United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1414 **September Term, 2017**

FILED ON: MARCH 20, 2018

JOHN DOE,

PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION,

RESPONDENT

On Petition for Review of an Order of
the Securities & Exchange Commission

Before: SRINIVASAN and WILKINS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the record from the Securities and Exchange Commission, and on the briefs of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the Petition for Review of an Order of the Securities and Exchange Commission dated November 14, 2016 be **DENIED.**

Under 15 U.S.C. § 78u-6(b), the Securities and Exchange Commission can pay monetary awards to "whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of [a] covered judicial or administrative action." The petitioner in this case, John Doe, provided information that the Commission used in an enforcement action against a man named Brian Smart. *SEC v. Smart*, No. 2:09-cv-00224, 2011 WL 2297659 (D. Utah June 8, 2011). That information, the parties agree, did not qualify as "original" because Doe first provided it before July 21, 2010—the date that § 78u-6 was enacted as part of the Dodd-Frank Act. *See* 17 C.F.R. § 240.21F-4(b)(1)(iv).

After July 2010, however, Doe continued providing information to the Commission. He did so both through email and by giving Commission staff access to a password-protected section of his personal website, where he stored documents related to Smart and several of Smart's associates. Doe contends that the Commission used some of that information in a successful enforcement action against Wendell and Allen Jacobson, a father-and-son investment team, and

their company, Management Solutions, Inc. *SEC v. Management Solutions, Inc.*, No. 2:11-cv-01165 (D. Utah Dec. 15, 2011).

In January 2013, Doe applied for a whistleblower award in connection with the *Management Solutions* case. Two other people—whom the parties refer to as Claimant No. 1 and Claimant No. 2—also applied for awards. The Claims Review Staff at the Commission's Office of the Whistleblower reviewed the three applications. In a Preliminary Determination, the Staff recommended accepting Claimant No. 1's application, but denying Doe's, in part because Doe's information did not "lead to" the *Management Solutions* action.

Through counsel, Doe then asked the Commission to produce "the materials that formed the basis of the Preliminary Determination[s]" on his and Claimant No. 1's applications. J.A. 185. The Commission gave him the materials related to his application, but not those related to Claimant 1's. Doe contested the Staff's recommendation to deny his application, as permitted by 17 C.F.R. § 240.21F-10(e). In response, three Commission employees submitted declarations in support of the Staff's recommendation. One of the employees, Brian Fitzsimons, did not sign his declaration, purportedly because a family emergency prevented him from doing so. Commission's Opening Br. 18-19 n.7. Another employee, Amitab Mukerjee, signed Fitzsimons's declaration in his stead. *Id.*

In its final order, the Commission denied Doe's application, determining that Doe's information did not "lead to" the *Management Solutions* action. That was so, the Commission said, because the Commission employees who investigated and tried the *Management Solutions* case either did not have access to Doe's information, or had access but did not use the information. This petition followed.

Doe raises two procedural challenges to the Commission's decision. First, he argues that the Commission erred by denying his request for "the materials that formed the basis of the Preliminary Determination" that Claimant No. 1 should receive a whistleblower award. J.A. 185. Under 17 C.F.R. § 240.21F-10(e)(1)(i), the Commission must produce requested materials to a claimant only if the materials "formed the basis of the . . . Staff's Preliminary Determination" on the claimant's application. Here, the Staff recommended denying Doe's application, not because Claimant No. 1 had already provided the same information later provided by Doe, but rather because the Commission did not use any of Doe's information. As a result, materials related to Claimant No. 1 were not part of the "basis of the . . . Staff's Preliminary Determination" on Doe's application. *Id.* Doe therefore had no entitlement to any materials related to Claimant No. 1.

Doe responds that, at a minimum, the Commission needed to include the materials related to Claimant No. 1 in the administrative record for purposes of judicial review. Without those materials, Doe says, our court will be unable to check whether Claimant No. 1's information (rather than Doe's) actually underlays the Commission's action in *Management Solutions*. But it is black-letter administrative law that courts "must judge the propriety of [agency] action solely [on] the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *NLRB v. CNN Am., Inc.*, 865 F.3d 740, 751 (D.C. Cir. 2017). And again, here, the Commission's stated reason for denying Doe's application was that the members of the *Management Solutions* team either did not have access to, or had access to but did not use, Doe's information. We can assess whether

that determination is supported by substantial evidence without any materials related to Claimant No. 1. Hence, the Commission did not err by failing to include those materials in the administrative record.

Doe's second procedural challenge is that the Commission erred by considering the declaration purportedly written, but not signed, by Commission attorney Brian Fitzsimons. If even without that declaration, substantial evidence supports the Commission's decision, then, under the harmless-error doctrine, we need not decide whether considering the declaration was improper. *See Nat'l Ass'n of Broadcasters v. FCC*, 789 F.3d 165, 176 (D.C. Cir. 2015).

We turn, then, to Doe's substantial-evidence challenge, disregarding Fitzsimons's declaration for purposes of the analysis. Under 15 U.S.C. § 78u-6(b)(1), a claimant can receive a whistleblower award only if his information "led to [a] successful enforcement . . . action." Information "leads to" a successful enforcement action if it either (i) causes the Commission to open, reopen, or expand an examination or investigation, or (ii) otherwise "significantly contribute[s] to the success of [an] action." 17 C.F.R. § 240.21F-4(c).

Here, substantial evidence supports the Commission's determination that the people who investigated and tried the *Management Solutions* case either never had access to Doe's information, or had access but never used the information. During the Commission's investigation of the case, the *Management Solutions* team consisted of two individuals: an accountant, Scott Frost, and an attorney, Alison Okinaka. Frost submitted a declaration in which he stated that neither he nor Okinaka ever: (i) received information directly from Doe; (ii) received information from members of the *Smart* team; or (iii) accessed the password-protected section of Doe's website, where Doe says the relevant information was stored. Moreover, another Commission attorney, the aforementioned Amitab Mukerjee, searched the Commission's databases and the *Smart* team's emails, attempting to determine whether Doe's information ever reached Frost or Okinaka. Mukerjee found that no information relevant to the *Management Solutions* action had been uploaded to the databases, or forwarded to Frost or Okinaka. Substantial evidence thus indicates that neither Frost nor Okinaka ever had access to Doe's information.

As Doe points out, another individual, an attorney named Thomas Melton, joined the *Management Solutions* team before trial. Melton had also been a member of the *Smart* team, serving as "local counsel"—a role in which he "provid[ed] guidance . . . on Utah local rules and procedures but no investigative assistance." J.A. 141. As local counsel in *Smart*, Melton had access to (at least some of) Doe's information. But Frost's declaration states that Melton did not provide that information to the *Management Solutions* team—and thus, the information was never used. Further, Mukerjee's search of Melton's emails confirmed that Melton never forwarded any email from Doe or his attorney to Frost or Okinaka. Substantial evidence thus indicates that Melton did not use any of Doe's information in the *Management Solutions* case.

Doe has several responses, none of which is convincing. First, he points out that IP addresses associated with the Commission generated thousands of "hits" on the password-protected section of his website between 2009 and 2012. But the *Smart* team (rather than the *Management Solutions* team) could be responsible for all of those hits. Granted, some of the hits took place after June 8, 2011, when the enforcement action against Smart concluded. *Smart*, 2011

WL 2297659. But Smart's appeal remained undecided until 2012, which might explain why the Commission continued to access the documents. *See SEC v. Smart*, 678 F.3d 850 (10th Cir. 2012). Second, Doe notes that an IP address associated with Deloitte—an accounting firm retained by the court-appointed receiver in *Management Solutions*—also generated a number of hits on the password-protected section of his site. But Deloitte worked with the court-appointed receiver, not with the Commission. And there is no evidence that Deloitte got the password from the Commission's *Management Solutions* team. Indeed, Frost denies that the team ever had the password. Finally, Doe asserts that Mukerjee's search of the email archives was inadequate because he did not use appropriate search terms to cull the relevant messages. But Mukerjee reviewed every email sent from Doe's or Doe's attorney's email addresses, and he found that none of those emails had been forwarded to Frost or Okinaka.

In sum, Doe's IP-address evidence can be squared with Frost's declaration. And Doe's search-terms argument does little to blunt the force of Mukerjee's declaration. Those two declarations therefore amount to substantial evidence supporting the Commission's decision. Accordingly, the petition for review is denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk