



Issue Date: 31 May 2011

CASE NO.: 2011-SOX-30

IN THE MATTER OF

MARK SWANK

Complainant

v.

**BANC PASS, INC.
TELVENT GIT, S.A.
TELVENT FARRADYNE, INC. and
GLENN DEITIKER**

Respondents

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

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.

On March 31, 2011, Complainant filed a Complaint with OALJ against Respondent, alleging he was terminated on September 30, 2010, in violation of SOX. Specifically, Complainant alleged he reported Respondent violated CTRMA procurement policies, Texas state procurement policies and U.S. federal procurement laws by the following actions:

1. Mr. Deitiker (President and Chief Technology Officer of Telvent Farradyne's Toll Division) paid the cost of attendance (\$5,000) for Executive Director of Central Texas Regional Mobility Authority (CTRMA) Mike Heiligenstein, and Mr. Heiligenstein's wife, who is a Texas Department of Transportation certified contractor, to attend a political fund raiser for Texas Governor Rick Perry on May 28, 2010.
2. Mr. Deitiker and/or Ms. Swank paid for Mr. and Mrs. Heiligenstein's wedding reception in October 2005.
3. Mr. Deitiker stated he was planning to buy an airline ticket for Mrs. Heiligenstein to accompany her husband to the annual industry convention in San Diego in September 2010.
4. Mr. Deitiker allowed government employees to use his vacation home in Hunt, Texas and Respondent's apartment in New York City in the hopes of securing contracts.
5. Ms. Swank and her family vacationed with CTRMA's Director of Operations Ron Fagan and his family in Florida the week of July 16, 2010.
6. Mr. Dietiker, Ms. Swank and Mr. and Mrs. Heiligenstein took a trip to California wine country.

On April 25, 2011, Respondents Telvent GIT, S.A. and Telvent USA Corporation, as successor in interest to Telvent Farradyne, Inc., (herein Respondent) filed a Motion to Dismiss, seeking dismissal of Complainant's complaint in its entirety, alleging: (1) the Complaint fails to state a claim under SOX; (2) Complainant did not engage in protected activity; and (3) Complainant is not a protected employee under SOX.

Complainant filed Complainant's Response to Respondent's Motion to Dismiss on May 9, 2011, arguing: (1) Complainant outlined specific actions by Respondents he reasonably believed violated federal law; (2) "without a background knowledge of his own to inform his decision and upon advice from . . . company lawyers," Complainant had a subjective and objective reasonable belief "federal securities laws were being violated."

On May 13, 2011, Respondent filed a Reply Memorandum in Further Support of the Motion to Dismiss by Respondents Telvent GIT, S.A. and Telvent USA Corporation, contending (1) Complainant's allegations did not describe conduct within the purview of SOX; (2) the complaint never alleged or addressed fraudulent conduct; and (3) Complainant failed to allege sufficient facts to establish OALJ has jurisdiction.

DISCUSSION

Under Rule 12(b)(6), the allegations of the complaint are accepted as true, all reasonable inferences are drawn in the light most favorable to the Complainant, and dismissal is appropriate if it appears Complainant would prove no set of facts that would entitle a Complainant to relief. See Brown v. Philip Morris Inc., 250 F.3d 789, 796 (3d Cir. 2001). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1969 (2007). Thus, if a well-pled complaint allows the undersigned to do no more than infer the possibility of misconduct, it fails to state a claim upon which relief may be granted. FRCP 12(b)(6); See also Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937 (2009).

A. The Statutory Provisions of Sarbanes-Oxley

The whistleblower provision of Sarbanes-Oxley, set forth at 18 U.S.C. §1514A, states, 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. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(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 because of any lawful act done by the employee--

(1) 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) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) 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), (b)(1).

Title 18 U.S.C. § 1514A(b)(2) provides that an action under Section 806 of the Act will be governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell Ford Aviation Investment and Reform Act for the 21st Century (the AIR 21 Act). See, Platone v. FLYi, Inc., ARB No. 04-154, Case No. 2003-SOX-27 (ARB Sept. 29, 2006). 49 U.S.C. § 42121(b) reads in pertinent part:

(i) Required showing by complainant. The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a **prima facie** showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer. Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by **clear and convincing evidence**, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

Title 29 C.F.R. § 1980.101 of the implementing regulations of Sarbanes-Oxley defines the term "employee," stating in pertinent part:

Employee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.

29 C.F.R. § 1980.101 (2008).

The whistleblower provision of Sarbanes-Oxley is similar to whistleblower provisions found in many other federal statutes. Since the Sarbanes-Oxley Act is relatively new, reference to case authority interpreting other whistleblower statutes is appropriate. See Welch v. Cardinal Bankshares Corporation, Case No. 2003-SOX-15 (ALJ Jan. 28, 2004), *rev'd on other grounds*, ARB 05-064 (ARB May 31, 2007).

B. The Burden of Proof

In a Sarbanes-Oxley "whistleblower" case, a complainant must establish by a **preponderance of the evidence** that: (1) he engaged in protected activity as defined by the Act; (2) his employer was aware of the protected activity; (3) he 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.

C. Complainant's Prima Facie Case

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).

D. Reasonable Belief Standard

The legislative history of Sarbanes-Oxley states that the reasonableness test "is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts." Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002), 2002 WL 32054527 (citing Passaic Valley, 992 F.2d 474 (3rd Cir. 1993)). "The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." Id.; see Collins v. Beazer Homes USA, Inc., 344 F.Supp.2d 1365 (N.D. Georgia 2004).

Thus, complainant's belief "must be scrutinized under both subjective and objective standards, i.e., [he] 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).

Additional guidance is contained in the legislative history, noting "certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief." Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002).

E. Essential Elements of Fraud actionable under SOX: Intent, Materiality/Significant Deficiency, Impact on Shareholders

The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the SOX whistleblower provision. See e.g., S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (explaining that the pertinent section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company"). The provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent." Id.

In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." Ames Department Stores Inc., Stock Litigation, 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations). While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit. See Hopkins v. ATK Tactical Systems, Case No. 2004-SOX-19 (ALJ May 27, 2004); Tuttle v. Johnson Controls, Battery Division, Case No. 2004-SOX-0076 (ALJ Jan. 3, 2005).

The elements of fraud include: (1) a misstatement or omission; (2) of a material fact; (3) made with the intent to defraud; (4) on which the [complainant/shareholders] relied; and (5) which proximately caused the [complainant's/shareholders'] injury.¹ Williams v. WMX Technologies, Inc., 112 F.3d 175, 177 (5th Cir. 1997). Hence, a fraudulent activity cannot occur without the presence of intent.

¹ In the context of securities fraud claims under section 10(b) of the Securities Exchange Act and Rule 10-b5, the "intent to defraud" element is replaced with "scienter." Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud, or at minimum, highly unreasonable (conduct), involving not merely simple, or even excusable negligence, but an extreme departure from the standards of ordinary care . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." In re: Alparma Inc. Securities Litigation, 372 F.3d 137, 148 (3d Cir. 2004); see also Tuchman v. DSC Communications Corporation, 14 F.3d 1061, 1067 (5th Cir. 1994).

Sarbanes-Oxley was enacted for the purpose of eliminating perpetration of fraud against shareholders as evidenced by the plain language of the Act as a whole. SOX goes to great lengths to assure that information assimilated to the investing public is not fraudulent by, among other measures, establishing the Public Company Accounting Oversight Board to ensure auditors' independence, assessing responsibility to the Audit Committee of the Board of Directors of a company, requiring management to attest to the accuracy of internal controls and financial reports, and installing criminal penalties for intentional misrepresentations to the investing public. 15 U.S.C. § 7211; 15 U.S.C. § 7241; 15 U.S.C. § 78j-1; 18 U.S.C. § 1350.

"An employee's protected communications must relate 'definitively and specifically' to the subject matter of the particular statute under which protection is afforded." Platone v. FLYi, Inc., supra, at 17 (ARB Sept. 29, 2006). The ARB reiterated this position in Welch, supra, in which the ARB held that recording of accounting information in violation of generally accepted accounting principles (GAAP), or other industry specific standards, was not ipso facto violation of federal securities laws. Welch, supra, @ 11-12. Consistent with the position expressed by the ARB, an allegation of "shareholder fraud" is an essential element of a cause of action under SOX. Therefore, where the conduct complained of involves potential dissemination of false information to the investing public, not all intentionally fraudulent activity may support a cause of action under SOX. Rather, the alleged conduct must be sufficiently material to rise to the level of shareholder fraud. See also, Harvey v. Safeway, Inc., Case No. 2004-SOX-21 (ALJ February 11, 2005). In the instant case, Complainant's complaint does not comport with any of these requirements.

The Supreme Court, in addressing other types of shareholder fraud, held that to "fulfill the materiality requirement there must be a substantial likelihood that the disclosure of the omitted (or misstated) fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976)). Therefore, under subjective and objective standards, Complainant must actually and reasonably believe, based on the knowledge available to a reasonable person, that Respondent intentionally acted fraudulently, and that such conduct was sufficiently material so as to constitute fraud against the shareholders.

Here, the Complaint never alleged actual or potential dissemination of false information or omission of material information. Nor did the Complaint allege any affect whatsoever on the shareholders. In fact, Complainant specifically alleged in his Complaint "Complainant believed [Respondent's actions] were in violation of CTRMA procurement policies, Texas state procurement policies, and U.S. federal procurement laws."² However, the SOX Act does not provide protection to employees who report violations of state statutes or laws.

Under SOX, protected activity must be based on **both** a Complainant's subjective and an objective reasonable belief that one or more of the relevant laws specifically listed under the SOX statute have been violated. "As to the subjective component, the law is not meant to protect those whose complaints are not undertaken in subjective good faith." Day v. Staples, Inc., 555 F.3d 42, 54 (1st Cir. 2009). Complainant also bears the burden of showing his belief was objectively reasonable. An objectively reasonable belief of the existence of shareholder fraud requires that Complainant's theory of shareholder fraud "must at least approximate the basic elements of a claim of securities fraud." Id. at 56. Securities fraud under § 10(b) and SEC Rule 10b-5, at a minimum, requires: "(1) a material misrepresentation or omission; (2) scienter; (3) connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation." Id., citing Ezra Charitable Trust v. Tyco Int'l, Ltd., 466 F.3d 1, 6 (1st Cir. 2006).

Even if Complainant shows an objectively reasonable belief that Respondent misrepresented or omitted material facts to shareholders and/or investors, "the employee must [also] reasonably believe that his or her employer acted with a mental state embracing intent to deceive, manipulate, or defraud its shareholders." Allen v. Admin. Rev. Bd., supra at 480. Fraudulent intent may be inferred if Complainant either alleges facts showing the employer had the opportunity **and** motive to defraud shareholders and/or investors or alleges "facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Chill v. General Electric Co., 101 F.3d 263, 267 (2nd Cir. 1996).

² Complaint, p. 3.

"[R]eckless conduct is, at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." Chill, supra at 269, citing Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d. Cir. 1978). "An egregious refusal to see the obvious, or to investigate the doubtful, may in some cases give rise to an inference of . . . recklessness." Chill, supra at 269, citing Goldman v. McMahan, Brafman, Morgan & Co., 706 F.Supp. 256, 259 (S.D.N.Y. 1989). To show an employer's recklessness, a Complainant must allege facts that are "strong circumstantial evidence" of reckless conduct, such that "it gives rise to a strong inference of fraudulent intent." Chill, supra at 269. In the instant complaint, Complainant has not alleged Respondent engaged in reckless conduct sufficient to infer fraudulent intent.

In this matter, I note the complaint filed with OALJ never addressed or alleged fraud of any type, nor did it allege any violation of SEC rules or regulations. The complaint alleges Complainant reasonably believed Respondent's activities were in violation of CTRMA procurement policies, Texas state procurement policies and U.S. federal procurement laws. None of these laws are connected to mail, wire, radio, TV, bank or securities fraud, or any SEC rule or regulation. It was not until Complainant responded to Respondent's Motion to Dismiss that fraud against shareholders was ever alleged. Although the factual averments in the pleadings are deemed true, the undersigned may refuse, as I do here, to accept as true the pleader's statements made for the first time in a legal memorandum or brief that forms no part of the official pleadings. See Henthorn v. Department of Navy, 29 F.3d 682 (D.C. Cir. 1994).

Complainant, in his response to Respondent's Motion to Dismiss, argues Respondent omitted the illegality of its activity from its public statements to shareholders. However, not only was such a statement absent from the Complaint, but the Complainant has yet to allege any reliance or loss by the shareholders. Moreover, Respondent's fraudulent intent cannot be inferred because Complainant has not alleged opportunity and motive to defraud shareholders. Motive entails "concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." Chill, supra at 268. **Actions that naturally benefit a corporation, such as the maintenance of contractual relationships and ostensible**

corporate profitability, do not "entail concrete benefits" and thus do not satisfy the motive requirement. Id.; See also In re: Crystal Brands Sec. Litig., 862 F.Supp. 745, 749 (D. Conn. 1994).

In this matter, Complainant's allegations, even if proven, would not suggest that Respondent has violated the SOX Act. The substance of his complaint does not fall under the limited umbrella of the subject matter regulated by the Act. Thus, viewing the events Complainant describes in his complaint in the light most favorable to his position, I conclude that he has failed to state a claim upon which relief can be granted. FRCP Art. 12(b)(6). Accordingly, Complainant's Complaint is **dismissed**.³

Considering the foregoing,

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss be, and it is, **GRANTED**.

IT IS HEREBY FURTHER ORDERED that Complainant's complaint against Respondent be, and it is **DISMISSED**.

In view of the foregoing, the formal hearing scheduled on June 7, 2011, is hereby **CANCELLED**.

ORDERED this 31st day of May, 2011, at Covington, Louisiana.

A

LEE J. ROMERO, 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. 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

³ Because Complainant's Complaint has been dismissed on the above grounds, a discussion of whether Respondent is a company subject to the provisions of SOX or whether Complainant is a covered employee is moot.

Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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).