



Issue Date: 28 October 2014

**CASE Nos.: 2014-SOX-26
2014-SOX-27
2014-SOX-28**

IN THE MATTER OF

**JOE PALMER, SHANE TESORO, LESLIE LANGE,
Complainants**

v.

**HUMANA, INC.,
Respondent**

RULING ON RESPONDENT'S MOTION TO DISMISS

Procedural Background

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX)¹ and the regulations promulgated thereto,² brought by Complainants against Respondent. After the Occupational Health and Safety Administration (OSHA) dismissed their initial complaint, Complainants filed a timely objection. Following an initial scheduling order, Complainants filed a revised complaint detailing each alleged protected activity, adverse action, and relief sought. Respondent then filed its answer and a motion to dismiss for failure to state a claim.³ Complainants answered and Respondent replied.

Alleged Factual Background⁴

Respondent Humana, Inc., is a large healthcare insurer serving more than 6 million members and traded publically on the New York Stock Exchange. Working through its wholly-owned subsidiary and product distribution arm, Humana MarketPoint Inc., Respondent contracted with Innovative Medical Solutions, LLC (IMS) to act as one of its sales agents. Respondent was contractually obligated to provide IMS with data support, which included access to personal medical information protected under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).⁵ Respondent intentionally blocked IMS from access to

¹ 18 U.S.C. § 1514A *et seq.*

² 29 C.F.R. Part 1980.

³ FED. R. CIV. P. 12(b)(6).

⁴ Given the procedural setting, I must assume all of the factual allegations in the complaint are true.

⁵ 45 C.F.R. § 164a *et seq.*

data they needed and at the same allowed access to other agents and third parties who should not have had it. Respondent did so in order to churn sales at more favorable prices and allow the third parties to steal IMS's business. Respondent engaged in fraud, since it used a server that it knew would result in the disclosures and HIPAA violations. After Complainants, who were employees of IMS, reported the access problems and HIPAA violations to Respondent, Respondent terminated the contract with IMS.⁶

Respondent's Motion and Complainants' Answer

Respondent argues that even with the facts as alleged by Complainants, there can be no valid SOX whistleblower claim, since (1) Complainants are not employees under SOX and (2) they did not engage in any activity protected by SOX. Specifically, Respondent argues that Complainants did not communicate to Respondent anything that they could have reasonably believed to have constituted conduct that violated SOX.⁷ Complainants answers that employees of private contractors of a publically-held company are indeed considered employees of that company under SOX. They then argue that their complaint includes a fair inference that they reasonably believed Respondent was engaged in mail, bank, or wire fraud, since it was disclosing HIPAA information not for any authorized use, but to solicit insurance.

Applicable Law

The regulations incorporate by reference procedural rules for hearings conducted under SOX. "Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, part 18 of title 29 of the Code of Federal Regulations."⁸ In the event those rules do not provide for or control a situation, the Rules of Civil Procedure for the District Courts of the United States shall apply.⁹

To survive a motion to dismiss, a complaint must contain facts sufficient to state a facially plausible claim to relief. Although conceding that "ALJs are entitled to manage their caseloads and decide whether a particular case is so meritless on its face that it should be dismissed in the interest of justice[.]"¹⁰ the Board has repeatedly emphasized that "... SOX claims are rarely suited for Rule 12 dismissals,"¹¹ noting that "Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge (OALJ) rules. The OALJ rules do not contain a

⁶ The initial complaint included IMS as a discrete complainant. Respondent moved to dismiss IMS, as it is not an individual but rather a business entity and could not qualify as an employee under SOX. Complainants did not respond to that motion. IMS is not an employee of Respondent. Moreover, it could not have engaged in any protected activity apart from that of the other named complainants. The motion is granted and IMS is dismissed from the complaint.

⁷ Respondent also argues that Complainants failed to allege a basis for reasonably believing Respondent had violated HIPAA. However, the procedural setting requires that I accept the factual allegation of that belief. The question of whether they can create a genuine issue of material fact as to that fact is not yet ripe.

⁸ 29 C.F.R. § 1980.107(a).

⁹ 29 C.F.R. § 18.1(a).

¹⁰ *Sylvester v. Parexel Int'l LLC*, ALJ Nos. 2007-SOX-39, 42, slip op. at 13 (ARB May 25, 2011).

¹¹ *Id.*

rule analogous to Rule 12, but instead allow parties to seek prehearing determinations pursuant to ALJ Rule 18.40.”¹²

Section 806 of the Act, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activities. Section 1514A(a) states in relevant part:

No company ... with a class of [registered] securities ... or that is required to file reports ... including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company..., 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-

...

(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)...¹³

Complaints filed under SOX are governed by the burdens of proof set out in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹⁴ To prevail, a complainant must prove by a preponderance that: (1) she engaged in protected activity or conduct; (2) the respondent knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable or adverse action.¹⁵

The employees of a contractor of a publically-held company are protected by SOX from adverse action taken against them by that contractor.¹⁶ SOX presumes “an employer-employee relationship between the retaliator and the whistleblower.”¹⁷

¹² *Id.*

¹³ 18 U.S.C. § 1514A(a)(1).

¹⁴ 49 U.S.C. § 42121; 18 U.S.C. § 1514A(b)(2)(C).

¹⁵ *See, e.g., Allen v. Admin. Review Bd.*, 514 F.3d 468, 475, 76 (5th Cir. 2008).

¹⁶ *Lawson v. FMR LLC*, 134 S.Ct. 1158, 1166 & n.7 (2014). (However, the court also noted “We need not decide in this case whether [SOX] also prohibits a contractor from retaliating against an employee of one of the other actors governed by the provision.”).

¹⁷ *Id.* at 1167.

Section 806 “prohibits retaliation *only if* the employee provides information regarding conduct that he or she reasonably believes violates one of six enumerated categories of U.S. law.”¹⁸ The categories are federal mail, wire, bank, and securities fraud statutes, all rules and regulations of the SEC, and any other federal law related to fraud against shareholders.¹⁹

The critical focus is on whether the employee reported the specific conduct that he or she reasonably believes constituted a violation of federal law.²⁰ The belief must be reasonable for an individual in the employee’s circumstances with his training and experience.²¹ The employee need not have actually communicated the reasonableness of those beliefs, as long as the recipients of the whistleblower’s disclosures understood their seriousness.²² A violation need not yet have occurred as long as the employee reasonably believed that the violation was likely to happen.²³ The reasonably believed facts need not constitute an actual violation if the whistleblower communication is based on a reasonable, albeit incorrect understanding of one of the six enumerated categories of law under Section 806.²⁴ Thus, a reasonable communication about an anticipated violation is protected, even if it is factually incorrect, based on an incorrect understanding of the law, and the anticipated event or action never occurs.²⁵

The plain language of SOX the whistleblower protection provisions “protects all good faith and reasonable reporting of fraud.”²⁶ As long as an employee reasonably believes her communication relates to one of the listed violations, it does not have to definitively and specifically describe the violation.²⁷ Standing alone, any of the six enumerated categories of violations set forth in Section 806 are prohibited by law, but a violation does not necessarily result in immediate shareholder fraud. Instead, a violation may be merely one step in a process leading to shareholder [fraud](#).²⁸ Consequently, an employee can engage in protected activity “even if he or she fails to allege or prove materiality, scienter, reliance, economic loss, or loss [causation](#).”²⁹

Discussion

Respondent submits two reasons the complaint must be dismissed on its face. First, Respondent argues that although SOX might protect Complainants from retaliation by IMS as their employer, it does not protect them from retaliation by a publically-traded company with which IMS contracted. Second, Respondent insists that the communications made by Complainants were not related to the subjects within the protection of SOX.

¹⁸ *Villanueva v. U.S. Dept. of Labor*, 743 F.3d 103, 108 (5th Cir. 2014).

¹⁹ *Id.* (citing 18 U.S.C. § 1514A(a)(1)).

²⁰ *Sylvester v. Parexel Int’l LLC*, ALJ Nos. 2007-SOX-39, 42, slip op. at 14 (ARB May 25, 2011).

²¹ *Id.* (citing *Melendez v. Exxon Chems.*, ALJ No. 1993-ERA-006, slip op. at 28 (ARB July 14, 2000)).

²² *Id.* at 15 (citing *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1377-78 (N.D. Ga. 2004)).

²³ *Id.* at 16

²⁴ *Id.* (citing *Welch v. Chao*, 536 F.3d 269, 277 (4th Cir. 2008)).

²⁵ *Id.* (citing *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476, 77 (5th Cir. 2008)).

²⁶ *Id.* at 17 (citing 148 CONG. REC. S7418-01, S7420 (daily ed. July 26, 2002)).

²⁷ *Id.* at 19.

²⁸ *Id.* at 21.

²⁹ *Id.* at 22.

Protected Communication

The Administrative Review Board (the Board) has very broadly interpreted the language related to the required substantive content of a protected communication. Here, the complaint alleges and Complainants argue that if nothing else, they reasonably believed that Respondent's actions violated HIPAA, subjected Respondent to possible enforcement penalties, and Respondent failed to identify those possible penalties in its filings. Consequently, Complainants allege that they reasonably believed Respondent's fraud could impact shareholders. Under SOX, Complainants do not have to be right about any of those beliefs and it is almost impossible to dismiss a whistleblower claim on the face of the complaint based on the question of reasonable belief. The motion to dismiss based on a failure to allege a protected communication is denied.

Employee Status

The motion to dismiss also presents a straightforward legal question. Does SOX protect a whistleblowing employee of a private contractor against a publically-held company when the neither the publically-held company nor the contractor take any adverse action directly against the employee, but the publically held company cancels the contract with the contractor?

The law is clear that Complainants would have a cause of action against IMS if IMS had terminated them. They might also in that instance argue that IMS was acting as Respondent's agent and name Respondent as a liable party. However, IMS did not terminate them and the complaint alleges no adverse action by IMS.

In this case, Complainants seek relief not from their employer, but the company with whom their employer had a contract.³⁰ The adverse action taken was *against* their employer, not *by* their employer. Of course, even in the absence of any specific allegations in the complaint, it is more than fair to infer that the cancelation of the contract with IMS had an impact on Complainants that would otherwise qualify it as an adverse action under SOX. Moreover, it is also fair to infer for the purposes of this motion that the cancellation of the contract was directly in retaliation for the actions of the employees of the contractor.

While the Court in *Lawson* extrapolates the statutory language to extend whistleblower protection, that extrapolation appears not to be without limits. Significantly, those limits include a presumed employee-employer relationship between the whistleblower and liable party.

³⁰ Complainants' prayer for relief include reinstatement, back and front pay, but it is not totally clear from the face of the complaint whether they remained employees of IMS and if so, what impact the loss of the contract with Respondent had on them. However, given the procedural setting of the motion, those questions are not particularly ripe.

There is little question that a cancellation of a major contract with an employer may immediately result in loss of hours or jobs for the people who work for the employer. It is equally true that threat of a cancellation of a contract may stifle whistleblower activity by the employees of that contractor. Nonetheless, I decline to further depart from the statute, particularly in light of the limits recognized even in *Lawson's* very broad application of the language.³¹

Accordingly, since there was no employer-employee relationship between Complainants and Respondent, the motion to dismiss is granted.

The complaint is **dismissed**.

In view of the foregoing, the hearing scheduled on **19 May 15** in **Fort Worth, Texas** is hereby **CANCELLED**.

SO ORDERED.

PATRICK M. ROSENOW
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 issuance of the administrative law judge's decision. 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(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

³¹ I recognize that the Board well may further extrapolate the law to encompass the compelling alleged facts in the complaint, but until they do so, I will apply the law as written and currently interpreted in case law. I understand the *Lawson* language is at least in part *dicta*, but it is consistent with a plain reading of the statute.

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1980.110(a).

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(e) and 1980.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1980.110(b).