

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 26 August 2020

CASE NO.: 2020-SOX-00006

In the Matter of:

CHRISTOPHER WILLIAMS, JR.,
Complainant,

v.

FEDEX,
Respondent.

**ORDER DISMISSING COMPLAINT BASED ON
CROSS SUMMARY DECISION MOTIONS**

This matter arises from a complaint of discrimination filed by Christopher Williams, Jr. (“Complainant” or “Williams”) against FedEx (“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 “the Act”) and the procedural regulations found at 29 C.F.R. Part 1980.

I. BACKGROUND

This claim was filed by Williams on October 4, 2019, with the Occupational Health and Safety Administration (OSHA). The Complaint alleges that Williams was retaliated against by his employer, FedEx, for SOX-protected activity. Specifically, he alleges that he reported activity that he had suspected was fraudulent, and that he met retaliation in the form of a suspension on April 4, 2019, and then termination on April 12, 2019.

OSHA dismissed the complaint on November 6, 2019, and Williams sought review by the Office of Administrative Law Judges. This tribunal issued a Notice of Hearing and Pre-hearing Order on January 9, 2020, with a hearing date of June 3, 2020. Following a Motion to Continue, the hearing was rescheduled to the week of September 21, 2020. Because of the COVID-19 situation, the hearing has been set as a video hearing.

The Parties have filed cross-motions for summary decision. Williams filed a Motion for Partial Summary Decision on July 10, 2020, which he amended on July 17, 2020. (Comp. Mot.) FedEx filed its own Motion for Summary Decision on July 20, 2020, (Resp. Mot.) along with its

Response in Opposition to Williams's motion. (Resp. Opp.) Because of the similarities in the issues raised, FedEx's motion and opposition overlap, and share attachments. On July 21st, Williams requested that the Court provide him, as a *pro se* litigant, with a notice of the requirements to oppose FedEx's Motion for Summary Decision. See *Wallum v. Bell Helicopter Textron*, ARB No. 09-081, ALJ No. 2009-AIR-6 (ARB Sept. 2, 2011); *Hooker v. Washington Savannah River*, ARB No. 03-036, 2001-ERA-016 (ARB Aug. 26, 2004); *Motarjemi v. Metro. Council Metro Transit Div.*, ARB No. 08-135, 2008-NTS-002 (ARB Sept. 17, 2010). The Court provided such a notice by email on July 22, 2020, informing Williams that he is entitled to file his own Motion for Summary Decision; that he must respond to FedEx's motion otherwise it will be taken as true and unopposed; that he can answer any affidavits FedEx filed with other affidavits in response; and that his response was due on August 10th. Williams filed a response to FedEx's motion on August 9th. (Comp. Opp.)

After reviewing the positions of the Parties and the evidence, the Court will grant FedEx's motion for summary decision and dismiss the complaint. As explained below, the evidence, even in the light most favorable to Williams, fails to show that he had a subjective belief that the actions reported were fraudulent. Additionally, there is clear and convincing evidence that Williams's termination would have occurred regardless of the alleged protected activity. As a result, even in the light most favorable to Complainant, FedEx is entitled to a summary decision as a matter of law.

II. DISCUSSION

A. Standard of Review

The Court reviews a motion for summary decision under 29 C.F.R. § 18.72(a). Under that regulation, the Court shall grant summary decision if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to the decision as a matter of law. A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the Parties. *Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

In determining whether there is a genuine issue for trial, the court views the evidence and factual inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). If the non-moving party produces enough evidence to create a genuine issue of material fact, it defeats the motion for summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). However, if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, there is no genuine issue of material fact and the moving party is entitled to summary decision. *Id.* at 322-23. The party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision are sufficient for this requirement. *Id.* at 324.

Here, because some of the issues between the cross-motions overlap, the Court will discuss each issue in turn, and indicate when the issue has been raised by both Parties.

B. SOX Jurisdiction

Williams lists one of his first issues as whether the Parties are covered by SOX. FedEx is a publicly traded company, covered by SOX jurisdiction. Resp. Opp. at 2. Williams was employed with FedEx from March 12, 2014, until his termination on April 12, 2019. Resp. Mot. attach. 1 at 37. Prior to the termination of his employment, Williams was suspended from work with pay on April 4, 2019. Resp. Mot. at 6. There is no opposition to the notion that FedEx is a SOX-covered organization, and the Court will find as such. That matter is settled.

C. Timeliness of the Complaint

Williams next identifies the issue of the timeliness of the Complaint. Comp. Mot. at 1. Williams refers to the letter that OSHA provided in response to his original complaint. Comp. Mot. attach 1.¹ In that letter, with regard to timeliness, OSHA found that Williams's suspension was on April 4, 2019, and his termination of employment was on April 12, 2019. The deadline for filing a complaint is 180 days. 18 USC § 1514A(b)(2)(D); 29 CFR 1980.103(d). OSHA found that the Complaint in this case, filed on October 4, 2019, was untimely with regard to the suspension, but timely with regard to the termination of employment. FedEx counters that Williams's complaint in relation to the April 4, 2019, suspension is, in fact, time-barred. Resp. Opp. at 2-3; Resp. Mot at 10-11. The Court will review the matter de novo.

The regulations state that the time for filing begins to run on the date on which the facts that support the complaint were apparent or should have been reasonably apparent. 29 CFR § 1980.103(d). Williams does not disagree with the dates on which the relevant events (suspension, termination of employment and filing the Complaint) occurred, or that he learned of the adverse employment actions on those dates. Comp. Mot. attach 1 & attach 2 at 7. Calculating the time between them, the Court finds that the Complaint was filed 183 days after Williams's suspension, and 175 days after the termination of his employment. So the filing was facially untimely in regard to the suspension.

The regulation allows that the time for filing a complaint may be equitably tolled for reasons warranted by applicable case law, such as mistakenly filing a legitimate complaint with the incorrect agency, so the Court will look at circumstances where tolling might be appropriate. 29 CFR § 1980.103(d). Williams argues that a hostile work environment should have been actionable, as considered in *Grove v. EMC*, 2006-SOX-00099 (ALJ July 2, 2006). This argument does not hold up, because the only actions that would allow for a facially timely complaint would be those within 180 days prior to the filing complaint—that is, they must have taken place

¹ Williams has labeled the attachments to his motion as “CX-1”, “CX-2”, etc. To prevent any confusion with potential future hearing exhibits, which normally use those labels, the Court will cite to the motion attachments as “attach. 1”, “attach. 2”, etc.

on April 7th or after. As Williams had been suspended from work on April 4th, the Court does not see how it is possible that he could have encountered a hostile work environment in that small window, while he was suspended. Alleging a hostile work environment does not toll the statute of limitations. The only adverse action that took place within the allowable time frame is the termination of Williams's employment.

Williams also argues for tolling of the statute of limitations under *Smale v. Torchmark*, ARB No 09-012, ALJ No. 2008-SOX-00057 (ARB Nov. 20, 2009). There, the Board looked at the requirements for equitable estoppel in tolling the statute of limitations. *Id.*, slip op. at 8. Under an equitable estoppel analysis the Board has held that the party invoking the doctrine must show (1) the respondents wrongfully concealed their actions; (2) the complainant failed to discover the operative facts that are the basis of the cause of action within the limitations period; and (3) the complainant acted diligently until discovery of the facts. *Id.* Here, there is no evidence that FedEx concealed any actions that affected the timeline. Williams knew on April 4, 2019, that he had been suspended, and on April 12, 2019, that FedEx had terminated his employment. By his own accounts now, Williams knew that he had raised concerns prior to his termination that he believed concerned the Act. So, even assuming all facts in the light most favorable to Williams, he had 180 days from the day of each of the adverse actions to file his claim. Williams made the deadline for his termination, but failed to do so for his suspension.

Other situations in which equitable modification may apply include when the complainant has, in some extraordinary way, been prevented from filing his action and when the complainant has raised the precise statutory claim at issue, but has done so in the wrong forum. Neither of those is in evidence here. Therefore, taking the evidence in the light most favorable to Williams, the retaliation claim related to Williams's suspension is time-barred as a matter of law, while the retaliation claim in relation to the termination of employment is timely. Respondent's Motion for Summary Decision is partially granted on this issue.

D. Complainant's Prima Facie Case

Williams next argues that he has "met the initial burdens of proof necessary to trigger a response." Comp. Mot. at 2. The Court takes this to mean that Williams is attempting to show his prima facie case—he is attempting to substantiate that there is enough support for his allegations on the merits that his case should move forward. In the second attachment to his motion, he provides a signed statement from himself, laying out his version of the series of events in question. Comp. Mot. attach. 2 at 9. This dovetails with the argument in FedEx's motion that Williams has failed to establish at least one element of his case, and as a result cannot meet his burden of proof for a prima facie case. FedEx argues that because of this, there is no genuine issue of material fact and it is entitled to a summary decision as a matter of law. Resp. Mot. at 11. Though Williams will have the initial burden to show a prima facie case under Section 806 of SOX, at the summary decision stage, the Court reviews the evidence to determine whether a rational factfinder could determine that Complainant has made his prima facie case. *Leshinsky v. Telvent GIT*, No. 10 Civ. 4511, Memo and Order, slip op. at 10 (S.D.N.Y. May 1, 2013). Respondent's burden here is greater under Section 806 of SOX than under other federal

employee protection statutes, making summary judgment in SOX cases a more difficult proposition. *Id.*

To start, the Parties both appear to be clear on the burdens of proof for a SOX whistleblower case. Specifically, to prevail on the claim, Williams is responsible for showing, by a preponderance of the evidence, that: (1) he engaged in protected activity; (2) FedEx knew that Williams engaged in the protected activity; (3) Williams suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. Comp. Mot. at 2; Resp. Opp. at 3; 18 USC § 1514A(a); see also *Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443, 447-48 (2d Cir. 2013); *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016). FedEx concedes element number 3—that Williams's employment with FedEx was terminated on April 12, 2019—but challenges Williams's ability to make a prima facie case on the other elements. Under the standard for motions for summary decision, if the non-moving party, in this case, Williams, fails to show that a rational factfinder could determine that he can establish the existence of all elements essential to his case, there will be no genuine issue of material fact and FedEx will be entitled to summary decision. *Celotex*, 477 U.S. at 322-23.

If a complainant establishes that his protected activity was a contributing factor in the adverse action, a respondent can still avoid liability by proving, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Platone v. FLYi*, ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at 16 (ARB Sept. 29, 2006); see 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv).

Here, the Court finds that the evidence, even in the light most favorable to Williams, shows that he did not have a subjective belief, at the time, that the conduct he complains of was a violation of an applicable law. And, in any event, there is also clear and convincing evidence that Williams's employment would have been terminated even if the alleged protected activity had been actionable.

1. Protected Activity

The first contested element of Williams's prima facie case is whether or not there was protected activity. Pursuant to 18 U.S.C. § 1514A(a)(1), a plaintiff's activity is "protected" only if he (1) "provide[s] information," (2) "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities and commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders," to (3) a federal agency, Congress, or "a person with supervisory authority over the employee."

When looking at the information provided, the critical focus is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law. *Sylvester v. Paraxel Int'l*, ARB Case No. 07-123, slip op. at 14 (ARB May 25, 2011). A complainant fulfills his duty under Sarbanes-Oxley when he identifies] "conduct that falls within

the ample bounds of the anti-fraud laws” *Wiest v. Lynch*, 710 F.3d 121, 132 (3rd Cir. 2013). The purpose of a protected report is not to expose illegality, but to “trigger an investigation to determine whether evidence of discrimination exists”. Procedures for the Handling of Discrimination Complaints under the Sarbanes–Oxley Act, 69 Fed.Reg. 163, 52106 (Aug. 24, 2004). To demonstrate that a complainant engaged in a protected activity, he must show that he “had both a subjective belief and an objectively reasonable belief that the conduct he complained of constituted a violation of relevant law.” *Sylvester*, ARB No. 07-123 at 14. In other words, the employee must show both that he actually believed the conduct complained of constituted a violation of pertinent law and that a reasonable person in his position would have believed that the conduct constituted a violation. *Id.*

Here, Williams describes two incidents in which he alleges protected activity. The first he describes this way:

The incident involved putting fraudulent scans on packages that would not allow the customer to ask for the credit for the time of day deadline on the packages. Without the time of day deadline imposed on the package the only requirement on FedEx is to attempt to deliver that package on that day. The customer would then be billed fully via the United States Postal Service and if there was a scan on that package that meant the customer could not ask for a refund for the package that I believe would be mail fraud in violation of 18 U.S.C. § 1341.

Upon my observance of this action I reacted on the belt in a demonstrative fashion. The next day the senior manager Mark Branch approached me and asked me to meet with him in his office about why I had a demonstrative outbreak on the belt. I explained to him what I observed to best of my knowledge at the time which was that we didn’t attempt to get the priority packages out in the morning sort and that because we didn’t get those packages out in the morning sort those packages would then come out to full timers as extra work for them. After he realized what I was saying he abruptly ended the conversation and sent me back to work.

Comp. Mot. attach. 2 at 3. This took place around August 2017. FedEx characterizes this incident differently, noting Williams’s deposition testimony, in which he does not raise any concerns of fraud:

Complainant admits he had an outburst on the sort belt and walked off the line, because the sort did not flow properly because enough packages were not unloaded early enough, and the priority packages were not prioritized during unloading causing some of the freight to be left behind for later delivery, which caused him to have more work. At the time, Complainant thought the holding of packages for later delivery was fraud against employees.

Resp. Opp. at 4-5 (citing Resp. Mot. attach 1 at 161:2-25; 162:1-13; 234:7-19; 235:2-7). Williams describes his second incident as such:

On or about August 20, 2018 I reported via email and telephone to my HR advisor Yvonne Nunez that I felt management was falsifying production records in order to embezzle bonus money from the company

Comp. Mot. attach. 2 at 6-7. He goes on later to say:

[Regarding the] claim that I had brought to my HR representative Yvonne Nunez. I reported to her that I believed Gerald was forging my timecards in order to increase my on-road production numbers so that the operations managers would be able to make their production numbers in order to receive their bonuses. I signed what I believed to be a falsified Platt report that said that my production numbers were higher than they should have been based on my daily review of my production numbers. This would constitute falsification of company documents to embezzle from the company...

Comp. Mot. attach. 2 at 8. FedEx argues, conversely:

Complainant's August 20, 2018 report to his HR Advisor was regarding changes to his production work records for the better, not to allow his manager to receive more bonus or steal bonus money. His email to his HR Advisor does not mention fraud or anything that resembles unlawful conduct by FedEx under any federal statute or regulation. Complainant's emailed requested the HR Advisor to:

...should look into is my signed final Platt[e] report month of July, my initialed daily on road report, [i] believe it's the 126, my signed time cards for the month of July my current gap report and reprint my electronic time cards. [t]he signed Platt report should have my signature and Gerold Gittens electronic signature.

This email evidences that Complainant had a dispute with his manager regarding his daily production records, not the records of FedEx, or any unlawful conduct of FedEx deceptive to shareholders.

Resp. Mot. at 16 (citations omitted). So, in short, Williams characterizes these incidents as reporting fraud, while FedEx characterizes them as disagreements over Williams's own workload and work reporting requirements.

The relevant question here is whether, construing the facts in the light most favorable to Complainant, he had a subjective belief that fraud was taking place, and whether it was

objectively reasonable to believe that fraud was taking place.² The subjective belief is met if Complainant actually believed that the conduct he complained of was a violation of relevant law. *Sylvester*, slip op. at 14. The objective portion is met if a reasonable person, with the same knowledge and under the same circumstances, would have believed it was a violation. Furthermore, the relevant inquiry should not be what was alleged in the complaint, but what Williams actually communicated about alleged fraud prior to the termination of his employment. *Giurovici v. Equinix*, ARB No. 07-027, ALJ No. 2006-SOX-107, slip op. at 6 (ARB Sep. 20, 2008); *Platone v. FLYi*, ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at 17 (ARB Sep. 29, 2006).

The Court finds that Williams did not have a subjective belief, much less a reasonable one, that these activities constituted fraud that would be actionable under a SOX complaint, and that the allegations of fraud came only after his employment was terminated. The evidence that existed at the time of the actual reporting shows that Williams had concerns about the work and accounting procedures in place, and how they affected his work load and work environment, but not that anyone was undertaking illegal activity. In the guaranteed fair treatment procedure (GTFFP) procedure offered to him by FedEx, Williams, in his own submissions, did not mention anything about fraudulent activity at FedEx, nor did he even mention anything about either of the incidents he now claims led to his termination. Resp. Mot., attach. 1, exh. 24 at FDX Williams 0316-18.

The specific concerns about fraud were not raised prior to his discharge. At most, Williams's allegations amount to speculation raised after his discharge that fraud was somehow involved. This is insufficient to constitute protected activity under SOX. *See Giurovici*, slip op at 7; *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 05-SOX-88 through -92, slip op. at 12 (ARB Apr. 29, 2008). Although the bar for surviving a summary decision motion in a SOX whistleblower case is fairly low, Complainant has failed to clear it. Because the Court finds that, even in the light most favorable to Williams, that he did not engage in protected activity, he fails to meet his burden for a prima facie case, and his complaint will be dismissed.

2. Same Unfavorable Personnel Action

While the Court grants FedEx's motion for summary decision motion on the grounds that there was no protected activity, even if there were protected activity, the Court would still grant the motion because FedEx has presented clear and convincing evidence that it would have taken the same unfavorable personnel action against Williams—here, terminating his employment—in the absence of protected activity. If an employee establishes the elements of a SOX whistleblower claim, 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.” *Vannoy v. Celanese*, ALJ No. 2008-SOX-00064, Summ. Dec., slip op at 10-11 (ALJ June 24, 2009); *Platone v. FLYi*, ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at

² Because the Court finds no subjective belief of wrongdoing, it will not delve into the question of the specificity of the type of fraud alleged.

16 (ARB Sept. 29, 2006). That clear and convincing evidence, even in the light most favorable to Complainant, is present here.

In the evidence presented, Williams admits that he lost a package on April 3, 2019, that ultimately led to his termination. In his own motion to the Court, he says:

On 04/03/2019 I was drafted late to do a double shift and was forced into an overload situation and in my haste to complete all my work in the allotted time lost custodial control of a customer's property in the form of a letter addressed to 552 W 38st. Upon my notice of this I tried to contact my manager Miguel DeJesus to inform him but he didn't answer the call so I chose to proceed to do my second shift and informed the night manager Joel Valdez of the loss customer property as I am required to do under (P8-80). The next morning 04/04/2019 I was interviewed by security and pointed them to the exact point where I lost the property. That evening upon my return to the station I was placed on an investigative suspension with pay under policy (P2-5). On 04/11/2019 I was informed to report to work to see Operations Manager Damien Chung on 04/12/2019 upon which he issued my termination letter.

Comp Mot Attach 2 at 7. In his statement in response to the investigation, at the time, Williams wrote:

On Wednesday, 4-3-19 I left the building 475 10th Ave and the wind blew my bucket over and a letter must have fallen out that I was unable to retrieve. I didn't notice that the letter was missing until I went to go do the stop. I tried to call manager and he didn't answer so I went to do night route and informed night manager when I returned.

Resp. Mot. attach 1, exh 20. In a follow-up statement in the investigation, Williams raises issues only about the method in which he was served the second warning letter for termination. *Id.* exh. 24. And in his Guaranteed Fair Treatment Procedure (GFTP) meeting, he changed his story, stating that 2 packages had stuck together and when Williams separated them, the missing one was left on the bumper of the vehicle; he did not raise any concerns about fraud or potentially SOX-protected activity. *Id.* exh. 27. In short, at no time during the discipline and termination procedure did he raise any issues of fraud or the incidents now cited, and he did not—and still does not—contest the factual basis on which the warning/termination letter was issued. *Id.*

It is not contested that Williams had previously received a warning letter for a security violation on June 13, 2018, for failing to secure his truck. Resp. Mot., attach 1, at 113:22-23, 114:11-25, 115:4-25, exh. 17. The warning letter advised Williams that another violation of vehicle and package security requirements would result in disciplinary action up to and including termination. *Id.* at 114:6-25; 115:1-25; 116:2-20, exh. 17. There is no debate between the Parties that losing a package in transit is, in fact, a disciplinary offense at FedEx; Williams only raised concerns about the procedure that the disciplinary process took. The Parties are not in dispute

that Williams lost a package that he had been responsible for. There is no disagreement that it was his second incident of this type, and he had been previously warned. So there is no material disagreement that this action would have been taken even if Williams were found to have engaged in protected activity. The evidence is clear and convincing—even in the light most favorable to Williams—that FedEx would have taken this action regardless. And as a result, FedEx is entitled to summary decision as a matter of law.

ORDER

The following **ORDER** is hereby entered:

Complainant's Motion for Partial Summary Decision is **DENIED**. Respondent's Motion for Summary Decision is **GRANTED**, the hearing scheduled to start on September 21, 2020, is **CANCELLED**, and the Complaint is hereby **DISMISSED**.

SO ORDERED.

JERRY R. DeMAIO
Administrative Law Judge

Boston, Massachusetts