

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 21 May 2010**

Case Nos.: 2006-SOX-00098

*In the Matter of:*

JACK R. T. JORDAN,  
*Complainant,*

v.

SPRINT NEXTEL CORPORATION,  
CLAUDIA TOUSSAINT,  
TOM GERKE,  
GARY FORSEE,  
CHRISTIE HILL,  
GARY BEGEMAN,  
LEONARD KENNEDY,  
EUGENE SCALIA,  
GIBSON, DUNN & CRUTCHER LLP,  
C. WILLIAM BAXLEY, AND  
KING & SPALDING LLP,

*Respondents.*

**ORDER DISMISSING COMPLAINT**

This matters arises out of a complaint filed by Jack R.T. Jordan (“Complainant”) against Sprint Nextel Corporation, six of its officers or employees, and several of its attorneys and their law firms (“Respondents”), 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 (“SOX” or the “Act”). The statute and implementing regulations (appearing at 29 C.F.R. Part 1980) prohibit retaliatory actions by publicly-traded companies against employees who (1) provide information to their supervisors, federal regulatory or law enforcement agencies, or Congress, relating to activities that they reasonably believe to constitute violations of certain specified federal criminal statutes, any Securities and Exchange Commission regulations, or federal laws relating to fraud against shareholders, or (2) assist in investigations or proceedings relating to such activities.

## BACKGROUND

Complainant is a former in-house attorney for Respondent Sprint Nextel. On April 11, 2005, he filed his first complaint under the Act, alleging that he suffered discrimination for having reported violations of the securities laws by his former employer and three of the same individuals who are named in this matter. His employment with Sprint Nextel ended on April 25, 2005. He filed a supplemental complaint on April 28, 2005, alleging retaliation for having filed his initial complaint and for having reported additional violations of securities laws. That complaint was dismissed by the Occupational Safety and Health Administration. Complainant appealed that dismissal, and the matter is pending before me as Case No. 2006-SOX-00041 (Jordan I).

Complainant filed a second complaint under the Act on March 22, 2006. In his second complaint, he alleged that Respondents violated the employee-protection provisions of the Act by making false allegations in their responses to the complaint filed in Jordan I. He additionally alleged that Respondents violated the employee-protection provisions of the Act by making false allegations against Complainant in an SEC proceeding, in their response to a shareholder proposal submitted to the SEC by Complainant's wife. The second complaint, assigned Case No. 2006-ALJ-00098 (Jordan II) is the subject of the current motion to dismiss.

### A. *The Jordan II Complaint*<sup>1</sup>

The complaint at issue here alleges that Complainant engaged in 12 protected activities. Complainant alleges that he reported violations of SEC rules and regulations to two of the named respondents, as well as to Sprint's board of directors, on eight occasions between February 9 and April 10, 2005. He further alleges that on April 11, 2005, he filed his first complaint with OSHA, alleging retaliation for having made those eight reports. He additionally alleges that he made an additional report of a violation of SEC rules and regulations on April 19, 2005, and that on April 28, 2005 he filed a supplemental complaint with OSHA after three of the named respondents retaliated against him for having filed his initial complaint and for having made the additional report of violations. Finally, he alleged that he made two more reports of violation to Sprint's board and to another named respondent on May 10 and December 23, 2005.

The complaint further alleges that Sprint retaliated against Complainant for the protected activities described above by making false statements to OSHA during the course of its investigation of his first complaint, and by making public his dispute with Sprint in its request to the Securities and Exchange Commission for a "no-action letter" on a shareholder proposal submitted by Complainant's wife.

#### 1. *Statements During OSHA Investigation*

Complainant alleged in his complaint that Sprint's statements to OSHA in connection with Complainant's complaint in Jordan I falsely suggested that Complainant was a security risk. He alleged that the response was retaliatory because (1) it would cause improper dismissal of his complaint, ensuring the effectiveness of the retaliatory discharge, and (2) it would improperly

---

<sup>1</sup> As discussed below, I must accept the allegations in the complaint as true for purposes of the instant motion.

ensure that Complainant was not eligible for preliminary reinstatement at Sprint pending conclusion of the OSHA investigation.

2. *Sprint's No-Action Letter*

a. Shareholder Proposal

On September 20, 2005, Complainant's wife, Maria Jordan, submitted a shareholder proposal to Sprint for inclusion in Sprint's proxy statement for its 2006 annual shareholder meeting. Her proposal requested that Sprint address an alleged failure in 2004 to disclose significant financial transactions between Sprint and four of its executive officers that had occurred in 2003. Specifically, Mrs. Jordan alleged that Sprint had provided indirect payments and loans totaling \$1 million<sup>2</sup> to those officers when they relocated to the Kansas City area in 2003, and that Sprint did not disclose the transactions in its proxy statement filed in March 2004 or in its amended proxy statement filed in November 2004. She requested a shareholder vote on her resolution that Sprint's board of directors prepare and issue to stockholders a report thoroughly addressing the alleged failure to disclose those transactions in 2004.

b. *Sprint's Response*

In response to Mrs. Jordan's shareholder proposal, Sprint, through its attorneys, requested approval from the Securities and Exchange Commission to omit it from its proxy materials. Sprint's request is a common response to shareholder proposals, known as a "no-action letter" (NAL). Sprint's NAL identified three regulatory bases for its request to omit Mrs. Jordan's proposal from its proxy materials: (1) that it constituted a personal grievance or was to further a special interest, under SEC Rule 14-8(i)(4); (2) that it involved matters relating to the company's ordinary business operations, under Rule 14a-8(i)(7); and (3) that the proposal had already been substantially implemented, under Rule 14a-8(i)(10).

In Sprint's NAL, it made certain of representations that Complainant alleges constitute illegal retaliation under the Act, specifically:

1. In December 2004 [Complainant] began expressing dissatisfaction with his supervisor, the performance evaluation he had received for the prior year, and his workload. He also requested to review background information relating to his performance evaluation. Mr. Jordan began elevating concerns with aspects of the Company's 2004 proxy statement, including aspects addressed in the Proposal at issue. Repeatedly, Mr. Jordan raised issues associated with the proxy statement in conjunction with the assurances he sought regarding his employment concerns.

---

<sup>2</sup> According to Mrs. Jordan's shareholder proposal, Sprint first disclosed the transactions when it filed a registration statement on Form S-4 in March of 2005. The registration statement disclosed that Sprint's relocation company had purchased the homes of two of its executives from them and then resold the homes at a loss, and Sprint then reimbursed the relocation company for the losses. In addition, the registration statement disclosed that two other executive officers had received short-term loans totaling \$350,000 to assist in their relocation to Kansas City.

2. [After December 2004] Mr. Jordan began elevating concerns with aspects of the Company's 2004 proxy statement, including aspects addressed in the Proposal at issue. Repeatedly, Mr. Jordan raised issues associated with the proxy statement.... After a series of meetings regarding these matters in early 2005, Mr. Jordan took paid leave, initially at his request. The paid leave was then extended by the Company, and in April 2005, Mr. Jordan resigned.

3. In response to the concerns Mr. Jordan had expressed regarding the 2004 proxy statement, independent outside counsel was engaged to perform a full investigation of Mr. Jordan's allegations. In March 2005, such independent outside counsel issued a report of its investigation. The report recommended that additional disclosure regarding those benefits was appropriate in order to comply with the technical requirements of the federal securities laws. Mr. Jordan was promptly advised in writing of the conclusions contained in the report and the Company's intended remedial actions. As indicated in the Proposal, the Company included additional disclosure in its 2005 proxy statement of certain relocation benefits received in 2003 by certain of the Company's executive officers.

4. Independent outside counsel was engaged promptly when Mr. Jordan's complaints first included references to the 2004 proxy statement. Such independent outside counsel conducted a thorough evaluation of the issues in question and prepared a report. Acting on the advice of such a report, the Company included additional disclosure in its 2005 proxy statement of certain relocation benefits received in 2003 by certain of the Company's executive officers.

5. Mr. Jordan commenced legal proceedings and has indicated that he is considering bringing additional claims in litigation relating to issues that arose during his employment with the Company. The legal proceeding initiated by Mr. Jordan was recently dismissed on the merits with no finding of wrongdoing by the Company, and the Company believes that all potential claims that have been threatened by Mr. Jordan are entirely without merit.

6. The concerns Mr. Jordan had expressed regarding the 2004 proxy statement...[pertained to mere] technical requirements of the federal securities laws.

7. The failure to disclose relocation-related transactions and benefits was an inadvertent omission of certain disclosures from [Sprint's] 2004 proxy materials.

According to the complaint, the foregoing statements are false, and are "clearly designed to mark [him] for special avoidance, antagonism, or enmity," thus qualifying as retaliatory blacklisting under *Leville v. New York Air National Guard*, 1994-TSC-003 and 4 (Sec'y Dec. 11, 1995). Complainant asserts that Sprint knew that its comments regarding Complainant's protected activities and other negative references to Complainant would be posted in on-line databases that

are used by the public and their legal advisors, and that Sprint therefore knew and intended that the allegations would be accessed by potential employers among public companies and their legal counsel. He further asserts that this blacklisting attempt was designed to “prevent [him] from obtaining employment as an attorney at any public company, or if [he] do[es] manage to obtain such employment, then to create circumstances that will cause any future employer to work surreptitiously to terminate [his] employment.”

B. Summary of Respondents’ Motion to Dismiss

Respondents move for dismissal of this matter for failure to state a claim on two grounds: (1) that their communications to OSHA and to the SEC are legally protected and cannot form the basis of a SOX retaliation claim, and (2) that their communications to OSHA and to the SEC are not adverse employment actions under the Act. They move in the alternative for dismissal of the claim as against certain individual respondents and as against the law firms named in the Complaint.<sup>3</sup>

1. *Legally-Protected Communications*

Respondents first move for dismissal based on their argument that their representations to OSHA and to the SEC are legally-protected communications that cannot form the basis of a retaliation complaint under the Act. Citing *Levi v. Anheuser Busch Companies, Inc.*, ARB Case Nos. 06-102, 07-720, and 08-006 (April 30, 2008), Respondents argue that because the statements of their counsel are not evidence, they cannot be the basis of a claim under the Act.

Respondents additionally argue that because the representations to OSHA and to the SEC were made in the course of responding to Complainant’s accusations, they are absolutely privileged and cannot form the basis of a SOX complaint. In support of their argument, Respondents cite a number of state and federal cases, as well as administrative decisions.

Finally, Respondents argue that to permit the Complaint to go forward would hopelessly complicate SOX proceedings within the Department of Labor and would inappropriately involve the Department in regulating what matters may be addressed to the SEC.

2. *Communications as Adverse Employment Actions*

As an alternative basis for dismissal, Respondents argue that their representations to OSHA and to the SEC do not, as a matter of law, constitute adverse employment actions. They recognize that blacklisting may constitute an adverse employment action, but submit that their communications do not constitute blacklisting. They additionally suggest that Complainant’s arguments to the contrary amount to speculation about possibilities, rather than presenting a plausible interpretation of Respondents’ actions. Respondents further argue that because their communications were not directed to the terms and conditions of Complainant’s employment, were not directed toward prospective employers, and were not adverse employment references, they do not qualify as blacklisting.

---

<sup>3</sup> As the motion will be granted on the first two grounds and the complaint dismissed in its entirety, I will not address the motion to dismiss certain of the Respondents.

C. Summary of Complainant's Opposition<sup>4</sup>

Complainant opposes Respondents' motion on a number of grounds. First, Complainant argues that Respondents' statements to OSHA and to the SEC are not absolutely privileged. Second, Complainant argues that the false allegations made in those statements constitute adverse actions. Third, Complainant argues that all Respondents are properly named.

1. *Legally-Protected Communications*

Complainant argues that Respondents' statements to OSHA and to the SEC are not absolutely privileged, because certain federal statutes explicitly impose liability for making false statements of fact to government authorities and for retaliation based on an employee's statements to government agencies. He cites 18 USC § 1001 in support of the former proposition, and 18 USC § 1513(e) in support of the latter. He additionally argues that decisions in state-law defamation proceedings are not precedential or persuasive authority, and that in any case, Respondents' statements were not provided in connection with any judicial or quasi-judicial proceeding. Complainant additionally asserts that his complaint is based not only on Sprint's position statement with OSHA, but on additional statements made by Respondents to OSHA to which he has not had access.

With respect to Respondents' arguments under *Levi, supra*, Complainant argues that the *Levi* did not hold that statements by attorneys can never be probative. He further argues that the circumstances in this case differ from those in *Levi*, in that the Administrative Review Board has held in this case that statements by attorneys are admissible. *Levi* is different, additionally, because in that case the administrative law judge was unable to determine what the alleged false statements may have been, while in this case, says Complainant, he can identify Respondents' falsehoods. Complainant additionally argues that Respondents' statements to OSHA and to the SEC are admissible under several additional evidentiary rules.

2. *Communications as Adverse Employment Actions*

Complainant argues that his complaint should not be read as limited to blacklisting, but that Respondents' statements to OSHA and to the SEC should be considered as prohibited harassment as well. He additionally argues that as a matter of law, statements made to OSHA in response to a SOX complaint are inherently directed at the terms and conditions of employment, in particular where they falsely suggest that the complainant is a security risk and are intended to prevent preliminary reinstatement of the employee. Complainant further argues that Respondents' NAL request contained specific information about his protected activities, including that his original SOX complaint had been dismissed and that Respondents believed his

---

<sup>4</sup> Complainant's opposition to Respondents' motion to dismiss betrays his misunderstanding of the employee-protection provisions of the Act. This case does not, as he claims, involve massive securities fraud on the scale of millions of dollars. It does not involve violations of the fiduciary duties of executive officers of Sprint to their company. It does not involve the Respondents' having caused false and misleading statements in their SEC filings from 2004-2006. This matter is equally important but far narrower in scope: whether Respondents discriminated against him for having reported a securities violation regardless of its size. His substantial generalized statements of securities fraud by Respondents and by other public companies such as Tyco are irrelevant.

claims lacked merit, that were harassing. He appears to argue in addition that because his protected activities occurred while he was employed by Sprint, Sprint's responses to his SOX complaint and to Mrs. Jordan's shareholder proposal are related to the terms and conditions of his employment. Characterizing Respondents' statements to OSHA and to the SEC as abuses of legal process, Claimant cites several cases that he claims support his position that those statements constituted adverse action. He additionally argues that under *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (ARB Sep. 30, 2008), Respondents' communications to OSHA and to the SEC qualify as adverse employment actions. Finally, Claimant devotes considerable time to his argument that the purposes advanced by the employee-protection provisions of the Act establish that Respondents' communications to OSHA and to the SEC, constituting post-employment harassment, should be considered to be adverse actions under the Act.

## LEGAL STANDARDS

### A. Motion to Dismiss

Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not address a motion to dismiss, 29 C.F.R. § 18.1 (a) provides that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. See *Evans v. U.S. Environmental Protection Agency*, ARB Case No. 08-059, ALJ Case No. 2008-CAA-003 (ARB April 30, 2010), slip op. at p. 3. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move for dismissal on the grounds that a complaint does not state a claim upon which relief can be granted. See *id.*, slip op. at pp. 3-4. Such a conclusion is not a determination on the merits, but involves an inquiry as to whether, even assuming that all of the Complainant's allegations are true, he has stated a cause of action upon which relief can be granted.

### B. Whistleblower Protection

The Act provides whistleblower protection for employees of publicly-traded companies who provide information or participate in an investigation relating to violations of certain criminal statutes relating to fraud, rules or regulations of the Securities and Exchange Commission, or any provisions of Federal law relating to fraud against shareholders. To be protected, the information must have been provided to the employee's superior or to another employee with the authority to investigate, discover, or terminate the misconduct, to federal law enforcement or regulatory personnel, or to members of Congress; or the employee must have participated in proceedings relating to the violation. Actions brought under the Sarbanes-Oxley Act are governed by the burdens of proof set forth under 49 U.S.C. §42121(b), the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21."). 15 U.S.C. §1514A(b)(2)(C); *Halloum v. Intel Corporation*, ARB No. 04-068, ALJ No. 2003-SOX-7 (ARB Jan. 31, 2006); see also 29 C.F.R. §1980.104 (discussing general burdens of proof for SOX claim).

To state a SOX claim, a complainant must allege facts showing that: (1) he engaged in a protected activity; (2) the respondent knew that he engaged in the protected activity; (3) he

suffered an unfavorable personnel action, i.e., an adverse employment action; and (4) the protected activity was a contributing factor in the adverse employment action. See *Halloum, supra*, ARB No. 04-068, slip op. at 6, citing *Getman v. Southwest Securities, Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005), *recon. denied* (ARB March 7, 2006). Here, Respondents argue first that even if the Complaint alleges sufficient facts to satisfy each element, Complainant nonetheless has not stated a claim because the Respondents' communications to OSHA and to the SEC cannot, as a matter of law, form a basis for a SOX complaint. Second, Respondents argue that assuming that such communications can be the basis for a SOX complaint, they do not qualify as adverse employment actions under the Act.

C. Discussion

1. Legally-Protected Communications

a. Levi Decision

*Levi* involved three separate SOX complaints by the complainant, which were consolidated before the Administrative Review Board on appeal. Respondents moved to dismiss the first complaint ("Levi I") on the basis that it was untimely. Complainant believed that certain statements made in the motion to dismiss were false, and filed a second SOX complaint predicated on those false statements. The second complaint ("Levi II") was dismissed by an administrative law judge on the grounds that statements of counsel are not evidence, and therefore cannot form the basis of a SOX complaint. Levi filed a third complaint ("Levi III") based on certain alleged false statements made by opposing counsel during a telephone conference in the Levi II proceedings. The administrative law judge dismissed Levi III as duplicative of Levi I and because statements of counsel are not evidence. The Administrative Review Board agreed with the ALJs and affirmed all three dismissals.

Complainant argues that *Levi* is not dispositive precedent, and in any case is distinguishable from the present matter. In support of the former position, he argues first that the ARB has approved the previous ALJ ruling in 2006-SOX-00041 that "there is no exception in the statute for ... attorneys." While the language is correct, the apparent conclusion that Complainant wishes to draw is not. Judge Purcell's ruling was in response to a motion to dismiss Complainant's first complaint on the basis that because Complainant was an in-house attorney for Sprint, any communications between him and Sprint were privileged. The issue addressed by Judge Purcell did not involve any question whether statements of counsel could form the basis of a SOX complaint; instead, he rejected a general argument that in-house counsel could never be proper SOX complainants. Second, Complainant argues that *Levi* is limited to its facts, pointing out that the ARB actually said, "Statements by an attorney are not evidence and do not constitute an actionable adverse [job] action *in this case*." [Emphasis added.] To the contrary, "in this case" referred to Levi's third SOX complaint, and did not purport to limit the holding to the facts of the consolidated appeal case; in other words, "in this case" meant that the ARB holding in Levi II applied to Levi III as well. Third, Complainant argues that the only general principle regarding statements of counsel is that they do not constitute evidence in support of a party opposing summary judgment. While that may be true as a proposition of law, the situation being considered here does not involve summary judgment. As the statements to

OSHA and to the SEC were statements by Respondents' attorneys, they cannot form the basis of a complaint under SOX.

Accordingly, the complaint in this matter will be dismissed for failure to state a claim upon which relief can be granted. Nonetheless, Complainant will have the opportunity to present evidence that the statements made were false in the course of prosecuting Jordan I; as *Levi* instructs, the statements may go to the credibility of Respondents' defenses. At this point, however, I make no ruling on their admissibility.

b. Absolute Privilege

Respondents argue that their statements to OSHA and to the SEC are absolutely privileged, and cite a number of state and federal decisions in support of that position. A close review of those cases, however, demonstrates that each of them applied a state-law privilege to a state-law cause of action, whether brought in state court or federal court. See *Alexandru v. Strong*, 837 A.2d 875 (Conn. App. Ct. 2004) (applying privilege under Connecticut law); *Heavrin v. Nelson*, 384 F.3d 199 (6th Cir. 2004) (applying privilege under Kentucky law); *Morlan v. Qwest Dex, Inc.*, 332 F.Supp. 2d 1356 (D. Or. 2004) (applying privilege under Oregon law); *Matta v. May*, 118 F.3d 410 (5th Cir. 1997) (applying privilege under Texas law); *Visnick v. Caulfield*, 901 N.E.2d 1261 (Mass. App. Ct. 2009) (applying privilege under Massachusetts law).

There is scant authority addressing whether state-law privileges apply to matters brought under federal employment law. The Ninth Circuit, in *Pardi v. Kaiser Foundation Hospitals*, 389 F.3d 840 (9th Cir. 2004), held that the California litigation privilege is unavailable in claims brought under federal law because it stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). The Seventh Circuit has held likewise. See *Steffes v. Stepan Co.*, 144 F.3d 1070 (7th Cir. 1998) ("[A] state litigation privilege purporting to confer immunity from suit cannot defeat a federal cause of action" for retaliation under Title VII and the Americans with Disabilities Act. *Id.* at 1074.)

The law of either the Eighth Circuit or the Tenth Circuit is applicable to this matter under 18 USC § 1514A(b)(2), which provides for review by the United States Court of Appeals for the circuit in which the alleged violation occurred or in which the complainant resided at the time of the alleged violation. The initial allegedly retaliatory decisions were made in Kansas City, Missouri, which is in the Eighth Circuit, and Complainant resided in Kansas, which is in the Tenth Circuit. In the Eighth Circuit, Respondents' statements to OSHA and to the SEC are absolutely privileged, while the Tenth Circuit has not ruled on the issue.

In *Mock v. Chicago, Rock Island and Pacific R.R. Co.*, 454 F.2d 131 (8th Cir. 1972), the Eighth Circuit held that an employer who responded to administrative proceedings enjoyed an absolute privilege against use of that response as a basis for a subsequent action. The Court determined that state law immunities did not apply to the case, as it was brought under federal law, and that the existence of a privilege must be "judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress." *Id.* at 133, quoting *Howard v.*

*Lyons*, 360 U.S. 593, 597 (1959). In applying those standards, the Court held that allegations made in the employer’s pleading during the regular course of proceedings initiated by the employee before the National Railroad Adjustment Board were absolute privileged. 454 F.2d at 133. The Court identified two factors to be determined in evaluating whether the privilege was available: (1) whether the administrative proceeding was quasi-judicial in nature, and (2) whether the statement was in some way relevant to the issues involved in that proceeding. *Id.* at 134. As to the first factor, the Court further explained that a proceeding is quasi-judicial in nature when “the function of the administrative body under consideration involves the exercise of discretion in the application of legal principles to varying factual situations and requires notice and hearing.” *Ibid.* The Court held that the National Railroad Adjustment Board was a quasi-judicial body, based on its purpose (to settle minor day-to-day disputes that arose in the railroad industry) and its statutory attributes (the Board must give notice to the employee and the carrier, and is authorized to conduct hearings and make written findings). *Ibid.* Likewise, the Secretary of Labor is empowered to investigate and adjudicate, after notice and hearing, alleged violations of the Act; accordingly, Respondents’ statements to OSHA are privileged in the Eighth Circuit under *Mock*. Similarly, the SEC is empowered to investigate and adjudicate violations of the securities laws, and is empowered to conduct hearings into those violations; accordingly, Respondents’ statements to the SEC are privileged in the Eighth Circuit under *Mock*.

Neither the Tenth Circuit nor the ARB has found an absolute privilege for statements made to quasi-judicial or administrative agencies under federal law. The Tenth Circuit has observed that it is an “interesting question” that it declined to answer in *Timmerman v. U.S. Bank*, 483 F.3d 1106, 1123 (10th Cir. 2007). One unpublished district court decision in the Tenth Circuit has found that such statements are not privileged in a retaliation claim under the Age Discrimination in Employment Act; however, the court did not engage in a discussion or analysis of its conclusion. *Gray v. Oracle Corp.*, No. 2:05-CV-534 TS, 2007 WL 3333388 at \*3-\*4 (D. Utah Nov. 8, 2007).

Given the uncertainty as to the source of applicable law<sup>5</sup>, and the recent trend against finding such immunity, I find that the statements made by Respondents to OSHA and to the SEC are not absolutely privileged.

## 2. Adverse Employment Actions

A respondent in a claim under the Act may not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment” in response to a complainant’s having engaged in protected activities. 18 USC § 1514A(a); 29 CFR § 1980.102(a). With limited exceptions, actions taken after the conclusion of the employee-employer relationship do not constitute adverse employment actions. In addition, actions that do not affect the terms and conditions of employment do not constitute adverse employment actions.

---

<sup>5</sup> Which Circuit law applies depends on how this matter proceeds – a final decision by the ARB may be reviewed in either the Eighth Circuit or the Tenth Circuit, and the appealing party makes that determination; theoretically, should Complainant choose to remove this matter to a U.S. district court under 29 CFR § 1980.114(a), the jurisdiction and venue rules under Title 28, U.S. Code will apply.

Respondents' statements to OSHA and to the SEC did not affect the terms and conditions of Complainant's employment. First, Complainant was not employed by any of the Respondents at the time the statements to the SEC were made. The employee-employer relationship between Complainant and Sprint ended on April 25, 2005. Respondents' request for a no-action letter from the SEC, containing the allegedly false statements about Complainant, was dated eight months later, on December 23, 2005. It is unclear from any of the complaints when Respondent made statements to OSHA in response to the complaint in Jordan I. However, it is clear that the statements were not made until some time after Complainant filed his supplemental complaint in Jordan I on April 28, 2005. By that time, Complainant was no longer an employee of any of the Respondents. For these reasons, Respondents' statements to OSHA and to the SEC occurred after the end of the employee-employer relationship, and could not have affected the terms and conditions of Complainant's employment, and therefore do not constitute adverse employment actions.

The first exception to the above principles relates to so-called "blacklisting," which the parties agree is a prohibited adverse employment action. Blacklisting generally refers to efforts by an employer to prevent the employment of the former employee, and is prohibited under the Act when it is motivated by the former employee's having engaged in protected activities. Complainant argues that Respondents' statements to OSHA and to the SEC were designed to prevent his employment with another publicly-traded company, and therefore constitute blacklisting.

In *Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056 and 02-059, ALJ Case No. 01-CAA-018 (ARB Nov. 28, 2003), the ARB set out a definition of blacklisting under the environmental whistleblower statutes. Its definition included the following observations:

A blacklist is defined as a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate. *Leveille v. New York Air National Guard*, Case No. 94-TSC-3, slip op. at 18-19 (Sec'y Dec. 11, 1995); see *Black's Law Dictionary* 154 (5th ed. 1979). As *Black's* explains, a trade union may blacklist workers who refuse to conform to its rules, or a commercial agency or mercantile association may publish a blacklist of insolvent or untrustworthy persons.

A blacklisting may also arise "out of any understanding by which the name or identity of a person is communicated between two or more employers in order to prevent the worker from engaging in employment." 48 Am. Jur. 2d, *Labor and Labor Relations* § 669 (2002). Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. *Barlow v. U.S.*, 51 Fed.Cl. 380, 395 (2002) (citation omitted).

...

In addition, blacklisting requires an objective action—there must be evidence that a specific act of blacklisting occurred. See *Howard v. Tennessee*

*Valley Authority*, Case No. 90-ERA-24 (Sec’y July 3, 1991), *aff’d sub nom.*, *Howard v. U.S. Dept. of Labor*, 959 F.2d 234 (6th Cir. 1992) (table) (the existence of a memorandum and status report on whistleblower complaints was insufficient to establish blacklisting without further indications of specific adverse action). Subjective feelings on the part of a complainant toward an employer’s action are insufficient to establish that any actual blacklisting took place. *See Bausemer v. Texas Utilities Electric*, Case No. 91-ERA-20, slip op. at 8 (Sec’y Oct. 31, 1995) (an employer’s letters to contractors requesting notice of any discrimination cases filed against them did not constitute blacklisting of complainant).

Under *Smith v. Tennessee Valley Authority*, Case No. 90-ERA-12, slip op. at 4 (Sec’y Apr. 30, 1992), an allegation of blacklisting must include some form of detriment to the complainant. Thus, there must be some objectively manifest personnel or other injurious employment-related action by the employer against the employee, proved directly or circumstantially, to support a claim of illegal action under the statute. *McDaniel v. Mead Corp.*, 622 F. Supp. 351, 358 (W.D. Va. 1985), *aff’d*, 818 F.2d 861 (4th Cir. 1987) (table).

Here, Complainant has alleged no facts to bring Respondents’ statements within any of the examples of blacklisting set forth above. He has not alleged that Respondents communicated his name to another employer with the object of preventing his employment; he has not alleged that their statements have affirmatively prevented him from obtaining employment; and he has not alleged any objective form of detriment to him. Instead, his blacklisting claim relies entirely on speculation that if he were to seek employment in the future from a publicly-traded company, the company or its attorneys may access the public information available to it and determine that he was an undesirable employee. Such speculation does not transform Respondents’ statements – made in response to actions initiated by Complainant – into blacklisting. Complainant has alleged no specific employment-related detriment that has occurred as a result of Respondents’ statements. Under *Evans, supra*, the failure to allege sufficient facts to show an element of the claim is fatal. As Complainant has failed to allege sufficient facts to show that the statements to OSHA and to the SEC are adverse employment actions, his complaint must be dismissed.

The second exception to the general rule that adverse employment actions must affect the terms and conditions of employment is the principle set forth in *Melton, supra*. In *Melton*, the ARB established a rule for all whistleblower cases adjudicated by the Department of Labor that conduct constitutes a materially adverse employment action if it “could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Melton*, slip op. at p. 19. Respondents’ statements to OSHA and to the SEC do not qualify under that standard. With respect to Respondents’ statements to OSHA, it is unfathomable that a reasonable employee would be dissuaded from reporting securities violations because his employer *might* contest a claim he *might* file in the future for retaliation based on actions that the employer *might* take in response to reporting such violations. That position simply is too tenuous to entertain. With respect to the statements made to the SEC, Complainant’s position is even less tenable: it would require a belief that a reasonable employee would be dissuaded from reporting securities violations because the employee’s spouse – not the employee himself – *might* later file a

shareholder proposal, to which an employer *might* respond. Again, such a position is not reasonable.

Based on the foregoing, I find that Complainant has not alleged that he suffered a cognizable adverse employment action in the current complaint, and it must be dismissed for failure to state a claim upon which relief can be granted.

D. Complainant's Additional Arguments

I have considered each of Complainant's additional arguments in support of his position that Respondents' statements to OSHA and to the SEC are cognizable under the Act. In essence, Complainant wishes to convert other provisions of law, with their own enforcement provisions, into the employee-protection provisions of the Act. His argument, although creative, is not supported by the text of the Act or by any relevant authority, and I reject it.

E. Conclusion

The complaint in Jordan II, Case No. 2006-SOX-00098 must be dismissed for two separate and independent reasons: (1) under *Levi, supra*, statements of counsel to OSHA and to the SEC cannot form the basis of a complaint under the Act; and (2) those statements, even if they can form the basis of a complaint under the Act, do not constitute adverse employment actions.

**ORDER**

In light of the foregoing, IT IS ORDERED that the complaint in this matter be DISMISSED WITH PREJUDICE.

**SO ORDERED.**

**A**

**PAUL C. JOHNSON, JR.**  
Administrative Law Judge

**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, Suite S-5220, 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).