



Issue Date: 11 April 2011

CASE NO.: 2011-SOX-00020

IN THE MATTER OF

**RHONDA BRADLEY,
Complainant**

v.

**CENTERPOINT ENERGY, INC.
Respondent**

ORDER DISMISSING CLAIM

On March 9, 2011, Respondent filed a Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted in the above entitled matter. In the motion, Respondent contended that, even assuming all allegations as true, Complainant did not allege any facts showing shareholder fraud or any species of fraud enumerated in the statute. Rather, at most, Complainant identified a concern about a future business practice stating the Respondent may, in some future time, submit to the government an incomplete and/or inaccurate affirmative action plan or VETS 100 document. Further, this conduct did not constitute protected activity because even if accepted as true it does not fall within one of the enumerated violations listed in Section 1514(A); therefore, Complainant did not state a claim for relief that is plausible on its face. *Neuer v Bessellieu, et al.*, ARB No. 07-036 (August 31, 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2006)).

As a result of Respondent's Motion, the undersigned issued an Order to Show Cause directing the Complainant to show cause within ten (10) days why the motion should not be granted. A telephone conference was subsequently scheduled in order to give the parties the opportunity to state their respective positions. The conference was held on March 30, 2011, and both parties were represented by Counsel. During the conference, Complainant was given the opportunity to but could not present additional facts in support of the claim.

Standard of Review

The rules governing hearings in whistleblower cases contain no specific provisions for dismissing complaints for failure to state a claim upon which relief may be granted. It is therefore appropriate to apply Rule 12(b)(6), the Federal Rule of Civil Procedure governing

motions to dismiss for failure to state such claims. Fed. R. Civ. P. 12(b)(6). Under Federal Rule 12(b)(6), all reasonable inferences are made in the non-moving party's favor, and the burden is on the complainant to frame a complaint with "enough facts to state a claim to relief that is plausible on its face." Fed. R. Civ. P. 12(b)(6); *Neuer v. Bessellieu, et al.*, ARb No. 07-036, ALJ No. 2006-SOX-00132 (ARB Aug. 31, 2009).

The purpose of the employee protection provisions of SOX is to protect employees of publicly traded companies who provide information or who assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of various federal fraud provisions, including Sections 1341 (fraud and swindles), 1342 (fraud by wire, radio, or television), 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 U.S.C. §1514A; 29 C.F.R. §1980.102(a); *Hendrix v. American Airlines, Inc.*, 2004-AIR-00010 and 2004-SOX-00023 (ALJ Dec. 9, 2004).

The information or assistance must be provided to or the investigation must be conducted by a federal regulatory or law enforcement agency, any member of Congress, or any committee of Congress, or a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.). 18 U.S.C. §1514A(a)(1); See also, 29 C.F.R. §1980.102(a)(1). An 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 of any lawful act done by the employee under the Act's protection. *Id.*

Protected Activity

Protected activity under SOX is defined as reporting an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. *Marshall v. Northrup Gruman Synoptics*, 2005-SOX-00008 (ALJ June 22, 2005). The employee's belief must be scrutinized under both subjective and objective standards. *Id.*, citing, *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051 (July 14, 2000). The employee does not need to show that the employer's conduct actually caused a violation of the law, but must show that he reasonably believed the employer violated one of the laws or regulations enumerated under SOX or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders. *Id.*; See also, 18 U.S.C. §1514A; 29 C.F.R. §1980.102(a); *Hendrix v. American Airlines, Inc.* at 9. In addition, the communicated information must "definitively and specifically relate" to one of the six enumerated categories found in § 1514A." *Allen v. Administrative Review Board, U.S. Dept. of Labor*, 514 F.3d 468, 475 (5th Cir. 2008) (quoting *Platone v. FLYI, Inc.*, ARB Case No. 04-154, 2006 WL 3246910, at *8 (ARB Sept., 2006).

Protected activity under SOX is thus essentially comprised of three elements: (1) report or action that involves a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders; (2) complainant's belief concerning the activity must be subjectively and objectively reasonable; and (3) complainant must communicate his concern to either his employer, the federal government or a member of Congress. See, *Harvey v. Safeway, Inc.*, 2004-SOX-21 at 29 (ALJ Feb. 11, 2005).

Fraud is an integral element of a SOX claim, which necessarily includes an implicit element of deceit that would impact shareholders or investors. *Marshall v. Northrup Gruman Synoptics* at 4. Materiality is likewise an integral element of a SOX claim. Section 302 of SOX specifically “establishes a requirement for the accuracy of material facts relating to finances.” *Harvey v. Safeway, Inc.* at 31 (emphasis in original). This provision particularly “demonstrates Congress’ intention to protect shareholders by requiring accurate reporting of significant information concerning a corporation’s financial condition.” *Id.* (emphasis in original). Stated differently, the Act “was not intended to capture every complaint an employee might have as a potential violation of the Act.” *Id.* at 4. Instead, the “goal of the legislation was to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws.” *Id.* In order to successfully maintain an allegation of a violation of SOX, a complainant’s belief as to a violation of SOX must be reasonable from the outset, (*Bechtel v. Competitive Industries, Inc.* at 31), or complainant may show that he actually believed the activity to be violative of SOX at the time of his complaint. *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-8 (ALJ June 15, 2004). SOX does not apply to generic allegations of accounting violations, violations of GAAP, or general allegations of fraud. See, *Marshall v. Northrup Gruman Synoptics* at 5 (stating that, “The fact that the concerns involved accounting and finances in some way does not automatically mean or imply that fraud or any other illegal conduct took place.”). Rather, applicability of SOX is limited to specifically enumerated laws or regulations related to fraud against shareholders. *Id.* at 3.

Complainant’s Allegations

On February 28, 2011, Complainant filed a complaint with the undersigned setting forth her claim as follows, and pursuant to the applicable standard all allegation will be assumed true.

Complainant was the HR manager, Regulated Operations at Respondent’s Houston, TX, office. In March of 2010, Complainant became responsible for the Respondent’s Affirmative Action Plan and resulting reports. Respondent received grants, some worth three hundred million dollars (\$300,000,000.00), from the federal government based upon its compliance with the Affirmative Action guidelines and reporting requirements. The entire time she was responsible for the program she complained about deficiencies in both the plans and reporting process.

On June 16, 2010, Respondent was notified that it would be subjected to a random audit regarding its Affirmative Action programs and that it had thirty (30) days to submit information to federal auditors. Thereafter, Complainant was chosen to generate the required data working along with Complainant’s supervisor, Alice Otchere, who would provide the narrative for the reports. Due to a failure of internal procedures, Respondent’s applicant tracking data was incomplete, and Otchere was aware of this issue. After multiple meetings, it was apparent that there were significant deficiencies in the data which would lead to the number of applicants being incorrectly reported. Otchere decided to obtain an extension for the submission of the information.

Respondent's internal procedures establish that after a draft report consisting of the data and narrative is compiled, the report is transferred to the Legal and Finance departments for review, input, and approval.

On July 23, 2010, Complainant attended a meeting with Respondent's Assistant General Counsel, Steve Calvert. Calvert was aware that a successful audit was needed in order to avoid a potential loss of the many federal grants. In the meeting, she expressed concerns about the completeness and the accuracy of the information in Respondent's affirmative action plan. Complainant also notified Calvert that she had recently received information regarding problems with a 2009 VET-100 report.

Calvert told Complainant he needed to discuss this issue with his boss who was out of the office at the time. Calvert then requested that Complainant prepare to present a time line of events and the affirmative action plan at a meeting on July 27, 2010. However, on July 26, 2010, Calvert notified Complainant that the meeting of July 27, 2010, had been cancelled. On the same day, Complainant met with Otchere in order to update the audit information and to report the problems with the 2009 VET-100 report.

On July 28, 2010, Complainant was called into a meeting with Otchere and Carol Wilson, Respondent's Sr. HR Director. The purpose of the meeting was to address complaints made regarding Otchere's lack of support for Complainant and also to notify Complainant that she was the subject of an investigation. By meetings end, Complainant had been temporarily suspended, and she was subsequently terminated on August 2, 2010. The decision to terminate Complainant was made by Otchere. Complainant was informed by telephone her termination was due to performance related problems.

Complainant's asserted claim for relief states that she was suspended and then terminated in retaliation for multiple complaints to Respondent's management about deficiencies in the affirmative action plan and the information necessary for the completion of the required audit reports. Further, the affirmative action plan and the audit reports must be submitted in order to receive various government grants. Therefore, the lack of the plan and report could have led to the cancellation of those grants which would have a significant financial impact on Respondent.

Complainant contends that "...Highly lucrative grants depend on the accuracy of Center Point's AAP reports and these inaccuracies in the reports are material and would be something about which stockholders or prospective stockholders would want to know...[Complainant's] termination was in retaliation for her protected conduct, reporting an area of stockholder fraud."

Conclusion

It is clear from a review of the allegations that even construing all Complainant's statements as true she has failed to allege or set forth any facts that involve a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders. Complainant reported to her superiors that inaccurate information was used as the basis for drafts of affirmative action plans and reports. However, Complainant does not allege that these drafts were eventually submitted much less intentionally submitted with incorrect information in order

to commit some fraud upon shareholders. In other words, she does not claim that she provided her supervisor with information regarding any conduct which she reasonably believed, at the time of reporting, constituted a violation of one of the laws or regulations enumerated in SOX.

As stated above, an employee's report must "definitely and specifically" relate to mail, wire, bank, or securities fraud (18 U.S.C. §§ 1341, 1343, 1344, 1348) or any provision of federal law relating to fraud against shareholders in order to constitute protected activity under SOX. 18 U.S.C. § 1514A(a)(1); *Allen v. Admin. Rev Bd*, 514 F.3d 468, 477 (5th Cir. 2008). While the report need not refer to an actual violation, the employee must believe that the employer's conduct is a violation of one of the laws enumerated in Section 1514(A) of SOX; moreover, the employee's belief must be both subjectively and objectively reasonable. *Wengender v. Robert Half International Inc.*, ALJ 2005-SOX-00059 (2006).

Thus, even assuming Complainant was terminated as a result of her actions, namely reporting inaccuracies in employee applicant data, the claim must fail as the action does not constitute protected activity. In her complaints to her employer, Complainant never indicated that she believed failing to keep accurate job candidate records in anyway constitutes or relates to mail, wire, bank, or securities fraud or any provision of federal law relating to fraud against shareholders. Simply reporting company practices that may have a potential financial impact on the company which may affect shareholders is not sufficient. *See Harvery v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-00020 and -00036 (ARB June 2, 2006). As a result, Complainant has failed to allege that she engaged in protected activity under SOX. Thus, the undersigned finds Complainant has failed to state a claim upon which relief can be granted.

Based on the foregoing:

IT IS HEREBY ORDERED that Respondent Motion is granted, and the complaint filed in the above entitled matter is dismissed.

A

**CLEMENT J. KENNINGTON
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. 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).