



**Issue Date: 19 January 2010**

**Case No.: 2010-SOX-00004**

*In the Matter of:*

**MARIA FALCON-RODRIGUEZ,**  
*Complainant,*

v.

**HERTZ CORPORATION,**  
*Respondent.*

### **ORDER DISMISSING COMPLAINT**

This matter arises out of a complaint filed by Maria Falcon-Rodriguez (“Complainant”) against Hertz Corporation (“Respondent”), 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 USC § 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 (and their subsidiaries or agents) 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.

### **PROCEDURAL HISTORY**

On February 7, 2009, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA). After completing an investigation, the Area Director for OSHA determined that there was no reasonable cause to believe that Respondent violated the Act, and dismissed the complaint on October 13, 2009. Complainant filed objections and a request for a hearing before an administrative law judge by letter dated November 5, 2009.

On December 3, 2009, I issued an order directing Complainant to show cause why her complaint should not be dismissed for failure to state a claim upon which relief can be granted. By letter dated December 15, 2009, Complainant responded to the Order to Show Cause. Taking into account Complainant’s *pro se* status, I have not held her to the same evidentiary standards as those parties who are represented. After reviewing Complainant’s response, I find that Complainant failed to state a claim upon which relief can be granted under the Act. Thus, her claim must be dismissed.

## **FACTUAL BACKGROUND**<sup>1</sup>

Complainant was employed by Respondent for almost thirty years. November of 2008. Complainant alleges that Respondent received an indefinite suspension in January of 2009, later reduced to two days; a second indefinite suspension in March of 2009, which is apparently pending arbitration; and was “written up” and warned for various violations of company practices. She alleges that these actions were taken against her in retaliation for having reported certain illegal activities by managers in the Miami, Florida area, in 2003. Specifically, she reported the managers for firing local contractors and hiring their own friends in exchange for kickbacks. She also alleges that she reported unspecified unethical behavior by co-workers.

## **LEGAL FRAMEWORK**

### A. STANDARD FOR DISMISSAL

Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not address motions 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. 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. On its face, the Rule refers to such dismissal on the motion of a party; however, it has been uniformly held that a court may dismiss a complaint for failure to state a claim upon which relief can be granted when it is patently obvious that the complainant could not prevail on the facts as alleged in the complaint. Courts have the inherent power to take such action, or to find that a complaint is frivolous on its face. *See Koch v. Mirza*, 869 F.Supp. 1031 (W.D.N.Y. 1994); *Washington Petroleum and Supply Co. v. Girard Bank*, 629 F.Supp. 1224 (M.D. Pa. 1983); *Johnson v. Baskerville*, 568 F.Supp. 853 (E.D. Va. 1983); *Cook v. Bates*, 92 F.R.D. 119 (S.D.N.Y. 1981). 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, she has stated a cause of action upon which relief can be granted. Assuming the truth of Complainant’s allegations, I find that the Complainant failed to state a claim upon which relief can be granted.

### B. WHISTLEBLOWER PROTECTION PROVISIONS OF THE ACT

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

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<sup>1</sup> In reaching my conclusion in this matter, I have assumed the truth of the allegations in Complainant’s objections to the decision of the Area Director and in her response to my Order to Show Cause.

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 claim under the employee-protection provisions of the Act, a complainant must allege that: (1) she engaged in a protected activity; (2) the respondent knew that she engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action, i.e., an adverse employment action; and (4) the protected activity was a contributing factor in the unfavorable action. *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).

## C. DISCUSSION

### a. Protected Activity

Under Section 806 of SOX, a covered employer may not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment” because the employee engaged in protected activity. 18 U.S.C. 1541A (a). As discussed above, a “protected activity” under the Act consists of providing information regarding violations of certain criminal and/or securities laws to specified parties. Complainant has identified only one communication that may qualify as protected activity: reporting managers for firing contractors and hiring their friends in exchange for kickbacks.

In order for a communication to qualify as a “protected activity,” the Complainant must show that her communication to the employer was specifically related to one of the laws specified in the Act. Both the Fourth and First Circuits have held that Complainant must hold both a subjective and objectively reasonable belief that the conduct constituted a violation of that specified law. *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009); *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008). Additionally, the complaint must “definitively and specifically” relate to one of the laws identified in the Act. *Godfrey v. Union Pacific Railroad Co.*, ARB No. 08-088, ALJ No. 2008-SOX-005 (ARB July 30, 2009). Those laws include 18 USC §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. 18 USC § 1514A; *Godfrey, supra*, ARB No. 08-088, slip op. at p. 4.

After review of Complainant’s objections to the findings of the Area Director and her response to my Order to Show Cause, I find that her communication regarding managers’ receipt of kickbacks was not related to any of the laws set forth in the Act. Complainant’s submissions generally express that she believes she was mistreated by Respondent, but do not state with any specificity what securities laws she felt were being violated. Thus, she has failed to show that her activities qualify as “protected activities” under the fact.

## CONCLUSION

Complainant's claim fails to state a claim on which relief can be granted, and must be dismissed on that basis.

## ORDER

Based on the foregoing, IT IS HEREBY ORDERED that Complainant's Complaint is DISMISSED.

**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).