



Issue Date: 09 April 2019

CASE NO.: 2017-SOX-34

DANNY FEDERHOFER,
Complainant,

v.

FIRST DATA MERCHANT SERVICES,
Respondent

**ORDER ON RESPONDENT'S MOTIONS
TO DISMISS AND STAY DISCOVERY**

PROCEDURAL BACKGROUND

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX or the Act)¹ and the implementing regulations² brought by Complainant against Respondent. The Occupational Safety and Health Administration (OSHA) dismissed the complaint, but Complainant filed objections and pursuant to his request, the case was referred for hearing before an administrative law judge (ALJ). Respondent filed a Motion to Dismiss for failure to state a claim, but I denied the motion, with leave to file a Motion for Summary Decision after discovery was conducted. Respondent did file such a motion and Complainant filed his opposition.

ISSUES AND POSITIONS OF THE PARTIES

Complainant alleges that his supervisors instructed him and other sales staff to enter false and misleading information in the sales database that Respondent relied on in part to make reports to the investing public. He further alleges that he engaged in protected activity by objecting to his supervisors and ultimately filed an internal complaint to Respondent's ethics hotline. Complainant finally alleges that as a result of his protected activity, he was placed on a pretextual performance improvement plan and ultimately fired.

¹ 18 U.S.C. § 1514A.

² 29 C.F.R. § 1980.

Respondent moves for summary dismissal of the complaint. It argues there is no genuine issue of material fact that would allow a finding that Complainant reasonably believed his protected communication related to fraud by Respondent against shareholders. It further maintains that there is a similar absence of any genuine issue of material fact that would allow him to prevail on his argument that protected activity contributed to his termination or that Respondent would not have terminated him even in the absence of any protected activity.

APPLICABLE LAW

Substantive Law

The Act creates a private cause of action for employees of publicly traded companies who are retaliated against for engaging in certain protected activity. It protects employees who provide information regarding any conduct which the employee reasonably believes constitutes a violation of mail fraud,³ wire fraud,⁴ bank fraud,⁵ securities fraud,⁶ any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders.⁷

The legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)⁸ govern SOX whistleblower actions.⁹ To prevail, an employee must prove by a preponderance of the evidence¹⁰ that (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.¹¹ In order for a complainant to demonstrate that he engaged in protected activity, he must show that he had a reasonable belief that a violation occurred. Reasonableness is determined on the basis of knowledge

³ 18 U.S.C. § 1341.

⁴ 18 U.S.C. § 1343.

⁵ 18 U.S.C. § 1344.

⁶ 18 U.S.C. § 1348.

⁷ 18 U.S.C. § 1514A.

⁸ 49 U.S.C. § 42121(b).

⁹ 18 U.S.C. § 1514A(b)(2)(C).

¹⁰ The employee is entitled to the relief provided by § 1514A(c) "only if the [employee] demonstrates that [his protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(iii). The term "demonstrates" means to prove by a preponderance of the evidence. See *Dysert v. Sec'y of Labor*, 105 F.3d 607, 610 (11th Cir. 1997) (addressing analogous statutory burden-shifting framework under the Energy Reorganization Act of 1974 (ERA)).

¹¹ 49 U.S.C. § 42121(b)(2)(B)(iii); *Stojicevic v. Arizona-American Water*, ARB Case No. 05-081, 2007 WL 3286331, at *7 (Oct. 30, 2007); *Welch v. Cardinal Bankshares Corp.*, ARB Case No. 05-064, 2007 WL 1578493, at *5 (May 31, 2007); see *Reyna v. ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1380 (M.D. Ga. 2007); see also 29 C.F.R. § 1980.104(b)(1)(i)-(iv).

available to a reasonable person in the circumstances with the employee's training and experience.¹²

The definition of protected activity under the Act has developed from and beyond the statutory language through case law. Early Administrative Review Board (the Board) interpretations of protected activity held that the whistleblower's communications must "definitively and specifically" relate to one of the listed categories of fraud or securities violations¹³ and the Fifth Circuit followed that logic.¹⁴

However, the Board subsequently found that the "definitively and specifically" standard had evolved into an inappropriate test and been applied too strictly. The Board replaced it with one based on philosophy rather than text. It announced that protected activity under the Act would require only that the whistleblower provided information that he or she reasonably believed related to one of the listed violations and abandoned the requirement for "definitively and specifically" describing that violation.¹⁵

Moreover, the Board determined that applying the materiality element commonly included in the definition of fraud would thwart the purposes of the whistleblower protection provision. It therefore ruled that materiality would not be a requirement to establish protected activity. It also clarified that the statutory language requiring a relationship to shareholder fraud does not apply to the fraud violations.¹⁶

Circuit Courts have accepted the *Sylvester* holding that although a complainant must establish that a reasonable person in his position, with the same training and experience, would have believed Respondent was committing a securities violation, he need not "definitively and specifically" describe the violation. However, they have rejected the suggestion that materiality is not a factor in determining whether or not a complainant could have reasonably believed he was describing a violation of security laws.¹⁷

Procedural Standard

Summary decision is a tool used to dispose of actions in which there is no genuine issue of material fact between the parties and which may be decided as a matter of law.¹⁸

¹² *Grant v. Dominion E. Ohio Gas*, 2004-SOX-63 (ALJ Mar 10, 2005).

¹³ *Platone v. FLYi, Inc.*, 2003-SOX-27 (ARB Sept. 29, 2006).

¹⁴ *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008).

¹⁵ *Sylvester v. Paraxel Int'l LLC*, 2007-SOX-39 (ARB May 25, 2011).

¹⁶ *Id.*

¹⁷ *Beacom v. Oracle Am., Inc.*, 825 F.3d 376, 380–81 (8th Cir. 2016)(affirming summary judgment for the respondent where the complainant's protected communication related to \$10 million in revenue projections in a company generating billions of dollars and finding no reasonable employee could believe that misstated revenue projection could constitute fraud on investors).

¹⁸ *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

An ALJ may grant a motion for summary decision if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact.¹⁹ In a motion for summary decision, the moving party has the burden of establishing the absence of evidence to support the nonmoving party's case.²⁰ The evidence is then viewed in the light most favorable to the nonmoving party.²¹ To meet its burden, though, “the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts.”²² The nonmoving party may not rest solely upon his allegations or speculations, but must present specific facts that could support a finding in his favor at trial.²³

The nonmoving party must “make a showing on every element that is essential to his or her case and on which the party will bear the burden of persuasion at trial.”²⁴ The ALJ will take all evidence presented by the nonmoving party as true, but “a properly crafted defense motion for summary judgment requires a complainant to exhibit admissible proof of facts crucial to his or her claim for relief...[which] must be grounded in affidavits, declarations and answers to discovery[.]”²⁵ If the moving party presented admissible evidence in support of the motion for summary decision, the nonmoving party must also provide admissible evidence to raise a genuine issue of fact.²⁶

DISCUSSION

Respondent urges three grounds for dismissal, arguing that there is no genuine issue of material fact in support of protected activity, contribution of protected activity to adverse action, or no adverse action even in the absence of protected activity.

Protected Activity

Respondent does not contest at this stage whether Complainant’s supervisors gave him specific directions in terms of the entry of information into the sales force database. However, it does submit three bases for its argument that his subsequent complaints about those instructions did not constitute protected activity. Respondent argues there is no evidence that (1) Complainant’s supervisors instructed him to enter “fraudulent” information into the database; (2) Any “fraudulent” information from the database was

¹⁹ 29 C.F.R. § 18.72.

²⁰ *Wise v. E.I. DuPont de Nemours and Co.*, 58 F.3d 193, 195 (5th Cir. 1995), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

²¹ *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

²² *Taita Chemical Co., Ltd. v. Westlake Styrene Corp.* 246 F.3d 377, 385 (5th Cir. 2001), quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

²³ *Hasan v. Enercon Services, Inc.*, ARB No. 10-061, 2011 WL 3307579 at *3 (July 28, 2011); 29 C.F.R. § 1840(c).

²⁴ *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, 2007 WL 1578494 at 7 (May 24, 2007).

²⁵ *Gallagher v. Granada Entertainment USA*, ALJ No. 2004-SOX-74 (April 1, 2005).

²⁶ *Hasan* at 3.

communicated to the investing public; or (3) Any of the alleged “fraudulent” information would have been material to shareholders. Complainant’s response emphasizes that he need only have a reasonable belief that the information he is communicating relates to covered misconduct and argues that the record creates a genuine issue of material fact as to his reasonable beliefs.

Consequently, the central issues raised by the current motion are not particularly fact intensive, but rather suggest questions of law, many of which were previously addressed in a slightly different context in Respondent’s previous Motion to Dismiss for failure to state a claim upon which relief can be granted.

In that regard I note that both parties cited *Beacom*²⁷ as providing controlling precedent. Thus, the essential inquiry is whether the record creates a genuine issue of material fact that would allow a finding that Complainant reasonably believed (1) he had been instructed to enter fraudulent information into the Salesforce database; (2) that the database played a role in information that was communicated to the investing public; and (3) the fraudulent information would have been material to shareholders.²⁸

Fraudulent Sales Projection Data

Respondent argued that its system for potential sales revenue applied weighted percentages based on the likelihood that an anticipated deal would ultimately be completed. Given the general probabilities of finalizing potential sales, Respondent explained that its sales staff was expected to project sales in an amount that was five times their actual sales quota. Thus, its database did not fraudulently report potential sales, but recognized the probabilities of closing pending deals. Accordingly, Respondent submits that Complainant could not have reasonably believed that he was being instructed to enter fraudulent data.

In response, Complainant offered evidence that he had extensive experience in the sale of financial products and services below. He also cited his deposition, in which he testified that he told his supervisor that the data he was being instructed to enter was considered by him and other sales staff to be bogus. He gave as examples being told to enter \$35 million that dropped out of New Markets/Gaming and 15 million in pipeline prospects that he believed were inflated and unrealistic.

²⁷ See *supra*, n.17.

²⁸ Complainant briefly suggested that he believed that just the fact that his supervisors instructed him to enter the data could “potentially be illegal” and that therefore he did not need to prove elements (2) or (3). However, he offered nothing beyond a vague assertion of illegality and cited no proposition to support his suggestion that such instructions would constitute securities fraud or violate any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders.

Complainant need not establish that he was correct in his conclusion that he was being asked to enter false information in the sales database. A determination of whether or not his conclusion was reasonable involves an assessment of his experience and training and thought process in reaching that conclusion. That, at least in part, requires an assessment of his credibility and makes the issue not particularly suitable for summary decision. Thus, Respondent's Motion to Dismiss based on the absence of a genuine issue of material fact as to whether Complainant reasonably believed he was directed to enter false information into the sales projection database is denied.

Impact on Investor Information

Respondent submits that there is no evidence to indicate that any Salesforce information was relied upon in communications to the investing public. It notes that the database is a tool for internal use and that Complainant admitted in his deposition testimony that no one ever told him that information was used to forecast sales to the investing public. It argues that the only reference to gaming vertical during the 10 Feb 16 earnings call cited by Complainant was a statement that "The new vertical expansion that we talked about, an example would be gaming, Hard Rock in Florida; we are now in that casino, a space which we never operated before." Respondent notes that the statement is accurate and provides no evidence to substantiate Complainant's claim that Salesforce data played a role in that call. Finally, Respondent submits that forecast revenue projections are inherently predictive and optimism would not constitute actionable misrepresentation.

Complainant responded that the false information remained in Salesforce until senior management conducted an earnings conference call with the investing public on 10 Feb 16. Complainant also offered a 10 Feb 16 email from Jonathan O'Connor indicating that Global Business Solutions was tracking Salesforce data. He further argued that during the earnings conference call, Respondent's senior management made "glowing statements" about the gaming vertical. Complainant submitted that he reasonably believed those statements to be based on Salesforce data. He also argued that his fifteen years with IGT led him to believe that senior management used Salesforce data in determining probable future revenue.

Respondent replies that Complainant's own evidence submitted in opposition to the motion shows that it considers sales projections to be nonpublic financial information. It further noted the absence of any evidence that Salesforce data was disclosed or communicated to the public. Finally, it argued that the actual IGT records submitted by Complainant failed to substantiate his argument that in his experience, IGT management relied on Salesforce data.

Complainant's fundamental position appears to be that although there is no evidence that Respondent communicated Salesforce data itself to the public, his experience with IGT caused him to reasonably believe that Respondent's senior management was using that information as part of its communications to investors.

Again, a determination of whether or not his conclusion was reasonable involves an assessment of his experience and training and thought process in reaching that conclusion. That, at least in part, requires an assessment of his credibility and makes the issue not particularly suitable for summary decision. Thus, Respondent's Motion to Dismiss based on Claimant's failure to create a genuine issue of material fact as to whether he reasonably believed Salesforce data was communicated directly or indirectly to the public is denied.

Materiality

Respondent argues that Complainant could not have held a reasonable belief that the Salesforce data could constitute material information to shareholders. It noted that Respondent generates \$2.4 billion in revenue each quarter and \$9.5 billion in annual revenue. Noting that Complainant had a sales quota of \$6.5 million for the first quarter of 2016, it argues that the relevant Salesforce data could have represented no more than 0.3% of revenue. Respondent concludes that as a matter of law, no employee could reasonably believe that to be a material amount.²⁹

In response, Complainant distinguished his case from that in *Beacom* on the grounds that *Beacom* involved changing revenue projections from "bottom-up" to "top-down," whereas his involves specific allegations of the fraudulent entry of data.³⁰ Complainant also noted that he testified about his belief that fraud was occurring throughout the Global Business Systems unit, which comprised more than half of Respondent's business.³¹ Consequently, he reasonably believed that fraudulent data constituted a far more significant percentage of Respondent's revenue.

As was the case with the fraudulent data entry and public disclosure elements, Complainant need only establish that he had a reasonable belief that the data entered into a Salesforce was material. It is clear that the sales projection information he alleges was fraudulently entered into the Salesforce database was not material in terms of Respondent's overall financial position. Rather than suggest that he somehow reasonably

²⁹ *Beacom*, 825 F.3d at 381 (holding a reasonable employee would "understand that \$10 million is a minor discrepancy to a company that annually generates billions of dollars.").

³⁰ However, that argument is not particularly relevant to the materiality analysis. It simply echoes his earlier unsuccessful argument that the instructions given him could have potentially been illegal in and of themselves and thus make it unnecessary to show further communication or materiality. *See* n.28.

³¹ Respondent did not cite to any specific page of his deposition transcript in support of this argument.

believed less than one half of 1% of revenue would be relevant, he alleges that he reasonably believed fraudulent data was being entered throughout the Global Business Systems Unit, which impacted more than half of Respondent's business operations. Consequently, he argues that he reasonably believed the information fraudulently entered was material.

His argument is essentially that since fraudulent data was entered in one part of the business unit, it was reasonable for him to believe it was being entered in all parts of the business unit. However, such a conclusion is mere supposition, unsupported by anything more than his subjectively based suspicions. To allow a complainant to extrapolate what is clearly an immaterial amount by simply arguing that "if someone is doing it others must be doing it" would be to render the requirement for materiality meaningless, even to the extent that it only requires reasonable belief.

Consequently, I find the record to be insufficient to establish a genuine issue of material fact that would allow Complainant to show a reasonable belief that Respondent relied on false sales projection data of any more than 0.3% of its revenues. Given the clear immateriality of that data, I find Complainant failed to show a genuine issue of material fact that he reasonably believed the false data was material. Consequently, Complainant failed to show a genuine issue of material fact that would allow him to prevail on the element of protected activity. Accordingly, the complaint is dismissed.³²

In view of the foregoing, the hearing scheduled on **30 April 19** in **St. Louis, MO** is hereby **CANCELLED**.

ORDERED this 9th day of April, 2019 at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

³² My finding renders the other issues raised by the parties moot.

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this 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

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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