



Issue Date: 06 December 2010

Case No.: 2010-SOX-00050

In the Matter of:

JACK R. T. JORDAN,
Complainant,

v.

SPRINT NEXTEL CORPORATION,
CHARLES WUNSCH¹,
DAN HESSE,
GORDON BETHUNE,
V. JANET HILL,
FRANK IANNA,
SVEN-CHRISTER NILSSON,
RODNEY O'NEAL,
EUGENE SCALIA,
GIBSON, DUNN & CRUTCHER, LLP,
CLAUDIA TOUSSAINT,
THOMAS GERKE,
GARY FORSEE, and
TIMOTHY P. O'GRADY,
Respondents.

**ORDER DISMISSING COMPLAINT AND DENYING MOTION FOR ATTORNEY'S
FEES**

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. § 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

¹ Mr. Wunsch’s name was misspelled in the original caption in this matter.

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 (Jordan II). 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 a proceeding before the Securities and Exchange Commission (SEC), in their response to a shareholder proposal submitted to the SEC by Complainant's wife. By Order dated May 21, 2010, I dismissed that complaint. Complainant's appeal of that Order is pending before the Administrative Review Board.

Complainant filed a third complaint under the Act on January 19, 2010, and supplemented that complaint on March 26, 2010. The third complaint, assigned Case No. 2010-SOX-00050 (Jordan III) is summarized below, and is the subject of the current motion to dismiss.

A. The Jordan III Complaint²

The complaint at issue here alleges that Complainant engaged in nine protected activities. Complainant alleges that he reported violations of SEC rules and regulations to one of the named respondents, to another individual, and to Sprint's board of directors, on four occasions between March 3 and December 23, 2005. He further alleges that on April 11 and 28, 2005, he filed his first complaint with OSHA, alleging retaliation for having made those reports. He additionally alleges that on March 20, 2006, he filed his complaint with OSHA in Jordan II, that in 2008 and 2009 he made additional reports of a violation of SEC rules and regulations to the Acting Secretary of Labor and to the SEC. Finally, he alleges that on November 24 and December 14, 2009, he submitted initial and final versions of a shareholder proposal to Respondent Charles Wunsch, General Counsel of Respondent Sprint Nextel.

The complaint further alleges that Sprint retaliated against Complainant for the protected activities described above (1) by seeking to bar him from submitting the shareholder proposal,

² As discussed below, I must accept the allegations in the complaint as true for purposes of the instant motion.

and to bar him from submitting future shareholder proposals that may be related to the current proceedings before the Department of Labor, (2) by making false statements in its request to the Securities and Exchange Commission for a “no-action letter” (NAL) on the shareholder proposal he submitted, (3) by blacklisting him from future employment with Sprint and other potential employers, (4) by attempting to prevent him from disclosing certain evidence to the SEC and to the Department of Labor in the course of litigating the claims pending before this tribunal, and (5) by making false allegations in the NAL request, which constitutes harassment in violation of the Act.

1. *Shareholder Proposal*

In late 2009, Complainant submitted a shareholder proposal to Sprint for inclusion in Sprint’s proxy statement for its 2010 annual shareholder meeting. His proposal requested that Sprint address an alleged failure in 2004 to disclose that it had purchased the homes of two of its executive officers who were hired in 2003, and that one of the executive officers had falsely certified that the disclosures it did make were correct. He requested a shareholder vote on his resolution that Sprint’s Board of Directors explain its purported failure to adopt an ethics code after discovery of those improprieties.

2. *Sprint’s Response to Complainant’s Shareholder Proposal*

In response to Complainant’s shareholder proposal, Sprint, through its Vice President – Securities & Governance, 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 Complainant’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). As part of its argument that the proposal constituted a personal grievance or was to further a special interest, Sprint also asked that the NAL it requested apply to future similar proposals from Complainant or his wife.

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

1. [Complainant] has commenced two legal proceedings against Sprint and numerous individuals associated with Sprint that relate substantially to the 2004 disclosure matters that, according to his supporting statement, justify adoption of the Proposal. All three of the individuals mentioned in the supporting statement (as well as Sprint) have been named as defendants in both legal proceedings and the supporting statement repeats allegations that are central to [Complainant’s] allegations in those proceedings against Sprint and the individuals, namely, purported statements and actions regarding the Company’s 2004 proxy statement.

2. For the reasons set forth above, the Company believes that the Proposal is excludable ... because [Complainant] is attempting to use the shareholder proposal procedure to redress his personal grievance with the Company and further his personal interest.

3. We hereby request the concurrence of the Staff that no enforcement will be recommended if the Company omits the Proposal from its 2010 Proxy Materials.

4. In light of the ... apparent intention of [Complainant] to continue his attempts to advance his grievance, the Company respectfully requests the concurrence of the Staff that it will not recommend enforcement action if the Company relies on Rule 14a-8(i)(4) to exclude from all future proxy materials all future proposals of the Proponent that are identical to or similar to the Proposal.

3. Allegations of Falsehoods by Respondents

Complainant alleges four categories of false allegations that Sprint or its attorneys made that are professionally damaging. First, he asserts that Sprint's attorney falsely claimed that he initiated requests for "financial concessions" from Sprint, and that the possibility of a financial resolution of this matter was originated and repeatedly raised by Sprint's attorneys. Second, he asserts that the argument in Sprint's NAL request under Rule 14a-8(i)(4) was false because it failed to show how his shareholder proposal would benefit him. Third, he asserts that Sprint's statement in the NAL request that he did not elevate his concerns with the 2004 proxy statement until after December of 2005 was false because he met with two of Sprint's officers in February and March of 2005 to discuss the disclosure issues. He also asserts that Sprint's allegation that the disclosure violations were inadvertent was also false. Finally, Complainant asserts that Sprint's representation in the NAL request that he had resigned from employment was false, because he had been constructively discharged.

4. Allegations Relating to Blacklisting

Complainant alleges that Sprint's statements as set forth above, combined with statements made by Sprint's attorney, establish that Sprint has blacklisted him from future employment with Sprint. He further alleges that because his entire supervisory chain and virtually the entire Board of Directors had changed since he left his employment with Sprint, the company's efforts with regard to his shareholder proposal and its proposals to settle this claim are intended to prevent his future employment with Sprint. Additionally, because Sprint's purported falsehoods in its NAL request would be published on line and maintained "in perpetuity," and therefore were analogous to a negative employment reference that would prevent his future employment with publicly traded companies.

5. Allegations Relating to Attempt to Prevent Disclosure of Evidence

Complainant alleges that the attorneys representing Sprint in the current matter withheld certain evidence from him unless he agreed not to disclose it to DOL or to the SEC. He asserts

that the attempt to “gag” him is patently illegal and constitutes an adverse employment action under the Act and its implementing regulations.

6. *Harassment*

Complainant alleges that the false representations made to the SEC by Sprint in its NAL request were made with the intent to harass him.

B. *Summary of Respondents’ Motion to Dismiss*

Respondents move for dismissal of this matter for failure to state a claim on the same grounds on which Jordan II was dismissed: (1) that their communications to the SEC are legally protected and cannot form the basis of a SOX retaliation claim, and (2) that none of the alleged retaliation constitutes an adverse employment action 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.³

1. *Legally-Protected Communications*

Respondents first move for dismissal based on their argument that their representations 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 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.

2. *Communications as Adverse Employment Actions*

As an alternative basis for dismissal, Respondents argue that their representations to the SEC and their discussions with Complainant do not, as a matter of law, constitute adverse employment actions. They recognize that blacklisting may constitute an adverse employment action, but submit that Complainant has not successfully alleged a claim of 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.

³ 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

Complainant opposes Respondents' motion on a number of grounds. First, Complainant argues that Respondents' statements 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 I should adhere to my holding in Jordan II that Respondents' statements to the SEC are not absolutely privileged under a litigation privilege or under the *Noerr-Pennington* doctrine.

With respect to Respondents' arguments under *Levi, supra*, Complainant incorporates by reference the arguments he made on the issue in the Jordan II proceedings. In addition, he argues that the 2008 and 2009 letters to the SEC from Respondents' counsel constitute blacklisting.

2. Communications as Adverse Employment Actions

Complainant argues that Respondents' attempts to obtain his agreement not to disclose information obtained in the course of this proceeding to government agencies constitute "gag attempts" that are prohibited harassment under the Act. Those "gag attempts", he argues, additionally constitute an adverse employment action. He asserts that those attempts, as well as Sprint's requests to SEC that he be precluded from submitting future shareholder proposals, are actionable adverse employment actions. He further asserts that all of these communications by Sprint constitute harassment, which is prohibited against former employees as well as current employees under the Act. He argues that Sprint's public statements regarding his own alleged ethical violations are direct evidence of retaliation, in that Sprint has failed to make required disclosures about benefits to its former executives while "rushing" to make non-required disclosures about Complainant. He additionally argues that the public disclosures are themselves adverse employment actions.

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. *Privileged Communications*

Although no party has mentioned it, it appears that any claim that relies on Sprint's attempts to negotiate a resolution of Jordan's claims is barred under 29 C.F.R. § 18.408, which provides in pertinent part:

Evidence of furnishing or offering or promising to furnish, or of accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Based on that provision, the email that Complainant received from Respondents' counsel (respondent Scalia) on May 8, 2006 cannot form the basis of any claim. It was clearly an attempt

to compromise Jordan's then-pending claims. Accordingly, I will not consider that email in reaching my decision.

2. *Legally-Protected Communications*

a. *Levi Decision*

The implications of *Levi* were fully discussed in my Decision and Order Dismissing Complaint in Jordan II. In this matter, *Levi* is not applicable to Sprint's NAL request because the NAL request from Sprint was made by Timothy O'Grady, who is identified as Vice President – Securities & Governance. He is not identified as an attorney, but as an executive officer of Sprint. Respondents' motion to dismiss allegations related to the NAL request on the basis of *Levi* will therefore be denied. *Levi* is, however, applicable to the letters dated September 24 and October 3, 2008 from Sprint's counsel to the SEC. Because under *Levi* the statements of counsel are not evidence, those letters cannot be used as the basis of a complaint under SOX. Respondents' motion to dismiss allegations based on those letters will be denied.

Complainant will have the opportunity to present evidence that the statements made were false in the course of prosecuting Jordan I, as 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 the SEC are absolutely privileged, and cite a number of state and federal decisions in support of that position. Again, that argument was fully discussed in the order dismissing Jordan II, and for the reasons set forth therein, is rejected here.

3. *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.

Respondents' statements 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' letters to the SEC regarding the SEC's participation in an earlier appeal of Jordan I were in September and October 2008, more than three years later, and their NAL request was dated January 4, 2009, more than four years after Complainant's employment ended. 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 two exceptions to the above principles are (1) blacklisting, which the parties agree is a prohibited adverse employment action, and (2) the doctrine established in *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (ARB Sep. 30, 2008), which is more fully discussed below.

a. *Blacklisting*

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' communications to the SEC were designed to prevent his re-employment with Sprint and future employment with any other 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).

(i) *Future Employment With Another Publicly-Traded Company*

With respect to future employment with companies other than Sprint, 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, as in *Jordan II*, 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 the SEC are adverse employment actions, his complaint with respect to potential future employers must be dismissed.

(ii) *Future Employment With Sprint*

Complainant alleges that Respondents have blacklisted him from future employment with his former employer, and the complaint contains certain factual allegations that would support his claim. As a matter of law, however, the cases cited above persuade me that “blacklisting” requires a communication with a potential employer that is not the previous employer of the employee. Thus, a company does not blacklist a former employee when it instructs its personnel not to re-hire the employee; and that is essentially what Complainant alleges happened here.

Complainant argues, however, that the current iteration of Sprint is not the same company with which he was employed. He asserts that after his employment ended, Sprint merged with another company to form the current entity known as Sprint Nextel, and that the key personnel of the new company are entirely different from those in his former employer. Because the new entity is not the same entity with which he was employed, the communications

from his former employer constitute blacklisting with respect to the new entity. Complainant's position is untenable. If the new entity is not the same as his former employer, then Complainant's shareholder proposal – relating to the proxy statement of the new entity – cannot form the basis of a claim against the former employer; however, Respondents' response to that proposal forms the entire foundation of his current complaint. He refers to the current entity as “the Company” throughout his complaint, and clearly considers the current entity to be the legal successor of his former employer. In addition, business entities change form and personnel continuously, and Complainant's position would prevent any publicly-traded company from making a corporate decision not to re-hire a former employee of any of its predecessors. Accordingly, Complainant's claim of blacklisting as it relates to Sprint and/or Sprint Nextel will be dismissed.

b. *Melton doctrine*

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 the SEC do not qualify under that standard. Complainant's position would require a belief that a reasonable employee would be dissuaded from reporting securities violations because the employee *might* later file both an administrative claim against the employer and a future shareholder proposal, to both of which an employer *might* respond. 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.

c. *Harassment*

Complainant argues at considerable length that Respondents' conduct amounts to harassment, and that harassment of a former employee is prohibited by the Act. His argument hinges largely on application of a grammatical principle to statutory construction.

The Act provides in pertinent part:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment ...

18 U.S.C. § 1514A.

Likewise, the applicable regulation provides in pertinent part:

No company or company representative may discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment....

29 C.F.R. § 1980.102(a).

Complainant argues in essence that the phrase “in the terms and conditions of employment” modifies only the precedent phrase “in any other manner discriminate against any employee,” and does not modify any of the other prohibited acts. He cites a number of cases in support of his position; however, his interpretation cannot be sustained. Were he correct, it would be a violation of the Act for a publicly-traded company to discharge a non-employee, or to demote a customer, or to suspend a supplier, or to threaten passers-by, all of which are absurd interpretations of the Act. It is clear that the phrase “in the terms and conditions of employment” must refer to all of the prohibited acts, and not just to the so-called residual clause. Accordingly, because Complainant was not employed by Respondents at the time of their communications with the SEC, those communications did not affect the terms and conditions of his employment and he has failed to state a claim of harassment under the Act.

D. Conclusion

The complaint in this matter must be dismissed for two separate and independent reasons: (1) under *Levi, supra*, statements of counsel to SEC (specifically, the letters of September and October 2008) cannot form the basis of a complaint under the Act; and (2) the communications from Respondents to SEC, even if they can form the basis of a complaint under the Act, do not constitute adverse employment actions.

Attorney’s Fees

Respondents have filed a motion for attorney’s fees under 29 CFR § 1910.109(b), arguing that Complainant’s complaint was frivolous and brought in bad faith. Complainant has filed an opposition to the motion for attorney’s fees.

Respondents first argue that the complaint was frivolous, as it was foreclosed by *Levi v. Anheuser Busch Companies, Inc.*, ARB Case Nos. 06-102, 07-020, and 08-006 (April 30, 2008). They note that *Levi* was decided before Complainant filed this complaint, and that Complainant was aware that *Levi* applied because I dismissed Jordan II under *Levi* before Complainant filed his objections and request for hearing in this matter. Second, they argue that the complaint was frivolous because Complainant alleged no facts to support a claim against several of the individual respondents. With regard to bad faith, Respondents argue that Complainant named 14 respondents, including members of the Board of Directors who have never met Complainant, Respondents’ counsel, and several individuals who left their employment with Sprint years ago. Respondents argue that naming those individuals is clearly intended to vex and harass individuals for assisting Sprint. In their supplemental statement in support of their requests for

sanctions, Respondents object to Complainant's alleged threat to communicate directly with the new employer of one of the individual respondents if Respondents' counsel would not provide him with that respondent's address or confirm that they had forwarded certain communications to that respondent. Respondents allege that Complainant's threat is an ethical violation, in that he is prohibited from communicating directly with a represented party, and that it is evidence of his bad faith.

In opposition, Complainant argues that Respondents have not shown that his complaint was without factual foundation, and incorporates his argument from his opposition to Respondents' motion for attorney's fees in *Jordan II*. That argument was that his current complaint is not frivolous under *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sep. 30, 2005). *Reddy* held that a complaint is frivolous if it lacks an arguable basis in law or fact. [Opposition, p. 1., quoting *Reddy*, slip op. at p. 5.] Because his complaint was based on allegations that Respondents retaliated against him in violation of the Act, he argues, it did not lack an arguable basis in law; and because Respondents did not even try to show that the complaint lacked a basis in fact, it was not frivolous on that basis. Complainant argues that his complaint was not brought in bad faith, because (1) naming individual respondents is not evidence of bad faith – indeed, in this very case it was upheld by the previously-assigned administrative law judge; and (2) Respondents' actions were “profoundly illegitimate” and Complainant reasonably believed that they constituted adverse employment actions.

Discussion

Under 29 CFR § 1910.109(b), If I determine that the complaint “was frivolous or was brought in bad faith,” I may award to Respondents a “reasonable attorney's fee, not exceeding \$1,000.” The terms “frivolous” and “bad faith” are not defined in the regulation. They have, however, been applied by the Administrative Review Board and by other administrative law judges, and those applications are instructive here.

Frivolousness

In *Reddy, supra*, the ARB addressed the award of attorney's fees for filing a frivolous complaint. The Board explained:

A complaint is frivolous if it lacks an arguable basis in law or fact. A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist. A complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless.

Reddy, supra, slip op. at p. 5⁴.

⁴ *Reddy* involved the application of 29 CFR § 1910.110(e), which allows the ARB to award attorney's fees when a complaint is frivolous or brought in bad faith. The language is identical to that in 29 CFR § 1910.109(b), and the ARB's discussion of frivolousness under the former section is equally applicable to the latter.

Here, the complaint cannot be said to lack an arguable basis in law. Contrary to Respondents' argument, the dismissal of the complaint was only partly based on the holding in *Levi, supra*. *Levi* did not foreclose the complaint to the extent that it was based on the NAL request, as that request was not made by counsel. In addition, it is clear that the complaint did not allege "the violation of a legal interest which clearly does not exist." Every employee covered by SOX has a legal interest in protection against retaliatory adverse employment actions.

Reddy also identifies a frivolous complaint as one that is grounded on baseless facts. At the pleading stage, however, no party is required to demonstrate the existence of facts. Instead, dismissal was based on the assumption that the facts pled were true [Dismissal, p. 7].

I conclude, therefore, that the complaint was not frivolous.

Bad Faith

The meaning of the phrase "brought in bad faith" as used in 29 CFR § 1910.109(b) has not been addressed by the ARB. In *Reddy*, the Board apparently equated "bad faith" with "vexatious reasons," [slip op. at p. 10] but did not base its decision on that definition. "Bad faith" has been addressed by administrative law judges in a small number of cases. In general, attorney's fees have been denied if a complainant has "a sincere belief a legitimate claim could be brought." *Pittman v. Siemens AG*, ALJ Case No. 2007-SOX-013 (ALJ July 26, 2007), p. 8; *Grant v. Dominion East Ohio Gas*, ALJ Case No. 2004-SOX-063 (ALJ Mar. 10, 2005), p. 51; see also *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003 (ARB Jan. 30, 2004) (no award of attorney's fees where complainant had a firm and sincere belief that he was the victim of retaliation). I do not believe in this case that Complainant has such a sincere belief. Even though his complaint was not entirely foreclosed by *Levi*, he alleged and pursued theories that were rejected in *Jordan II*. Nonetheless, the ARB has not addressed the dismissal of *Jordan II* and, although the theories he pursued in the instant claim were rejected there, it may well be that the ARB disagrees with my analysis. Complainant has the right at this point to preserve those theories, at least unless and until the ARB finds against him. Even if Complainant was motivated in part by a wish to harass those whom he believes to be liable to him, at this point he is not precluded from bringing those claims.

Based on the foregoing, I conclude that the complaint was not brought solely in bad faith. As Respondents have not demonstrated that Complainant's complaint was frivolous or brought in bad faith, their motion for attorney's fees must be denied.

ORDER

In light of the foregoing, IT IS ORDERED:

1. The complaint in this matter is DISMISSED WITH PREJUDICE; and
2. Respondents' motion for attorney's fees is DENIED.

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).