U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 September 2007

CASE NO.: 2007-SOX-00021

In the matter of:

DAVID STONE
Complainant

v.

INSTRUMENTATION LABORATORY SpA
INSTRUMENTATION LABORATORY COMPANY
BRIAN DURKIN, ANN DEFRONZO, and RAMON BENET
Respondents

Appearances:

R. Scott Oswald, Adam Augustine Carter, and Jason Zuckerman, The Employment Law Group, PC, Washington, D.C., for the Complainant

Robert M. Shea and Scott J. Connolly, Morse, Barnes-Brown & Pendleton, P.C., Waltham, Massachusetts for the Respondent

ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION DISMISSING COMPLAINTS AND ORDER DENYING COMPLAINANT'S MOTION TO STAY SUMMARY DECISION

I. Introduction

This matter arises from a complaint of discrimination filed by David Stone ("Complainant"), against Instrumentation Laboratory SpA ("IL SpA"), Instrumentation Laboratory Company, ("ILC"), Brian Durkin, Ann DeFronzo, and Ramon Benet 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 2004) ("Sarbanes Oxley" or the "Act") and the procedural regulations found at 29 C.F.R. Part 1980 (2004). The Complainant filed a complaint with the Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA"), alleging he was terminated in retaliation for raising concerns or reporting deficiencies in internal controls. By letter dated January 3, 2007, the Regional Administrator of OSHA, acting as agent for the Secretary of Labor, ("Secretary"), notified the Complainant of the Secretary's preliminary finding dismissing the complaint. By letter dated January 31, 2007, Complainant Stone objected

to the Secretary's preliminary order dismissing his complaint, and requested a hearing pursuant to 29 C.F.R. § 1980.106. A hearing in the matter is set for October 24, 2007, before the Office of Administrative Law Judges ("OALJ").

On January 29, 2007, the Complainant filed a second complaint with OSHA ("Second Compl.") alleging that IL SpA and ILC blacklisted him in retaliation for filing his initial complaint alleging unlawful termination. Without investigation, OSHA immediately referred the blacklisting allegation to the Office of Administrative Law Judges stating that it arose from the initial termination complaint, Case No. 2007-SOX-00021, which had been appealed to the OALJ for hearing. The undersigned issued an order on March 23, 2007, consolidating the Complainant's initial complaint alleging unlawful termination and his second complaint alleging blacklisting.

On March 1, 2007, ILC, Brian Durkin, Ann DeFronzo, and Ramon Benet (the "Respondents") filed a Motion for Summary Decision ("Resp. Mot.").[1] The Respondents seek summary decision regarding Stone's initial termination complaint on three issues. First, the Respondents maintain that the Complainant did not engage in activity protected by Sarbanes-Oxley. Respondents argue that Stone's communications regarding the GPO coding project did not "definitively and specifically" relate to any Sarbanes-Oxley listed law or rule. Resp. Mot. at 11-14 citing *Platone v. FLYi, Inc*., ARB No. 04-154, 17 ALJ No. 2003-SOX-27 (Sept. 29, 2006). Respondents also argue that the Complainant did not have a reasonable belief that any alleged weakness in internal financial controls constituted a violation of Sarbanes-Oxley or its implementing regulations. *Id.*

Second, Respondents contend that the Complainant is not a covered employee under Section 806 of the Sarbanes-Oxley Act because ILC is not a public company. In this regard, Respondents assert that ILC is a private company and therefore is not covered by SOX. Resp. Mot. at 14. Respondents also assert that there is no basis to find that ILC's parent corporation, IL SpA, controlled Stone's employment relationship with ILC or that IL SpA participated in Stone's termination such that IL SpA's public status should extend to its subsidiary ILC. *Id*. Finally, Respondents argue that Stone was terminated for poor performance.

On April 25, 2007, the Respondents filed a Supplemental Memorandum of Law in Support of Summary Decision in response to Stone's Second Complaint to OSHA ("Suppl.

[1] Counsel for Respondents has stated that on information and belief Instrumentation Laboratory SpA ("IL SpA"), the foreign parent corporation, was never served with either of the Complainant's complaints. Suppl. Mem. at 11-12. IL SpA has not joined in the motion for summary decision filed by Respondents ILC, Durkin, DeFronzo and Benet, nor has IL SpA joined in the Supplemental Memorandum in Support of Summary Decision in Response to the Complainant's Second Complaint filed by Respondent ILC, nor has IL SpA responded to any of the Complainant's motions. Counsel for Respondent ILC, also states that ILC was never served with the second or blacklisting complaint by the Assistant Secretary for OSHA, but received a courtesy copy from Complainant's counsel. The Complainant has not responded to this issue. Pursuant to 29 C.F.R. §1980.104, the Assistant Secretary for OSHA is required to notify all named respondents including IL SpA of Stone's complaints. The record does not reflect that the Assistant Secretary ever notified IL SpA of either complaint. It appears the Assistant Secretary also failed to notify ILC of the Complainant's blacklisting complaint. ILC later received a copy of the blacklisting complaint from the Complainant. As I have resolved this matter on other grounds, it was not necessary to reach this issue. Nevertheless, the Assistant Secretary might review its procedures with regard to compliance with 29 C.F.R.. §1980.104.

Memo"). The Respondents' supplemental memorandum seeks summary decision of the second blacklisting complaint asserting that (1) the Complainant is not a protected employee under Section 806 of the Act because ILC is not a public company; (2) the Complainant failed to allege any adverse action by ILC to interfere with his employment prospects; and (3) the blacklisting complaint is time barred.

On May 9, 2007, the Complainant filed an Opposition to Respondents' Motion for Summary Decision ("Opp. to Mot.") and a Motion to Stay Consideration of Respondents' Motion for Summary Decision and to Permit Discovery Pursuant to Rule 56(f) ("56(f) Motion").[2] In his opposition to summary decision, the Complainant argues that summary decision should not be considered at this stage as he has not had an opportunity to take discovery. Opp. to Mot. at 1-3. Alternatively, the Complainant contends that he has submitted sufficient proof that there are genuine issues of fact warranting a hearing with regard to (1) whether IL SpA and ILC are covered employers under SOX; (2) whether he engaged in protected activity, and (3) whether the Respondents' stated reason for the termination is pretext. *Id.* at 3.

The Complainant's 56(f) Motion asserts that consideration of the motion for summary decision should be stayed to afford him an opportunity to conduct discovery that is "necessary to the adjudication of his claims and to adduce facts necessary to oppose" the motion for summary decision. 56(f) Motion at 1-2. Specifically, Stone maintains that he needs discovery to demonstrate that IL SpA and ILC are covered employers under SOX, to demonstrate that he engaged in protected conduct, and to show the reason for his termination is pretext. *Id*. at 4-8.

On May 24, 2007, the Respondents filed an Opposition to Complainant's Motion to Stay Summary Decision ("Opp. to 56(f)"). Respondents argue that the documents the Complainant points to as evidence of his protected activity are in the record, and they show that Stone did not engage in protected activity. Opp. to 56(f) at 1-2, 3-9. In addition, Respondents maintain that any evidence of Stone's protected activity is within Stone's own personal knowledge and thus discovery is unnecessary. *Id*. Respondents further argue that Rule 56(f) continuances should be denied when the requesting party fails to present by affidavit facts establishing the likelihood that contrary evidence necessary to overcome summary decision exists and fails to provide specific reasons why such evidence cannot be presented at the present time. *Id*. at 3-9 (citations omitted). With regard to the blacklisting claim, Respondents argue that the Complainant has not brought forth any evidence showing a genuine issue of fact concerning whether ILC interfered with his prospective employment prospects. *Id*. at 9-10.

The Complainant filed a Motion for Leave to File a Reply to Respondents' Opposition to the 56(f) Motion and a Reply to Respondents' Opposition to Complainant's 56(f) Motion ("Reply to Opp. to 56(f) Mot.") on May 31, 2007.

[2] On March 7, 2007, the Respondents filed a Motion for Protective Order requesting that the Court issue a protective order staying all discovery pending the Court's determination of the motion for summary decision. In a telephone status conference on March 12, 2007, the parties agreed that the Respondents would withdraw the Motion for Protective Order without prejudice and the parties' agreed to stay discovery pending rulings on the Respondents' Motion for Summary Decision. However, as noted above, Complainant has since filed a motion seeking to stay consideration of the Respondents' motion for summary decision pending completion of discovery.

On July 20, 2007, the Complainant filed a Motion for Leave to File Notice of Supplemental Authority and a Notice of Supplemental Authority. On July 26, 2007, the Respondents filed a Response to Complainant's Notice of Supplemental Authority. On August 6, 2007, the Complainant filed a Motion for Leave to File a Reply to Respondents' Response to Complainant's Notice of Supplemental Authority along with the Reply.

For the reasons set forth below, the Respondents motion for summary decision is granted and the Complainant's Rule 56(f) motion to stay consideration of summary decision and to permit discovery is denied.

II. Background

A. Termination Complaint

Instrumentation Laboratory SpA ("IL SpA") is an Italian corporation. Opp. to Mot., Declaration of Jason M. Zuckerman, Esq. in Support of Complainant David Stone's Opposition to Respondents' Motion for Summary Decision ("Zuckerman Decl. in Supp. Opp. to Mot."), Ex 2; Resp. Mot. at 9. ILC is a wholly owned subsidiary of IL SpA.[3] *Id.* ILC maintains separate financial accounting and reporting functions and distinct financial statements from IL SpA, and has its own internal accounting staff which manages ILC's day-to-day accounting functions, arranges for preparation of and filing of federal and state income tax returns and maintains its own bank accounts, and funds in those accounts are not intermingled with IL SpA funds. Resp. Mot. at Ex. A. ILC's employment policies and practices, and ILC's management of its hiring, staffing, and employment functions are separate and distinct from those of IL SpA. Resp. Mot. at Ex. B.

The Complainant began working for ILC as a Sales Representative in 1999, and was promoted to Sales Manager for ILC's Northeast Area in November 2001. Complaint at 3-4; Resp. Mot. Ex B at ¶ 4; Resp. Mot. at 3. In February 2005, the Complainant was promoted to the position of Director of National Accounts. Complaint at 4; Resp. Mot. at 3; *see also* Resp. Mot. at Ex. Z, Tab 4. The Complainant reported to Brian Durkin, ILC's Director of Sales, in both his position as sales manager and the new position as director of national accounts with ILC. Complaint at 2; Resp. Mot. Ex B at ¶ 4. Mr. Durkin reports to Ramon Benet, ILC's Vice President of Marketing, Sales and Service. *Id*. The Complainant, Durkin and Benet are employed by ILC.[4] *Id*.

The new tasks of the National Accounts Department included "(i) managing the relationships with the three Group Purchasing Organizations ("GPOs") with whom ILC had contractual relationships, and (ii) attempting to develop new business relationships with other GPOs with whom ILC did not have contracts." Resp. Mot. at 3; Complaint at 4.

[3] The Complainant has referred to IL SpA and ILC collectively as IL. Complaint at 2; Second Complaint at 1; 56(f) Mot. at 4-7. In my order, I refer to the parent corporation IL SpA, as IL SpA, and the subsidiary as ILC as a key issue is whether there is an agency relationship between the parent and the subsidiary.

[4] Ann DeFronzo is employed by ILC as Director of Business Administration. Stone Decl. ¶ 16; Resp. Mot. Ex B at ¶ 4.

ILC develops, manufactures and distributes critical care and in vitro diagnostic instruments, related reagents and controls for use primarily in hospitals and independent clinical laboratories. *Id.*; Complaint at 2. GPOs are buying consortiums in which groups of hospitals affiliate with one another and enter into contracts with medical suppliers to purchase equipment and supplies at lower prices than the hospitals could obtain acting alone. Complaint at 4; Resp. Mot. at 3, fn 1. GPOs receive administrative fee payments from contract vendors and ILC's contracts with its GPOs required ILC to pay fees. Complaint at 4; Resp. Mot. at 3. As Director of National Accounts, Stone worked with GPOs and was involved in obtaining contracts with GPOs. Complaint at 4. ILC had contracts with three GPOs (Premier, Amerinet and MedAssets). Complaint at 4-5. Those contracts covered certain products sold by ILC but not all of ILC's products.[5] Resp. Mot. at 3, fn. 1; Stone Decl. Ex 2 (Ex A).

In February 2005, following Stone's promotion to the position of Director of National Accounts, a meeting was held with his supervisor, Durkin, Paul Stickel (ILC's Business Administrator for Sales and National Accounts), William Manchester and Ron Brito (the National Accounts Department's Key Account Managers and the Complainant's direct reports), at which the Complainant was assigned a project that involved a national review of hospitals to determine their correct GPO affiliation ("GPO coding project"). Resp. Mot. at 3-4.[6] The main purpose of the GPO coding project was to provide sales information that ILC could use to obtain future contracts with non-contract GPOs. Resp. Mot. at 4. Hospitals affiliated with non-contract GPOs purchased products from ILC. For sales and marketing reasons, Respondents sought to collect sales information concerning hospitals that were affiliated with non-contract GPOs and then ILC's National Accounts department could use the information to gain contracts with non-contract GPOs because "ILC would be able to show sales revenue that ILC derived from the GPO's affiliated hospitals that was not resulting in any administrative fee payments from ILC to

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[5] The Respondents explain its relationship with GPOs and the obligation to pay administrative fees as follows:

> In other words, vendors that *have a contract* with a GPO pay a percentage of the amount of the sales of those *products covered by the contract* that the vendor makes to affiliated hospitals. At all times relevant to this case, ILC had contracts that covered certain of its products (not all of ILC's products) with *three* GPOs, Amerinet, Premier, and MedAssets. ILC also sold products that were not covered by its contracts with these three GPOs to hospitals. No administrative fee is due to GPOs on such sales. In addition, many hospitals that are affiliated with GPOs other than Amerinet, Premier, and MedAssets purchase products from ILC even though ILC does not have contracts with these GPOs. Because ILC does not have contracts with these GPOs, it is not obligated to pay administrative fees to GPOs for such sales – such obligations arise only from a contract. Generally, when a hospital purchases products from ILC, the hospital will designate its preferred GPO affiliation (on average, hospitals are affiliated with 2.4 GPOs) on the sales documentation. If ILC has a contract with the GPO designated by the hospital on the sales documentation, *and* the products purchased by the hospital are covered by the contract, ILC will calculate and pay administrative fees base[d] on the sales amount in accordance with the terms set in the particular GPO contract.

Resp. Mot. at 3, fn. 1 (emphasis in original); *see also* Complaint at 2, 4. The Complainant does not dispute this explanation.

[6] Stone does not acknowledge that the sales meeting occurred in February 2005 or that he was assigned the GPO coding project. However, e-mail messages between the Complainant and his subordinates in August 2005, some of which were copied to Durkin, demonstrate that Stone was responsible for the GPO coding project, that he had been working on the project at least since April, that his subordinates had been waiting for him to complete the project and that they needed the information for sales purposes. Resp. Mot. at Ex D.

the GPO (because there was no contract in place, and therefore, no obligation on the part of ILC to pay such fees to the GPO)." Resp. Mot. at 4; Ex. Z at 7-8. If ILC was able to obtain a contract with a non-contract GPO it gained access to the affiliated hospitals, increasing the number of potential customers for ILC's products.

In working on the GPO coding project, Stone discovered that ILC was not accurately tracking GPO membership status. Stone said that he "found that at least 33% of the data in the SAP customer sales database was inaccurate, that $7,223,092 in sales had not been credited to contracted-GPOs, and that IL failed to pay at least $216,693 in administrative fees owed to GPOs." Stone Decl. at ¶ 14. Stone alleges that he first brought his concerns about deficient internal accounting controls to the attention of ILC management during a meeting in May 2005 which included Durkin, DeFronzo, Amy Picarillo (ILC's Finance Controller), Brito, and Stickel. Stone Decl. at ¶ 15. Stone pointed out that IL was not tracking the dual membership status of members of contracted GPOs (Premier, MedAssets and Amerinet) and members of non-contracted GPOs (Novation and Corsorta), as required by ILC's contracts with its GPOs. *Id*. Stone said the contracts included recourse/remedy in the event IL failed to properly notify contracted GPOs of dual membership status of members of contracted GPOs. *Id*. In failing to properly track dual membership, Stone believed IL was not accounting for substantial administrative fees owed to its contract GPOs. *Id*.

Stone states that he was rebuked during the May 2005 meeting "because management wished to avoid paying the administrative fees that IL owed to GPOs." Stone Decl. at ¶ 15. Stone reports that DeFronzo told him that her department lacked the resources to either track dual membership status or recode GPO member status to the contracted GPO in the SAP database. Stone Decl. at ¶ 16. Stone also said that Durkin was "opposed to [his] suggestion to correct IL's deficient internal controls because he wanted to avoid acknowledging to GPOs that IL had failed to pay contractually-required administrative fees" and to avoid the "risk of an audit" of ILC's tracking procedures by the contracted GPOs *Id*.

In response to e-mail inquiries in August 2005 from Manchester and Brito, (copied to Durkin), asking questions about the status of the GPO coding project and emphasizing the need for the information for sales purposes, Stone replied that he was working on the project and asked them to be patient. Resp. Mot. at Ex. D, 2-3.

On October 11, the Complainant sent an e-mail to Paul Stickel stating as follows:

> "From the SAP database, Bill and myself have identified all Non-coded GPO's as well as confirming the coding of those accounts in SAP – there are alot [sic] that need corrected…Please use this information to calculate the HPG info in preperation [sic] for our RFP response. In addition, you can update SAP with those non-coded GPO's in which we have identified a primary gpo and no other."

Resp. Mot. at Ex. F.

On November 22, 2005, Durkin met with the Complainant to deliver his 2005 Progress Review Guide and placed him on a performance improvement plan, citing numerous performance issues. Resp. Mot. at 5; Resp. Mot. at Ex. G. One of the performance deficiencies addressed was Stone's failure to complete the GPO coding project as of November 18, 2005. *Id*.

Stone submitted a written response to Durkin via e-mail on November 23, 2005. Resp. Mot. at Ex. H. In his response, Stone took responsibility for the delays with the GPO coding project, and stated that he had taken steps "to insure that it will be completed ASAP." *Id.*

On December 14, 2005, Stone sent an e-mail to Durkin and Stickel relating to his findings on completion of the GPO coding project. Stone stated that the coding of accounts listed on SAP were completed. Stone Decl. at Ex. 3 He indicated that a decision needed to be made as to the changes in the SAP system. Stone identified the accounts needing to be changed as follows: (a) those accounts going from one contracted vendor to another (30 accounts)…; (b) those accounts going from a non-contracted vendor to a contracted vendor (216 accounts)…; (c) those accounts going from one contracted vendor to non-contracted vendors (45 accounts). Stone Decl. at Ex. 3. Stone closed his December 14, 2005 e-mail by stating, the next step was for "Paul [Stickel] to determine the cost in admin fees to convert previously non-contracted vendors to contracted vendors and the savings in admin fees to convert contracted vendors to non-contracted vendors. From here, Brian [Durkin] and myself will discuss how to approach Ramon [Benet] with the added cost to re-code previously non-contracted accounts." Stone Decl. at Ex. 3.

On December 21, 2005, the Complainant sent an e-mail message to Durkin titled "SAP changes from Non-Contracted GPO to Contracted GPOs." Resp. Mot. at Ex. J, 3.[7] Complainant said that before he discussed changes to SAP with DeFronzo, he and Durkin need to know whether Benet would support switching SAP accounts from Non-contracted GPO's (Novation) to Contracted GPO's (Amerinet). Stone stated that "[t]here may be a considerable jump in admin fees to our contracted vendors if [we] implement the changes…Changing SAP and giving the Admin fees to our contracted GPO's – I believe is the right thing to do, especially given Premier's policy regarding hospitals with Dual Affiliations (if we don't notify them, we pay anyway…). We could spin this to our advantage during the Q1 QBR's at Amerinet & MedAssets. How would you like to proceed?" Stone Decl. at Ex. 4.[8]

On February 2, 2006, the Complainant e-mailed Durkin telling him of a meeting the Complainant had on February 1, 2006 with the Contract Manager and Senior Director, Contract Administrator of Premier, its contract GPO. Resp. Mot. at Ex. N. The purpose of the meeting with Premier was for Premier to inform ILC of its new system for assessing vendor performance. Resp. Mot. at Ex. N, 1. The Complainant's e-mail states that ILC met Premier's expectations in the area of sales reporting accuracy. Resp. Mot. at Ex. N, 1. The Complainant wrote as follows:

[7] Stone copied Brito, Manchester and Stickel.

[8] In response to Stone's December 21, 2005 e-mail to Durkin, Brito raised additional questions about the implications of changing GPO account codings stating "I guess what I'm thinking is that before changes are made we should thoroughly analyze the impacts of those changes. I believe more analysis than number of accounts gained/lost needs to be considered." Stone Decl. at Ex. 5. Durkin echoed Brito's concerns and responded to Stone's December 21, 2005 e-mail stating "This topic requires thought and discussion before we implement changes if any. Example, [i]f we recode all Novation, our data may not support a new contract with them when the time comes. I will review the logistical aspects with Paul [Stickel] and then set some time for a group discussion." Resp. Mot. at Ex. K.

> "Our performance YTD 2005 (84.5%) is directly attributable to Paul Stickel's commitment to excellence, keeping Premier up to date on required reports (sales, admin fees, customer price activations, etc.)…If these datapoints are important to Premier, perhaps we should consider providing similar information to MedAssets and Amerinet proactively and spin it as IL's way of measuring our performance as a committed business partner."

Resp. Mot. at Ex. N, 2.

A sales meeting was held on February 9, 2006, between ILC's National Accounts team and ILC management to discuss sales data and sales initiatives for 2006. Stone Decl. at ¶ 27. During the meeting, the Complainant questioned the accuracy of the sales numbers that were provided to him by Stickel. The day after the sales meeting Durkin sent an e-mail to Stone expressing his disappointment in Stone's performance at the meeting. Stone Decl. at Ex. 9; Resp. Mot. at Ex. Q, 3. With regard to the sales numbers that Stone questioned during the meeting, Durkin stated:

> Regarding sales numbers and your comment, 'I don't produce numbers, I only report them.' That is an unacceptable comment. First, the numbers you receive are correct, however, they may vary based on the information requested. Second, we had already discussed the numbers as a national account group, no need to air your issues with marketing and Ramon [Benet], third, it is your responsibility as the presenter to review and understand your presentation content, 'I don't make the numbers, I only report them' is weak at best. Fourth, you implied that either Paul Stickel's or business admins [sic] data is incorrect, this is not the case at all and was unfair to Paul and BA…Regarding the SAP coding session, the project is obviously still incomplete. The final codes were due to BA on December 9th.

Stone Decl. at Ex. 9; Resp. Mot. at Ex. Q, 3. [9]

On February 15, 2006, Stone replied to Durkin's February 10, 2006 e-mail. Resp. Mot at Ex. Q, 1-2. He disagreed with Durkin's view that the meeting accomplished little. With regard to the SAP/GPO coding project and the sales numbers, Stone responded that the SAP project was progressing and he attached a document detailing the possible changes to GPO coding within the SAP accounts. Resp. Mot at Ex. Q, 1-2. With regard to the sales numbers, Stone noted that Paul

[9] The Complainant asserts that when he confronted Stickel on February 10, 2006, about the sales data that Stickel provided for the meeting, "Stickel explained…that he was using three different sets of sales numbers: one set of numbers referred to as 'Sales Dollars' represented the numbers that IL reported to GPOs; a second set of numbers called 'Total Sales Dollars,' which represented the actual sales dollars and which were concealed from the GPOs; and a third set of numbers called 'Invoice Dollars,' which included all products sold to GPOs, as well as revocable rental contracts and cash deals." Stone Decl. at ¶ 27. The Complainant states that Stickel's explanation "further heightened [his] concerns about IL's internal control deficiencies." Stone Decl. at ¶ 27. However, contrary to his declaration attached to his opposition to Respondents motion for summary decision, it appears that any concerns Stone had related to the "numbers" Stickel reported, were soon satisfactorily addressed, as Stone e-mailed Durkin that one outcome of the meeting was that Stickel would generate "a list of definitions to in-house financial terms (Invoice dollars, Sales Dollars, etc.) to minimize confusion within the NA Team. Paul is also creating a consistent monthly NA Financial statement based our discussion of financial results needed by NA [sic]." Resp. Mot. at Ex. Q, 1-2 (Stone e-mail to Durkin).

Stickel is generating a list of definitions to in-house financial terms (Invoice dollars, Sales Dollars, etc.) to minimize confusion within the NA Team. Stone noted Stickel was also creating a consistent monthly National Accounts Financial Statement to provide the financial results needed by the National Accounts department. *Id.*

In the period between February 15 to March 16, 2006, Stone exchanged e-mails and documents with Brito, Manchester, and Stickel (copying Durkin), and held a conference call with Brito, Manchester, and Stickel related to the proposed GPO changes to the SAP database. In explaining the GPO changes he proposed, Stone prepared documents and spreadsheets identifying five categories of accounts for changes. The GPO category changes he proposed were: (1) Continuing Paying Fees GPO changes (going from one contracted GPO to another contracted GPO - $6,980/year admin fees) (28 accounts); (2) Stop Paying Fees (going from a contracted GPO to a non-contracted GPO - $10,000/year admin fees) (46 accounts); (3) No Fees Paid Ever (either a No GPO or non-contracted GPO going to No GPO or non-contracted) (185 accounts); (4) Start Paying Fees (going from a non-contracted GPO to a contracted GPO with no other GPO affiliations - $5331/year admin fees) (40 account numbers); and (5) Paying Fees Optional (multiple situations where an argument can be made either way, pay or not pay…- $77,936/year admin fees) (214 account numbers). Stone Decl. at Ex. 10; Ex 11 at 4-5.[10]

During a conference call on March 2, 2006, Stone "spoke at length about the deficiencies in the SAP database." Stone Decl. at ¶ 30. Although Stone does not state what he said specifically regarding the deficiencies in the SAP database, he has submitted as exhibits to his declaration e-mails and memoranda that he sent subsequent to the March 2, 2006 conference call between March 2, 2006 and March 16, 2006. Stone Decl. at ¶ 30-31; Ex. 11. Stone wrote a memorandum to Manchester, Brito, Stickel, and copied Durkin after the conference call, including a list of topics, outcomes, and action items and expressing his view that the call had been productive in moving the SAP GPO coding project forward and in preparing for an upcoming planning meeting. Stone Decl., Ex. 11 at 1-3. Of relevance, Stone noted that a review of the database analysis he provided on February 15, 2006 titled (Admin Fee Analysis of SAP Dbase 02-14-06.xls), which outlined the five categories of accounts he proposed changing, had generated a great deal of discussion. As a result, Stone was drafting a *Policy & Procedure Statement* relative to price changes as a result of coding changes in SAP and finalized during the 3/15 planning meeting and, Stickel would continue to provide small segments of the database to BA for changes to be implemented within SAP. Stone also indicated that Brito and Manchester were reviewing those accounts appearing on the "Paying Fees Optional" tab of the dbase (Admin Fee Analysis of SAP Dbase 02-14-06.xls) and would present their opinions on how to handle accounts in this category during the 3/15 planning meeting.[11] Resp. Mot. at Ex. U, 2-3; Stone Decl., Ex. 11 at 2-3.

Consistent with the action items above, the Complainant prepared a draft memorandum on March 2, 2006, titled "Policy & Procedure Statement for GPO coding & price changes within

[10] Stone had provided this same information to Durkin on February 15, 2005, when Durkin questioned the outcomes of the February 9 sales meeting.

[11] Stone also included action items for Maintenance of the GPO database when changing GPO coding. He was drafting a *Policy & Procedure Statement* and finalized [sic] during the 3/15 planning meeting. Resp. Mot. at Ex. U, 2-3; Stone Decl., Ex. 11 at 2-3.

SAP (Draft)" which he sent to Manchester, Brito, Stickel, and copied to Durkin. Resp. Mot. at Ex. U, 6-7; Stone Decl., Ex. 11 at 4-5. The draft discussed the five GPO category changes discussed in prior e-mails and the conference call. With regard to the "Paying Fees Optional" category, which included 214 accounts, and potentially $77,936 in administrative fees, Stone wrote that "[t]his group is comprised of accounts with multiple GPO affiliations where the obligation to pay fees or not is open to interpretation. This group is currently under study by Ron Brito & Bill Manchester whom will present their findings during the March 15 & 16 planning meeting for final determinations." Stone Decl., Ex. 11 at 5. *See also* Stone Decl., Ex. 11 at 6.[12]

Durkin cancelled a scheduled meeting with the Complainant, Stickel, Manchester, DeFronzo, and Brito to discuss Stone's proposals to discuss the GPO coding changes that had been discussed, so Stone scheduled a teleconference for March 16, 2006 with DeFronzo, Stickel, Manchester, and Brito to discuss the issues. Stone Decl. at ¶ 32. Stone states that during the March 16, 2006 teleconference, "DeFronzo and Stickel gave several excuses as to why IL could not implement [Stone's] corrections to IL's internal control deficiencies, including management's reluctance to pay administrative fees owed to GPOs; limited resources in the Business Administration and Sales Administration departments to monitor, track and administer changes; and limited resources to pay for necessary programming enhancements to the SAP database." Stone Decl. at ¶ 32. Stone "told DeFronzo, Stickel, Manchester, and Brito that IL must meet its obligations to accurately track GPO-member affiliation in the SAP database and to pay administrative fees owed to GPOs." Stone Decl. at ¶ 32. Stone states that DeFronzo responded "in a hostile tone" that the Business Administration department was "unwilling to take the necessary corrective actions." Stone Decl. at ¶ 32. Stone states that Stickel stated that "IL would not make corrections to the SAP database because the corrections would reveal the magnitude of the unpaid administrative fees." Stone Decl. at ¶ 32. According to Stone, "Stickel also noted that IL needed to be very cautious about providing accurate data to GPOs because IL wished to conceal from GPOs the fact that IL was not honoring negotiated price concessions in its sales to many contracted GPO members." Stone Decl. at ¶ 33. Stone states that he "again reminded DeFronzo and Stickel that IL needed to accurately track the administrative fees owed to GPOs and must honor its obligation to pay the fees to avoid losing its ability to sell its products to GPO members." Stone Decl. at ¶ 34. The Respondent's did not dispute the Complainant's statements with regard to the teleconference on March 16.

The Complainant sent an e-mail on March 20, 2006, to DeFronzo, Stickel, Manchester and Brito with the revised draft of policy on customer prices in SAP after GPO changes are implemented and asks each to review and confirm their acceptance as Stone intended to review the document with Durkin. Stone Decl. at Ex 13, 2; EX 12.

Durkin terminated Stone from his position at ILC on March 22, 2006. Complaint at ¶ 55.

[12] On March 14, 2006, the Complainant also prepared a revised "Policy & Procedure Statement for GPO affiliation and GPO database maintenance (draft) which he e-mailed to Durkin, Manchester, Brito and Stickel. In this memorandum, Stone laid out his view of ILC's obligation to its GPO customers and explains how ILC will maintain their GPO membership roster, update membership additions and deletions from the GPO membership database, handle multiple GPO affiliations, use a Letter of Commitment to change accounts from multiple GPO affiliations to sole source, pay administrative fees in accordance with GPO agreements, and maintain databases including the SAP, Salestrack, and the Excel database. Stone Decl., Ex. 11 at 7-8.

B. Stone's Second (Blacklisting) Complaint

The Complainant filed his Second Complaint against IL SpA and ILC on January 29, 2007. Stone alleges that, in retaliation for filing his original complaint with OSHA, IL SpA and ILC "blacklist[ed] Stone by informing prospective employers that Stone filed a SOX complaint and by providing disparaging information about Stone." Second Compl. at ¶ 3.[13] The Complainant alleges that after his termination, he applied for comparable employment with the following four employers: (1) Beckman Coulter Inc. ("Beckman Coulter"); (2) Hemagen Diagnostics ("Hemagen"); (3) Gambro Renal Products ("Gambro"); and (4) Medical Resources, Inc. ("MRI"). Second Compl. at ¶ 15.

Stone had several meetings with Alex Cherlin and others at Beckman Coulter beginning in May 2006. Stone Decl. at ¶ 50. In August 2006, Stone met with Cherlin again and he disclosed that he was no longer with ILC. Stone Decl. at ¶ 51. Stone continued to receive interest from Beckman Coulter through the Fall of 2006, including calls from Cherlin, and an interview with David Bespalko and the Beckman Coulter Human Resources Department on November 21, 2006. Stone Decl. at ¶ 52. Stone states that he provided employment references to Beckman Coulter for the first time after the November 21, 2006 meeting with Bespalko and the Beckman Coulter Human Resources department. Stone Decl. at ¶ 53.[14] On November 22, 2006, Stone received an e-mail from Kevin Kinsella, Director, Southeast Area at Beckman Coulter stating "I heard that your meeting went well. Lets talk either today or on Monday…. " Stone Decl. Ex. 18.

On November 27, 2006, the Complainant received an e-mail from Cherlin asking for his mailing address so that Cherlin could forward some paperwork to him. Stone Decl. at Ex. 19. On December 1, 2006, Stone received an e-mail from Cherlin stating "Just want to make sure you received the information from HR. Let me know if you have sent it back. I can bird dog it to try to move it through the process." Stone Decl. at Ex. 20. The Complainant states that, "after complying with Cherlin's request, on the morning of December 7, 2006, [he] received a…phone call from Cherlin indicating Beckman Coulter's intentions to make [Stone] an offer and [Cherlin] described…what needed to take place next within the organization." Stone states that on either December 12 or 13, 2006, Cherlin called Stone and "asked [Stone] to 'explain the lawsuit he had against IL.'" Stone Decl. at ¶ 57. Stone was "shocked by Cherlin's knowledge of the case, and refused to discuss it." Stone Decl. at ¶ 57. Stone never heard from Cherlin or Beckman Coulter again. Stone Decl. at ¶ 57. [15]

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[13] In his second complaint, Stone again refers to ILC and IL SpA as Respondents "IL" collectively. I will refer to ILC and its parent corporation, IL SpA, as separate entities.

[14] David Bespalko, Beckman Coulter's Vice President and General Manager of Commercial Operations for its Eastern Zone, acknowledged that he was involved, along with another individual, in interviewing the Complainant for a sales position, that no offer was extended, and reports that the decision was made at the field level. Suppl. Memo at Ex. E. Bespalko also said that no one from ILC told him of the Complainant's legal action at any time during the selection process. *Id*.

[15] Alex Cherlin, was the hiring manager in talks with the Complainant regarding a sales position in his organization. Suppl. Memo, Ex. F. Cherlin claims that in early December, he asked the Complainant to explain what happened at ILC, indicating that is a common question relevant to a hiring decision. *Id*. Cherlin denies knowledge of any legal action against ILC at that point, and denies asking about a "lawsuit." *Id*. Cherlin reports that he subsequently decided not to extend an offer to the Complainant, and was unaware of any legal action at that time. *Id*. Cherlin

The Complainant also alleges that he had numerous interviews with Hemagen between April and September 2006. Second Compl. at ¶ 20. On July 11, 2006, during a meeting with William Hales, the Chairman, President, and CEO of Hemagen, the Complainant revealed that he was no longer employed by ILC. *Id*. Stone met with Hales again on July 21, 2006, and Hales expressed continued interest in Stone at that meeting. Second Compl. at ¶ 21-22. On August 3, 2006, Hales e-mailed Stone requesting another meeting within the week, but Stone's attempts to connect with Hales were unsuccessful. Second Compl. at ¶ 23. On August 8, 2006, Stone alleges that "Hales finally e-mailed Stone requesting references and requesting clarification on the date which Stone separated from IL." Second Compl. at ¶ 24. With regard to the requested references, Hales specified that the "[r]eferences should be people [Stone] reported to" in his previous employment at companies including ILC. *Id*. Stone alleges that he complied with Hales' request the following day. *Id*. According to his Second Complaint, "[a]fter repeated inquiries by Stone, Hales finally responded and set up a meeting with Stone later in the week. This was the last time Stone heard from Hales." Second Compl. at ¶ 25.

Stone alleges he also received "interest from hiring managers at Gambro (November to December [2006]) and MRI (August to October [2006]) only to have their interests abruptly end following submission of employment references." Second Compl. at ¶ 26.

During the week of December 4, 2006, Stone received a telephone call from Dan Yeager, a reference, who told him that IL informed Yeager that Stone filed a SOX claim against IL. Second Compl. at ¶ 27. Stone also states that "[o]n January 2, 2007, a former employee of IL, Diana McAuley, in speaking to Stone's wife, repeated significant details associated with Stone's claim against IL." Second Compl. at ¶ 28.

ILC employees, Dan Yeager, a Technical Service Representative, and John Glagolev, an Account Manager, reported to Stone when Stone held the position of Area Sales Manager for the Northeast Region. Suppl. Mem. at Ex. A and B. Both Yeager and Glagolev acknowledged that at Stone's request, they served as references for him and provided favorable references when they were contacted by prospective employers. *Id*. Yeager and Glagolev did not disclose any information regarding the Complainant's legal claim against ILC to any of the prospective employers. *Id*. Glagolev's was not even aware that Stone had filed a legal claim against ILC until February or March 2007 when the Complainant told him. *Id*.

Kathy Farrell, ILC's Human Resources Director explained the procedure in ILC's Human Resources Department for responding to requests for references, and stated that when ILC's Human Resources department receives a reference request, the ILC policy is to respond by providing only the former employee's title and dates of employment with ILC. Suppl. Memo., Ex. C. Farrell reports that ILC's Human Resources Department had not been contacted by Beckman Coulter. Although Farrell does not recall the name of the prospective employer, she states she did receive one telephone call to confirm the Complainant's dates of employment with ILC, and she responded by providing only the dates of employment and no other information.

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states that the first he learned of the Complainant's lawsuit when the Complainant called him in early January 2007 and asked him how he found about the lawsuit. *Id.* For purposes of the motion for summary decision, I must construe the facts in a light favorable to the Complainant.

Brian Durkin, the Complainant's manager at ILC, states that he has not been contacted by anyone at Beckman Coulter, Hemagen, Gambro, MRI, or any other prospective employer of the Complainant. Suppl. Memo, Ex. D. Durkin also said that he has not disclosed any information concerning the Complainant's employment with ILC or his pending SOX claim to anyone at Beckman Coulter, Hemagen, Gambro, MRI, or any other prospective employer. *Id.*

III. Discussion

A. Motion for Summary Decision

Summary judgment may be entered for either party 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." 29 C.F.R. § 18.40(d). The nonmoving party may not rest upon the mere allegations or denials of pleadings but must set forth specific facts and present affirmative evidence in order to show that there is a genuine issue of fact for the hearing. 29 C.F.R. § 18.40(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision are sufficient for this requirement. *Celotex*, 477 U.S. at 324.

Summary decision will be granted if, upon review of the evidence in the light most favorable to the non-moving party, the factfinder concludes that there is no genuine issue as to any material fact. *Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, OALJ No. 1999-TSC-4, slip op. at 4 (ARB Feb. 10, 2003); *Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 99-107, OALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30 1999).[16] If the nonmoving party fails to establish an essential element of his case, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the case necessarily renders all other facts immaterial. *Friday v. Northwest Airlines, Inc.*, ARB No. 03-132, OALJ Nos. 2003-AIR-19, 20, slip op. at 3 (ARB Jul.29, 2005) (citing *Celotex*, 477 U.S. at 322-323).

Respondents argue that they are entitled to summary decision as ILC is a private company and is not covered by SOX. Respondents also contend that IL SpA, ILC's parent, had no involvement in the Complainant's employment or termination. Resp. Mot. at 2, 9, 14-17. Respondents maintain summary decision is also appropriate as the Claimant failed to allege that he engaged in activity protected under Sarbanes-Oxley. *Id*. at 1-2, 6-9, 10-14. Finally, Respondents assert that Stone was terminated for cause. *Id*. at 17-18. Respondents claim summary decision is proper on the second blacklisting complaint because neither ILC nor IL SpA are covered employers, the Claimant failed to allege any action by ILC interfering with his employment prospects and the claim is untimely. Suppl. Memo. The Claimant argues that he was employed directly by IL SpA and, alternatively, that ILC and Il SpA are joint employers, or ILC is an agent of IL SpA and therefore a covered employer under SOX. Stone argues that

[16] A material fact is "one whose existence affects the outcome of the case" 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." *Reddy v. Mediquest, Inc.,* ARB No. 04-123, OALJ No. 2004-SOX-35, slip op. at 4 (ARB Sept. 30, 2005) (internal citations omitted).

summary decision is not appropriate as there are issues of fact with regarding whether IL SpA and ILC are covered employers under SOX; whether he engaged in protected activity, and whether the Respondents' stated reason for the termination is pretext. Opp. to Mot. at 3.

B. Rule 56(f) Motion to Stay Consideration of Motion for Summary Decision

The Complainant has filed a Motion for Stay of Consideration of the Motion for Summary Decision pursuant to Rule 56(f) Federal Rules of Civil Procedure,[17] contending that summary decision is not proper at this stage because he has not had an opportunity to conduct discovery. The Complainant argues that summary decision is premature and in order to show that there are genuine issues of material fact to survive summary decision he needs to conduct discovery on the issue of whether ILC is an agent of IL SpA, and thus, a covered employer under SOX, and on the issue of whether he engaged in protected conduct. 56(f) Motion at 4-6; Reply to Opp. to 56 (f) Mot. at 3-9.

The Respondents oppose the Complainant's Motion to Stay Consideration of the Motion for Summary Decision. The Respondents argue that neither IL SpA nor ILC are covered employers under SOX. Opp. to 56(f) at 2, 12-13. With regard to the issue of protected activity, Respondents assert that it is not necessary for the Complainant to take discovery on the issue of protected activity because "the documentation Stone has pointed to as evidence of his alleged protected activity during his employment at ILC already is contained in the record for summary decision." *Id*. The Respondents maintain that the documentation in the record conclusively demonstrates that the Complainant did not engage in any protected activity while employed by ILC. Opp. to 56(f) at 2. Furthermore, the Respondents assert that the Complainant has not met his Rule 56(f) burden of showing that any controverting evidence relating to his own protected conduct exists, and "if such evidence existed, it would lie within Stone's own personal knowledge" and could be presented by affidavit without the need for discovery. Opp. to 56(f) at 2-3, 5. With regard to the second or blacklisting complaint, ILC maintains that Stone failed to detail in an affidavit what additional facts he would seek, how those facts would be obtained and how those facts would create a genuine issue of fact. Opp. to 56(f) at 9-11.

The Supreme Court has stated that "[a**]**ny potential problem with…premature [summary judgment] motions can be adequately dealt with under Rule 56(f) which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery." *Celotex Corp. v. Catrett*, 477 U.S.

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[17] Rule 56(f) provides:

> [s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). Although the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (29 C.F.R. Part 18) do not contain the same language as Rule 56(f), 29 C.F.R. Section 18.40(d) provides that summary judgment may be denied "whenever the moving party denies access to information by means of discovery to a party opposing the motion," and Section 18.1 provides that the Federal Rules of Civil Procedure "shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation." 29 C.F.R. §§ 18.1, 18.40(d).

317, 326 (1986). However, "where a nonmoving party has made no showing of specific evidence expected to be obtained through discovery and has not shown how such evidence will impact the pending summary judgment motion, a ruling on the summary judgment motion is not precluded." *Johnson v. U.S.*, 188 F.R.D. 692, 696 (N.D. Ga. 1999). The party seeking additional discovery carries the burden "to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment." *Chance v. Pac-Tel Teletrac, Inc.*, 242 F.3d 1151, 1161 (9th Cir. 2001). I will consider the Complainant's Motion for Stay of Summary Decision in the course of evaluating the merits of the Respondents' Motion for Summary Decision.

C. Elements of a SOX Whistleblower Complaint

Section 806 of Sarbanes-Oxley protects employees of publicly traded companies,[18] or agents of such companies, from retaliating against employees for (1) providing information the employee reasonably believes constitutes a violation of section 1341 (mail fraud), 1343 (wire 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 or for (2) participating in a proceeding alleging such violations.
18 U.S.C.A. § 1514A(a).

The statute expressly covers employees of publicly traded companies who disclose certain violations of securities law or regulations. Section 1514A(a) also explicitly protects employees of entities which are agents of publicly traded companies. 18 U.S.C.A. § 1514A(a). Based upon Stone's complaints, the Sarbanes-Oxley employee protection provision relevant here, protect employees of covered employers from disclosing or reporting conduct that the employee reasonably believes constitutes a violation of any rule or regulation of the Securities and Exchange Commission and any provision relating to fraud against shareholders.

The Complainant must also prove by a preponderance of the evidence that: (1) he engaged in protected activity or conduct; (2) the Respondents knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Welch v. Cardinal Bankshares Corporation*, ARB No. 05-064, OALJ No. 2003-SOX-15, slip op. at 8 (ARB May 31, 2007).

1. Protected Activity With Regard to Stone's Initial Complaint

Stone must establish that he engaged in activity protected under the Act. The Respondents argue that the initial complaint must also be dismissed because the Complainant failed to establish that he engaged in protected activity, an essential element of his claim. In support of their position, the Respondents have submitted e-mail correspondence regarding administrative fee payments and the GPO coding project written by Stone to his supervisor Durkin and other ILC employees. Respondents contend that the e-mail messages establish that Stone did not raise concerns to ILC management about any violations of SEC rules governing internal controls and prohibiting shareholder fraud.

[18] Publicly traded companies are companies with a "class of securities registered under Section 12 of the Securities Exchange Act of 1934," or a company that "is required to file reports under Section 15(d) of the Securities Exchange Act of 1934…" 18 U.S.C.A. §1514A.

As an initial matter, Stone seeks to delay consideration of summary decision until he has taken discovery in order to show there is an issue of fact as to whether he engaged in protected activity.[19] Alternatively, Stone opposes the motion for summary decision, asserting that he engaged in protected conduct when he raised concerns to ILC management about internal control deficiencies related to the GPO coding project and payment of administrative fees. The Complainant's declaration in support of his opposition to summary decision and exhibits to the Complainant's declaration, including e-mail correspondence about administrative fee payments and the GPO coding project, set forth his communications to ILC management regarding his concerns. In addition to e-mails, the Complainant has asserted that he raised concerns at a May 2005 meeting with his supervisor Durkin, Ann DeFronzo, Ron Brito, Paul Stickel and Amy Picarillo that the company was not tracking dual membership status of members of contracted GPOs and members of non-contracted GPOs as required by the company's contracts with contracted GPOs. Opp. to Mot. at 21, Compl. Decl. ¶ 15. The Complainant also alleges that he held a telephone conference on March 16, 2006 with Ms. DeFronzo, Stickel, Brito and Manchester again raising a concern with the recoding of accounts and the payment of administrative fees to GPOs and that Ms. DeFronzo and Mr. Stickel refused to make the changes to the SAP database. Opp. to Mot. at 26, Compl. Decl. ¶ 32-33.

Stone argues that in order to overcome the motion for summary decision on the issue of protected activity, he needs discovery to show that there are issues of fact related to his reasonable belief that ILC failed to maintain adequate internal controls and to show he specifically and definitively raised concerns about deficient internal controls. However, to show that he engaged in protected activity, the Claimant must describe or outline his own communications, statements or actions and show how those actions are protected under Sarbanes-Oxley, rather than focusing on ILC's alleged conduct. Evidence of the Complainant's own conduct or statements is within the Complainant's personal knowledge.[20] Stone can and has offered testimony in the form of an affidavit and exhibits (e-mails, memos and spreadsheets) setting forth his own conduct. *See* Stone. Decl.[21] In his declaration, the Complainant has identified the concerns he raised regarding ILC's "internal controls" and what he communicated

[19] With regard to protected activity, the Complainant argues that the requested discovery is necessary to demonstrate that there are triable issues of fact concerning (1) the Complainant's reasonable belief that ILC failed to maintain adequate internal controls and (2) that the Complainant specifically and definitively raised concerns to ILC management about ILC's internal control deficiencies. The Complainant also contends that taking discovery will allow him to demonstrate the extent to which ILC was violating SEC rules that require ILC to maintain adequate internal controls and the extent to which the concerns that the Complainant raised about ILC's deficient internal controls definitively and specifically relate to any SOX-listed law or rule. 56(f) Motion at 5-6. The Complainant's 56(f) Motion is supported by the Declaration of Jason Zuckerman, Esq. in Support of Motion to Stay Consideration of Respondents' Motion for Summary Decision and to Permit Discovery, Pursuant to Rule 56(f) ("Zuckerman Decl. in Supp. 56(f)"), one of the Complainant's Attorneys of Record for this matter. Zuckerman Decl. in Supp. 56(f) at ¶¶ 13, 16.

[20] *Santamaria v. U.S. Environmental Protection Agency,* ARB No. 04-063, ALJ No. 2004-ERA-6 (ARB May 31, 2006), (ALJ did not abuse his discretion in suspending further discovery after the Respondent filed a potentially dispositive motion for summary decision where the Complainant failed to show how further discovery would have permitted rebuttal of the Respondent's motion based on argument that the Complainant had not engaged in protected activity. ARB observed that the Complainant himself should have known whether he engaged in such activity.)

[21] Respondents have also submitted several e-mails written by Stone.

regarding these concerns to ILC's management in e-mails, memos and during meetings.[22] Stone has attached numerous exhibits which he asserts demonstrate his protected activity. As evidence relating to the Complainant's own actions is uniquely within the Complainant's knowledge, and the Complainant has not shown that there is any specific evidence he expects to obtain through discovery to show his protected activity nor has he shown such evidence would preclude summary decision, his motion to stay summary decision on this issue is denied.

In order to meet the Motion for Summary Decision in the present matter, the Complainant must show that that there is a genuine issue of fact as to whether or not he engaged in activity protected under SOX. Whether a complainant engaged in protected activity is determined by examining the individual's statements, communications, and actions. The ARB has held that the protected activity must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. §1514A. *Platone v. FLYi, Inc*., ARB No. 04-154 (September 29, 2006) slip op. at 17. The ARB reasoned that "[t]he Corporate and Criminal Fraud Accountability Act of 2002 does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills. Rather, under SOX, the employee's communications must 'definitively and specifically' relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1)." *Id*. In determining whether Platone engaged in protected activity, the Board stated that the relevant inquiry is not what Platone alleged in her complaint to OSHA, but rather, what Platone "actually communicated to her employer" prior to her termination. *Platone* slip op at 17. The Board found that Platone did not engage in protected activity because she did not provide information about conduct she reasonably believed constituted a violation of the listed statutory or regulatory provisions. *Platone* slip op 17-18. Rather, she raised a concern about a "possible violation of internal union policy and she expressed concern on how this might affect the employer's ability to collect a debt, but nothing approximating fraud against shareholders." *Platone*, slip op. at 17-18.[23]

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[22] The specific discovery the Complainant seeks as to the extent to which deficiencies in ILC's controls affected the accounting of sales to contract and non-contract GPOs, and the extent to which ILC failed to accurately track the administrative fees it should have paid, as required by SEC rules, is designed to establish that ILC violated SEC rules and will not produce evidence as to the Complainant's actions. Whether a company actually violated SEC rules is not relevant to whether or not a claimant engaged in protected activity.

[23] *See also Reddy v. Medquist, Inc.*, ARB No. 04-123, OALJ No. 2004-SOX-35, (ARB Sept. 30, 2005). In *Reddy v. Medquist, Inc.*, the ARB found that the employer, Medquist, was entitled to summary decision since there was no genuine issue of material fact as to whether the complainant, Reddy, engaged in protected activity. *Reddy*, slip op. at 10. Reddy worked for Medquist as a medical transcriptionist and was paid by the number of 65-character lines she transcribed. *Reddy*, slip op. at 2. Reddy e-mailed Medquist's Regional Manager complaining that "new managers had 'zapped' the line count in her transcripts by increasing the number of characters per line from 65 to 90 and, as a result, she was transcribing fewer lines and getting paid less." *Reddy*, slip op. at 2. Reddy filed a complaint with OSHA alleging that Medquist violated SOX when it terminated her contract after she informed her supervisor about the "zapped" line counts. *Reddy*, slip op. at 3. On review, the Board examined the record to determine whether Reddy engaged in protected activity and stated "[t]he relevant portions of her e-mails to [her supervisor] complain only that the line counts are being 'zapped' and that the 'zapping' is an 'Enron-type' accounting practice. Her subsequent pleadings do not explain or demonstrate how the e-mails constitute protected activity." *Reddy*, slip op. at 8. The Board noted that instead of demonstrating that she engaged in protected activity, Reddy focused on Medquist's (alleged) conduct. *Reddy*, slip op. at 8-9. Reddy "did not show that her e-mails to [her supervisor] provided information about conduct she reasonably believed constituted a violation of the federal fraud statutes, or an SEC rule or regulation, or any federal law relating to shareholder fraud." *Reddy*, slip op. at 8-9.

Two recent district court decisions have addressed the issue as to the type of communications or disclosures that constitute protected activity under Sarbanes-Oxley. In *Portes v. Wythe Pharmaceuticals, Inc*., No. 06-CV-2689, 2007 WL 2363356 (S.D.N.Y. Aug. 20, 2007) (ALJ No. 2005-SOX-98), the United States District Court for the Southern District of New York found that the complainant, a chemist and project manager for a pharmaceutical company, was not engaged in protected activity under Sarbanes-Oxley because his complaints and disclosures went to allegations of violations of drug manufacturing regulations and guidelines, and not to federal law related to fraud against shareholders. The District Court stated that disclosures are protected under Sarbanes-Oxley "only when they 'implicate the substantive law protected in Sarbanes-Oxley 'definitively and specifically.'" Slip op. at 7 (citing *Fraser v. Fiduciary Trust Co. Int'l*, 417 F.Supp.2d 310 (S.D.N.Y.2006), and *Platone* among other citations). The Court stated that the complainant did not allege that he "explicitly referred to fraud, shareholders, securities, statements to the SEC or SOX" in his communications to his supervisors. Slip op. at 8. Rather, the alleged violations involved an earlier consent decree, FDA regulations and other drug manufacturing guidelines and not SEC rules or other federal laws related to fraud against shareholders. Accordingly, the court found the complainant's disclosures were not sufficiently related to shareholder fraud to allege protected activity sufficient to overcome a motion to dismiss for failure to state a claim. *Id*.

In *Smith v. Corning Inc*., No. 06-6516, 2007 WL 2020063 (W.D.N.Y. July 9, 2007), the District Court in denying a motion to dismiss the complaint for failure to state a claim, concluded that the complainant, a senior financial analyst, in the Information Technology Department, had made disclosures sufficient to allege protected activity under Sox for purposes of surviving a motion to dismiss. Slip op. at 5-6. Specifically, the court noted the complainant reported concerns that the financial reporting program being implemented did not comply with Generally Accepted Accounting Principles (GAAP, and was "not correctly reporting financial data [which] affected the reporting of sub-ledgers to the general ledger, making the general ledger incorrect" and that these errors were "serious" and "would impact the integrity of Corning, Inc.'s quarterly reports." Slip op. at 1-2, 4-6. The Court stated that incorrect quarterly reports could mislead investors and that submission of quarterly reports that were not compiled in accordance with GAAP would also violate a rule or regulation of the SEC which required financial statements to be prepared in compliance with GAAP.

Applying the analysis utilized by the District Courts' in *Portes* and *Smith*, and the ARB's *Platone* analysis, it is apparent that in order to show that disclosures are protected activity under Sarbanes-Oxley, a complainant must establish that disclosures definitively and specifically allege a violation of SEC rules or regulations, or relate to fraud against shareholders or misstatements of the financial records affecting the financial condition of the company. In making this assessment in the present matter, it is necessary to consider what the Complainant actually communicated to his supervisor or to other officials at ILC prior to his termination, rather than, what the Complainant's attorneys alleged in his complaint to OSHA or in his motions in the present proceeding.[24] Stone asserts that he raised concerns about "deficient internal controls" in

[24] The Complainant correctly asserts that he need not show that he cited to the relevant securities law "chapter and verse" when he raised concerns to management. Opp. to Mot. at 14-16. Nevertheless, *Platone* and *Portes* require that through his statements to management or his actions he must show that he provided specific information regarding violations of SEC regulations or fraud against shareholders to his supervisor or other company officials. *Platone*, slip op. at 19; *Portes*, slip op. at 6.

a meeting with his supervisor Durkin, Ms. DeFronzo, Ms. Picarillo, Mr. Brito and Mr. Stickel held in May 2005, in several e-mails he sent to various individuals between May 2005 and March 2006, and in a conference call in March 2006. Opp. to Mot. at 21-27. A careful reading and review of the Complainant's e-mails shows that the Complainant raised questions related to the proper coding of accounts to GPOs, and proposed changes to the coding of accounts to comply with contracts ILC had with its contract GPOs which may have resulted in additional administrative fess being owed.

The e-mail messages reflect an ongoing dialog between Stone and management and his subordinates regarding progress on the GPO coding project and the decision points that were needed as a result of the findings. In Stone's e-mail of December 21, 2005 to Durkin, Stone states, "Before discussing SAP changes with DeFronzo, you and I need to know if Benet will support switching SAP accounts from Non-contracted GPOs…to Contracted GPOs…There may be a considerable jump in admin fees to our contracted vendors if we implement the changes…Changing SAP and giving the Admin fees to our contracted GPO's – I believe is the right thing to do…We could spin this to our advantage [with] Amerinet & MedAssets. How would you like to proceed?" While Stone states in his e-mail that he believes making the changes to the SAP database and paying Admin fees to the contracted GPOs is the "right thing to do," he does not identify the coding changes or the alleged past nonpayment of administrative fees to contracted GPOs as being some type of shareholder fraud, SEC rules violation, or as implicating the financial condition of the company.[25]

Stone's GPO coding project identified proposed changes to coding accounts including changes to a category of accounts labeled "Paying Fees Optional." The e-mail communications reflect that with regard to the "Paying Fees Optional" group of accounts, which represented potentially $77,936 in additional administrative fees, an argument could be made to support either paying fees or declining to pay fees. Therefore, it was not certain that this group of accounts were required to be recoded. It is also apparent from the e-mail exchanges and from Stone's declaration regarding his own statements during the March 2006 teleconference that changing the coding on this category of accounts raised issues, other than simply a potential increase in administrative fees, which required thought, further discussion, and coordination both within ILC's sales department and with other ILC divisions outside of Stone's sales department.[26]

For purposes of evaluating the motion for summary decision, I considered the documents and e-mails submitted and I accept the Complainant's assertions that he raised a concern in a meeting in with Durkin, DeFronzo and others in May 2005 that ILC was not tracking dual membership status of GPO customers as required by the contracts with ILC's contract GPOs and therefore was not accounting for substantial administrative fees, and that he discussed his

[25] Although Stone contends that ILC refused to implement his recommended corrections to the GPO coding, based on the e-mail correspondence that has been submitted by both Stone and the Respondents, it is apparent that the Complainant and ILC management were engaged in an ongoing discussion regarding how to address erroneous GPO coding in the SAP database.

[26] *See* Resp. Mot., Ex. J at 3; Resp. Mot., Ex. K at 1; and Resp. Mot. at Ex. L raising other issues related to this project.

proposed coding changes to the SAP database in a conference call with DeFronzo and Stickel in March 2006.

None of Stone's e-mail messages, memos, or any of his statements regarding his own communications at the May 2005 meeting or the March 2006 teleconference provide specific information about a Sarbanes-Oxley listed category of shareholder fraud or securities or SEC regulation violations. Stone did not tell ILC officials of any concern that the changes he believed were necessary to the SAP data-base affected the financial condition of ILC.[27] The disclosures discuss a plan of action with respect to the GPO coding project rather than identifying concerns regarding shareholder fraud, or violations of SEC regulations. Nor do the e-mails or statements mention any concern that the inaccuracies in the SAP system, in coding customer GPO affiliations, or in tracking administrative fees might have any impact on "ILC's ability to accurately report revenues and liabilities" as he alleged in his complaint. Compl. Decl. ¶13. Although Stone's complaint to OSHA alleges that he provided information to "management both orally and in writing about [ILC's] failure to maintain adequate internal accounting controls" and in doing so he "disclosed to management a violation of any rule or regulation of the SEC," his actual written and oral communications to Durkin and other ILC officials do not mention a concern about internal controls, violations of SEC rules or a concern that failing to track the administrative fees owed might interfere with the company's reporting responsibilities. Opp. to Mot. at 13; Compl. Decl. ¶¶ 13-14. As *Platone* instructs, it is the complainant's actual communications to the employer, or actions taken, prior to discharge that determine whether the complainant engaged in protected activity, rather than what is alleged in the complaint. Rather, Stone's disclosures and communications in several e-mails and in meetings raised concerns for possible violations of ILC contracts with its contract GPOs and not violations of rules of the SEC, or fraud against shareholders or inaccurate financial statements.

Upon careful consideration of the parties' submissions and viewing the evidence in the light most favorable to the Complainant, I find that the Complainant's concerns with regard to the GPO coding project went to allegations of possible violations of the contracts ILC had with its contract GPOs, and not to federal law related to fraud against shareholders, or violations of SEC rules. The Complainant's concerns about the coding of accounts and payment of administrative fees to contract GPOs, his communications to his supervisor, Durkin, and DeFronzo and others at ILC did not raise any concerns that "definitively and specifically" relate to a listed category of fraud or securities violations or violations of an SEC regulation under 18 U.S.C.A. §1514A(a)(1).[28] Accordingly, I conclude that the Complainant has not established that there is a genuine issue of fact as to whether he engaged in protected activity. Therefore, Respondents motion for summary decision on this issue is granted and the claim for unlawful termination is dismissed.

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[27] Nor do Stone's communications or disclosures to supervisors or others refer to concerns involving the Company's financial statements.

[28] As I have determined that the Complainant did not engage in protected activity because he failed to communicate any concern about internal controls, violations of SEC rules or that the failure to track administrative fees might interfere with the reporting requirements or the company's financial condition to his supervisor or other officials at ILC, it is not necessary for me to address the Respondents' argument that the claim must also fail because the Complainant cannot establish that he had an actual, subjective belief that ILC engaged in conduct that violated SEC rules and regulations, or provisions of Federal law relating to fraud against shareholders. Resp. Mot. at 13.

2. Are IL SpA and ILC Covered Employers Under The Whistleblower Provisions of Sarbanes-Oxley?

a. Are ILC and IL SpA Joint Employers or is ILC an Agent of IL SpA?

Respondents argue they are also entitled to summary decision because the Complainant was not employed by IL SpA and ILC is neither a publicly traded company nor an agent of IL SpA. In order to come within the whistleblower protections afforded by the Act, a complainant must show that he is employed by a publicly traded company or its agent. *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB 04-149, ALJ No. 2004-SOX-11 (ARB May 31, 2006). The Complainant asserts that he is a covered employee on several grounds: (1) he asserts he was employed directly by IL SpA, (2) IL SpA and ILC are joint employers and (3) that ILC is an agent of IL SpA.

The concept of joint employer in both the labor relations and employment discrimination areas recognizes the companies are separate entities and evaluates whether they share or co-determine matters governing the essential terms and conditions of employment. *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1122-23 (3rd Cir. 1982). The joint employer inquiry, "is a matter of determining which of two, or whether both, respondents control, in the capacity of employer the labor relations of a given group of workers." *Browning-Ferris*, 691 F.2d at 1122-23; *see also*, *Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814, 820-821 (1st Cir. 1991) (factors for determining whether joint employer relationship exists in employment discrimination matter include authority to hire and fire, discipline, pay and records, supervision and work assignments) (citations omitted).

With regard to the assertion that ILC is an agent of IL SpA, the ARB has stated that, in determining whether a particular subsidiary is an agent of a public parent for purposes of the Sarbanes-Oxley, principles of general common law of agency are applied. *Klopfenstein*, slip op. at 14. Factors relevant in assessing whether an agency relationship exists, include whether there are overlapping officers between the two companies and whether the principal was involved in decisions relating to the complainant's employment. *Klopfenstein*, slip op. at 15; *see also, Rao v. Daimler Chrysler Corp.* 2007 WL 1424220 (E.D. Mich) (May 14, 2007) slip op. at 5 (granting summary decision dismissing SOX complaint as plaintiff failed to allege anyone at parent corporation knew of or participated in decisions regarding his employment).

Under either a joint employer or an agency theory, the key issue is whether or not IL SpA was involved in matters related to the hiring and firing, discipline, pay and employment records, supervision and work assignments of the Complainant and other ILC employees. Complainant contends discovery is necessary in order for him to show issues of fact exist as to whether IL SpA and ILC are joint employers or whether ILC is an agent of IL SpA to defeat the motion for summary decision. ILC has presented the affidavit of its Director of Human Resources, Kathy Farrell. Through Ms. Farrell, the Respondents have produced evidence that ILC's employment policies and practices including hiring, staffing, discipline, employee evaluations, promotions, terminations and employment functions are separate from those of IL SpA. In addition, ILC maintains employee benefit plans and payroll functions separate from those of IL SpA. Ms. Farrell also indicated that the Complainant reported to Durkin, an ILC employee, and she stated she was not aware of the Complainant having formal contact with any IL SpA employees during

his employment with ILC. The Complainant has offered public filing documents showing some overlap of officers between IL SpA and ILC. The Complaint has also offered an affidavit asserting that officers of IL SpA accompanied him on sales meetings, attended advisory committee meetings, participated in a 2003 sales meeting with ILC's sales management team, and that two IL SpA officers maintain an office at ILC's location in Massachusetts and "routinely" worked at ILC's Massachusetts office in an effort to show that the two companies functioned as one and/or that IL SpA exerted substantial control over his employment. The activities the Complainant's affidavit alleges do not directly address the key factors related to employment matters which were outlined above, and which are required, for establishing either a joint employer relationship or agency in the present matter. The Complainant is entitled to attempt to obtain evidence relevant to whether IL SpA officials were involved in the hiring and firing, discipline, pay and employment records, supervision and work assignments of ILC employees, including the Complainant, in order to counter the Respondents evidence and the motion for summary decision. Therefore, the Complainant's motion to stay consideration of summary decision to permit discovery on the issue of whether IL SpA participated in key employment matters involving ILC employees, such that the two companies are joint employers or that ILC is an agent of IL SpA, is granted.[29]

b. IL SpA's Termination of Its Registration of Securities - Blacklisting Complaint

On June 7, 2006, IL SpA filed a Form 15, Certification of Notice of Termination of Registration Under Section 12 (G) of the Securities and Exchange Act of 1934, with the Securities and Exchange Commission to terminate it prior registration of securities. Resp. Mot. Ex. 2. Therefore, ILC contends that, in any event, it is entitled to summary decision on the blacklisting claim because neither ILC nor IL SpA were public companies when the blacklisting complaint was filed. Resp. Mot. at 14. The Complainant contends that IL SpA's delisting of securities does not take the company outside Sarbanes-Oxley coverage. Opp. to Mot. at 34-35. In this regard, the Complainant urges that precedent under Title VII be followed on the coverage issue citing *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997). *Id*.

The Complainant filed his initial complaint alleging unlawful termination on June 19, 2006, approximately two weeks after IL SpA delisted its securities. His second or blacklisting claim alleging that ILC and IL SpA had interfered with his prospective employment was filed on January 29, 2007. As discussed above, Sarbanes-Oxley provides protection to employees of publicly traded companies meaning companies with a "class of securities registered under Section 12 of the Securities Exchange Act of 1934," or a company that "is required to file reports under Section 15(d) of the Securities Exchange Act of 1934…" 18 U.S.C.A. §1514A. S*ee, 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).[30] There is no dispute among the parties that ILC is not a

[29] I have granted the motion for summary decision and dismissed the unlawful termination claim based upon the Complainant's failure to show an issue of fact as to his protected activity. Whether or not IL SpA and ILC are covered employers is now relevant only to the remaining blacklisting claim.

[30] The Complainant's reliance on Title VII precedent is unpersuasive. Under Title VII, an employer is a covered employer and liable for discriminatory acts if the Employer had has "fifteen or more employees for each working

public company. Thus, the Complainant must show that there is an issue of fact as to whether IL SpA was a public company at the time of the alleged retaliatory blacklisting to meet the motion for summary decision seeking dismissal for failure to name a covered employer. The evidence submitted shows that IL SpA had been a public company, but ceased to be a public company on June 7, 2006, when it delisted its securities with the SEC. The Complainant has not alleged that there is evidence it could obtain in discovery showing that IL SpA was a public company after June 7, 2006. Therefore, the Complainant fails to meet the Rule 56(f) requirements for delaying consideration of the motion for summary decision pending discovery.

The blacklisting complaint alleges that, in retaliation for filing his initial complaint alleging his termination violated Sarbanes-Oxley, ILC and IL SpA further retaliated by blacklisting him by informing prospective employers that he had filed a Sarbanes-Oxley complaint. Second Comp. at 7. The Complainant filed his initial complaint on June 19, 2006, after IL SpA delisted its securities. ILC and IL SpA could not have learned of the Sarbanes-Oxley complaint until the date the complaint was filed on June 19, 2006, and the Complainant has not made contrary allegations on this point. By this date, IL SpA was no longer a public company. Therefore, even accepting the blacklisting allegations as true for purposes of the motion, IL SpA was not a publicly traded company and, therefore, was not an employer covered by Sarbanes-Oxley at the time the alleged blacklisting occurred. Accordingly, the motion for summary decision on the ground that neither ILC nor IL SpA were publicly traded companies covered by the Act at the time the alleged blacklisting occurred is GRANTED. [31]

IV. Conclusion

In conclusion, I determined that there was no genuine issue of material fact with regard to whether the Complainant engaged in protected activity. I found that the Complainant's written and oral communications to Durkin and other ILC officials did not show that he engaged in activity protected by Sarbanes-Oxley. Accordingly, the Respondents motion for summary decision on this basis is GRANTED and the Complainant's unlawful termination complaint is dismissed.

With regard to whether or not ILC and IL SpA were covered employers under either a joint employer or agency theory, I found that the Complainant was entitled to engage in discovery on this issue in order to obtain evidence showing an issue of fact, sufficient to defeat the motion for summary decision, existed. However, I also determined that even if there was evidence showing IL SpA and ILC were covered employers with regard to the initial claim

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day in each of twenty or more calendar weeks in the current or preceding calendar year." 78 Stat. 253, as amended, 42 U.S.C. § 2000e(b). *Walters*, 519 U.S. at 204. The Title VII cases which extend coverage to employers as long as the employer had 15 employees during the course of the year or the preceding year in which the alleged discriminatory act occurred are construing statutory language. No similar language appears in Sarbanes-Oxley and thus, the Title VII cases are inapposite. In addition, the Complainant's suggestion that a failure to rule that IL SpA was a covered employer even though it delisted its securities would encourage companies to retaliate against employees in violation of Sarbanes-Oxley and then avoid liability by delisting their shares from the market is nonsensical.

[31] It is not necessary for me to address the Respondents additional arguments that summary decision is appropriate (1) because the Complainant failed to allege any adverse action by ILC to interfere with his employment prospects or (2) that the blacklisting complaint with regard to Hemagen and MRI is time barred.

alleging unlawful termination, as either joint employers or agents, neither company was a covered employer at the time of the alleged blacklisting activity. Accordingly, Respondent's motion for summary decision dismissing the blacklisting claim for lack of coverage is GRANTED.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. See 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).