



Issue Date: 27 April 2011

Case No.: 2011-SOX-00009

In the Matter of

TAMER ADEL,

Complainant,

v.

SCHLUMBERGER, N.V. (Schlumberger, Limited),
Respondent.

**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION
and
ORDER DISMISSING COMPLAINT**

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (the Act or SOX), 18 U.S.C.A. § 1514A¹, and its implementing regulations found at 29 CFR Part 190. Section 806 provides “whistleblower” protection to employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain “protected activity” by the employee. The Complainant filed a complaint on September 27, 2010. The complaint was denied by the Regional Administrator, Occupational Safety and Health Administration, Dallas, Texas, on October 15, 2010. The Complainant filed a subsequent request for hearing before an Administrative Law Judge on December 27, 2010. The Complainant amended his complaint on December 28, 2010.

On March 1, 2011, Respondent’s counsel filed a motion for summary decision seeking dismissal of the complaint on the ground, inter alia, that the Complainant’s original complaint and amended complaint clearly show that complainant never engaged in protected activity under the Act. Respondent avers that neither the original complaint nor the amended complaint even suggest that Complainant ever reported a violation of 18 U.S. Code Sections 1341, 1343, 1344, 1348; company fraud related to any rule or regulation of the Securities and Exchange Commission; and any violation of federal law relating to fraud against shareholders.²

¹ VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio and television 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.

² The enumerated violations are: (1) 18 US Code § 1341, Frauds and swindles; (2) 18 U.S. Code § 1343, Frauds by wire, radio or television; (3) 18 U.S. Code 1344, Bank fraud; (4) 18 U.S. Code § 1348, Securities fraud; (5)

Complainant filed a brief in opposition on April 20, 2011. Complainant submits that his complaints regarding paying bribes to foreign officials³ and falsifying books, records and accounts⁴ subject to Section 13(b)(2)(A) of the Securities Exchange Act falls squarely within the scope of protected activity under SOX.

Under the relevant portions of SOX, the Respondent may not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee ... to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344 or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by ... a person with supervisory authority over the employee ... An employee prevailing in any action [under SOX §1514A] shall be entitled to all relief necessary to make the employee whole.”

Thus, the Complainant must allege sufficient facts to show, when viewed in a light most favorable to her, that (1) he engaged in “protected activity” by providing information or a complaint to his supervisor or other individual authorized to investigate and correct misconduct where such information or complaint regarded conduct that he reasonably believed constituted one of six violation types enumerated in § 1514A(a) of the Act⁵; (2) the Respondent knew, actually or constructively, of the “protected activity”; (3) the Respondent discharged him or took another unfavorable personnel action against her; and (4) her providing the information or making the complaint aware of the violation(s) was a contributing factor to the discharge or other adverse personnel action taken by the Respondent.

The Complainant’s allegations related to “protected activity” under SOX must set forth facts that she provided definitive and specific information to her employer about conduct that she reasonably believed constituted one of six violation types enumerated in SOX 18 U.S.C.A. § 1514A(a). Though the employee need not cite a code section the employee believes was violated or being violated, “the reported information must have a certain degree of specificity [and] must state particular concerns, which, at the very least, reasonably identify a respondent’s conduct that the complainant believes to be illegal.” *Bozeman v Per-Se Technologies*, 456 F. Supp. 2d 1282 (N.D. GA, 2006) citing *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). “[The] protected activity must implicate the substantive law protected in Sarbanes-Oxley ...” *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D. NY, 2006) and cases

company fraud related to any rule or regulation of the Securities and Exchange Commission; and (6) any violation of federal law relating to fraud against shareholders. 18 U.S. Code § 1514A(a)(1), *Livingston v Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir., 2008).

³ 15 U.S.C.A. Sections 78dd-1, 78dd-2 and 78dd-3.

⁴ SEC Rule 13b2-1 (17 C.F.R. Section 240.13b2-1).

⁵ The enumerated violations are: (1) 18 US Code § 1341, Frauds and swindles; (2) 18 U.S. Code § 1343, Frauds by wire, radio or television; (3) 18 U.S. Code 1344, Bank fraud; (4) 18 U.S. Code § 1348, Securities fraud; (5) company fraud related to any rule or regulation of the Securities and Exchange Commission; and (6) any violation of federal law relating to fraud against shareholders. 18 U.S. Code § 1514A(a)(1), *Livingston v Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir., 2008)

cited therein. The communication made by the employee must identify the specific conduct that the employee reasonably believes to be illegal, even if it is a mistaken belief. General inquiries do not constitute protected activity. When the communications are “barren of any allegations that would alert [a respondent] that [the complainant] believed the company was violating any federal rule or law related to fraud” the communication is not protected activity under SOX. *Livingston v. Wyeth*, 2006WL2129794 at *10 (M.D. NC, Jul 28, 2006) *aff’d* 520 F.3d 344 (4th Cir. 2004); *Skidmore v. ACI Worldwide, Inc.*, 2008WL2497442 (D. Neb, Jun. 18, 2008); *Portes v. Wyeth Pharmaceuticals, Inc.*, 2007 WL 2363356 (S.D. NY, Aug. 20, 2007) Under SOX, the communications which may be considered as “protected activity” only involves what is actually communicated to the covered employer prior to the unfavorable employment action and not what is alleged in the complaint filed with OSHA. *Welch v. Chao, surpa*, citing *Platone v. FLYi, Inc.*, ARB Case No. 04-154 (ARB, Sept. 29, 2006); *aff’d* 548 F.3d 322 (4th Cir. 2008); *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D.NY, 2006)

The described conduct which the employee reasonably believes constitutes the violation must have already occurred or be in the process of occurring based on circumstances that the complainant observes and reasonably believes at the time the information was provided. A complaint relying on speculative future contingencies fail to establish the element of “reasonable belief” of a violation that has occurred or is in the process of occurring. *Livingston v. Wyeth, Inc.*, 520 F.3d 344 (4th Cir., 2008); *Welch v. Chao*, 536 F.3d 269 (4th Cir., Aug. 5, 2008), see also *Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006).; *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB, July 29, 2005) There must be an objective basis for suspecting fraud on the respondent’s shareholders. *Livingston v. Wyeth Inc.*, 2006 WL 2129794 (M.D. NC, 2006) citing the Senate Report No. 107-146, 2002 WL 863249 (May 6, 2002). It is enough if the employee’s communication or described conduct definitively and specifically related to the fraudulent activity. *Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009) [where the terms fraud, fraud on shareholders and stock fraud not used in the communications but Sarbanes-Oxley or SOX may have been used]; *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009) [where communication indicated concerns involving defrauding shareholders]; *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008) [where complainant refused to certify two 10-QSB reports to the SEC and used terms Sarbanes-Oxley and fraudulent acts]; *Allen v. Administrative Review Board*, 514 F.3d 468 (5th Cir. 2008)

In order for an activity to be “protected activity” under the Act, there must be not only subjective/objective reasonable belief of activity that would violate one or more of the six protected areas of the Act, but there must also be a definitive and specific expression of concern to the employer over the perceived violation(s). Without both factors, there is no “protected activity” under the Act. *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008); *Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006) at page 11 and 15

Respondents have requested the case be dismissed through summary decision. Summary judgment is proper if the pleadings, discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to a material fact and a party is entitled to judgment as a matter of law. The moving party bears the burden of establishing that there is no genuine issue of material fact when the material submitted for consideration is viewed in a light

most favorable to the non-moving party. The non-moving party may not rest on mere allegations or denials in pleadings but must set forth specific facts showing that there is a genuine question of material fact for a hearing. *Celotex Corp. v. Catrett*, 477 US 317, 106 S.Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 US 242 (1986); *Webb v. Carolina Power and Light Co.*, 1993-ERA-042 (Sec of Labor, Jul. 17, 1995)

In order to avoid a summary decision, the material considered, when viewed in a light most favorable to the non-moving Complainant, must show that there is at least one remaining genuine question of material fact, related to the issues that (1) she engaged in “protected activity” by providing information or a complaint to a covered supervisor or other individual authorized to investigate and correct misconduct where such information or complaint regarded conduct that he reasonably believed constituted one of six violation types enumerated in § 1514A(a) of the Act⁶; (2) the covered Respondent knew, actually or constructively, of the “protected activity”; (3) the covered Respondent discharged him or took another unfavorable personnel action against her; or (4) her providing the information or making the complaint was a contributing factor to the discharge or other adverse personnel action taken by the covered Respondent.

For the Respondent to prevail on a motion for summary judgment, the Respondent may point to the absence of evidence proffered by the non-moving Complainant to establish the existence of an essential element of the Complainant’s prima facie case.

If there is no genuine question of material fact, summary decision may be entered for either party if that party is entitled to summary decision. 29 CFR §§18.40 and 18.41

DISCUSSION

In Complainant’s original SOX complaint filed on September 30, 2010, there is a one page cover sheet which makes no mention of any specific protected activity. Attached to the coversheet is a five page letter dated June 25, 2010 from Complainant’s former attorney to Respondent. The letter accused Respondent of retaliation against Complainant for bringing to its attention certain activities which Complainant believed to be in violation of the Foreign Corrupt Policies Act (FCPA). He also averred that Complainant was pressured to change a negative compliance report he had prepared. I find that absolutely nothing in the original complaint shows any protected activity under SOX.

In Complainant’s amended complaint filed December 28, 2010, Claimant’s Counsel notes Respondent’s ongoing “Culture of permitting FCPA violations.” Moreover, it lists FCPA violations in Yemen and China which Complainant also believed violated various sections of the Securities and Exchange Act against bribing foreign officials. Nowhere in the amended complaint is there any mention of violations of the enumerated fraud provisions under SOX. Nor is there any indication that such complaints were ever expressed to Respondent in any fashion whatsoever. Therefore, I find that absolutely nothing in the amended complaint constituted protected activity.

⁶ The enumerated violations are: (1) 18 US Code § 1341, Frauds and swindles; (2) 18 U.S. Code § 1343, Frauds by wire, radio or television; (3) 18 U.S. Code 1344, Bank fraud; (4) 18 U.S. Code § 1348, Securities fraud; (5) company fraud related to any rule or regulation of the Securities and Exchange Commission; and (6) any violation of federal law relating to fraud against shareholders. 18 U.S. Code § 1514A(a)(1), *Livingston v Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir., 2008)

In Complainant's brief in opposition to the motion for summary decision, Counsel for Complainant merely submits that the prohibitions in the Securities and Exchange Act against bribing foreign officials and falsifying books records or accounts somehow are included as protected activity under SOX. Yet Complainant offers no specific authority for this. I therefore conclude that there is no remaining issue of fact that Complainant engaged in protected activity under SOX and expressed his concern of violations to Respondent.

Since there is no question of fact remaining concerning protected activity, Respondent's motion for summary decision IS Granted. Accordingly, IT IS ORDERED the complaint IS DISMISSED.

A

DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/ccb
Newport News, Virginia

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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).