



**Issue Date: 31 March 2015**

**CASE NO.: 2014-SOX-00041**

In the Matter of:

**QINGMING SWINNEY,**  
Complainant,

v.

**FLUOR CORPORATION,**  
Respondent

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

This proceeding arose from an action filed by Qingming Swinney (Complainant) against Fluor Corporation (Respondent) under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("SOX" or "Act") and the employee protective provisions promulgated hereunder at 29 C.F.R. Part 1980. Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) on or about June 10, 2014, alleging that she had been terminated from employment with Respondent because she had raised concerns about conduct that violated SOX. After investigating, OSHA dismissed the complaint finding Complainant did not engage in activity protected by SOX. Complainant objected to the OSHA findings and requested a *de novo* hearing before an administrative law judge.

On February 4, 2015, Employer filed a Motion for Summary Decision. Employer asserts that Complainant has not pled, nor can she establish, that she engaged in any protected activity under SOX or that any alleged protected activity contributed to her termination. The Court issued an Order to Show Cause requiring Complainant to file a Response no later than February 23, 2015. On February 27, 2015, the Court granted an extension for Complainant's Response. On March 4, 2015, the Court received Complainant's Response.<sup>1</sup>

**SUMMARY DECISION STANDARD**

An administrative law judge may enter summary decision for either party on an issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. § 18.40(d).

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<sup>1</sup> In addition to her Response, the Court has considered the evidence from Complainant's Pre-Hearing Submissions.

By moving for summary decision, a party asserts that based on the present record and without the need for further exploration of the facts and conceding all unfavorable inferences which may be drawn from the record, there is no genuine issue of material fact to be decided and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); 29 C.F.R. § 18.40(d).

The non-moving party may not rest upon mere allegations, speculation or denials in his pleadings, but must set forth specific facts through affidavits, material obtained by discovery or otherwise, on each issue upon which he would bear the ultimate burden of proof. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 256 (1986). The response must set forth specific facts showing that there is a genuine issue of material fact for the hearing. 29 C.F.R. § 18.40(c).

## **DISCUSSION**

Section 806 of SOX, 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 activity. Section 1514A(a) states, in relevant part:

(a) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(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); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged 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.

18 U.S.C. § 1514A(a); *see also Hendrix v. American Airlines, Inc.*, 2004-AIR-00010, 2004-SOX-00023 (ALJ Dec. 9, 2004) (unpublished).

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, 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). Any 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.*

To prevail in a SOX whistleblower action, an employee must prove by a preponderance of the evidence that (1) he or she engaged in protected activity; (2) the employer knew that he or she had engaged in the protected activity; (3) he or she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor to the unfavorable action. 49 U.S.C. § 42121(b)(2)(B)(iii); *Hemphill v. Celanese Corp.*, 430 Fed. Appx. 341,344 (5th Cir.2011); *Allen v. Admin Rev. Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008); *see also* 29 C.F.R. § 1980.104(b)(1)(i)-(iv); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, (ARB July 29, 2005). A contributing factor need not be significant, motivating, substantial, or predominant; and can be any factor which alone, or in connection with other factors, tends to affect in any way the outcome of the decision. *Collins v. Beazer Homes U.S.A., Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004). Ordinarily, temporal proximity between the protected activity and unfavorable personnel action will satisfy the burden of making a *prima facie* showing of employer knowledge and that the protected activity was a contributing factor. *Id.*

If the employee establishes these four elements, the employer may avoid liability if it can prove “by clear and convincing evidence” that it “would have taken the same unfavorable personnel action in the absence of that [protected] behavior.” 49 U.S.C. § 42121(b)(2)(B)(iv); *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, (ARB January 31, 2006); *Allen*, 514 F.3d at 476.

### **Protected Activity**

SOX prohibits a publicly-traded company from retaliating against an employee who reports information to a supervisor “regarding any conduct which the employee reasonably believes constitutes a violation” of one of the six enumerated categories. 18 U.S.C. § 1514A(a)(1); *Marshall v. Northrup Gruman Synoptics*, 2005-SOX-00008 (ALJ June 22, 2005). SOX does not apply to generic allegations of accounting violations, violations of GAAP, or general allegations of fraud. *Marshall*, 2005-SOX-00008 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.”).

The employee's reasonable belief of a violation must be scrutinized under both subjective and objective standards. *Welch v. Cardinal Bankshares Corp.*, ARB Case No. 05-064, 2007 WL 1578493 (ARB May 31, 2007); *see also Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, 93-ERA-00006 (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/she reasonably believed the employer violated one of the laws or regulations enumerated under SOX, any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders. *Id.*; see also *Halloum v. Intel Corp.*, ARB No. 04-068, 2006 WL 3246900 (ARB Jan. 31, 2006). The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee. *Allen*, 514 F.3d at 477; see also *Welch*, 2007 WL 1578493 at \*7. The subjective reasonableness requires that the employee actually believe the conduct being complained of constitutes a violation of pertinent law. *Day v. Staples*, 555 F.3d 42, 54 (1st Cir. 2009); see also *Harp v. Charter Communications, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009).

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 who has the requisite reviewing ability. See *Harvey v. Safeway, Inc.*, 2004-SOX-00021 at 29 (ALJ Feb. 11, 2005).

### ***The OSHA Complaint***

In her OSHA complaint, Complainant alleged being unjustly terminated in reprisal for reporting that one of the reports in the reporting package (final version) she reviewed on February 20, 2014, didn't have any backup or a signature. She further alleged that on September 29, 2010, her supervisor asked her to backdate accounting records because the supervisor failed to sign them in a timely manner. Complainant did as requested and backdated the documents. (RX 25, 26).

### ***2010 Backdated Accounting Records***

In the Motion for Summary Decision, Respondent refers to Complainant's deposition testimony to prove that Complainant had neither a subjectively nor objectively reasonable belief that Respondent's alleged backdating of documents involved a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders. (RX A).

In September 2010, Complainant brought forth concerns that her supervisor (Quintanilla) had backdated some of her signatures on account analyses and reports related to executive compensation. (RX A, pp 204 – 206, 210). When Complainant reported the backdating conduct she did not actually believe that any illegal or fraudulent conduct was occurring, she did not believe that Quintanilla had violated any law and she never reported to anyone that the purported backdating violated the law. When Complainant raised the issue, she was simply "raising questions" and "expressing concerns" about this conduct. (RX A, pp 219 – 220). Further, Complainant admits the reports about which she raised the backdating concerns were internal reports that were not sent to the SEC or shareholders. (RX A, pp 199 – 201).

Nowhere in her Response or Pre-Hearing Submissions does Complainant dispute the foregoing facts. While Complainant does not need to show that Respondent's conduct actually

caused a violation of the law, she must show that she reasonably believed Respondent violated one of the laws or regulations enumerated under SOX, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. I find it is undisputed that Complainant did not have a subjectively or objectively reasonable belief that Quintanilla's alleged backdating of documents involved a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

Further, it is not disputed that the documents that were allegedly backdated were internal reports that were not to be submitted to the SEC or shareholders. Nowhere in her Response or Pre-Hearing Submissions does Complainant dispute this fact. Inquiries relating to internal reports are not the basis for protected activity under SOX. *Allen v. Administrative Review Board*, 514 F.3d 468 (5<sup>th</sup> Cir. 2008).

### ***February 20, 2014 report without any backup or a signature***

In the Motion for Summary Decision, Respondent again refers to Complainant's deposition testimony to prove that Complainant had neither a subjectively nor objectively reasonable belief that Respondent's alleged failure to have a signature or backup on the February 20, 2014 report involved a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

In her deposition Complainant testified that the report is an internal report and is not distributed externally. (RX A, pp 221 – 223). She is unaware of any intent to manipulate or deceive shareholders in connection with the report. At the time she discussed the report with her supervisors, she did not believe that any conduct associated with it was unlawful or fraudulent. (RX A, pp 250 – 251). Further, Complainant cannot identify any internal policy or external law that requires this report to be signed. (RX A, p 230 – 231).

Nowhere in her Response or Pre-Hearing Submissions does Complainant dispute the foregoing facts. While Complainant does not need to show that the Respondent's conduct actually caused a violation of the law, she must show that she reasonably believed Respondent violated one of the laws or regulations enumerated under SOX, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. I find it is undisputed that Complainant did not have a subjectively or objectively reasonable belief that Respondent's alleged failure to backup or sign the February 20, 2014 report involved a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

Further, it is not disputed that the February 20, 2014 report was an internal report that was not to be submitted to the SEC or shareholders. Nowhere in her Response or Pre-Hearing Submissions does Complainant dispute this fact. Inquiries relating to internal reports are not the basis for protected activity under SOX. *Allen v. Administrative Review Board*, 514 F.3d 468 (5<sup>th</sup> Cir. 2008).

### ***Request for OALJ Hearing***

In her request for an OALJ hearing, Complainant alleges two specific additional instances of protected activity and a general "there are other accounting entries that are suspicious" allegation that were not raised during the OSHA investigation. Complainant alleges

concerns about a \$63 billion adjustment entry concerning foreign currency gains or losses. Complainant's second allegation relates to a \$7.8 million discrepancy Complainant found in an intercompany report in January 2014. (RX 28).

### ***The \$63 billion adjustment***

In the Motion for Summary Decision, Respondent refers to Complainant's deposition testimony and affidavits to prove that Complainant had neither a subjectively nor objectively reasonable belief that the \$63 billion adjustment entry involved a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

On April 4, 2013, Respondent's accounting department noted the \$63 billion entry. Based on the size of the entry, it was evident that the entry was erroneous. It was determined that the entry was likely the result of someone mistyping the entry on the keyboard. General Accounting fixed the erroneous entry on their systems. Corporate Accounting then needed to fix the entry on their system. On April 8, 2013, Quintanilla asked Complainant to make a topside entry to fix the entry in their Corporate Accounting system. The topside entry was made and signed off on the same day. Neither Quintanilla nor Foertsch interpreted any of Complainant's inquiries to be a report of illegal or fraudulent conduct. (RX B, E).

In her deposition testimony Complainant admits she did not believe the \$63 billion entry or the correction entry was illegal or fraudulent. Further, the erroneous entry was corrected as soon as it was discovered. Complainant also admits she never express a belief that any conduct related to the \$63 billion entry was illegal or fraudulent. The entry she made was a clearing entry and would not show up on profit and loss statements and had no SEC implications. (RX A, pp 272 – 281).

In her Response, Complainant only briefly mentions the \$63 billion entry. She describes it as "an historic error" (Response p. 3) and briefly describes the processes and interactions encountered during the correction process. (Response p. 11). Nowhere does she indicate that anything fraudulent or illegal was occurring, much less indicate what law or SEC rule or regulation that Respondent was allegedly violating. Moreover, Complainant does not indicate she was reporting anything illegal or fraudulent to Quintanilla, Foertsch or anyone else working for Respondent.

Subjective reasonableness requires that the employee actually believe the conduct being complained of constitutes a violation of pertinent law. I find it is undisputed that Complainant did not have a subjectively or objectively reasonable belief that the \$63 billion adjustment entry involved a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

### ***The \$7.8 Million Discrepancy on the SAP Report***

In the Motion for Summary Decision, Respondent refers to Complainant's deposition testimony and affidavits to prove that Complainant had neither a subjectively nor objectively reasonable belief that the \$7.8 million discrepancy on the SAP Report involved a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

On January 13, 2014, in performance of her monthly intercompany netting responsibilities, Complainant reported a \$7.8 million difference between the BMG Report and SAP Report. Complainant was notified that another employee had noted the discrepancy and was posting an entry in SAP to reconcile the reports. Later that afternoon Complainant was notified that the erroneous entry had been corrected. (RX A pp 282 – 289, 301 – 304). Several emails were exchanged between Complainant and Quintanilla concerning the process of the correction. (RX A pp 311 – 325).

Despite having a lot of questions about the discrepancy, Complainant is not aware of anything to suggest the discrepancy was intentionally created, nor that any law was violated by Respondent's failure to catch the internal discrepancy earlier. Complainant did not communicate to anyone that Respondent's conduct was in violation of any law or involved any illegal or fraudulent conduct. (RX A pp 313 – 339).

The monthly netting process between the BMG Report and the SAP Report involves intercompany numbers only, which are not reported externally and has no SEC or SOX implications. (RX A pp 285 – 286).

In her Response and Pre-hearing Submissions, Complainant notes the \$7.8 million discrepancy occurred in December 2013 but was not fixed until January 13, 2014. (Response pp 4, 8, 12). However, nowhere does Complainant suggest the discrepancy was intentionally created, nor that any law was violated by Respondent's failure to catch the internal discrepancy earlier. Further, Complainant did not communicate to anyone that Respondent's conduct was in violation of any law or involved any illegal or fraudulent conduct.

Subjective reasonableness requires that the employee actually believe the conduct being complained of constitutes a violation of pertinent law. I find it is undisputed that Complainant did not have a subjectively or objectively reasonable belief that the \$7.8 million discrepancy on the SAP Report involved a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

Further, it is not disputed that the BMG Report and the SAP Report involve intercompany numbers only, which are not reported externally and have no SEC or SOX implications. Nowhere in her Response or Pre-Hearing Submissions does Complainant dispute this fact. Inquiries relating to internal reports are not the basis for protected activity under SOX. *Allen v. Administrative Review Board*, 514 F.3d 468 (5<sup>th</sup> Cir. 2008).

#### ***Other accounting entries that are suspicious allegation***

In her deposition Complainant identified only one other incident that she thought was "suspicious." But she admits that her inquiries about the \$20,000 intercompany netting reports discrepancy were just general inquiries and she did not express, nor did she have any belief that the entry or any conduct related to the entry violated the law or constituted a misrepresentation to the SEC or to shareholders. (RX A p 451). Nothing to the contrary has been presented. Thus, I find it is undisputed that Complainant did not have a subjectively or objectively reasonable belief that the \$20,000 intercompany netting reports discrepancy involved

a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

### **CONCLUSION AND ORDER**

Based on the foregoing, the undisputed facts show that Complainant never subjectively nor objectively reasonably believed that any of the alleged conduct of Respondent involved a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

Accordingly, IT IS HEREBY ORDERED that Qingming Swinney's Complaint under the Sarbanes-Oxley Act is hereby **DISMISSED**.

**So ORDERED.**

**LARRY W. PRICE**  
**ADMINISTRATIVE LAW JUDGE**