ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

SHANNON GLADDEN, Complainant,	)	ALJ Case No. 2021-SOX-0012
v.	)	ARB Case No. 2022-012
THE PROCTOR & GAMBLE CO., Respondent.	)	

BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS *AMICUS CURIAE*

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BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS *AMICUS CURIAE*

The Assistant Secretary of Labor for Occupational Safety and Health ("OSHA") submits this brief as *amicus curiae* in response to the Administrative Review Board's ("Board") August 22, 2022 order inviting OSHA to address whether the Administrative Law Judge ("ALJ") erred in applying *res judicata* to dismiss Complainant Shannon Gladden's SOX whistleblower retaliation claim, which remained within the Department's adjudicative tribunal. OSHA is responsible for enforcing the whistleblower protection provision of the Sarbanes-Oxley Act (SOX) of 2022 and has a significant interest in its proper administration. For the reasons set forth below, OSHA respectfully submits that although claim preclusion may in some circumstances apply to a SOX whistleblower claim pending before a Department of Labor ("Department) ALJ, the ALJ erred in

dismissing Gladden's claim as *res judicata* in this case because Proctor and Gamble acquiesced in the splitting of Gladden's claims.

STATEMENT OF THE ISSUE

Whether the ALJ erred in applying *res judicata* to bar Gladden's SOX whistleblower retaliation claim which remained within the Department's adjudicative tribunal?

STATEMENT OF THE CASE

A. Statutory Background

This case arises under the anti-retaliation, or whistleblower protection, provision of the Sarbanes-Oxley Act (SOX) of 2022, 18 U.S.C. 1514A. The SOX whistleblower provision protects employees who work for publicly traded or certain other companies from retaliation for reporting alleged mail, wire, bank, or securities fraud or engaging in other activities protected by the statute. Id.

SOX requires that a complainant file a complaint with the Secretary of Labor, who has delegated responsibility for receiving and investigating complaints and issuing investigative findings and orders to OSHA. 18 U.S.C. 1514A(b)(1); see also 29 CFR 1980.103-105 (providing that a complaint must be filed with OSHA and setting forth procedures for OSHA's investigation, investigative findings, and orders); Sec'y's Order No. 8-2020 (May 15, 2020), 85 Fed. Reg. 58,393-01 (Sept. 18, 2020).

After OSHA issues its investigative findings and order, either party may request a full hearing before a Department ALJ. 29 C.F.R. 1980.106. The ALJ may hold a hearing or decide the matter without a hearing based on a motion to dismiss or motion for summary decision, as appropriate. See generally 29 C.F.R. Part 18. The ALJ's decision and order may be appealed to the Board, which issues the final decision of the Secretary of Labor in the case, subject to the Secretary's discretionary review. 29 C.F.R. 1980.110; Sec'y's Order No. 01-2020 (Feb. 21, 2020), 85 Fed. Reg. 13,186-01 (Mar. 6, 2020). If the Secretary "has not issued a final decision within 180 days of the filing of the complaint" the complainant may bring an action "for de novo review in the appropriate district court of the United States." 18 U.S.C. 1514A(b)(1)(B).

B. Brief Statement of Facts[1]

Shannon Gladden worked for Proctor and Gamble for 18 years before the employer terminated her in 2018. App. Tab K (Order at 2). Prior to her termination, Gladden communicated concerns that one of Proctor and Gamble's vendors was misrepresenting itself as a minority-owned company and was out of compliance with its agreement with Proctor and Gamble. Id. Gladden alleges that she believed Proctor and Gamble illegally benefited from tax breaks and other

[1] The Assistant Secretary draws these facts from the ALJ's August 26, 2021 Order Denying Respondent's Motion for Dispositive Action. See App. Tab K.

financial benefits as the result of the vendor's misrepresentations and that Proctor and Gamble "had wire fraud and fraud against the shareholders." Id. at 2-3.

C. Procedural History

On March 21, 2019, Gladden, to comply with the administrative exhaustion requirement under Title VII of the Civil Rights Act of 1964 ("Title VII"), filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that Proctor and Gamble discriminated against her because of her gender and retaliated against her in violation of Title VII. P&G App. Tab 6 (Ex. 1); see also Forehand v. Fla. State Hosp. at Chattahooche, 89 F.3d 1562, 1567 (11th Cir. 1996) (explaining that Title VII requires that a complainant first file a charge with the EEOC). The next day, on March 22, 2019, Gladden filed a complaint with OSHA alleging that Proctor and Gamble discharged her in retaliation for activity protected under the SOX whistleblower provision. App. Tab A (Order at 1-2).

The EEOC issued Gladden a Notice of Right to Sue, stating that it could not complete its investigation within 180 days and that it was "terminating its processing" of Gladden's Title VII charge. App. Tab F. On June 26, 2019, Gladden filed a Title VII complaint in federal district court. P&G App. Tab 6 (Ex. 1).

Before OSHA was able to complete its investigation of Gladden's SOX whistleblower complaint, 180 days passed. App. Tab G. Beginning at that time,

the SOX statute afforded Gladden the option to "bring a de novo action in Federal District Court." Id. Gladden did not remove her complaint to federal district court, and proceedings on her SOX whistleblower claim continued before the Department.

In early 2021, Gladden and Proctor and Gamble filed cross-motions for summary judgment on Gladden's Title VII claim in federal district court. App. Tab H; App. Tab L (Order at 1). Proctor and Gamble filed an opposition to Gladden's motion on February 1, 2022. Attached Ex. A (Dkt. 71). In its opposition motion, Proctor and Gamble stated that "Gladden has a pending OSHA charge she brought pursuant to the Sarbanes-Oxley Act ("SOX"), in which she brought similar . . . claims regarding purported retaliation for compliance concerns. The elements of a SOX retaliation claim stand independent of and are unrelated to Title VII claims." Id. at 14-15. Proctor and Gamble went on to assert that "[t]hese are different statutes concerning different fact situations," and that the court "should ignore any effort by Gladden to conflate the two." Id. at 15. Proctor and Gamble did not object to Gladden splitting her claims between the federal district court and the Department. Id.

On February 8, 2021, OSHA completed its investigation, issued findings that there was no reasonable cause to believe that Proctor and Gamble had violated the SOX whistleblower provision, and dismissed Gladden's complaint. App. Tab

I. Gladden requested a de novo hearing before a Department of Labor ALJ on March 9, 2021. App. Tab J. On May 4, 2021, Proctor and Gamble moved the ALJ for dispositive action on Gladden's SOX whistleblower complaint. P&G App. Tab 1. Proctor and Gamble did not object at that time to the fact that Gladden was litigating her SOX whistleblower and Title VII claims in different forums. Id.

On September 8, 2021, the district court granted summary judgment to Proctor and Gamble on Gladden's Title VII claim. App. Tab L. A few days later, on September 24, 2021, Proctor and Gamble filed with the ALJ a motion to dismiss on the grounds that the preclusive effect of the federal district court's Title VII decision was *res judicata* barring further adjudication of Gladden's whistleblower claim. P&G App. Tab 6. The ALJ granted Proctor and Gamble's motion to dismiss on October 22, 2021, and denied Gladden's motion for reconsideration on November 16, 2021. App. Tab A; App. Tab B.

This appeal followed. On August 22, 2022, after the parties had completed their briefing, the Board issued an order inviting the Assistant Secretary of Labor for OSHA to submit an amicus brief on the question of whether—when a "federal court has issued a final decision in a case involving the same cause of action," and "the complainant could have removed the OSHA claim to federal court"—the "doctrine of *res judicata* applies to bar SOX whistleblower claims that remain

within the Department's adjudicative tribunal." ARB Order, 2022-0012 at 5 (August 22, 2022).

D. The ALJ's Decision and Order of Dismissal

In dismissing Gladden's SOX claim, the ALJ began by setting forth the elements of *res judicata* as adopted by this Board, including: "(1) a final decision on the merits in the first action by a court of competent jurisdiction;" (2) a "second action" that "involves the same parties or their privies, as the first action;" (3) a "second action" that raises an issue actually litigated or which could have been litigated in the first action; and (4) that the "cases involve the same cause of action." App. Tab A (Order at 3-4). The ALJ noted that there was no dispute that the first and second elements were satisfied in Gladden's case.

With respect to the third and fourth elements, the ALJ found the facts of the matter "remarkably similar," to those in Evans v. Affiliated Computer Services, ALJ No. 2012-SO00035 (Jan. 29, 2019). App. Tab A (Order at 4). In Evans, Chief Judge Henley dismissed as *res judicata* a complainant's SOX whistleblower claim after a federal district court issued a final judgment on the complainant's employment retaliation suit involving the same operative set of facts. App. Tab A (Order at 4). As in Evans, the ALJ held, Gladden's SOX whistleblower claim was not "actually litigated in the federal court," but "could easily have been brought in

federal district court and consolidated with the Title VII case." Id. As such, the ALJ found that the third element of *res judicata* was satisfied. Id.

Turning to the fourth element, the ALJ concluded that—like in Evans and the Fifth Circuit's decision in Thanedar v. Time Warner, upon which Evans relied—Gladden's SOX whistleblower and Title VII claims constituted the same cause of action because they involved "the same nucleus of operative facts." Tab A (Order at 6). In particular, the "underlying facts that the federal district court examined in connection with granting summary judgment" for Proctor and Gamble "were nearly identical to the facts at issue" before the ALJ, "including all of the events and communications that preceded [the] termination, as well as the fact of the termination itself." App. Tab A (Order at 4).

The ALJ also addressed Gladden's argument that Proctor and Gamble did not seek to consolidate Gladden's claims, unlike the respondent in Evans. App. Tab A (Order at 5); see also P&G App. Tab 7 (Mtn. at 9); P&G App. Tab 7 (Exhibit D). To the contrary, Gladden asserted, Proctor and Gamble "play[ed] the result" and objected to Gladden splitting her claims only "after it prevailed in the Title VII action." P&G App. Tab 7 (Mtn. at 9); see also Id. (Mtn. at 6) (arguing that Proctor and Gamble filed "nothing in either venue suggesting that the claims should be merged," and "instead waited for a result to come in to attempt a 'gotcha' game against Gladden.").

The ALJ disagreed with Gladden that Proctor and Gamble's actions were "significant or relevant." App. Tab A (Order at 5). Gladden, rather than Proctor and Gamble had "the power to remove the action to federal court," the ALJ explained. App. Tab A (Order at 5); see also P&G App. Tab 8 (Mtn. at 5) (asserting that Gladden tried "to shift the burden of stopping her actions to P&G by suggesting P&G willingly subjected itself to her double litigation in two separate forums.").

Finally, the ALJ rejected Gladden's arguments that dismissing her SOX whistleblower claim would be "inconsistent with the purpose" of claim preclusion because she was required by statute to initially file her Title VII claim and her whistleblower claim in separate forums. App. Tab A (Order at 6).[2] The ALJ concluded instead that the case presented "the precise situation that *res judicata* is meant to preclude" because though Gladden "brought claims under two separate statutes, they are based on the exact same facts and circumstances. Tab A (Order at 7). Thus, the ALJ held that Gladden's SOX whistleblower action was "barred by *res judicata*, due to the final judgment issued in her Title VII claims" by the federal district court, and the ALJ dismissed the case. Tab A (Order at 7).

[2] Gladden also argued that Evans was distinguishable because "the complainant in that matter was pro se, made erratic allegations, and did not substantively oppose the respondent's motion to dismiss the case on res judicata grounds." App. Tab A (Order at 4). The ALJ noted that these facts "did not form the basis of the court's decision in Evans, and, in any event, were "immaterial." Id.

SUMMARY OF ARGUMENT

Although claim preclusion may apply to a SOX whistleblower claim pending before a Department ALJ, the ALJ erred in dismissing this case as *res judicata* because Proctor and Gamble acquiesced in the splitting of Gladden's claims between the Department and the federal district court. Courts have long recognized that *res judicata* is a defense that a defendant relinquishes by acquiescing to claim splitting, as Proctor and Gamble did in this case. This exception to *res judicata* ensures that litigants do not wait to object to dual proceedings until they receive a favorable judgment in one proceeding. And it is particularly important where, as in this case, a statute or statutes require a complainant to file her claims in separate forums. The ALJ erred as matter of law, therefore, in holding that Proctor and Gamble's actions (or lack thereof) were irrelevant to whether *res judicata* barred Gladden's SOX whistleblower claim pending before the Department.

Proctor and Gamble acquiesced to Gladden prosecuting her claims in separate forums when it failed to promptly object while both proceedings were ongoing—and Gladden would still have had the opportunity to consolidate the claims. Proctor and Gamble further acquiesced to claim splitting in a federal district court pleading in which it recognized the separate proceedings and highlighted the independence of these proceedings. Proctor and Gamble therefore

relinquished any defense that the district court's decision in her Title VII action precluded Gladden's SOX whistleblower claim, and the ALJ erred in dismissing Gladden's claim based on *res judicata.*

ARGUMENT

Although *res judicata* may apply to SOX whistleblower claims that remain before a Department ALJ, the ALJ erred in dismissing Gladden's SOX whistleblower case because Proctor and Gamble acquiesced in the splitting of Gladden's claims.

1. The Board need not address in this case whether *res judicata* applies, as a general matter, to SOX whistleblower cases that remain before the Department. As explained below, Proctor and Gamble "acquiesced in parallel proceedings until obtaining summary judgment in one of them." Gladden Br. at 21; see also Gladden Br. at 17; Gladden Reply at 5. Thus, while *res judicata* may, as a general matter, apply to SOX whistleblower claims, it does not bar the SOX claim here. See Lee v. Norfolk S. Ry., 802 F.3d 626, 635-36 (4th Cir. 2015) (noting that "traditional claim-splitting rules apply equally in the federal whistleblower context" and remanding for the district court to determine whether the defendant acquiesced in claim splitting); see also Leon v. IDX Sys. Corp., 464 F.3d 951, 962 (9th Cir. 2006) (applying traditional *res judicata* principles to hold that the Department's investigation and adjudication of a complainant's SOX whistleblower claim could be precluded based on an earlier federal district court judgment under a different statute). Even when the elements of *res judicata* are

met, as the Board's briefing order in this case suggests they may be, exceptions apply.[3] One such exception is when "the defendant has acquiesced" to the plaintiff splitting their claims between different forums. See Restatement (Second) of Judgments § 26 (1982); Lee, 802 F.3d at 636.

When a defendant acquiesces to claim splitting—as Proctor and Gamble did in this case— "it impliedly agrees to let both suits proceed to resolution," and cannot later assert a *res judicata* defense. Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067, 1070 n.2 (11th Cir. 1993), abrogated on other grounds by Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 (2002).[4] This exception to *res judicata* promotes fairness and transparency in the litigation process. If courts imposed claim preclusion notwithstanding that a defendant has acquiesced in claim splitting, this "would encourage litigants to engage in dishonest (or at least less than forthright) behavior to gain tactical advantage." In Matter of Super Van, 92 F.3d 366, 371 (5th Cir.1996). The acquiescence exception is especially important in cases such as this one, where the complainant

[3] This Board's Order describes a scenario in which a "federal court has issued a final decision in a case involving the same cause of action," and the "complainant could have removed the OSHA claim to [the same] federal court." ARB Order, 2022-0012, at 5.

[4] When a party acquiesces to claim splitting, and therefore cannot obtain dismissal based on *res judicata*, that party may still successfully argue that the other party is precluded from relitigating specific issues that were "actually litigated and necessarily decided" in the first proceeding. See Clements v. Airport Auth. of Washoe Cnty., 69 F.3d 321, 329-30 (9th Cir. 1995).

was required by statute to file her claims in separate forums and *res judicata* would bar a proceeding within an administrative agency that had to be filed with that agency in the first instance. The ALJ thus erred by concluding that Proctor and Gamble's actions were not "significant or relevant" to whether *res judicata* should bar Gladden's claim. App. Tab A (Order at 5).

2. Proctor and Gamble acquiesced to parallel proceedings before the federal district court and the Department, by failing to timely object to (and, indeed, affirmatively acknowledging) the claim splitting prior to when the federal district court entered judgment on Gladden's Title VII claim. Both a defendant's failure to promptly object to claim splitting and a defendant's affirmative acknowledgement that separate claims will go forward support a finding that a defendant acquiesced to two claims proceeding in separate forums. See, e.g., Lee v. Norfolk S. Ry., 187 F. Supp. 3d 623, 629-30 (W.D.N.C., May 11, 2016), aff'd, 670 F. App'x 777 (4th Cir. 2016) (finding defendant acquiesced for two independent reasons where the defendant both failed to object to claim splitting and made affirmative, though somewhat ambiguous, statements acknowledging that claims would go forward separately).

A defendant's failure "to object to the splitting of the plaintiff's claim" while both proceedings are pending "is effective as an acquiescence in the splitting of the claim." Super Van, 92 F.3d at 371 (quoting Restatement (Second) Judgments § 26,

cmt); see also 18 Fed. Prac. & Proc. Juris 4415 (3d ed) (explaining that when a defendant fails "to object to splitting a single claim between two simultaneously pending actions," it can lose the ability to assert a *res judicata* defense in the future). A defendant cannot "wait and see" whether they will prevail in one forum but must "promptly raise the issue while both proceedings are pending." Lee, 187 F. Supp. 3d at 630 (internal quotation marks and citation omitted). By raising an objection "prior to the entry of any final judgment" the defendant "puts the plaintiff on notice of the claim splitting problem and potential res judicata implications of inviting judgment against himself in one of the parallel actions." Riel v. Morgan Stanley, 2009 WL 2431497, at *6 (S.D.N.Y., Aug. 6, 2009). Indeed, there "is no reason to allow litigants to delay objecting to dual proceedings until they receive a favorable judgment in one proceeding" and "permitting such conduct could only encourage mischief." Rotec Indus., Inc. v. Mitsubishi Corp., 348 F.3d 1116, 1119 (9th Cir. 2003).

In Lee, for example, the defendant did not object while the complainant's federal district court race discrimination case and administrative OSHA claim were pending at the same time, but waited until after the federal district court ruled in the defendant's favor on the race discrimination claim. Lee v. Norfolk S. Ry., 187 F. Supp. 3d at 630. The district court held that the defendant had "agreed . . . in effect" that the complainant could split his claim, and therefore could not assert a

res judicata defense in one forum after it had prevailed in the other. Id. "[I]t was incumbent" on the defendant "to raise the claim splitting defense" while "the possibility" for the plaintiff to consolidate their claims remained. Id.

Like the defendant in Lee, Proctor and Gamble failed to object to Gladden's SOX whistleblower claim while both claims were pending. Instead, Proctor and Gamble waited two years to raise the issue—until after the federal district court decided the Title VII lawsuit in Proctor and Gamble's favor. See Res. App. Tab 6.[5] At this point, it was impossible for Gladden to consolidate her claims.

Proctor and Gamble additionally made affirmative statements acknowledging the claim splitting that were similar to statements courts have held demonstrated acquiescence. See Pueschel v. United States, 369 F.3d 345, 356 (4th Cir. 2004); Lee, 187 F. Supp. 3d at 629. In Pueschel, for example, the defendant acquiesced to claim splitting by "expressly stat[ing]" in its motion for summary judgement before the federal district court that the plaintiff had filed a related administrative complaint in another forum. Pueschel, 369 F.3d at 356. Specifically, the defendant noted that Pueschel had "filed another administrative

[5] Indeed, even when both proceedings remain pending, a defendant may acquiesce to claim splitting if it waits too long to raise an objection. See, e.g., Lawler v. Peoria Sch. Dist. No. 150, 837 F.3d 779, 785 (7th Cir. 2016) (holding that defendants had acquiesced to claim-splitting between federal and state court when they waited a year and a half before moving to stay the federal proceedings).

EEO complaint" which was "being investigated and thus not part" of the lawsuit before the court. Id. (internal quotation marks and alterations omitted). "By making this representation," the court of appeals held, the defendant "in effect consented" to the plaintiff splitting their claims and *res judicata* did not bar plaintiff's cause of action. Id.

Similarly, in Lee, the court found that defendant's counsel's agreement to limit discovery in a federal race discrimination lawsuit to exclude inquiry into subjects relevant to a Federal Railroad Safety Act ("FRSA") whistleblower claim that was pending in a Department of Labor administrative proceeding was sufficient to affirmatively acknowledge and acquiesce in the plaintiff's race discrimination and FRSA claims proceeding separately. Lee, 187 F. Supp. 3d at 629. This was so even though the court acknowledged that the relevant statements were "not the pinnacle of clarity." Id. The court found that the defendant had acquiesced and *res judicata* was inappropriate because even though the statement of the defendant's counsel was vague, "it was a sufficient basis to support Lee's reliance in splitting his claims." Id.

Like the defendants in Pueschel and Lee, Proctor and Gamble consented "in effect" to Gladden splitting her claims in its memorandum opposing Gladden's motion for summary judgement in federal district court. Pueschel, 369 F.3d at 356. In the pleading, Proctor and Gamble expressly acknowledged that Gladden had a

related administrative complaint in another forum, noting the "pending OSHA Charge [that] she brought pursuant to the Sarbanes-Oxley Act." See Ex. A (Mtn. at 14). Proctor and Gamble further stated that "[t]he elements of a SOX retaliation claim stand independent of and are unrelated to Title VII claims" and described the subject matter of Gladden's SOX alleged whistleblowing activity as "nothing but a red herring" in relation to the Title VII claims. Id. at 14-15. Far from opposing Gladden's splitting of the two claims, moreover, Proctor and Gamble urged the federal district court to "ignore any effort by Gladden to conflate the two." Id. at 15. Thus, in addition to failing to object to Gladden's choice to continue to proceed in two forums, Proctor and Gamble further acquiesced to claim splitting when it recognized the separate proceedings and highlighted the independence of these proceedings to the federal district court.

3. Echoing the ALJ's erroneous conclusion that Proctor and Gamble's actions are not relevant to a *res judicata* analysis, Proctor and Gamble emphasizes that only Gladden could "kick-out" her SOX whistleblower claim from the Department to the federal district court, and Proctor and Gamble "never had the ability to exercise such transfer rights." Resp. Br. at 4; see also App. Tab A (Order at 5) (explaining that Gladden, rather than the employer, had "the power to remove the action to federal court"). While it is true that only Gladden could remove her SOX claim to federal court, nothing prevented Proctor and Gamble from objecting

to Gladden's claim splitting while the Title VII and SOX whistleblower claims were pending in separate forums. This would have put Gladden on notice that Proctor and Gamble might assert a *res judicata* defense if she declined to move her SOX whistleblower claim to federal district court and consolidate it with her Title VII suit. See, e.g., Riel, 2009 WL 2431497 at *6 (holding defendant did not acquiesce to a plaintiff's claim-splitting between two federal court actions when the defendant moved to consolidate the claims and notified the plaintiff of its intent to argue claim preclusion should one case be dismissed before the other); cf. Evans v. Affiliated Computer Services, OALJ No. 2012-SOX-00035 at 10 n.9 (Jan. 29, 2019) (noting that the defendant had filed a motion in the federal employment retaliation lawsuit to consolidate the complainant's SOX whistleblower claim, which the complainant opposed). Instead, Proctor and Gamble affirmatively acknowledged that Gladden had split her claims between the federal district court and ALJ, but waited two years until it prevailed in one forum to raise any objection rather than "promptly" asserting a claim splitting defense while both proceedings were pending. Lee, 187 F. Supp. 3d at 630. Because Proctor and Gamble acquiesced by failing to object to claim-splitting and by its affirmative statements acknowledging the same, *res judicata* does not apply, and the Board should reverse the ALJ's decision.

CONCLUSION

For these reasons, the Assistant Secretary respectfully requests that the Board reverse the ALJ's decision dismissing this matter as *res judicata* and remand for further proceedings on Gladden's SOX whistleblower claim.

Dated: January 17, 2023

Respectfully submitted,

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Exhibit A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

SHANNON GLADDEN,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.:
v.	)	1:19-cv-02938-CAP-JSA
	)	
THE PROCTER & GAMBLE DISTRIBUTING, LLC,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant Procter & Gamble Distributing, LLC ("P&G" or the "Company") submits this Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. Based on P&G's Motion for Summary Judgment (Doc. 58), P&G's Memorandum in Support of that Motion (Doc. 58-19), P&G's Statement of Undisputed Material Facts (Doc. 64), P&G's Opposition to Plaintiff's Statement of Facts (filed with this brief), and this Memorandum, P&G requests the Court enter an Order dismissing Plaintiff Shannon Gladden's Title VII lawsuit. Dismissal is mandated by the undisputed facts in this record, which lead to only one conclusion: P&G discharged Gladden for legitimate business reasons having nothing to do with her gender or retaliation for alleged protected conduct under Title VII.

I. INTRODUCTION.

Gladden's Motion for Summary Judgment and her Statement of Facts are completely devoid of any evidence that P&G discriminated against her because of her gender or retaliated against her because she engaged in protected activity under Title VII. Accordingly, the Court should deny her Motion.

The admissible, relevant evidence in this record demonstrates, as a matter of law, that P&G discharged Gladden for legitimate, non-discriminatory, and non-retaliatory reasons. On September 28, 2018, P&G discharged Gladden because she violated multiple P&G policies, procedures, and guidelines, destroying P&G's trust and confidence in her ability to perform her job.

The underlying events leading to her discharge began on August 29, 2018, when a P&G vendor, Promoveo Health, discharged Lesli Hayes, a Promoveo employee who was/is Gladden's friend and neighbor. Gladden responded to Hayes's separation by (1) retaliating against Promoveo, (2) violating P&G protocol for addressing alleged contract compliance concerns, (3) directly engaging Promoveo and its employees on employee-management relation issues, another violation of P&G protocols and policies, and (4) coordinating or conspiring with Hayes to harass and intimidate P&G employees. Particularized and undisputed facts support P&G's decision and its honest belief in that decision, both then and now.

Despite knowing the actual basis for P&G's discharge (*See infra* Deposition Testimony of Carlos De Jesus), Gladden chose to ignore the factual realities of this case in her Motion. Instead, Gladden focused her Motion and Statement of Facts on inadmissible and immaterial purported facts that neither address the substance of her claims nor call into question the legitimacy of P&G's decision to discharge her.

Gladden's Motion and purported supporting evidence offer nothing to counter three inescapable realities: (1) P&G did not discriminate against her because of her gender; (2) P&G did not retaliate against her because she complained about gender discrimination; and (3) P&G is entitled to judgment on all of her claims.

There is simply no reasonable dispute in this case and the Court should dismiss Gladden's lawsuit.

II. FACTUAL BACKGROUND.

P&G incorporates its Statement of Undisputed Material Facts (Doc. 64), its Memorandum in Support of Its Motion for Summary Judgment (Doc. 58-19), and its Opposition to Gladden's Statement of Facts (filed with this brief). P&G's prior pleadings adequately set forth the underlying facts and law in this case. (Id.)

All of the evidence shows the following:

1) Gladden violated P&G's co-employment avoidance policies and training when she involved herself in Promoveo's discharge and compensation

decisions. (Doc. 64, at ¶¶11-14, 39-40, 43, 45, 62, 133-136.)

2) Gladden failed to report her alleged contract compliance concerns to Purchases, until she was explicitly told to do so – another violation of P&G policies. (Doc. 64, at ¶¶133-136.)

3) Gladden retaliated against Promoveo for Promoveo's decision to terminate Hayes, her friend and neighbor. (Doc. 64, at ¶¶37-136.)

4) Based on particularized information uncovered in P&G's extensive investigations, Gladden coordinated or conspired with her friend and neighbor, Hayes, to harass and intimidate P&G employees, including Jennifer Sasse who was in the midst of investigating Gladden's alleged concerns. (Id.)

Carlos De Jesus, the direct manager of Gladden's direct manager (Dave Shull), and the owner of the ultimate decision to discharge Gladden, described his and Shull's decision as follows:

Q. . . . [W]hat were the number of facts [that led to Gladden's discharge], not how many, but well, they were?

A. . . . I would say they fell into two key buckets. The first one being vendor management concerns and issues. So, as we talked, I believe Shannon [Gladden] was an expert in the vendor management process, prior to this,

this time. As she saw concerns in the relationship, she went completely out of process. In handling those, she directed, she talked to employees of the company [Promoveo], she talked to senior leaders at Promoveo, and that led to a lot of disruption on the business versus following the process that she knew, which was to contact purchasing [Purchases] and ensure that her complaint was taken seriously and acted upon. So, that was one whole area. The second area for me would be, we saw a lot of evidence that she was interacting with some folks outside of P&G that led to multiple communications to our P&G employees, which disrupted the business, creating anxiety and fear among our employees, which was just not acceptable. And those to me were violations of our PVPs which make termination decision.

(Doc. 64, at ¶136 – De Jesus Dep. 34:11-36:14.)

Q. . . . [W]hen you decided to terminate Shannon Gladden, who were you relying on to do that?

A. As we discussed earlier, the final group Dave Shull, her immediate manager; Dan [Lickteig]; Sarah Davies [HR]; and it became very, very clear, as painful as it was, as we've talked about it, I don't like having people leave my organization. It became very clear that she [Gladden] did

not have the best interest of P&G in mind, and we could not rely [o]n her. So, in the end, while a painful decision, an easy one to make.

Q. . . . [T]he reason it was determined that Shannon [Gladden] didn't have P&G's best interest in mind, was what?

A. We talked about the multiple processes earlier. I think one of the big things that came to light was that she helped her neighbor get a job at Promoveo. And when that job ended, she all of a sudden, took the relationship between Promoveo and P&G personally, and created a vendetta that created a lot of issues with our relationships, both internally and externally. She lied to us, she disseminated information that was private. That's not someone I can have on my team.

Q. What did she lie about?

A. She lied about multiple facts. Let's start with the simple one. She started by saying she didn't know who her neighbor was. Started by saying [she lived] somewhere in her territory. Later[,] [we] found out it was a few houses down from her. Later found out she, actually, recommended her to Promoveo to be hired. Which, again, is out of process. We are not allowed to tell third-party people to hire somebody that we know. That is a conflict of interest, another PVP violation.

(Doc. 64 at ¶136 – De Jesus Dep. 70:4-71:13.) There is no evidence remotely suggesting that De Jesus's testimony does not accurately reflect the real and proper justification for Gladden's discharge.

On September 28, 2018, Dave Shull and Sarah Davies spoke with Gladden and P&G sent her a letter, communicating P&G's decision. (Doc. 64 at ¶¶137-138.) P&G's decision to discharge Gladden had nothing to do with Gladden's gender or any complaints she claims to have made about gender discrimination. (Doc. 64 ¶¶133-140.) Gladden's Motion and alleged supporting evidence offer nothing to counter these undisputed facts.

III. ARGUMENT AND CITATION TO AUTHORITY

A. P&G Is Entitled to Summary Judgment.

Gladden alleges two causes of action in this case – both under Title VII: (1) she claims P&G discharged her because she is a female; and (2) she claims P&G discharged her because she engaged in protected activity under Title VII.[1]

In order to prove her case, Gladden must present evidence to this Court that P&G discharged her because either (1) she is a female or (2) she engaged in protected

[1] Gladden has not alleged any type of whistleblower or Sarbanes-Oxley-type allegations in this lawsuit.

activity under Title VII. See Burke-Fowler v. Orange County, Fla., 447 F.3d 1319, 1323 (11th Cir. 2006); Crisman v. Fla. Atl. Univ. Bd. of Trs., 659 Fed. App'x 572, 578 (11th Cir. 2016);[2] Welch v. Lincare, Inc., Case No. 7:09-CV-150, 2011 U.S. Dist. LEXIS 36901, *8-10 (M.D. Ga. Apr. 4, 2011); Greer v. Birmingham Bev. Co., 291 F. App'x 943, 945 (11th Cir. 2008) (citing Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997)); Manley v. DeKalb County, 587 F. App'x 507, 512 (11th Cir. 2014); Wallace v. Ga. DOT, 212 F. App'x 779, 802 (11th Cir. 2006) (citing Gupta v. Florida Bd. of Regents, 212 F.3d 571, 590 (11th Cir. 2000); Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000); Alexander v. Fulton County, 207 F.3d 1303, 1341 (11th Cir. 2000); Broner v. Dekalb County, 2005 U.S. Dist. LEXIS 58076, *28-29 (N.D. Ga. 2005); Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1363 (11th Cir. 1999); Robinson v. Hoover Enterprises, LLC, 2004 U.S. Dist. LEXIS 25375, *29 (N.D. Ga., Oct. 20, 2004) ("An employer's good faith, but incorrect, belief that an employee violated a work rule can constitute a non-discriminatory reason for that employee's suspension or termination.").

Gladden cannot produce any relevant evidence to prove either claim because none exists. (*See* Def.'s Memo. in Support of Mot. for Sum. J. (Doc. 58-19).)

[2] P&G filed the unpublished decisions cited in this string cite at Doc. 58-20.

As a matter of fact and law, P&G terminated Gladden for legitimate, non-discriminatory and non-retaliatory reasons:

1) Gladden admits she involved herself in the employee-management relationships at Promoveo, a violation of P&G policies on which P&G trained her. (Doc. 64, at ¶¶11-14, 39-40, 43, 45, 62, 83, 129.)
2) Gladden admits she did not first take her alleged contract compliance concerns to P&G's Purchases Organization, the proper thing to do. Instead, she first attempted to broach contract compliance concerns directly with Promoveo, a violation of P&G policies and practices she knew and understood. (Doc. 64, at ¶¶9-10, 20 51, 53, 62, 85.)
3) It is undisputed that P&G conducted multiple thorough investigations in September 2018, which reasonably led P&G to believe that Gladden (a) engaged in the behavior described above and (b) coordinated and conspired with her friend and neighbor, Lesli Hayes, to harass and intimidate P&G employees like Jennifer Sasse. (Doc. 64, at ¶¶66-132.)
4) Gladden lied to P&G about her relationship with Hayes. (Doc. 64, at ¶¶80-82, 96-100, 133-136.)

Carlos De Jesus's testimony, cited above, articulates P&G's decision quite well. (Doc. 64, at ¶136 – De Jesus Dep. 34:11-36:14, 70:4-71:13.)

While Gladden makes conclusory and non-specific allegations that P&G treated three male employees more favorably than her, she offers no evidence that these other employees either (1) performed the same job as her, or (2) engaged in similar conduct to her.

Gladden claims P&G treated three employees – Andrew Giangreco, Craig Harlan, and Dean Christopherson – more favorably than her. However, the following facts are undisputed: (1) none of them were responsible for vendor relationships like Gladden; (2) none of them have engaged a P&G vendor or other third party's employees concerning employee-management relations like compensation and discharge issues like Gladden did; (3) none of them have attempted to address alleged contract compliance issues directly with a third party like Gladden did; (4) none of them have retaliated against a vendor or third party with which P&G conducted business like Gladden did; (5) none of them have shared confidential P&G information with third parties who had no reason to know the information like Gladden did; and (6) none of them have coordinated or conspired to harass P&G employees the way Gladden did with Hayes. (Doc. 64, at ¶¶136, 139.) While Giangreco, Harlan, and Christopherson reported to Shull, like Gladden, there is no other fact showing they were similarly situated to Gladden in any aspect, let alone all relevant aspects. (Doc. 64, at ¶¶1-139.) See e.g., Phillips v. Aaron

Rents, Inc., 262 Fed. Appx. 202, 208 (11th Cir. 2008) (affirming summary judgment for employer in discrimination case; citing Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999), for the proposition that "the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions").[3]

There is zero evidence that P&G treated any similarly situated employee more favorably than it treated Gladden.

For these reasons, which are set forth in greater detail in P&G's Motion for Summary Judgment and supporting pleadings, no reasonable jury could possibly conclude that P&G terminated Gladden because she is a female or because she engaged in protected activity under Title VII. Accordingly, P&G is entitled to Summary Judgment.

B. There Is No Basis to Grant Gladden's Motion for Summary Judgment.

In order for Gladden to succeed on her own summary judgment motion, she must prove to this Court through admissible evidence that there are no issues of material fact and a reasonable jury could only conclude that P&G terminated her

[3] P&G filed the Phillips v. Aaron Rents, Inc., 262 Fed. Appx. 202, 208 (11th Cir. 2008), at Doc. 58-20.

because of her gender and because she complained about or otherwise opposed gender discrimination. See supra String Citation of Cases. Because the Court should grant summary judgment in favor of P&G, Gladden cannot present admissible evidence supporting her contention that she is entitled to summary judgment.

Carlos De Jesus's testimony alone makes it impossible for Gladden to succeed on her Motion. De Jesus clearly and undisputedly articulated legitimate, non-discriminatory and non-retaliatory reasons for Gladden's termination and those reasons are firmly based on undisputed facts that demonstrate P&G's good faith and honest belief in its decision both in 2018 and at present. (Doc. 64, at ¶136 – De Jesus Dep. 34:11-36:14, 70:4-71:13. *See also generally* Doc. 64 at ¶¶66-139.) Even if P&G was not entitled to summary judgment, which it is, De Jesus's testimony would create an issue of fact requiring the Court to deny Gladden's Motion.

Additionally, Gladden's Motion seems to contend or suggest that Promoveo and Rolando Collado somehow duped P&G into making its decision to terminate Gladden. None of the evidentiary facts bear this out. Promoveo and Collado did not make Gladden violate P&G policies. Promoveo and Collado did not make Gladden coordinate and conspire with Hayes to harass P&G employees. There is simply no basis for Gladden's contention. Rather, P&G conducted its own, extensive fact-finding investigations, which uncovered the facts leading to

Gladden's discharge. (Doc. 64 at ¶¶66-139.)

Gladden's loss of her job has nothing to do with her gender or any complaints she claims to have made. It has everything to do with her misconduct.

This Court has granted summary judgment for an employer in at least one case where an employee filed a cross-motion for summary judgment. See, e.g., Jackson v. Fulton County, 2015 U.S. Dist. LEXIS 183818 (N.D. Ga. 2015), Report and Recommendation Adopted at 2015 U.S. Dist. LEXIS 183817 (N.D. Ga. 2015).[4] This Court should do the same in this case.

C. The Court Should Reject Gladden's Attempt to Make This Case About Retaliation for Raising Purported Contract Compliance Concerns.

Gladden has filed two causes of action in this case: (1) the first claims that P&G discharged her because she is a female in violation of Title VII; and (2) the second claims that P&G discharged her because she complained about or otherwise opposed gender discrimination in violation of Title VII. (*See* Complaint – Doc. 1.) As the facts and law establish, there is no evidence to support either of Gladden's Title VII claims. (*See supra*; Doc. 58-19; Doc. 64.)

Separately, however, Gladden's Motion and Statement of Facts suggest that

[4] The unpublished Report and Recommendation and the subsequent Adoption are attached hereto as Exhibit 1.

she wants the Court to assess her retaliation claim based on complaints she made about Promoveo's purported contract compliance issues and its corporate structure. She makes this pitch throughout her statement of facts. (Doc. 65-2, at ¶¶7-14, 16-28, 39-42, 60-83, 121-132.) These issues about Promoveo's contract noncompliance or corporate structure are wholly irrelevant to Gladden's Title VII claims.

First, as P&G has shown in its own Motion and herein, it terminated Gladden for legitimate, non-discriminatory, and non-retaliatory reasons. (Doc. 64, at ¶136 – De Jesus Dep. 34:11-36:14, 70:4-71:13. *See also generally* Doc. 58-19 & Doc. 64 at ¶¶66-139.) P&G's decision had nothing to do with any purported "complaints" Gladden raised while a P&G employee. (Id.)

Second, P&G's Global Internal Audit Group reviewed Gladden's allegations about Promoveo and P&G found "no issues with Promoveo." (Def.'s Resp. to Pl.'s Statement of Facts, at ¶12 – De Jesus Dep. 81:5-13; Collado Dep. 153:16-24, 156:1-16.)

Third, Gladden's attempt to make this case about purported contract noncompliance concerns or Promoveo's corporate structure is nothing but a red herring. Gladden has a pending OSHA Charge she brought pursuant to the Sarbanes-Oxley Act ("SOX"), in which she brought similar, meritless claims regarding purported retaliation for compliance concerns. (Schwartz Decl. at ¶¶6-7, 10 (Doc.

27-2 & 27-3).) The elements of a SOX retaliation claim stand independent of and are unrelated to Title VII claims. SOX retaliation claims require that an employee prove an employer discharged her for complaining about issues she "reasonably believes constitute[ed] violation[s] of 18 U.S.C. §134," which include mail fraud, bank fraud, securities fraud, and any other rule or regulation of the SEC or Federal law relating to "fraud against shareholders." 18 U.S.C. §1514A(a)(1)(C). See also Day v. Staples, Inc., 555 F.3d 42 (1st Cir. 2009); Harp v. Charter Communs., Inc., 558 F.3d 722 (7th Cir. 2009.)[5]

Title VII retaliation claims require that an employee prove an employer discharged her for complaining about or otherwise opposing discrimination based on race, color, religion, sex, or national origin. 452 U.S.C. §§2000e-2, 2000e-3. These are different statutes concerning different fact situations. The Court should ignore any effort by Gladden to conflate the two.

Focused instead on the issues properly before this Court, P&G respectfully submits that the undisputed evidence in this record could lead a reasonable jury to only one conclusion: P&G did not discharge Gladden because of her gender or

[5] The Court might want to take note of the fact that this separate claim is at odds with her allegations in this case in that it involves a wholly different alleged motivation for her discharge. It would seem even Gladden is not certain what it is she believes was the basis for P&G's decision to terminate her employment.

because she complained about or otherwise opposed gender discrimination. P&G discharged Gladden for legitimate, non-discriminatory, and non-retaliatory reasons after extensive investigations and e-mails from Gladden's friend, Hayes, all of which demonstrated that Gladden violated numerous P&G policies and colluded with her friend to harass P&G and its employees. (*See* Doc. 58-19; Doc. 64.)

IV. CONCLUSION.

For these reasons, the Court should grant P&G's Motion for Summary Judgment and deny Gladden's Motion for Summary Judgment.

Respectfully submitted this 1st day of February 2021.

JACKSON LEWIS P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to LR 7.1(D), NDGa., I, Jeffrey A. Schwartz, do hereby certify that this document has been prepared in Times New Roman font, 14 point, approved by this Court in LR 5.1(C), NDGa.

/s/ Jeffrey A. Schwartz
Jeffrey A. Schwartz
Georgia Bar No. 558465

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

SHANNON GLADDEN,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.:
v.	)	1:19-cv-02938-CAP-JSA
	)	
THE PROCTER & GAMBLE DISTRIBUTING, LLC,	)	
	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I certify that on February 1, 2021, I electronically filed the within and foregoing **DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system, which will send e-mail notification and a true and correct copy of same to Plaintiff's counsel of record as follows:

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January 2023, I electronically filed copies of this BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE with the Administrative Review Board by using the Department's eFile/eServe system. All participants in the case are registered users of the eFile/eServe system and service on them will be accomplished by the eFile/eServe system.

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