



Issue Date: 16 September 2011

CASE NO: 2011-SOX-33

IN THE MATTER OF

ANGELA DEVONNE DAMPEER

Complainant

v.

JACOBS TECHNOLOGY – ENGINEERING AND SCIENCE GROUP

Respondent

DECISION AND ORDER

This proceeding arises under the Sarbanes-Oxley Act enacted on July 30, 2002, technically known as the Corporate and Criminal Fraud Accountability Act, Public Law 107-204, 18 U.S.C. § 1514A, et seq., (herein SOX or the Act), and the regulations promulgated thereunder at 29 C.F.R. Part 1980, which are employee protective provisions. This statutory provision prohibits any company with a class of securities registered under § 12 of the Security Exchange Act of 1934, or required to file reports under § 15(d) of the same Act, or any officer, employee or agent of such company, from discharging, harassing, or in any other manner discriminating against an employee in their terms and conditions of employment because the employee provided to the employer or Federal Government information relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission (herein SEC), or any provision of Federal law relating to fraud against shareholders.

A formal hearing was held in Houston, Texas, on June 2 and 3, 2011. The following exhibits were received into evidence: ALJ 1-3; Complainant's 1-18, except 16; and Respondent's 1-23. Aside from evidence and testimony received at trial, each party filed post-hearing briefs. My decision is based upon consideration of all evidence received.

UNDISPUTED FACTS

1. Angela Devonne Dampeer (Complainant) and Jacobs Technology Engineering and Science Group (Respondent) are both covered under the Act. (Tr. 8).

2. In November 2008 Complainant began working for Respondent in the Human Resources Department as an “at will” employee (RX-4). Prior to that time Complainant had worked as a contract employee in Respondent’s Human Resources Department for approximately one year.

3. During Complainant’s employment with Respondent, Jamilah Cummings was Complainant’s manager.

4. In June 2010 Complainant refused to verify a job title correction on Gary Grobe’s personnel profile because she felt it was against company policy.

5. In August 2010 Complainant again refused to verify the profile change, despite assurances from her manager that it was not inappropriate to do so.

6. On November 8, 2010, Complainant was terminated.

7. On February 3, 2011, Complainant filed her SOX Complaint with the Department of Labor, and on February 11, 2011, OSHA issued a determination denying the complaint.

8. Complainant appealed OSHA’s denial on March 15, 2011, and the aforementioned formal hearing was held on June 2 and 3, 2011.

ISSUE FOR DETERMINATION

The issue is whether or not Complainant engaged in protected activity under the Act of which Respondent had knowledge and therefore retaliated against her in violation of the Act.

CONCLUSION

For findings and reasons hereinafter set out, I find Complainant has not made out a *prima facie* case that she engaged in protective activity under the Act.

TESTIMONIES

Complainant testified at length at the hearing, but her testimony as to the issue of protected activity is rather short. On June 8, 2010, Complainant testified she attended a human resources staff meeting where a “practice audit” was conducted of selected files. Complainant’s Manager, Ms. Cummings, conducted the meeting and told those in attendance to verify changes only after the changes were documented. As a result of this meeting, Complainant said later in the month she was asked to verify an employee’s profile to show a change in job description, but she refused to do so out of concern that she lacked sufficient documentation and would be in violation of company policy.¹

Approximately two months later Complainant attended a meeting in Ms. Cummings’ office on August 17, 2010, where the subject of this particular profile again came up. At that meeting Complainant apparently agreed to verify the profile and backdate her verification to June when she had first reviewed the profile change. Concerned, however, that she heard the file had been selected as one of several others for a SOX audit, and despite Ms. Cummings’ request and assurance that there was nothing wrong with verifying the profile, Complainant refused because she did not feel it “ethical” to sign and backdate the employee’s profile and she was “uncomfortable” to do so.

Although acknowledging that verification of the profile was simply a change of “job code” and had nothing to do with finances or any financial impact on the company, Complainant did not believe that the spread sheet offered her sufficient documentation to enter the change even in the face of her superior’s telling her otherwise.

Steven Bodner is Respondent’s Financial Manager. He explained that an employee’s profile is simply a summary of his/her work history and that the job code is simply a generic job description having nothing to do with salary change. When a profile is changed, he testified, the person who makes the change signs first and the second signature is a verification that the change has been made.² A spread sheet for a job change is verification enough since there is no pay change involved. As to a SOX audit that was an internal audit to demonstrate compliance with the Act, and a job code change played no role in such an audit.

¹ The profile in question is found as Respondent’s EX-1B and the job classification change is shown at the top of the page. It involved no salary change but simply changing job designation.

² It was the verification (second signature) that was requested of Complainant after she was given the spread sheet.

Jamilah Cummings was Respondent's Human Resources Manager. It was Ms. Cummings who initially hired Complainant after meeting her socially. In May 2010, Ms. Cummings agreed that she had told the staff in reviewing a change in profiles to verify the authority supporting the change and that the change was correctly made. However, she said she met with Complainant about Complainant's failure to verify the profile (RX-1B) and explained to Complainant that the information attached was sufficient to support the change. The whole spread sheet was not necessary and would be too cumbersome.

Subsequently, in an August 17, 2010, meeting Complainant appeared satisfied and said she would verify the profile as of the date she first reviewed the document. The next day, however, Complainant refused the verification despite the fact Ms. Cummings assured her again that the code change in issue was only internal and not financial and "was not a key control under SOX." Fraud or a specific SOX violation was not referred to by Complainant, she simply maintained her desire to see the whole spread sheet, otherwise saying that the change was unethical and made her uncomfortable.

Complainant was written up for her insubordination. (RX-14). On November 8, 2010, Complainant was terminated during a RIF which had been ongoing since September 2010 (RX-20).

Amelia Serrano also worked in Human Resources, and she was present at the August 18, 2010 meeting. She testified Ms. Cummings tried to explain in this instance the documentation available was sufficient to verify the code change. Still, Complainant would have none of it and wanted more documentation. Her concern was over company policy not SOX according to Ms. Serrano.

Aside from the above, three other witnesses testified. Joy Kelly, Respondent's Deputy General Manager, explained how it was Complainant became a candidate for the RIF in Human Resources.

Michelle Wilkinson, Operations Director, testified in August 2010, Complainant expressed concern about back dating the verification, Ms. Wilkinson said she advised Complainant to simply put the present date signed. She did not perceive Complainant's concern to be about SOX violation, but rather about backdating. She also explained Complainant's RIF.

Shawn McCann, a Labor Specialist in Human Resources who had no experience with SOX or SOX audits, also testified that Complainant had expressed concern to him about the verification she was asked to perform. He advised her not to sign the document but rather to go to Ms. Wilkinson for advice. He never saw the profile, but was

concerned by implication it was involved in a SOX audit. No one suggested it was fraudulent or a scheme to obtain money, in fact Complainant never explained the type of document involved or its purpose. Simply hearing the word "SOX" had caused Mr. McCann to make the recommendation he did.

DISCUSSION AND FINDINGS

In a SOX "whistleblower" case, a complainant must establish by a **preponderance of the evidence** that: (1) She engaged in protected activity as defined by the Act; (2) her employer was aware of the protected activity; (3) She suffered an adverse employment action; and (4) circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. See Allen v. Admin. Rev. Bd., 514 F.3d 468, 475 (5th Cir. 2008); Macktal v. U. S. Dept. of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Zinn v. Univ. of Missouri, Case No. 1993-ERA-34 (Sec'y Jan. 18, 1996); Overall v. Tennessee Valley Auth., Case No. 1997-ERA-53 @ 12 (ARB Apr. 30, 2001). The foregoing creates an inference of unlawful discrimination. Id.

Under SOX, protected activity must be based on Complainant's reasonable belief that the employer's conduct constituted a violation of 18 U.S.C., sections 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), 1348 (securities fraud), any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1).

Complainant's reasonable belief "must be scrutinized under both subjective and objective standards, i.e., [she] must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable." Melendez v. Exxon Chemicals Americas, Case No. 1993-ERA-6 (ARB July 14, 2000). The reasonableness of a complainant's belief regarding illegality of a respondent's conduct is to be determined on the basis of "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." Melendez, supra, (quoting Minard v. Nerco Delamar Co., Case No. 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. @ 7, n.5); see Lerbs v. Buca Di Beppo, Case No. 2004-SOX-8 (ALJ June 15, 2004).

Complainant has failed to establish she actually had a genuine "reasonable" belief of a SOX violation. Particularly when Complainant's own testimony reveals that her initial concerns months earlier over the verification of the employee profile found at RX-1B was company policy not a SOX violation. It was not until two months later the need to verify this file was again addressed because of an internal audit. On that occasion, Complainant's manager explained again to her that the spread sheet they had at hand was and had been sufficient to justify the verification of a simple job code change. Without

reason or without any specific violation of the Act in mind, Complainant once more refused the verification maintaining it would be unethical and now attempts to mold her refusal into a protected activity.

Complainant makes a very well written argument that she had “reasonable” belief that her reluctance to verify the change in a routine job description profile somehow achieves the status of protected activity. I do not believe so, and I do not find that Complainant had an actual “reasonable” belief of a violation under Section 806 of the Act.

Sylvester v. Parexal Int’l LLC, ARB No. 07-123 (ARB 52511, is a recent Administrative Review Board’s decision which appears to have broadened the scope of protected activity under the Act; however, I do not understand the decision to hold that a mere unfounded suspicion, announced months after a previous unrelated refusal for other reasons, to be sufficient to provide coverage under the Act. To rule otherwise would open the doors to any and all, real or imagine expressions of concern if tagged with the words “SOX violation”.

Initially, Complainant said she was uncomfortable that such a verification was against company policy, months later, however, she once again refused to verify the profile change because it might be unethical. Never has Complainant provided a reasonable rationale as to why she thought it was potentially a SOX violation. Also, throughout her refusals Complainant’s superiors repeatedly explained to Complainant there was no salary change involved but only a job description and the spread sheet she had all along been provided was sufficient to authorize her verification.

Consequently, it is my finding that Complainant has failed to establish that her refusal to verify the job profile was based on a subjective or objective reasonable and genuine belief that the verification would constitute a violation of any conduct prohibited by SOX Section 806. In sum, Complainant has failed to demonstrate she engaged in protected activity under the Act, and therefore, I do not need to explore the reason for her termination in November 2010.

ORDER

Complainant’s Complaint is hereby **DISMISSED**.

So ORDERED this 16th day of September, 2011, at Covington, Louisiana.

A

C. RICHARD AVERY
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).