

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

KEVIN WALLACE,

Plaintiff,

VS.

TESORO CORP.,

Defendant.

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CIVIL ACTION NO. SA-11-CA-099-FB

ORDER ACCEPTING MEMORANDUM AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The Court has considered the Memorandum and Recommendation of the United States Magistrate Judge filed in the above styled and numbered cause (docket #59), Plaintiff's Objections to Magistrate's Recommendations Regarding Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint (docket #61), and Defendant's Response to "Plaintiff's Objections to Magistrate's Recommendations Regarding Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint" (docket #63).

Where no party has objected to a Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of them. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Memorandum and Recommendation and determine whether they are either clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989).

On the other hand, any Memorandum or Recommendation to which there are objections requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo

review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Commission*, 834 F.2d 419, 421 (5th Cir. 1987).

In the Memorandum, Magistrate Judge Primomo recommends Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint (docket #56) be granted because plaintiff failed to exhaust his administrative remedies as to the claims remaining before this Court: hostile work environment and claims of wire fraud by market manipulation, i.e., price signaling and inconsistent discounts.¹ Magistrate Judge Primomo found plaintiff's administrative complaint, follow-up documents, and the OSHA investigative report do not establish plaintiff raised these claims administratively. Although the OSHA report acknowledges the plaintiff engaged in protected activity, Magistrate Judge Primomo found it focuses instead on "significant problems between Wallace and other employees and allegations against Wallace himself of favoritism, discrimination and retaliation." *Memorandum and Recommendation*, docket #59 at page 14.

In his objections, plaintiff asserts the Magistrate Judge erred in failing to follow the decision cited by both plaintiff and defendant, i.e., *Thomas v. Texas Dep't of Criminal Justice*, 220 F.3d 389, 395 (5th Cir. 2000),² for the "proposition that a Plaintiff's SOX claim should be limited to those allegations contained in his administrative complaint, as well as those allegations that could 'reasonably be expected' to grow out of his administrative complaint." *Plaintiff's Objections to Magistrate's Recommendation*, docket #61 at pages 3-4. Plaintiff contends he and the defendant agree the Title VII standard applies in this case, but Magistrate Judge Primomo concludes otherwise. Although plaintiff

¹ In the alternative, if this Court should find plaintiff has exhausted his administrative remedies, the recommendation is made that Defendant's Motion to Dismiss be denied.

² Although in his objections plaintiff cites to *Thomas v. Texas Dep't of Criminal Justice* at 200 F.3d 389, the Court is presuming plaintiff meant to cite to 220 F.3d 389.

admits the question of whether or not the Title VII standard for exhaustion of administrative remedies applies in SOX retaliation cases has not been addressed by the Fifth Circuit Court of Appeals or any other circuit court and appears to be a question of first impression in the Western District of Texas, he maintains that because “the language in the charge filing provisions of SOX and Title VII are very similar it follows that the process for filing charges under SOX and Title VII are also very similar.” *Plaintiff’s Objections to Magistrate’s Recommendation*, docket #61 at page 4. The district courts considering the issue, thus far, do not agree.

In *Roganti v. Metropolitan Life Ins. Co.*, No. 12 Civ. 0161 (PAE), 2012 WL 2324476, at *5-6 (S.D.N.Y. 2012), the court explained in order for plaintiff to properly file a SOX claim, he must exhaust certain administrative remedies, and the “SOX’s administrative procedures must be exhausted before a claimant may file suit in district court.” The court rejected the plaintiff’s attempt to salvage his claim by referring to an exception to Title VII’s administrative exhaustion requirement whereby claims “reasonably related” to those in the administrative complaint may be brought in a district court even if never presented to the administrative agency. *Id.* at *6. The *Roganti* court noted that other courts have considered that question and concluded that exception inapplicable to claims brought under SOX. Relying on a case from the Eastern District of Pennsylvania, the court explained:

As the *Willis* court explained, Title VII is intended to promote settlement, whereas SOX is “judicial in nature and is designed to resolve the controversy on its merits.” [quoting *Willis v. Vie Fin Grp., Inc.*, No. 04-cv-435, 2004 WL 1774575 (E.D. Pa. Aug. 6, 2004)] 2004 WL 1774575 at *5. In addition, the administrative schemes of the two statutes differ, in that

[SOX] provides for an investigation of the actions alleged in the complaint, an issuance of findings and a preliminary order, a right to a hearing before an [Administrative Law Judge], a review before the Administrative Review Board, and a review before the Circuit Court of Appeals. These procedures stand in contrast to those of Title VII, which are geared toward fostering settlement. The purpose of permitting subsequent unexhausted Title VII claims to proceed was to foster informal conciliation. *Id.*

Accordingly, Roganti was not excused from exhausting his administrative remedies, and his SOX claim must be dismissed.

Id. at *6. District courts in Illinois and Idaho have also followed this rationale. *See Bridges v. McDonald's Corp.*, No. 09-cv-1880, 2009 WL 5126962, at *4 (N.D. Ill. Dec. 21, 2009) (asking the court to “import to SOX an exception recognized in Title VII cases” permitting a claim “against an unnamed party when that party had ‘adequate notice’ of the proceeding and the ‘opportunity to participate in the conciliatory proceedings aimed at voluntary compliance’”; the court agreed that parallel requirements between Title VII and SOX have been found, but courts also have “found a key difference in the administrative proceedings underlying the two statutes. Specifically, ‘[t]he administrative scheme underlying the Sarbanes-Oxley Act is judicial in nature and is designed to resolve the controversy on its merits, as opposed to the administrative procedures under Title VII. These procedures stand in contrast to those of Title VII which are geared toward fostering settlement.’”); *McClendon v. Hewlett-Packard Co.*, No. CV-05-087-S-BLW, 2005 WL 2847224, at *4 (Oct. 27, 2005) (recognizing in Title VII claims, dismissal required of claims not presented to the administrative agency based on facts occurring before and after the filing of an administrative claim and finding the result “even more compelling in the Sarbanes-Oxley context because of the differences between the administrative procedures underlying the two statutes.”).

This Court, however, need not decide whether the *Roganti* standard or *Thomas* standard applies because as Magistrate Judge Primomo explained, “[e]ven if the Court were to liberally construe Wallace’s administrative complaint, it falls short of providing sufficient information to warrant a finding that his claims that Tesoro engaged in price signaling and inconsistent discounts through wire fraud have been exhausted.” *Memorandum and Recommendation*, docket #59 at page 11. Magistrate Judge Primomo found the limited allegations in plaintiff’s administrative complaint and subsequent reports to OSHA do not allow this Court, as OSHA did not, presume defendant’s actions “implicated

wire fraud.” As he goes on to explain:

None of Wallace’s claims remotely suggests that he reasonably believed that Tesoro’s conduct constituted wire fraud. Wallace alleged only anti-trust violations. As noted above, in determining if a SOX cause of action has been exhausted, the Court is [sic] must ascertain if each separate and distinct claim was pled before the agency. A wire fraud claim was never pled.

Memorandum and Recommendation, docket #69 at page 13 (citing *Wong v. CKX, Inc.*, ___ F. Supp. 2d ___, 2012 WL 3893609, at *4, (S.D.N.Y. 2012). This comports with plaintiff’s request to apply the *Thomas* Title VII standard. *Thomas v. Texas Dep’t of Crim. Justice*, 220 F.3d 389, 395 (5th Cir. 2000) (noting the EEOC charge only alleged gender as the theory of discrimination and not race, and concluding “the district court’s ruling that Thomas’s later asserted race claim was necessarily encompassed in her gender claim on housing, is unsupported by the exhibits and testimony in the record); see *Mack v. John L. Wortham & Son, L.P.*, ___ F. App’x ___, 2013 WL 4758052, at *9 (5th Cir. Sept. 5, 2013) (noting Title VII complaint limited to scope of EEOC investigation which can “reasonably be expected to grow out of the charge of discrimination” but where EEOC charge alleged age and race based discrimination and complaint alleged “age, race, sex, and culture discrimination,” district court correct in determining the investigation into race and age based discrimination charges “would not reasonably lead the EEOC to investigate sex or culture discrimination charges”); *Sharley v. J.P. Morgan Chase & Co.*, 805 F. Supp. 2d 45, 53 (S.D.N.Y. 2011) (“appropriate inquiry under SOX is not whether every fact forming the basis for the belief that gave rise to the plaintiff’s protected activity was previously administratively pled, but whether each separate and distinct claim was pled before the agency”). Magistrate Judge Primomo correctly found plaintiff’s administrative complaint insufficient for failing to allege wire fraud administratively; wire fraud is a specific claim under SOX and is alleged in this case as the basis for both the price signaling and inconsistent discounts issues. Moreover, plaintiff never raised an inconsistent discounts allegation in any form before OSHA. Plaintiff’s objections are overruled.

Accordingly, the Court has reviewed the plaintiff's objections to the Memorandum and Recommendation, the defendant's response, and has conducted a de novo review of the Memorandum and Recommendation. The Court finds plaintiff's objections without merit. Therefore, the Court hereby accepts, approves, and adopts the Magistrate Judge's factual findings and legal conclusions contained in the Memorandum and Recommendation and incorporates herein the arguments and authorities presented by the defendant in Defendant's Response to "Plaintiff's Objections to Magistrate's Recommendations Regarding Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint." The Memorandum and Recommendation shall be accepted pursuant to 28 U.S.C. § 636(b)(1) such that Defendant's Motion to Dismiss (docket #56) should be GRANTED in that plaintiff has failed to exhaust his administrative remedies.

Therefore, it is hereby ORDERED that the Memorandum and Recommendation of the United States Magistrate Judge, filed in this case on February 28, 2013 (docket #59), is ACCEPTED such that Defendant's Motion to Dismiss (docket #56) is GRANTED in that plaintiff has failed to exhaust his administrative remedies, and plaintiff's remaining claims are DISMISSED. IT IS FURTHER ORDERED that motions pending, if any, are DISMISSED, and this case is CLOSED.

It is so ORDERED.

SIGNED this 27th day of September, 2013.



FRED BIERY
CHIEF UNITED STATES DISTRICT JUDGE