U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 February 2008

CASE NO: 2007-SOX-00050

In the Matter of:

THOMAS B. ADAM,
Complainant,

v.

FANNIE MAE,
Respondent,

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

On January 9, 2008, Fannie Mae ("Respondent") filed a Motion for Summary Decision, pursuant to 29 C.F.R. §§ 18.40 and 18.41(a). Respondent argues that Thomas Adam ("Complainant") raises no genuine issues of material fact and cannot make a prima facie showing that he engaged in protected activities within the meaning of § 806 of the Sarbanes-Oxley Act of 2002 ("SOX" or the "Act"). On February 19, 2008, Complainant filed a Response.

FACTS

The following facts are not disputed:

1. Respondent is an entity covered by the provisions of SOX.

2. In 2004 the SEC required Respondent to restate its 2002 to 2004 financial statements. (the Restatement project). This required the additional manpower and expertise of thousands of additional people. The vast majority were provided through Respondent's contracts with professional services consulting firms.

3. Complainant was hired by Respondent on July 17, 2006, as a Senior Developer.

4. Complainant had difficulties at work during the entire course of his employment. (Affs. Cooper, Bowman, Complainant).

5. On August 21, 2006, Complainant notified his supervisor and Respondent's ethics office about alleged improprieties in the manner in which Indian foreign nationals

were hired to work for vendors hired by Respondent to provide personnel to support the Restatement project. Complainant stated "I have two friends working at Fannie Mae as contractors. Both are foreign nationals from India. They have told me that it is a common practice for Indian contractors coming into Fannie Mae to effectively pay for a contract position by pledging a substantial part of their pay to their soon-to-be boss. That person is typically another Indian contractor." More specifically, Complainant alleged that Respondent's direct vendors for IT staffing acquired workers from sub-vendors who located and supplied technical personnel from India and sponsored them through H1-B visas. He further alleged that each incoming Indian worker was required to pay the sub-vendor $10.00 for each hour the worker provided services to Respondent. There was never any allegation that the alleged kickback scheme involved any of Respondent's employees nor were any of Respondent's officials alleged to have knowledge of the alleged kickback scheme. (Affs. of Williams, Cooper; RX 7).

6. In an August 22, 2006, email to Cooper, concerning the alleged kickback scheme, Complainant states "That is a pipeline that has potential corruption (kickbacks) written all over it. Is it occurring right now? I have NO facts that it is. But it sure is ripe for something corrupt to occur. (RX 6).

7. By email dated October 11, 2006, Complainant confirmed that "the other day" he had provided two names of Indian vendors/vender employees involved in the kickback scheme. (CX 9).

8. Complainant was terminated from employment on October 24, 2006.

9. On January 16, 2006, Complainant filed a timely SOX complaint. Complainant alleged the kickback scheme defrauds Respondent's shareholders out of tens of millions of dollars.

DISCUSSION OF LAW AND FACTS

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds "the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Id. Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party has met

its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. Lincoln v. Reksten Mgmt., 354 F.3d 262 (4th Cir. 2003); Green v. Ingalls Shipbuilding, Inc., 29 BRBS 81 (1995) (stating the purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact). However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

SOX provides protection for employees of publicly traded companies. Under the Act no such company or its officers, employees, contractors, subcontractors, or agents "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because the employee engaged in certain lawful acts:

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [*fraud and swindles*], 1342 [*fraud by wire, radio, or television*], 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, when the information or assistance is provided to or the investigation is conducted by —
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> > (A) a Federal regulatory or law enforcement agency;
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> > (B) any Member of Congress or any committee of Congress; or
> >
> > (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
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> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1342, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a)(1).

To receive protection under the Act, a complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity under the Act; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action; and (4) circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. § 1980.104(b); Macktal v. U.S. Dep't of Labor, 171 F.3d 323, 327 (5th Cir. 1999);

Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1101-02 (10th Cir. 1999); Dysert v. Sec'y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997).

In order to prevail on its motion for a summary decision, Respondent has the initial burden of showing that undisputed facts establish that one or more of the aforementioned elements is not established. If Respondent succeeds, Complainant may rebut this showing by setting forth specific facts establishing that there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In its motion for summary decision, Respondent asserts that Complainant's claim fails because he has not established that he engaged in protected activity.

Protected activity is defined under SOX as reporting an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. While the employee is not required to show the reported conduct actually caused a violation of the law, he must show that he reasonably believed the employer violated one of the laws or regulations enumerated in the Act. Thus, the employee's belief "must be scrutinized under both subjective and objective standards." Melendez v. Exxon Chemicals Americas, ARB No. 96-051 (July 14, 2000).

The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision. See, e.g., S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (explaining that the pertinent section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company.") The provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent." Id. In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." Ames Department Stores Inc., Stock Litigation, 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations). While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit.

Complainant alleges he engaged in protected activity by reporting to Respondent's management and ethics office alleged improprieties in the manner in which Indian foreign nationals were hired to work for vendors hired by Respondent to provide personnel to support the Restatement project. According to Complainant's argument the reporting of these alleged violations is protected under the Act. I disagree. I find that Complainant has not established that he had an actual, subjective belief that the Respondent violated one of the provisions enumerated in the Act or committed any violation related to fraud against shareholders.

There is no basis to argue that Respondent engaged in any inappropriate conduct that violated the provisions of SOX. At most, Complainant only alleges that Respondent was the victim of a fraud committed by vendors that supplied contract employees to Respondent. There was never any allegation that the alleged kickback scheme involved any of Respondent's officials or employees nor were any of Respondent's officials or employees alleged to have knowledge of the alleged kickback scheme.

In Allen v. ARB, No. 06-60849, 2008 U.S. App. Lexis 1236 (Jan 22, 2008), the Fifth Circuit noted that "for purposes of the sixth enumerated category of protected activity, the plain language of the statute indicates that some form of scienter related to fraud against shareholders is required… in cases involving the sixth "catch-all" category, we conclude that the employee must reasonably believe that his or her employer acted with a mental state embracing intent to deceive, manipulate or defraud shareholders.

Nowhere in Complainant's voluminous filing is there any indication that any employee or official of Respondent had any knowledge of the alleged kickback scheme. It is evident under Allen and on both the face of the statute and in decisions made by my fellow administrative law judges that complainants seeking whistleblower protection under SOX must have a reasonable belief that the employer in question has been involved in fraudulent activity. Grant v. Dominion East Ohio Gas, 2004 SOX 0063 (ALJ Mar. 10, 2005); Tuttle v. Johnson Controls, 2004 SOX 0076)ALJ Jan. 3, 2005).

The protected activity alleged in the complaint involves Complainant reporting to Respondent that certain vendors were committing a fraud against Respondent. There is nothing in the complaint or in the Response to the Motion for Summary Decision indicating that Complainant objectively or actually believed that Respondent was committing a violation of any of the enumerated securities laws or that Respondent was committing fraud on its shareholders. The matters complained of do not fall within the purview of the employee protections provisions of the Act.

CONCLUSION

Based on the foregoing discussion, construing all facts in the light most favorable to Complainant, the Court finds that Complainant did not engage in activities protected under the Act. Respondent is thus entitled to summary decision as a matter of law.

RECOMMENDED DECISION AND ORDER

It is RECOMMENDED that Respondent's Motion for Summary Decision be GRANTED.

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LARRY W. PRICE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the

administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time 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. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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(c). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).