverse action against the employee would have occurred even if the employee had not engaged in protected activity. *See Id., Lockert v. United States Dep’t of Labor*, 867 F.2d 513 at 519 n. 2. (9th Cir. 1989) In cases arising under the whistleblower provision of the Sarbanes Oxley Act, the defendant’s burden of showing that the same adverse action would have been taken can be satisfied only by “clear and convincing” evidence. *See* 18 U.S.C. §1514A. The parties to proceedings involving allegations of unlawful discrimination may present both direct and circumstantial evidence and neither of these two types of evidence is entitled to any greater weight or value than the other. *See Desert Palace v. Costa*, 539 U.S. 90 (2003).

### **Summary Judgment Standard in Ninth Circuit Retaliation Proceedings**

In administrative proceedings where it is alleged that a defendant has engaged in unlawful retaliation, including cases arising under the SOX, the standard for granting a summary decision is essentially the same as the one used in Federal Rule of Civil Procedure 56, which governs motions for summary judgment in the federal courts. *See Reddy v. Medquist*, ARB No. 02-123, 2004-SOX-35, slip op. at 4; *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, 200-ERA-6, slip op. at 6 (ARB 2001). Thus, pursuant to 29 C.F.R. §18.40(d), an Administrative Law Judge may issue a 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. A “genuine issue” exists when “the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Once a 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. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998). The non-moving party may not rest upon mere allegations, speculation, or denials in pleadings, but must set forth specific facts on each issue upon which he or she would bear the ultimate burden of proof. *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P 56(e). If the non-moving party fails to sufficiently show an element essential to his or her 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.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Accordingly, a summary decision can be granted if, upon review of the evidence in the light most favorable to the non-moving party, it is concluded, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact. *See Dominguez-Curry v. Nevada Transportation Department*, 424 F.3d 1027 (9th Cir.

2005). However, the Ninth Circuit has held that in cases where a plaintiff is alleging that the proffered reason for the employer's action is a pretext, summary judgment can be granted to the employer unless the plaintiff presents "specific" and "substantial" evidence indicating that the employer had motives other than the purported pretext. *See Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066 (9th Cir. 2004); *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654 (9th Cir. 2002).

## ANALYSIS

Because the Complainant has offered a plausible reason for failing to appear at the deposition that had been scheduled for November 22, 2005 and promptly asked the Respondent to set a new deposition date, it would be inappropriate to dismiss his complaint on the grounds that he failed to appear for a single deposition. However, it has also been determined that the Respondent's motion for summary judgment is meritorious and that the motion must therefore be granted. There are two primary reasons for this conclusion.

First, the Complainant has simply failed to provide enough evidence to enable a reasonable jury to find that he had the statutorily required reasonable belief that the conduct about he complained constituted a violation of section 1341, 1343, 1344, or 1348 of Title 18 of the United States Code, a rule or regulation of the Securities and Exchange Commission, or a provision of Federal law relating to fraud against shareholders. In this regard, it is recognized that the Complainant has alleged that Verizon or at least some of its employees have engaged in various types of conduct that at least in theory might also entail or be related to violations of the type set forth in section 806 of the SOX. For instance, if, as alleged, a Verizon employee was showing favoritism toward AllPro in awarding contracts, it is at least theoretically possible that the favoritism might have included acts of mail fraud in violation of 18 U.S.C. §1341 or conduct constituting wire fraud in violation of 18 U.S.C. §1343. However, the Complainant has not submitted any kind of evidence that would support a conclusion that he ever had enough information about the alleged favoritism to allow him to form a reasonable belief that the favoritism included mail or wire fraud. Although the Complainant's knowledge of the alleged favoritism might have led him to develop a suspicion that mail or wire fraud could have occurred, a suspicion is simply speculation and cannot logically be regarded as a reasonable belief. Likewise, although favoritism in procurement might sometimes result in accounting fraud or violations of the disclosure requirements of the Securities Exchange Act of 1934, the Complainant's response to the Respondent's motion does not contain any evidence that the Complainant had the kind of factual information would support a conclusion that he had a reasonable belief that any of these provisions were being violated.

It is recognized that the Complainant has on various occasions also alleged that Verizon employees have engaged in a series of other improper activities and that these other alleged activities might conceivably include violations of the various statutes and Securities and Exchange Commission regulations set forth in section 806 of the SOX. For example, the Complainant has alleged that he discovered a "major breach" of Verizon's ATM/Main Frame network and that several Verizon employees with fake identities were accessing an inordinate number of bank circuits and credit agency records. If such activities were in fact occurring, they would probably constitute a form of wire fraud. Likewise, if, as alleged by the Complainant,

Verizon has taken “control” of a “large government entity” without the knowledge of its shareholders, Verizon’s conduct would surely violate the disclosure requirements of the Security and Exchange Act. However, the Complainant’s response to Verizon’s summary judgment motion sets forth absolutely no information that could support a conclusion that he ever had a reasonable factual basis for making any of these allegations. Indeed, the Complainant’s various submissions to OSHA and the Office of Administrative Law Judges indicate that he has a penchant for leaping to conclusions that cannot in any way be logically supported by the available information. For instance, his assertions that Verizon has been harassing him by having a plethora of agents tail his vehicle and follow him up and down store aisles is simply not supported by any kind of probative evidence. Likewise lacking any rational factual basis is the Complainant’s assertion that the dates that have been selected for various events in this proceeding reveal some sort of sympathy for Nazi Germany by the person selecting those dates.

Second, even if there were evidence sufficient to show that there is a genuine issue of fact concerning the reasonableness of the Complainant’s allegations, Verizon’s motion for summary judgment would still have to be granted on the grounds that the Complainant has not provided evidence that would be probative enough to allow a reasonable jury to find that Verizon does not have clear and convincing evidence showing that it would have taken the same adverse actions against him even if he had not engaged in protected activities.

In this regard, it is important to recognize that the declarations and exhibits attached to Verizon’s motion for summary judgment unequivocally demonstrate that during late 2004 and early 2005 the Complainant engaged in a series of actions that caused his co-workers to become legitimately concerned about his mental fitness to properly perform his job. Among these actions were the various warning signs posted in the Complainant’s cubicle, the cryptic nature of some of his other signs, his assertion that he had installed a motion detector in his cubicle, and his decision to hang up a series of hand-written proverbs that all concerned the punishment of the “wicked.” Although any one of these actions by itself might not have been significant, in combination they clearly raised reasonable questions about the Complainant’s mental health and corroborated Mr. Duckson’s report to Mr. Murphy that the Complainant had become a security risk. Although the Complainant’s response points out that other Verizon employees had patriotic and religious items in their work spaces, it is apparent that the content and combination of the Complainant’s cubicle signs were so far out of the norm for work-space decoration that the Complainant’s supervisors had highly credible reasons for placing him on administrative leave pending a determination of his mental fitness.

Likewise, even though the Complainant has asserted that he was told he was “fine” by the Beverly Hills psychiatrist Verizon selected to conduct a mental fitness examination,<sup>2</sup> the Complainant has failed to provide any evidence that could support a reasonable jury’s conclusion that Verizon did not have clear and convincing reasons for terminating the Complainant’s employment for reasons unrelated to any of his allegedly protected activities. As previously explained, the documents submitted with Verizon’s motion show that the decision to terminate the Complainant was purportedly based on the Complainant’s repeated refusals to meet with Mr. Murphy and answer questions about his past behavior, including questions about his alleged disruption of telephone service to a Verizon office and assertions that he had improperly released

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<sup>2</sup> It is noted that neither party has submitted the report, if any, from the psychiatrist.

private information concerning Verizon employees. Such documentary evidence is entitled to be taken at face value unless there is some other evidence that raises plausible doubts about the validity of Verizon's representations. The Complainant, however, has failed to offer any such countervailing evidence. Although the materials submitted by the parties do show that the Complainant initially tried to justify his refusal to meet with Mr. Murphy on the grounds that he did not believe he could lawfully discuss the contents of his safe with Mr. Murphy and did not believe it proper to hold a meeting until there was a resolution of his ethics complaints concerning Mr. Murphy's alleged interest in the safe's contents, the Complainant has not provided any evidence to dispute the documents showing that Mr. Murphy later agreed not to ask the Complainant about the contents of the safe and reminded the Complainant that Verizon's ethics office had advised him to attend the meeting. In short, any reasonable jury would have to conclude that the Complainant did not have valid reasons for refusing to meet with Mr. Murphy and that his refusal to participate in such a meeting therefore amounted to insubordination. The legitimacy of Verizon's decision to terminate the Complainant for this insubordination is further strengthened by the fact that even though Mr. Murphy's letter of April 1, 2005 gave the Complainant a third opportunity to participate in a meeting, that opportunity was rejected by the Complainant.

### **RECOMMENDED ORDER**

1. All requests for relief under section 806 of the Sarbanes Oxley Act are hereby dismissed with prejudice.

**A**

Paul A. Mapes  
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. §1980.109(c) and §1980.110(a) 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, D.C. 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1980. To be effective, a petition must be filed with the Board within 10 days of the date of the decision of the Administrative Law judge and 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. If a timely petition for review is filed, the decision of the administrative law judge will become the

final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement will be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs 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 also 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.