U.S. Department of Labor

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Issue Date: 30 October 2008

Case No.: 2008-SOX-00061

In the Matter of

CLAYTON M. STEWARD, SR.
Complainant

v.

KELLOGG, USA
Respondent

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

The Complainant's Complaint and Procedural History

This proceeding arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, 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 et seq. ("the Sarbanes-Oxley Act," "SOX,"or "the Act") enacted on July 30, 2002. The Sarbanes-Oxley Act provides the right to bring a "civil action to protect against retaliation in fraud cases" to employees 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 section 1341, 1343, 1344 or 1348 [of title 18], 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). The Sarbanes-Oxley Act extends such protection to employees of a 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))." 18 U.S.C. § 1514A(a).

On May 27, 2008, the Complainant, Clayton Steward ("Complainant"), a former employee of Kellogg Company ("Respondent") filed a Complaint with the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") against the Respondent, under § 806, the employee protection provision of the Sarbanes-Oxley Act. In his Complaint, the Complainant alleged that Respondent had discriminated against him in violation of the Act because of his complaints to management regarding contractor theft and misconduct, and that Respondent terminated his employment "to deter any further reporting by [Complainant] or any other individuals." (Complainant's Complaint to OSHA).[1]

[1] On or about August 21, 2008, Complainant, who is represented *pro se*, submitted to the U.S. Department of Labor, Office of Administrative Law Judges, what appears to be an addendum to

After an examination by OSHA, on July 9, 2008, the Secretary of Labor, acting through her agent, the OSHA Regional Administrator, dismissed the Complainant's Complaint after finding that "Complainant's allegations of theft do not constitute reasonably perceived violations of 18 U.S.C. § 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." OSHA determined that the Complainant did not engage in activity protected under the Act.

By correspondence dated August 21, 2008, the Complainant objected to the Secretary's Findings and requested a hearing before an Administrative Law Judge ("ALJ"). The matter was assigned to me on August 25, 2008.

Under the applicable regulations, an administrative law judge's review of a complaint under section 806 of the Act is de novo. 29 C.F.R. § 1980.107(b).[2] For the purpose of this Order, based on my examination of the record and the parties' responses to my Order of August 26, 2008, I presume that the adverse action upon which this matter is based is the Complainant's termination of employment.

The Respondent's Motion for Summary Decision and the Complainant's Opposition

On September 19, 2008, the Respondent filed a "Statement of Position" which included assertions as to why the Complainant's complaint should be dismissed.[3] By Order of September 24, 2008, I directed Respondent to advise me whether to consider this "Statement of Position" as a Motion for Summary Decision. By letter dated October 2, 2008, Respondent requested that the statement be considered a Motion for Summary Decision. On October 7, 2008, I issued an Order directing the Claimant to respond to the Respondent's Motion for Summary Decision; specifically, the assertions that:

1. the Complainant was dismissed for legitimate, non-retaliatory reasons.

2. the Complainant did not engage in protected activity as defined by the Act.

(Respondent's Statement of Position at 2-3)

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his initial OSHA complaint along with his objection to the OSHA Regional Administrator's findings and his request for hearing. In this addendum, the Complainant makes further allegations of Respondent's misconduct, including food safety and sanitation issues. These allegations, apparently, were not submitted to OSHA in the initial complaint; even though the document is addressed to OSHA, it is unclear whether OSHA ever received this addendum to the original complaint. The OSHA investigation did not address the allegations in the Complainant's addendum.

[2] Unless otherwise noted, citations to the Code of Federal Regulations (C.F.R.) are to Title 29.

[3] In its "Statement of Position," Respondent conceded it is an entity to which section 806 of the Act applies.

By letter response received October 20, 2008, the Complainant requested that his complaint not be dismissed and generally asserted that there existed "genuine issue of material fact" to withstand the Respondent's Motion for Summary Decision. Complainant also stated that he would submit evidence to support the general assertions of his letter "within 10 days." Construing the Complainant's response as a request for additional time to submit a complete response, I issued an Order on October 22, 2008, directing the Complainant to submit his complete response by noon on October 27, 2008. Complainant's response to this order was received on October 27, 2008.

Legal Standards for Motions for Summary Decision on Complaints Brought Under Sarbanes-Oxley

Rules for the adjudication of complaints made under section 806 of the Sarbanes-Oxley Act are set forth at 29 C.F.R. § 1980, as supplemented by the Department of Labor's procedural rules set out in 29 C.F.R. part 18. These rules permit a party to move for a summary decision. § 18.40(b). An administrative law judge may grant summary decision in favor of a party where no genuine issue of material fact is found to have been raised. § 18.41(a). The standard for granting summary decision is essentially the same as that set forth in the Federal Rules of Civil Procedure governing summary judgment in the federal courts. Reddy v. Medquist, Inc., ARB Case No. 04-123 (ARB: Sept. 30, 2005). See also Fed.R.Civ.P. 56(c). No genuine issue of material fact is raised when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The moving party bears the initial burden of demonstrating there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In adjudicating a motion for summary decision, a court must take the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. Bowers v. National Collegiate Athletic Association, 475 F.3d 534, 535 (3d Cir. 2007). This includes factual ambiguities and inferences related to credibility. See Wishkin v. Potter, 476 F.3d 180, 184 (3d Cir. 2007). Issues of disputed fact may not be determined by summary judgment. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993).

A party opposing the motion may not rest upon the mere allegations or denials of the pleading. "Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." § 18.40(c). As the regulation states, an administrative law judge may enter summary decision if "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." § 18.40(d).

The Sarbanes-Oxley statute states that complaints are governed by the legal burdens of proof set forth in 49 U.S.C. § 42121(b), and shall be governed by the rules and procedures

applicable to that statute. 18 U.S.C. § 1514A(b)(2)(A) and (C).[4] The elements of a prima facie case that must be established by the Complainant under the Sarbanes-Oxley Act, incorporating the standards of the AIR 21 statute, are as follows:

1) The employee engaged in protected activity or conduct;
2) The employer knew that the employee engaged in the protected activity;
3) The employee suffered an unfavorable personnel action; and
4) The protected activity was a contributing factor in the personnel action.

Bechtel v. Competitive Technologies, Inc., ARB Case No. 06-010 (ARB: Mar. 26, 2008).

Prior to hearing, the Complainant is required to establish a prima facie case; that is, to produce enough evidence to allow the trier of fact to infer the facts at issue as to all elements. Summary decision in favor of the Respondent is appropriate only if the Respondent can demonstrate that, under the facts as set forth in the pleadings, affidavits, etc., no rational trier of fact could find in favor of the moving party, as to one or more of the elements. See Narin v. Lower Merion School District, 206 F.3d 323, 331-32 (3d Cir. 2000).

Because this matter involves a Motion for Summary Decision, and not a hearing on the merits, the burden of persuasion rests most heavily on the Respondent. Indeed, the non-movant's burden at this stage of the proceedings, to survive a motion for summary decision, is minimal. See Jute v. Hamilton Sutherland Corp., 420 F.3d 166, 173 (2d Cir. 2005)[Title VII case].

Whether the Complainant Engaged in "Protected Activity"

The Complainant was employed by the Respondent as a maintenance supervisor, and assigned to the Respondent's plant in Muncy, Pennsylvania. The Respondent discharged the Complainant on March 19, 2008, and on May 28, 2008, the Complainant filed a complaint with OSHA alleging that the Respondent had discriminated against him in violation of SOX. The Complainant alleged that he was discharged in retaliation for making complaints to management regarding contractor misconduct and potential theft. The Respondent denied any retaliatory motivation for the discharge, and maintained that it had discharged the Complainant for dishonesty and theft of time. The Complainant alleged in his complaint that:[5]

1) extreme perks were given to outside contractors,

[4] This statute is the Wendell H. Ford Aviation Investment and Reform Act for the 21 Century [AIR 21].

[5] Complainant's addendum to the Complainant's initial OSHA complaint, submitted on or about August 21, 2008, made further allegations of Respondent's misconduct, including food safety and sanitation issues such as: 1) the presence of mold on equipment, and 2) defective ball bearings that caused metal shavings to come into contact with food. As there is no evidence Complainant ever raised these issues to OSHA, or raised them within the timeframe required by 18 U.S.C. § 1514A(b), I decline to consider the addendum. See Portes v. Wyeth Pharmaceuticals, Inc., slip copy at 6, 2007 WL 2363356 (S.D.N.Y. 2007).

2) security privileges were afforded to the outside contractors,
3) the outside contractors were paying money for these privileges, and
4) the outside contractors were submitting inflated invoices.

The Complainant averred in his complaint that he had made verbal complaints to his management about contractors at the plant taking items, such as copper, aluminum, stainless steel and steel. Complainant asserted he felt management and the contract security agency hired by the Respondent were both ignoring and allowing these thefts to occur, and that the contractors had access to gates not guarded by the security agency. The Complainant alleged that the aforementioned misconduct affected profitability and/or stock price, stating: "I believe I was acting in a protected activity by reporting these violations… [which] directly affected the profitability of the plant and… Kellogg's stock prices." (Complainant's Complaint to OSHA).

Section 806 of the Sarbanes-Oxley Act, the "Whistleblower Protection" section, protects disclosures made to a person with supervisory authority over an employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct. The Act does not protect all disclosures made by employees, but only the conduct described in the statute. The section protects employees who communicate information concerning a situation they reasonably believe constitutes a violation of any of the following:

1) 18 U.S.C. § 1341 (mail fraud); § 1343 (wire/radio/television fraud); § 1344 (bank fraud); or § 1348 (securities fraud); or

2) any rules or regulations of the Securities and Exchange Commission; or

3) any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a). See O'Mahony v. Accenture, Ltd., No. 1:07-CV-07916 (S.D.N.Y. Feb. 5, 2008). Most recently, in Nixon v. Stewart & Stevenson Services, Inc., ARB Case No. 05-066 (ARB: Sept. 28, 2007), the Board reiterated its holdings that a complainant must demonstrate that he or she engaged in protected activity prior to the employer's adverse action, and must actually communicate a concern to the employer that its conduct implicates one of the enumerated statutes.

When assessing whether a communication constitutes protected activity, the statute requires that the communication to the employer be examined. Welch v. Chao, supra, (citing Platone v. FLYi, Inc., ARB Case No. 04-154 (ARB: Sept. 29, 2006) and Fraser v. Fiduciary Trust Co. International, 417 F. Supp. 2d 310 (S.D.NY., 2006)). By its terms, the Act does not mandate that the employee report activity constituting an actual violation of an enumerated provision, but requires only that the employee "reasonably believes" the conduct about which he provides information constitutes a violation of the specified laws, regulations, etc. See Halloum v. Intel Corp., ARB Case No. 04-068 (ARB: Jan. 31, 2006); see also Taylor v. Wells Fargo, Texas, 2004-SOX-00043 (ALJ: Feb. 14, 2005), aff'd, ARB Case No. 05-062 (ARB: June 28, 2007). The employee's "reasonable belief" is assessed using both objective and subjective standards. See Welch v. Cardinal Bankshares Corp., ARB Case No. 05-0641 (ARB: May 31, 2007), slip op. at 10. The Complainant must show that a reasonable person in his position would

have believed that the described conduct constituted a violation. Livingston v. Wyeth, Inc., 520 F.3d 344 (4th Cir., 2008); Welch v. Chao, ___ F.3d ___. 2008 WL 2971800 (4th Cir., Aug. 5, 2008), see also Henrich v. ECOLAB, Inc., ARB Case No. 05-030 (ARB: June 29, 2006); Getman v. Southwest Sec., Inc., ARB Case No. 04-059 (ARB: July 29, 2005). The Complainant must explain why such a belief is objectively reasonable. Brookman v. Levi Strauss & Co., ARB Case No. 07-074, slip op. at 11 (ARB: July 23, 2008).

The Administrative Review Board ("Board"), has held that generalized complaints about mismanagement or conclusory accusations about financial improprieties, where the employee's communications do not "definitively and specifically" relate to any of the enumerated statutes, are not protected activity. Stojicevic v. Arizona-American Water, ARB Case No. 05-081 (ARB: Oct. 30, 2007), slip op. at 8, quoting Platone v. FLYi, Inc., ARB Case No. 04-154 (ARB: Sept. 29. 2006), slip op. at 17. See also Inman v. Fannie Mae, 2007-SOX-00047 (ALJ: Mar. 5, 2008); Harvey v. Home Depot U.S.A, Inc., ARB Case No. 04-114, 04-115 (ARB: June 2, 2006).

Discussion

In determining whether the Complainant engaged in protected activity, the relevant inquiry is not what he alleged in his OSHA Complaint, but what he actually communicated to the Respondent prior to the unfavorable personnel action. Platone, ARB Case No. 04-154, slip op. at 17. Under the Act, the Complainant must show that before he suffered an unfavorable personnel action, he provided information to a "Federal regulatory or law enforcement agency," "any member of Congress or any committee of Congress," or to a "person with supervisory authority" over him, which he "reasonably believes to constitute a violation of section 1341 …" See 18 U.S.C. § 1541A. The issue of whether the Complainant's allegations constitute protected activity is raised in the Respondent's Motion for Summary Decision, therefore, I must first address whether the Complainant's activity was protected under the Act.

The Act "does not provide whistleblower protection for all employee complaints about how a public company spends it money and pays its bills." Platone, ARB Case No. 04-154, slip op. at 17. Rather, to constitute protected activity, an employee's complaints must "definitively and specifically" relate to one of the six enumerated categories found in § 1514A. Id.

To come under the protection of the Act, the whistleblower must ordinarily complain about a material, misstatement of fact (or omission) about a corporation's financial condition on which an investor would reasonably rely, and the protected complaint must "definitively and specifically" relate to the Act's subject matter; and be specific enough to permit compliance, and support a complainant's reasonable belief. See Harvey v. Home Depot U.S.A., Inc., ARB Case Nos. 04-114, 115, slip op. at 14 (ARB: June 2, 2006); see also Smith v. Hewlett Packard, ARB Case No. 06-064 (ARB: April 29, 2008).

Speculation or a mere possibility that shareholders would be defrauded because of certain corporate executive decisions does not satisfy the reasonable belief requirement. See Harvey, ARB Case Nos. 04-114, 115, slip op. at 14-15 ("A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough. Accordingly,

Harvey's August 31, 2002 letter does not express his reasonable belief that Home Depot was defrauding shareholders or violating security regulations."); See also Reed v. MCI, Inc., ARB Case No. 06-126 (ARB: April 30, 2008).

Among the violations that fall under the Act, allegations relating to company profit and stock price most closely relate to shareholder or securities fraud, and the elements of a cause of action for this type of fraud, such as a violation of SEC Rule 10b-5, are rooted in common law tort actions for deceit and misrepresentation. Platone, ARB Case No. 04-154, slip op. at 16 (citing Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005)). The basic elements include a material misrepresentation (or omission), scienter, a connection with the purchase or sale of a security, reliance, economic loss and loss causation – a causal connection between the material misrepresentation and the loss. Dura Pharm., 544 U.S. at 341-342. A fact is material if the reasonable investor would consider it significant to his trading decision. Basic Inc. v. Levinson, 485 U.S. 224, 240 (1998); see Platone, ARB Case No. 04-154, slip op. at 16. With respect to omissions of fact, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available. Basic, 485 U.S. at 231-232 (citing TSC Indus., Inc. v. Northway Inc., 426 U.S. 438, 449 (1976)); See also Smith v. Hewlett Packard, ARB Case No. 06-064 (ARB: April 29, 2008).

No evidence in the record indicates that at the time his communications to management were made, Complainant considered Respondent's conduct to constitute any of the enumerated violations of federal fraud listed in 18 U.S.C. § 1541A. There is no specific mention of any offense of fraud. Moreover, the Complainant only generally alleges in his OSHA complaint that the Respondent's misconduct could directly affect "the profitability of the plant and… Kellogg's stock prices." (See Complainant's Complaint to OSHA).

In the instant matter, the record of the Complainant's disclosures is devoid of any evidence that he conveyed a reasonable belief that there was a violation of any of the provisions enumerated under § 806 of the Act. The Complainant's OSHA Complaint states he made multiple communications to the Respondent, via his direct manager, regarding what he saw as "extreme extra perks and plant security privileges that were afforded to a group of outside contractors..." and that these contractors had paid for such privileges, as well as submitted inflated invoices. (Complainant's Complaint to OSHA).

The Complainant's complaint does not mention the specific manner in which the Respondent Employer was engaging in any type of violation enumerated in the Act, such as mail fraud; wire, radio, or television fraud; bank fraud; securities fraud; any rules or regulations of the Securities and Exchange Commission; or, more specifically (as he alleges misconduct affecting profitability and/or stock price), any provision of Federal law relating to fraud against shareholders.[6] Moreover, an examination of the record indicates there is no evidence which

[6] It must be noted that the Complainant never submitted any affidavits or other evidence in support of his opposition to the Motion. Therefore, there exists no substantive evidence on the record before me (only the OSHA complaint itself) upon which to assess the Complainant's position regarding whether his disclosures constituted protected activity.

would allow an inference that the Respondent's alleged misconduct, even if true, would either: (1) directly implicate the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a), or (2) constitute a material, misstatement of fact about a corporation's financial condition upon which an investor would rely. See Harvey, ARB Case Nos. 04-114, 115, slip op. at 14.

At most, the contractor misconduct Complainant has alleged could potentially, and in an attenuated way, adversely affect the Respondent's financial condition. But, as set forth above, based on the evidence of record, I cannot infer that the Complainant has thereby alleged a fraud against shareholders. See Harvey v. Home Depot U.S.A., Inc., ARB Case Nos. 04-114, 115 (ARB: June 2, 2006); See also Platone v. FLYi, Inc., ARB Case No. 04-154 (ARB: Sept. 29, 2006); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005); Basic Inc. v. Levinson, 485 U.S. 224, 240 (1998).

Conclusion

As set forth in the foregoing discussion, and construing all facts of record in the light most favorable to the Complainant, I find that the Respondent has established that there is no genuine issue of material fact as to whether the Complainant's actions constituted protected activity.

Therefore, Respondent's Motion on this basis is GRANTED. [7]

Order

Upon due consideration, as set forth above, I GRANT the Respondent's Motion for Summary Decision.[8]

SO ORDERED.

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ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

[7] Because I have found that the Complainant has failed to establish this element of a prima facie case, the issue of whether the Complainant was dismissed for legitimate, non-retaliatory reasons by Respondent need not be discussed.

[8] Because I have granted the Respondent's Motion for Summary Decision, the pre-hearing conference (set for November 3, 2008) and the hearing (set for November 7, 2008) are, hereby, cancelled.

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, Room S-4309, 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).