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Issue Date: 29 March 2006

Case Numbers: 2005-SOX-107
2006-SOX-18

In The Matter Of:

NELL WALTON,
Complainant,

v.

NOVA INFORMATION SYSTEMS
AND BANCORP,
Respondents.

ORDER DENYING MOTION TO DISMISS

Respondent, NOVA Information Systems Inc., a division of U.S. Bancorp, moves to dismiss the Second Amended Complaint as well as the original *pro se* complaint and First Amended Complaint of Complainant, Nell Walton, filed under the employee protection provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A ("SOX" or "Act"). Respondent filed its *Motion To Dismiss* on November 3, 2005, Complainant filed an *Opposition To Motion To Dismiss* on December 12, 2005 and Respondent filed a *Reply In Further Support Of Motion To Dismiss* on January 23, 2006.

Respondent argues that the complaint as amended should be dismissed as Complainant has failed to establish that she engaged in activity protected by the Act. Respondent asserts that the Act is designed to protect employees who report illegal conduct related to fraud against shareholders, and "[n]one of [Complainant's] allegations suggest that NOVA perpetrated any fraud, or violated any of the four criminal statutes specifically identified in the Act."

Neither the rules governing proceedings in whistleblower cases under the Act, 29 C.F.R. Part 1894, nor the rules governing proceedings before Administrative Law Judges, 29 C.F.R. Part 18, provide a specific procedure for motions to dismiss a complaint for failure to state a claim upon which relief can be granted. Therefore, Rule 12(b)(6) of the Federal Rules of Civil Procedure will be considered as governing Respondent's motion to dismiss. 29 C.F.R. § 18.1(a). *Harvey v. The Home Depot, Inc*., 2004-SOX-77 (2004). "Federal Rule of Civil Procedure 12(b)(6) provides that an action might be dismissed if it fails to state a claim upon which relief

can be granted. Under this Rule, dismissal of a claim is appropriate if the complaint fails to allege 'a set of facts, which if proven, could support [Complainant's] claim of entitlement to relief.'" *Freels v. Lockheed Martin Energy System,* 1995 CAA 92 and 1994 ERA 6 (ARB Dec. 4, 1996).

Complainant filed a *pro se* complaint on April 11, 2005, asserting that she was retaliated against by Respondent because she was engaged in activity protected by the Act. On July 29, 2005 Complainant filed an amended complaint prepared by counsel titled *First Amended Complaint of Discrimination*. On October 31, 2005 Complainant filed a Second Amended Complaint[1] alleging that Respondent violated the Act by terminating her employment on September 6, 2005 because she filed the April 11, 2005 complaint with the Department of Labor.

NOVA is a division of U.S. Bancorp. It is the third largest credit card processor in the United States.[2] Complainant has been a database administrator for fifteen years. She was employed by Respondent beginning in March 2003 as Production Database Administrator.[3] Complainant claims that as of November 18, 2004, she was responsible for insuring that the security of these data bases was effective and reliable and conformed to current security compliance levels prescribed by industry standards and NOVA/U.S. Bancroft internal controls.[4] Complainant asserts that she reported concerns about alleged "security lapses" in Respondent's data bases which could "*foreseeably* result in large scale criminal fraud against credit cardholders, merchants and their banks, and customers and shareholders of the Respondent and that *would* be financially harmful to the shareholders of U.S. Bancroft.[5] Complainant contends that "[t]he NOVA IT environment is generally disorganized and lacks effective and reliable security. It is vulnerable to internal and external intrusion and unauthorized access. It is an environment lacking in expected system and support documentation."[6]

Complainant alleges that beginning in 2004 and continuing until her disability leave in 2005, she persisted in voicing and seeking resolution to the aforesaid concerns of security lapses concerning personal and financial information. Complainant contends that the security lapses violated Respondent's obligation to comply with statutory and regulatory requirements mandated by Sarbanes-Oxley and other federal laws.[7]

PROTECTED ACTIVITY

Respondent denies that any security lapses occurred, but argues that assuming some did occur, Complainant's voicing concerns about them does not constitute activity protected by the Act. Respondent characterizes Complainant's asserted protected activity as "…reports incidents of alleged corporate disorganization, poor management style…and being required to support

[1] Complainant moved to File Corrected Second Amended Complaint Of Discrimination because the complaint was inadvertently titled First Amended Complaint. The motion was granted by Order dated March 15, 2006.
[2] First Amended Complaint, ¶ 13.
[3] First Amended Complaint, ¶ 9.
[4] First Amended Complaint, ¶ 18.
[5] First Amended Complaint, ¶ 2.
[6] *Id*. ¶ 20.
[7] Id. ¶ 3.

untested software."[8] It argues that Complainant's initial complaint merely reported violations of internal procedures that do not implicate fraud against a company's shareholders and therefore cannot constitute protected activity as defined by the Act as they "certainly do not allege intentional deceit that would impact shareholders."[9]

Respondent recognizes that Complainant amended her complaint to assert "that her alleged activities were protected by the Act because she reasonably believed that [Respondent's] failure to conform to what she believed to be proper industry practice with regard to internal controls violated federal laws and SEC regulations designed to prevent or reduce '*the opportunities to commit'* fraud [italics in original]."[10] Nevertheless, Respondent argues that the complaint as amended still does not allege activities protected by the Act. Respondent argues that it is not enough to report a violation of a rule or regulation of the Security Exchange Commission (SEC), the rule or regulation of the SEC that is reported must relate to fraud against shareholder.

Section 806 of the Act, 18 U.S.C. § 1514A, provides protection for employees of publicly traded companies who 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 sections 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...."

Complainant argues that Respondent offers a much too narrow interpretation of § 806. She contends that SOX not only protects a notification of fraud against shareholders but also protects the providing of information of a violation of any provision of Federal law relating to fraud against shareholders or the violation of a rule or regulation of the Security Exchange Commission.

Respondent's argument that SOX does not protect providing information of a violation of a rule or regulation of the SEC unless the Complainant also shows that the rule or regulation referenced is related to fraud against shareholders is rejected. Respondent's interpretation would, in effect, remove the phrase "any rule or regulation of the Security and Exchange Commission" from the Act as Respondent's interpretation would subsume the violation of SEC rule or regulation into the phrase "any provision of Federal law." There would be no reason to specify as protected activity a violation of SEC rule or regulation as such a violation is of course also a violation of Federal law. It is an elementary rule of statutory construction that every statute shall be construed, if possible, to give effect to all its provisions.

Respondent bases its interpretation on Administrative Law Judge decisions it interprets as holding that protected activity must relate to fraud against shareholders: *Marshal v. Northrup Gruman Synoptics*, 2005-SOX-0008 (ALJ June 22, 2005); *Hopkins v. ATK Tactical Systems*, 2004-SOX-19 (ALJ May 27, 2004); *Tuttle v. Johnson Controls, Battery Division*, 2004-SOX-76

[8] Memorandum of Respondent in support of motion to dismiss. at. 10.
[9] *Id.*
[10] Id. at 11

(ALJ January 3, 2005).[11] However none of these decisions speak to the issue of whether notification of a violation of a SEC rule or regulation is protected activity only if the intention of the particular SEC rule is protection of fraud against shareholders. None of the cases involve notification of violations of SEC rules. They involved reporting of defective batteries (*Tuttle*); disagreement over accounting methods (*Marshall*); and release of sludge water into ground water (*Hopkins*).

Moreover a decision by the United States District Court in *Collins v. Beazer Homes USA, Inc.,* 334 F. Supp.2d 1365 (N.D. Ga. 2004) is contrary to the Respondent's interpretation of § 806. In *Collins,* the Court refused to find on a motion for summary judgment that disclosures alleging attempts to circumvent the company's system of internal accounting controls and therefore state a violation of Section 13 of the Security Exchange Act are not acts protected by the Act. Accordingly, § 806 is interpreted as protecting the providing of information of a violation of any rule or regulation of the SEC.

Respondent argues further that even assuming that a report of activity violating SEC rules is protected activity contemplated by § 806. Complainant has not alleged that she made such reports but rather only complained of dissatisfaction with the internal structure of Respondent's IT Department. However, Complainant asserts much more than dissatisfaction with internal controls. She complains that her disclosures of security lapses in Respondent's databases, which causes them to be vulnerable to internal and external intrusion and unauthorized access, should have been revealed to external auditors, and the failure to do so is a violation of the management certification requirements of §§ 302, 404 and 906 of the Act. Complainant also asserts that the Respondent's failure to disclose such alleged security lapses is a violation of the Federal Deposit Insurance Act and the Gramm-Leach-Bliley Act,[12] and thus would constitute reports of activity contrary to the management certification requirements of §§ 302, 404 and 906of SOX, as well as the rules of the SEC,[13] and therefore protected activity under § 806. The U.S. District Court in *Collins v. Beazer Homes USA, Inc., supra*, was faced with an argument similar to that here. Defendant moved for summary judgment arguing that the Plaintiff did not engage in protected activity but only expressed vague concerns that amounted to nothing more than personality

[11] Respondent cites the ALJ decision in *Lerbs v. Buca di Beppo, Inc*., 2004-SOX-8 (ALJ June 15, 2004) for the proposition that reported violations of internal procedures do not implicate fraud against shareholders, therefore do not and cannot constitute a protective activity. However, *Lerbs* does not stand for such a broad proposition. In *Lerbs,* the alleged protected activities were found not to be protected because they were found to be legal, mere general inquiries, or speculative and unsubstantiated.

[12] See paragraphs 10-15 of amended complaint.

[13] Complainant alleges in her amended complaint that she believes that the concerns she raised to her supervisors were contrary to the management certification requirements of §§ 302, 404 and 906 of the Act and protected as the providing of information about both the violation of SEC rules and regulations and the violation of Federal laws relating to fraud against shareholders since §§ 302 and 404 of the Act are new amendments to the Securities and Exchange Act of 1934 and the provisions of SOX are obviously provisions of a Federal law relating to fraud against shareholders. Section 302 requires corporate officers to certify in each required statement that the financial statements and other information in the report fairly present in all material respect the financial condition and results of operations of the issuer. Section 404 requires the SEC to issue rules requiring corporate officers to certify the discharging of the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting. Section 906 requires that the chief executive officer and the chief financial officer certify with each periodic report containing financial statements filed with the SEC that the information contained in the periodic report fairly presents the financial condition and results of operations of the user.

conflicts and differences in marketing strategies when he alleged disclosures of attempts by Defendant to circumvent the company's system of internal controls and therefore violate section 13 of the Security Exchange Act. The Court held that those allegations could reasonably be found to be within the zone of protection afforded by SOX.

Respondent also argues that a complaint under § 806 of the Act asserting discrimination because of providing information of violation of §§ 302, 404 and 906 of the Act would essentially recognize a private right of action that was never intended by Congress. Respondent's argument is not accepted. Such an action requesting protection from discrimination under § 806 for providing information of violation of other provisions of the Act is an action expressly provided by Congress with the purpose of protecting the public as well as the whistleblower, as provisions of the Act would by definition be provisions of a Federal law relating to fraud against shareholders.

Respondent also contends that the Second Amended Complaint asserting that Complainant was fired for filing the whistleblower complaint at issue here does not allege protected activity because filing such a whistle blower complaint is not protected as § 806 of the Act is not a federal law within the meaning of § 806. However, it has long been recognized by the Secretary that whistleblower complaints under the Environmental and Nuclear whistleblower statutes charging employer retaliation are protected activity. *McCuiston v. TVA,* 1989-ERA-6 (Sec'y Nov. 13, 1991); *Bassett v. Niagra Mohawk Power Co.*, 86-ERA-2 (Sec'y Sept. 28, 1993). The same reasoning is applicable to a complaint filed under SOX.

Respondent argues that Complainant's disclosures are not protected activity because § 806 does not afford protection for whistleblowers who do nothing more than perform the job for which they were hired, and the specific purpose of Complainant's position was to review databases to verify their compliance with industry practices, and to advise Respondent of her view of whether the databases met those practices. To the contrary, as pointed out by Complainant in her brief, the record contains no support for the contention that her job duties required her to risk the disfavor of her superiors by asserting that disclosures of security problems had not been fairly made to the external auditors.

ADVERSE EMPLOYMENT ACTIONS

Respondent argues that Complainant's Complaint and First Amended Complaint should be dismissed because they fail to present a claim of an adverse employment action. It contends that the Complainant's allegations in support of a finding of a hostile work environment must fail because the facts alleged do not describe harassment that was sufficiently severe or persuasive to alter the conditions of her employment as provided by *Hughart v. Raymond James & Associates, Inc.,* 2004-SOX-9, (ALJ Dec. 17, 2004). Respondent's argument that the Complainant's complaint, as amended, should be dismissed because of failure to state a claim is denied. It cannot be found that, as a matter of law, the allegations of adverse actions in paragraph nos. 36 through 46 of Complainant's first amended complaint were not severe or persuasive enough to constitute a hostile work environment.

TIMLINESS

Finally, Respondent contends that some of the allegations of the amended complaint regard incidents that are time barred in that they occurred more than 90 days prior to the filing of the April 11, 2005 complaint with the Department of Labor. A complaint alleging a violation of the Act must be filed within 90 days of the alleged violation. Therefore, allegations of adverse actions that occurred more than 90 days prior to April 11, 2005, or prior to January 11, 2005 are untimely and cannot, in and of themselves, be the basis of a finding of violation of the Act. However, such allegations may be relevant to a determination of a hostile work environment. Also, Respondent's request that the factual claims included in paragraph nos. 27 through 33, be stricken from the amended complaint because they are untimely as they occurred more than 90 days prior to April 11, 2005, is denied as they constitute allegations of protected activity. Such allegations are relevant no matter when they occurred so long as Complainant shows that they were the cause of an adverse employment action.

ORDER

In consideration of the aforesaid, it is hereby ORDERED that Respondent's *Motion To Dismiss* is denied.

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Thomas M. Burke
Associate Chief Administrative Law Judge