



Issue Date: 25 February 2016

CASE NO.: 2015-SOX-00005

In the Matter of:

DAVID CARSON,
Complainant,

v.

**FARMERS UNION OIL COMPANY D/B/A
PINNACLE AND CHS, INC.,**
Respondents.

Appearances: David Carson
Self-represented

Lee Lastovich, Esq.
Alyssa M. Toft, Esq.
for CHS, Inc.

Daniel Mack Traynor, Esq.
for Farmers Union Oil Co.
d/b/a Pinnacle

Before: Steven B. Berlin
Administrative Law Judge

**DECISION AND ORDER GRANTING PINNACLE'S
RENEWED MOTION FOR SUMMARY DECISION
AND DISMISSING CASE**

This matter arises under the whistleblower protection provision of the Sarbanes-Oxley Act and its implementing regulations.¹ Respondent Pinnacle is a wholesale distributor of various products, including petroleum-based products that it buys from supplier CHS, Inc. Complainant worked for Pinnacle. He alleges that, while working for Pinnacle, he engaged in protected activity that contributed to Pinnacle's decision to take an adverse employment action. In

¹ The statute is codified at 18 U.S.C. § 1514A (as amended in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010). The regulations are at 29 C.F.R. Part 1980.

particular, he alleges that he reported to both Pinnacle and CHS that a CHS representative was engaged in price fixing, and that Pinnacle retaliated for Complainant's report by terminating his employment.

After each Respondent moved for summary decision, I granted CHS' motion on September 10, 2015, but denied Pinnacle's motion. Four days later, Pinnacle renewed its motion, asserting additional grounds for summary decision. One of these was that (for various reasons) Complainant's report of price fixing was legally insufficient to come within the Act's protection.

Complainant is self-represented. On September 16, 2015, I issued an order to show cause. I summarized Pinnacle's new arguments; explained the process on summary decision; stated that if Pinnacle prevailed on the motion, I would decide the case against Complainant and in favor of Pinnacle without a hearing; explained that, as Pinnacle was the only remaining respondent, if I dismissed Complainant's claim against Pinnacle, that would decide the case in its entirety against Complainant; described the form of evidence that Complainant needed to present; and required Complainant to file an opposition by October 5, 2015, or request an extension of time.² Complainant filed an opposition, including some evidence, on October 6, 2015.³

After reviewing the parties' submissions, I concluded that I needed additional briefing on the legal sufficiency of Complainant's alleged protected activity. On January 20, 2016, I issued a "Call for Additional Briefing on Summary Decision." In the "Call," I quoted the language in Sarbanes-Oxley that defines the scope of protected activity. *See* 18 U.S.C. § 1514A(a). I notified the parties that I understood the following about Complainant's protected activity:

It appears to be undisputed that Complainant asserts he engaged in activity that the Sarbanes-Oxley whistleblower provision protects when he reported that a supplier told him: "Just remember, we're selling this for \$12 a gallon, and everybody's agreed to it" (referring to a particular new product). Essentially, it appears that Complainant reported activity that he believed to be unlawful price fixing.

I then notified the parties that if my understanding was correct,

And if there is no other allegedly protected activity, the administrative law judge will consider whether the Sarbanes-Oxley whistleblower provision protects this activity. If it does not, the administrative law judge might grant summary decision to Pinnacle on that basis

² In a similar order to show cause issued on June 25, 2015 (after Respondents' first motion for summary decision), I repeated previous admonitions to Complainant that motions for summary decision were technical and that he had the right to retain counsel or a qualified non-attorney to represent him.

³ Though the opposition was filed one day late, Pinnacle did not object, and I allow the late filing.

I set a schedule for the parties to submit additional evidence and briefs on this issue.⁴ Pinnacle submitted its materials on February 6, 2016. Complainant filed his response on February 12, 2016. Pinnacle submitted a reply on February 16, 2016.

I conclude, as a matter of law, that based on the undisputed facts concerning Complainant's activity, Sarbanes-Oxley's whistleblower provision does not protect this activity against retaliation. Thus, even if Complainant's report of price fixing contributed to Pinnacle's termination of the employment, Complainant's claim fails.

Undisputed Facts⁵

In January 2014, a CHS representative said to Complainant about the price of a particular new Cenex-brand product: "Just remember, we're selling this for \$12 a gallon, and everybody's agreed to it." The CHS representative confirmed this by email. C.Dep. at 110:13-25. Complainant understood from this that "all of the Cenex dealers that were selling the [product] in the area" were charging that price. *Id.* at 122:13-14.

Complainant promptly reported this to his Pinnacle supervisor and to a Pinnacle manager. C.Dep. at 127-29. He does not remember whether he used the words "price-fixing" or "anti-trust," but he said the agreement was illegal. *Id.* at 129. He emailed CHS' customer service department to report the same information on February 7, 2014.

Pinnacle terminated Complainant's employment on April 25, 2014.

At a deposition on August 27, 2015, CHS questioned Complainant about the scope of his alleged protected activity:

Q. You told me that the statement here in Exhibit 11 [that] everyone is selling at \$12 per gallon across the board for all grades; you told me that you thought that was price-fixing.⁶

A. Yes.

* * *

⁴ "After giving notice and a reasonable time to respond, the judge may: (1) Grant summary decision for a nonmovant; (2) Grant the motion on grounds not raised by a party; or (3) Consider summary decision on the judge's own after identifying for the parties material facts that may not be genuinely in dispute." 29 C.F.R. § 18.72(f).

⁵ On summary decision, I consider only undisputed facts and view the evidence in the light most favorable to Complainant as the non-moving party. I draw all reasonable inferences in Complainant's favor. This recitation of facts therefore is for purposes of this motion only.

⁶ Exhibit 11 contains Complainant's notes about his discussions with CHS' representative "Ben" in January 2014 and Complainant's report to Pinnacle management about this. It states in pertinent part: "1/22/14 Met Ben in Minot. During our meeting he told me everyone had agreed to charge 12.00 per gallon . . . 1/23 Had meeting with Scott and Justin [the Pinnacle manager and supervisor] about . . . pricing."

Q. That's your belief. And I understand you're not a lawyer, okay, we get all that.⁷ But is there a particular law that you believe was violated?

A. An antitrust law.

Q. In what fashion?

A. In the fashion of that competitors have a fixed . . . price on a certain product

Q. Any other laws beyond that that you think are categories of laws that you think were violated?

A. No.

Q. Do you believe that any time either Pinnacle or CHS defrauded their shareholders?

A. Pinnacle says they don't have shareholders.

Q. So what's the answer to my question?

A. Well, it's hard to answer. I would say no.

Q. Are you familiar with the laws and regulations that the Securities & Exchange Commission applies?

A. Familiar.

Q. You are?

A. Somewhat.

Q. Is there any particular category of securities and exchange laws that you believed at the time that you talked about this issue had been violated?

A. I don't know.

C.Dep. at 167:19-23.

⁷ After graduating high school, Complainant took some courses at a community college but did not earn a degree. C.Dep. at 43-44. Much of his work has been of the kind he was doing for Pinnacle as a salesman in the energy industry. *Id.* at 44-57. For a time, he did independent consulting work with smaller companies in the energy business. *Id.* at 48. He holds no licenses or certifications. *Id.* at 44.

Discussion

Summary decision in general. On summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.72 (2015); FED. R. CIV. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under FED. R. CIV. P. 50 and 56).

Sarbanes-Oxley. The whistleblower protection provision in the Sarbanes-Oxley Act protects any employee who complains of conduct that the employee “reasonably believes constitutes a violation of [18 U.S.C.] section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], 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).

“To sustain a complaint of having engaged in SOX-protected activity . . . the complainant need only show that he or she ‘reasonably believes’ that the conduct complained of constitutes a violation of the laws listed at . . . 18 U.S.C.A. § 1514A(a)(1).” *Sylvester v. Parxel Int’l, LLC*, ARB No. 07-123 (May 25, 2011), slip op. at 11. “The ARB has interpreted the concept of ‘reasonable belief’ to require a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and also that the belief is objectively reasonable.” *Sylvester* at 11 (citation omitted).⁸

“To satisfy the subjective component of the “reasonable belief” test, the employee must actually have believed that the conduct he complained of constituted a violation of relevant law.” *Id.* “The employee is not required to provide the employer with the citation to the precise code provision in question [or] to show that there was an actual violation of the provision involved.” *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 997 (9th Cir. 2009).

Complainant lacked a reasonable belief that there had been a violation of a law listed in section 1514A(a). I conclude from the allegations, the deposition testimony, and the parties’ responses to the “Call” for responses to the present issue that Complainant had a reasonable subjective belief at the time he complained to Pinnacle management that CHS (or its representative Ben) was engaging in conduct that was unlawful. But he believed, in particular, only that the conduct violated one or another federal or state antitrust law’s prohibition of price fixing. He based this belief on the supplier CHS’ representative’s statement that “everyone” was charging \$12 per gallon. And I conclude (1) that neither the antitrust laws in general nor the prohibition of price fixing comes within the ambit of Sarbanes-Oxley’s whistleblower protection; (2)(a) that Complainant did not subjectively believe that CHS’ conduct violated any of the legal areas to which the SOX whistleblower provision does apply; and 2(b) even if he did believe there had been of violation of one of the covered laws, his belief was not objectively reasonable.

⁸ Objective reasonableness is measured “for an individual in [the employee’s] circumstances having his training and experience.” *Id.*

As the First Circuit explained:

The plain language of SOX does not provide protection for any type of information provided by an employee but restricts the employee's protection to information only about certain types of conduct. Those types of conduct fall into three broad categories: (1) a violation of [certain] specified federal criminal fraud statutes . . .; (2) a violation of any rule or regulation of the SEC; and/or (3) a violation of any provision of federal law relating to fraud against shareholders. The first and third categories share a common denominator: that the conduct involves "fraud," and many of the second category claims (violations of SEC rules or regulations) will also involve fraud.

* * *

"Fraud" itself has defined legal meanings and is not, in the context of SOX, a colloquial term. "The hallmarks of fraud are misrepresentation or deceit." That is the dictionary definition, as well. *See Black's Law Dictionary* 685 (8th ed. 2004) (defining fraud as the "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment").

Day v. Staples, Inc., 555 F.3d 42, 54-55 (1st Cir. 2009) (citations omitted).⁹

Complainant offers no evidence that he believed CHS or its representative engaged in misrepresentation or deceit. He never even alleged such a belief. When asked at his deposition about how CHS' conduct was unlawful, he cited specifically antitrust laws and price fixing. He was asked and offered nothing about corporate (or any) fraud, a violation of a securities regulation, or any form of misrepresentation or deceit. He relied for his views on a CHS representative's statement that everyone was charging \$12 per gallon, a statement that goes to price fixing, not fraud. His arguments in his briefs consistently focus on antitrust violations and refer to the Sherman Act, the Clayton Act, and the Federal Trade Commission's involvement in enforcement of these antitrust acts. He offers a definition of price fixing. Nothing about this relates to fraud. If anything, Complainant's pointing to the enforcement role of the Federal Trade Commission demonstrates that his report to his employer, if anything, was related to the rules and regulations of the FTC, not the SEC.¹⁰

Nothing about price fixing implicates the fraud statutes listed in the Sarbanes-Oxley whistleblower provision or the rules or regulations of the SEC. As Judge Easterbrook observed, antitrust violations have "no apparent link to fraud." *Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d

⁹ The *Day* court discusses particular requirements for the covered areas of fraud, such as the requirement of *scier* in securities fraud claims under SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. As a complainant need not allege facts that definitively and specifically implicate precise provisions in the SEC regulations, *see Sylvester* at 17-19, I disregard for the present purposes any requirement that Complainant show a belief more specific than a general concept of fraud or securities regulation. (The Eighth Circuit – controlling here – never adopted the definitive and specific standard for Sarbanes-Oxley whistleblower cases.)

¹⁰ The Department of Justice (Antitrust Division) also is involved in antitrust enforcement.

753, 758-59 (7th Cir. 2007). The Supreme Court has addressed “the illegality of agreements under which manufacturers or suppliers set the minimum resale prices to be charged by their distributors.” *See State Oil Co. v. Khan*, 522 U.S. 3, 11 (1997); *see* 15 U.S.C. §§ 1-7 (Sherman Act). The Court discusses the anti-competitive effects of price fixing but says nothing of fraud or securities regulation.

Current activity in Congress reflects the need for new legislation if antitrust whistleblowers are to be protected. On June 22, 2015, the Senate passed for the second time the Criminal Antitrust Anti-Retaliation Act, S. 1599. The bill would create whistleblower protection related to antitrust violations. The bill’s bipartisan sponsors modeled it after the whistleblower protections in the Sarbanes-Oxley Act. 176 CONG. REC. S. 5474 (statement of Sen. Leahy). One factor spurring them to action was a 2011 Government Accountability Office (GAO) report in which the GAO concluded that criminal antitrust whistleblowers lack a civil remedy. *Id.* at S. 5474-75; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-619, CRIMINAL CARTEL ENFORCEMENT: STAKEHOLDER VIEWS ON IMPACT OF 2004 ANTITRUST REFORM ARE MIXED, BUT SUPPORT WHISTLEBLOWER PROTECTION 47 (2011). The bill remains pending in the House of Representatives.

This pending legislation and the report of the Government Accountability Office strongly indicate that antitrust whistleblowers are unprotected under current legislation, including Sarbanes-Oxley. That is also my conclusion.

Finally, there remains a possibility that Complainant could have been reporting a violation of one of the covered laws even if he referred – not to the laws listed in section 1514A(a) – but to antitrust, which is not included in the list. Given Complainant’s background, education, and experience, his categorization of the alleged wrongdoing as an antitrust violation or price fixing, standing alone, does not necessarily negate his claim. If the underlying conduct of which he was complaining related to one of the laws listed in section 1514A(a), he would have met the requirement of a subjective belief of a relevant violation even if he’d given it the wrong name. But that is not what happened. Complainant actually was pointing to what looked to him as price fixing, which is a subject of antitrust legislation but not the laws listed in section 1514A(a). Accordingly, even if Complainant somehow did believe subjectively that his complaint related to one of the laws listed in section 1514A(a), his belief would not have been objectively reasonable: there simply is no connection between those laws and price fixing.

Because I find as a matter of law that Complainant did not (subjectively or objectively) reasonably believe that Pinnacle violated one of the laws listed in section 1514A(a), Complainant’s claim fails.

Order

For the foregoing reasons, Pinnacle’s renewed motion for summary decision is GRANTED. Complainant’s claim is DENIED, and his complaint is DISMISSED in its entirety. The hearing

set for March 7, 2016, is VACATED.

This Decision and Order will be served on Complainant and on Respondents' counsel by facsimile or email. It will also be served on them as well as all others on the service list by U.S. mail.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 should identify the legal 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).

When 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, Division of Fair Labor Standards, U.S. Department of Labor. See 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).