

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 19 September 2008

CASE NO.: 2007-SOX-00043

In the Matter of:

HEIDI FUNKE,
Complainant,

v.

FEDERAL EXPRESS CORPORATION
dba FEDEX EXPRESS,
Respondent.

Appearances: Curtis D. McKenzie, Esq.
For Complainant

Barak J. Babcock, Esq.
For Respondent

Before: Russell D. Pulver
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act ("SOX" or "the Act"), 18 U.S.C. § 1514A, enacted on July 30, 2002. The Act prohibits retaliatory actions by publicly traded companies against their employees who provide information to their employers, a federal agency, or Congress, that alleges violations of 18 U.S.C. §§ 1341, 1343, 1344, 1348, or any provision of Federal law related to fraud against shareholders. 18 U.S.C. § 1514A. Respondent Federal Express Corporation doing business as FedEx Express ("Respondent") is a publicly traded company with a class of securities registered pursuant to Section 12 of the Securities and Exchange Commission Act of 1934, and is required to file reports pursuant to Section 15(d) of this Act. 15 U.S.C. § 78l. Heidi Funke ("Complainant") alleges that Respondent suspended her without pay for three days in retaliation for reporting mail fraud concerns. *See* Complainant's Post-hearing Brief at 2. Respondent maintains that Complainant did not engage in activity protected under the Act but that she engaged in activities in violation of company policies and was therefore disciplined. *See* Respondent's Post-hearing Brief at 17.

Complainant lodged a complaint with the Occupational Safety & Health Administration ("OSHA") on January 16, 2007. Following an investigation, the Secretary's Findings in this

matter were issued by OSHA on April 5, 2007, dismissing the complaint. On April 25, 2007, Complainant objected to the Secretary's Findings, requesting a hearing on the merits of her whistleblower claim.

The matter was referred to the Office of Administrative Law Judges and pursuant thereto a Notice of Hearing was issued on May 8, 2007, scheduling a formal hearing for May 29, 2007. Subsequently, the hearing was continued to July 17, 2007, and then later was continued to August 21, 2007. Respondent filed a Motion for Summary Decision on July 25, 2007. The parties stipulated to a continuance until the matters raised by the motion were resolved, and the continuance request was granted. Complainant filed a Response to the Motion for Summary Decision on September 17, 2007. Respondent's Motion for Summary Decision was denied on September 20, 2007 because the undersigned found that the parties' arguments raised genuine issues of material fact. Another Notice of Hearing was issued on September 27, 2007.

On November 14, 2007 and November 15, 2007, the undersigned convened a formal hearing in Boise, Idaho. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs. Administrative Law Judge Exhibits ("AX") 1-8 were admitted without objection. *See* hearing transcript (hereinafter "TR") at 6. Complainant's Exhibits ("CX") 1-13 were admitted into evidence, two of which (CX 4 and CX 5) were admitted over Respondent's objections. TR at 11-14. Respondent's Exhibits ("RX") 1-18 were admitted without objection. *Id.* at 15. Complainant testified on her own behalf. *See* TR at 31. Mr. Stanley Macchione, Mr. Ronald Dean Harwood, and Mr. James Lennon testified on behalf of Employer. *See* TR at 231, 272, 335.

All parties submitted post-hearing briefs. The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable provisions, regulations and pertinent precedent. Any evidence in the record that has not been discussed specifically has been determined to be either relevant, but comprised in other evidence, or insufficiently probative to affect the outcome directly. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

ISSUE

1. Whether Complainant engaged in protected activity and, if so, whether Respondent knew of the protected activity.

FINDINGS OF FACT

Complainant began working for Respondent in 1991. TR at 31-32. In recent years, she acted as a courier on a rural delivery route which covers parts of southwestern Idaho and eastern Oregon. *Id.* at 33. Complainant's typical shift involves several residential deliveries and pickups, a rendezvous with a shuttle driver who takes the outbound freight, and a return to the Caldwell, Idaho station. *Id.* at 33-34. She maintains communication with fellow drivers and dispatchers throughout the day. *Id.* at 37-38. Prior to her suspension, Complainant had an

exemplary employment record and was held in positive regard by her supervisors. *Id.* at 142-144, 337; CX 13; RX 1-6.

Complainant is well-acquainted with Respondent's security department and investigative procedures pertaining to suspected fraudulent deliveries, based on her experience the year prior to the events underlying Complainant's claim. TR at 45-51, 52-55, 66, 72, 83-84. When she first started on her current route, the outgoing courier warned her about two attempts made by a particular family on the route to ship suspicious packages (hereinafter, "the A family"). *Id.* at 66. She also testified that in 2005 this same family had been investigated by Respondent's security department after she alerted Respondent's dispatch department regarding her suspicions. *Id.* at 45-57, 72. Complainant testified that she was told that Ms. A was "scared" by the security department and federal agents and that as a result the A family probably would not be involved in any more fraud schemes. *Id.* at 52-53.

A year later, when Complainant became suspicious of the A family again, she stated that based on her experience with the 2005 investigation, she anticipated that there would be another, similar investigation. *Id.* at 83-84. On three occasions in late October and early November 2006, Complainant became concerned that the A family was once again receiving fraudulent deliveries. *Id.* at 57, 62-63, 65-66, 174. The first delivery was attempted on or around October 19, 2006 by another employee but the A family declined it. *Id.* at 57. Address and name irregularities raised Complainant's concern that the delivery might be fraudulent. *Id.* Complainant contacted Respondent's customer service and dispatch departments and the vendor listed on the package asking whether they could research whether the package could be fraudulent. *Id.* at 58. She thought that Cingular, the vendor who sent the package, should be contacted and informed of Ms. A's history of fraud. *Id.* She was told by her dispatcher to attempt delivery and she did so on Monday, October 23, 2006. *Id.* at 57-58, 61, 175. When Complainant made that delivery, she asked Ms. A whether she was "getting involved in fraud again" and Ms. A, per Complainant's testimony, denied any such involvement. *Id.* at 61. The story Ms. A provided to Complainant concerning the address and name irregularities did not make sense to Complainant. *Id.* at 61-62.

Shortly thereafter, Complainant made two deliveries to Ms. A's home which did not involve irregularities and therefore did not raise any fraud concern for Complainant. *Id.* at 62. However, another package raised her suspicions. *Id.* at 62-63. She attempted, to no avail, to contact the package vendor. *Id.* at 63, 176. Complainant testified that she asked the dispatcher for the phone numbers for Respondent's security and fraud departments and the dispatcher told her he could not provide that information. *Id.* at 63, 176. She also testified that the dispatcher instructed her to make the delivery. *Id.* at 63, 175. Complainant made the delivery and reiterated her concerns of fraud to Ms. A. *Id.* Ms. A again denied such fraud was taking place and again told a story which Complainant found not plausible: Ms. A stated that a mother of a friend of her child's was receiving cell phone deliveries at the A family residence. *Id.* at 64-65.

Several days later, in late October or early November 2006, a third and final set of packages raised Complainant's suspicions and she decided to take additional action. *Id.* at 66, 113. Initially, when Complainant saw the packages and became concerned, she contacted her dispatcher and asked for the number to the security department. *Id.* at 65-66. She testified that

she was told she could not contact security directly and so she requested that the dispatch department contact security. *Id.* at 65-66. However, Dispatcher Ronald Dean Harwood testified to the contrary: that on November 1, 2006, upon Complainant's request, he provided the phone numbers of two individuals in the security department, Stan Macchione and Scott Avery. *Id.* at 67, 77-78, 92, 304. Complainant also contacted on that day Respondent's customer service department, the package vendor, and the County Sheriff's Department in Vale, Oregon, informing them all of her suspicions. *Id.* at 67, 72, 77-78. After describing the suspicious deliveries to a police officer, Complainant led that officer to the residence of the A family, but nobody was home. *Id.* at 74-75. The police instructed Complainant to contact them if she needed assistance in the future and they would send an officer to that residence. *Id.* at 75. At some point while Complainant was at the A residence before the police left, Complainant contacted the dispatcher, Mr. Harwood, and informed him that she was at the residence of family A with the police. *Id.* at 74-75, 304-305. Mr. Harwood testified that Complainant stated to him, "I'm playing good cop, bad cop." *Id.* at 305. Mr. Harwood also testified that he encouraged Complainant to leave the A's residence, to finish her route, and to let the police handle the situation. *Id.* at 305. He testified that he was not management and could not instruct Complainant to leave, and that he did not contact management that day because he did not want Complainant to get in trouble. *Id.* at 310-311, 324-325. He also testified that he heard from Complainant the next day that she had recovered packages from Respondent and other carriers but did not inform management of the events at the home of the A family or Complainant's contact with the police, because at that point he feared he, too, might be in trouble. *Id.* at 310-311, 324-325.

Complainant returned to the home of the A family without an officer on November 2, 2006, and without instruction to do so from anyone working for Respondent, confronted Ms. A again about her concerns regarding suspected fraud. *Id.* at 80-81. Upon Ms. A's invitation, Complainant went inside the house and viewed packages that Ms. A reportedly conceded to Complainant could be fraudulent. *Id.* at 80-81, 182-185. These packages included not only packages delivered by Respondent FedEx, but also those delivered by UPS, DHL, and USPS. *Id.* at 182-185. Complainant offered to take the packages to the sheriff "because I knew, number one, they were -- she had just admitted that they were involving fraud, but I knew that I could get them all back -- I looked at them, and I knew I could get every one of them back to where they belonged to their rightful owner." *Id.* at 83. Mrs. A, her husband and their son helped load the packages onto the FedEx delivery truck, after Ms. A explained she had thought she was legitimately employed and did not know that fraud was involved. *Id.* at 82, 186.

Complainant notified dispatch of these events while she was still in the driveway loading packages with the A family. *Id.* at 86. Complainant testified that the dispatch officer expressed concern about Complainant keeping up with her time commitments on her route but also told her, "Good job." *Id.* Complainant then drove to the Malheur County Sheriff's Department. *Id.* at 86. A detective recorded the packages. *Id.* Complainant then loaded those packages that were from FedEx as well as UPS, and returned them to FedEx and UPS; the detective took the other packages for return. *Id.* at 86-87.

During these events, Complainant never actually spoke with her supervisor or anyone in management regarding the three deliveries which she suspected were fraudulent. *Id.* at 174-177.

On November 4, 2006, Complainant noticed that the packages she had brought back to Respondent's office had not been returned to their respective vendors, and she spoke with manager Craig Taylor. *Id.* at 95-96. He asked about the events and Complainant told him what had transpired. *Id.* at 95-96. She expressed surprise as to how difficult it had been to make direct contact with the security department and was provided a phone number at security that she could use in the future. *Id.* at 96.

Complainant met with Respondent's management on November 6, 2006 to discuss her response to the alleged fraud. TR at 113. She produced a written statement about the events surrounding the deliveries and the packages she found suspicious. *Id.* at 116. Subsequently, management issued Complainant a warning letter which outlined three disciplinary grounds: 1) Complainant's unauthorized possession of customer's property/packages, 2) Complainant's actions that were detrimental to the best interests of Respondent and Complainant, and 3) Complainant's failure to notify management of her activities. *Id.* at 362. On these bases, Complainant was suspended from November 7, 2006 through November 9, 2006 without pay. *Id.* at 141.

CONCLUSIONS OF LAW

The Act states in pertinent part:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee – (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 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, when the information or assistance is provided to or the investigation is conducted by -- (A) a Federal regulatory or law enforcement agency; (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).

18 U.S.C. § 1514A (a)(1); *see also* 29 C.F.R. § 1980.102(a), (b)(1).

Thus, in order to prevail in a whistleblower protection case based upon circumstantial evidence of retaliatory intent, it is necessary for Complainant to prove by a preponderance of the evidence that: 1) Complainant was an employee of a covered employer; 2) Complainant engaged in protected activity as defined by the Act; 3) Respondent had actual or constructive knowledge of the protected activity; 4) Respondent thereafter took adverse action against Complainant; 5)

the protected activity was a contributing factor in Respondent's decision to take the adverse action. *Bechtel v. Competitive Technologies, Inc.*, ARB No. 06-010, ALJ No. 2005-SOX-33, slip op. at 4-5 (ARB Mar. 26, 2008). If Complainant shows these elements by a preponderance of the evidence, her claim is defeated nonetheless if Respondent produces clear and convincing evidence of a non-discriminatory motive for the adverse action. *Id.* at 5.

Here, there is no question that the Complainant worked for Respondent, a corporation governed by Sections 12 and 15(d) of the Securities Exchange Act. Further, there is no dispute that she was suspended from work for three days without pay. Complainant's protected activity is the key issue in this case. I need not consider the other elements of the whistleblower claim that Complainant must prove by a preponderance of the evidence, because for the following reasons I find Complainant failed to prove that she engaged in activity protected under the Act.

Protected Activity

Under the Act, protected activity occurs where an employee reports conduct by the employer which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. 29 C.F.R. § 1980.102(b)(1). While the employee is not required to show the reported conduct actually caused a violation of such laws, she must show that she reasonably believed the employer violated one of the laws or regulations enumerated in the Act. *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6, slip op. at 19-20 (ARB July 14, 2000). The employee's belief is scrutinized under both subjective and objective standards. *Id.* This determination is made on the basis of "the knowledge available to a reasonable [person] in the circumstances with the complainant's experience and training." *Id.* at 20. The belief must be about an existing violation, given that the violation requirement is stated in the present tense: a plaintiff's complaint must be "regarding any conduct which [he] reasonably believes constitutes a violation of [the relevant laws]." 18 U.S.C. § 1514A(a)(1); *see also Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 340-41 (4th Cir. 2006). A belief that a violation might occur in the future is not a reasonable belief. *See Jordan*, 458 F.3d. at 340-41.

Complainant argues that she engaged in protected activity when she contacted law enforcement because she held a reasonable belief that a violation had occurred of a federal law or a rule or regulation of the SEC relating to fraud against shareholders. *See* Complainant's Post-hearing Brief at 18. Specifically, she alleges that Respondent was "complicit in fraud that could affect shareholder value, and she communicated her concern to her employer or law enforcement." *See id.*

For the following reasons, I find that Complainant has failed to demonstrate that she held a reasonable belief that Respondent was "complicit in fraud" that implicated one of the laws or regulations enumerated in the Act. *See Melendez*, slip op. at 19-20. The employee's belief is scrutinized under both subjective and objective standards and I find Complainant has failed to demonstrate either a subjective or objective belief. *See id.* While Complainant raised general concerns regarding third party fraud to Respondent's dispatch and security departments, Complainant presented insufficient evidence that she held a reasonable belief that Respondent was engaging in 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. *See* 18 U.S.C. § 1514A (a)(1); *see also* 29 C.F.R. § 1980.102(a), (b)(1). Although a complainant need not show an actual violation of any of the regulations or laws enumerated under the Act, the complainant must nevertheless demonstrate a subjective as well as an objectively reasonable belief that the reported activity violated such law or regulation. *Melendez*, slip op. at 19-20. It is possible that under different circumstances a carrier such as Respondent could be complicit in third-party fraud in a manner that implicates a statute or a regulation covered by the Act. But here, the actions taken by Complainant reveal a belief not that Respondent engaged in assisting fraud but that Respondent was not as quick to respond to her concerns as she would have liked. Complainant testified to a concern that dispatch had not responded to her, and subsequently she phoned her contact in the security department who conducted the 2005 investigation of the A family. *Id.* at 92. But rather than waiting for a response, one day after Complainant left that message with security she initiated her own inquiry and investigation, entering the A residence. *Id.* at 67, 77-78, 92, 304.

For the following reasons, I do not find that the preponderance of the evidence reflects an objectively reasonable belief that Respondent was violating one of the laws or regulations enumerated in the Act. The process itself may have been slower than Complainant liked, but she knew from the 2005 investigation that the process takes time. She had notified Respondent in 2005 of concerns about deliveries to family A and was contacted, later on, by the security department who followed up with an investigation. *Id.* at 45-51, 52-55, 66, 72, 83-84. Complainant thus was in the best possible position to know that an investigation can take time. I do not find that a reasonable person with Complainant's work experience, including her experience with the 2005 investigation, would conclude that Respondent "turned a blind eye to the on-going mail fraud." *See* Complainant's Post-hearing Brief at 20. I find it simply too speculative and premature to assume that, if Complainant not chosen, in her own words, to play "good cop, bad cop," that Respondent *would have* not responded to her concerns about these deliveries. *Id.* at 305. Further, I find it unreasonable and far too speculative to assume Respondent was complicit in a fraud scheme simply based on Complainant's feeling that the dispatcher was unhelpful in contacting the security department and on her impatience to receive a call back from security.

However well-meaning Complainant's actions may have been, underlying these actions is not an objectively reasonable belief that Respondent was assisting third party fraud but rather her belief that Respondent was not taking action within a timeframe of her liking. And although it appears Complainant engaged in what she believed was proper activity, apparently because she did not want to wait for a response from her company, Complainant's conduct also speaks of self-serving intentions. For example, it is unclear why Complainant agreed to not only load the truck up with packages delivered to Ms. A by Respondent, but also packages delivered by DHL, UPS and the U.S. Postal Service. *Id.* at 182-185. It is unclear what, other than a self-serving interest, would create such dire urgency as to require entering the A residence, taking the packages, delivering them to the sheriff, and taking the packages from the sheriff to return to Respondent and some of the other carriers. Although intent of a self-serving manner does not defeat a whistleblower claim, it does raise serious concerns as to whether Complainant truly subjectively held a belief that Respondent was complicit in a scheme of fraud. I find that Complainant likely did not hold such a belief but rather saw herself as "the new sheriff in town"

and seized the opportunity to play out an idea of righting a situation which concerned her. Thus, Complainant apparently was operating under a belief that she should remedy the situation because Respondent did not act within her expected time frame. I therefore find Complainant presented insufficient evidence that she held a reasonable belief that Respondent was engaging in 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.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, Complainant has not proven protected activity under the Act and her complaint is hereby **DISMISSED**.

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

San Francisco, California

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).