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Issue Date: 22 October 2009

In the Matter of: **CASE NO: 2009-SOX-00062**

JASON BRISKI,
Complainant,

v.

BRAD FOOTE GEAR WORKS

and

BROADWIND ENERGY, INC.,
Respondents.

DECISION AND ORDER GRANTING SUMMARY DECISION AND DISMISSING COMPLAINT

Background

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (Act), 18 U.S.C.A. § 1514A, and its implementing regulations found at 29 C.F.R. Part 1980. Section 806 provides "whistleblower" protection to employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain "protected activity" by the employee.

Complainant was employed by Brad Foote Gear Works (BFGW) on September 22, 2008, as Director of Human Resources. BFGW is a wholly-owned subsidiary of Broadwind Energy, Inc. (Broadwind). BFGW was purchased by Broadwind in August 2007. BFGW had been previously a privately held company.

Broadwind is a company within the meaning of 18 USC §1514A in that it has a class of securities registered under Section 12 and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §781).

On February 27, 2009, the Complainant's position was eliminated as part of an ongoing reduction in force (RIF) which began in November 2008. The RIF was due to significant financial issues that arose during the recession.

Complainant is acting *pro se* in this matter and all due consideration for his status has been accorded him in rendering this decision.

The Complainant filed his complaint on May 22, 2009, and alleged that an adverse personnel action had occurred on February 27, 2009, when he was terminated from his employment. The complaint was denied by the Regional Administrator, Occupational Safety and Health Administration, Chicago, IL, on July 14, 2009. The Complainant filed a subsequent request for hearing before an Administrative Law Judge on August 15, 2009.[1]

By Order dated August 21, 2009, a formal *de novo* hearing was scheduled by the undersigned for November 17, 2009, in Chicago, IL.

On September 18, 2009, Respondents' counsel filed a Motion for Summary Decision to Dismiss the Complaint with an attendant Brief in Support of Motion to Dismiss. Respondents moved for dismissal of all claims averring that the Complainant's allegations do not on their face establish the "Protected Activity" necessary to invoke the subject matter jurisdiction of the Act in that they do not "definitively and specifically" relate to any of the listed categories of fraud or Securities violations under the Act.

Respondents also argued that the Complainant's position would have been eliminated anyway due to the massive reduction in force that had taken place.

On September 30, 2009, Complainant filed a Response to Respondents' Motion for Summary Decision. Complainant argued that his complaint constituted protected activity. He states that his position with "BFGW was eliminated as a result of the pay discrepancies revealed by information provided to SOX auditors hired by Broadwind and because of the labor relations issues that arose as complainant made changes to the pay increase procedure to comply with the SOX audit of BFGW's practices." He also alleges now that the "excess labor costs of $100,000 to $200,000 beyond the collective bargaining agreement rates constitute fraud against shareholders."

Complainant also argued in his affidavit that his March 9, 2009 "Whistleblower Charge" with OSHA alleged that the Respondents retaliated against him "for raising a (sic)

[1] Both his Complaint and the Request for Hearing were filed in a timely manner under the Act.

environmental/safety issue with Broadwind's General Counsel." Of note, in the Complaint filed May 22, 2009, Complainant stated that he believed his handling of the pay issues raised by SOX testing and the resulting labor relations problems was an additional reason for eliminating his position. Complainant provided no supporting evidence of the alleged "environmental concerns" he alludes to in his affidavit.[2]

Complainant's Affidavit in Support of Motion lists 23 arguments/incidents/events that he alleges support his position.[3]

Respondents filed a Reply Brief in Support of Respondents' Motion for Summary Decision on October 8, 2009. Respondents argue that Complainant has not established that his Complaint constitutes SOX Protected Activity or the he held any reasonable belief that they constituted Protected Activity and that Complainant has failed to establish that his purported "Protected Activity" was a contributing factor to his termination.

Standard of Review - Summary Decision

The standard for granting summary judgment or decision is set forth at 20 C.F.R. §18.40(d) which is derived from Federal Rules of Civil Procedure (FRCP), Rule 56.[4] Section 18.40(d) permits an Administrative Law Judge to enter summary decision, "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issue as to any material fact and that a party is entitled to summary decision." 20 C.F.R**.** §18.40(d). A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists when the non-movant produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. *Id*. at 249.

In deciding a Rule 56 motion for summary decision, the Court must consider all the material submitted by both parties, drawing all reasonable inferences in a manner most favorable

[2] The Complainant's May 22, 2009, Complaint addresses his position with regard to the labor relations issues but does not indicate he was relying on the environmental concerns any longer and provides no support whatsoever for that March 9, 2009, allegation. The March "Whistleblower Charge" was filed under Section 11(c)(1), 29 U.S.C. §660(c). It is not known whether the denial in that case has been appealed. In the Complainant's Request for Hearing dated August 15, 2009, he alleges only that the "concerns" that were raised during the SOX testing process were responsible for the elimination of his position.

[3] A thorough review of each of the points clearly shows that none could be reasonably characterized as the type of activity prohibited under the Act.

[4] Rule 56(c) provides that summary decision shall be rendered "if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c).

to the non-movant. *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 158-159 (1970); *Day v. Staples*, 2009 WL 294804 (1st Cir. Feb. 9, 2009) slip op. at 1, 8. In other words, the Court must look at the record as a whole and determine whether a fact-finder could rule in the non-movant's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324; *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998). If the non-movant fails to sufficiently show an essential element of his case, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 322-323.

Sarbanes-Oxley Act

The Sarbanes-Oxley Act creates "whistleblower" protection for employees of publicly-traded companies by prohibiting employers from retaliating against employees because they provided information about potentially unlawful conduct. Specifically, the Sarbanes-Oxley Act provides:

> No [publicly-traded company], or any officer [or] employee…of such company, may discharge. . . an employee…because of any lawful act done by the employee ― (1) to provide information…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 fraud], any rule or regulation of the [SEC], or any provision of Federal law relating to fraud against shareholders, when the information . . . is provided to a person with supervisory authority over the employee.

18 U.S.C. § l514A(a); *see also Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 (4th Cir. 2008); *Allen v. Admin, Review Bd.*, 514 F.3d 468, 475 (5th Cir. 2008).

The whistleblower protection provision of the Sarbanes-Oxley Act adopts the burden-shifting framework applicable to whistleblower claims brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121(b) (2000). *See* 18 U.S.C. § 1514A(b). Accordingly, an employee bears the initial burden of making a *prima facie* showing of retaliatory discrimination; the burden then shifts to the employer to rebut the employee's *prima facie* case by demonstrating by clear and convincing evidence that the

employer would have taken the same personnel action in the absence of the protected activity. 49 U.S.C. § 42121 (b)(2)(B).

The Department of Labor (DOL) regulations implementing §1514A provide that in order to make a *prima facie* showing, an employee's complaint must allege that: (1) the employee engaged in protected activity; (2) the employer knew, actually or constructively, of the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) the circumstances raise an inference that the protected activity was a contributing factor in the personnel action. 29 C.F.R. § l980.104(b)(1) (2007).

To satisfy the first element and establish that he engaged in protected activity, an employee 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*. (Emphasis added). *Livingston,* 520 F.3d at 352. Additionally, an employee must show that his communications to his employer "definitively and specifically relate[d]" to one of the laws listed in §1514A. *Platone v. FLYi, Inc.,* ARB Case No. 04-154, slip op. at 17 (ARB Sept. 29, 2006) (internal quotation marks omitted).

This requirement ensures that an employee's communications to his employer are factually specific. An employee need not "cite a code section he believes was violated" in his communications to his employer, but the employee's communications must identify the specific conduct that the employee believes to be illegal. *Fraser v. Fiduciary Trust Co. Int'l.*, 417 F, Supp. 2d 310, 322 (S.D.N.Y. 2006); *see also Bechtel Constr. Co. v. Sec y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995) (considering standard for protected activity under the whistleblower provisions of the Energy Reorganization Act, 42 U.S.C. § 5851). "[G]eneral inquiries do not constitute protected activity." *Fraser*, 417 F. Supp. 2d at 322.

The "definitively and specifically" language does *not* require that an employee complain of an *actual* violation. Indeed, the ARB has held that §1514A protects an employee's communications based on a reasonable, but mistaken, belief that conduct constitutes a securities violation. *See Halloum v. Intel Corp.,* ARB Case No. 04-068, slip op. at 6 (ARB Jan. 31, 2006); *accord Allen,* 514 F.3d at 477.

The ARB has held that, for the requirement that an employee's communications "definitively and specifically relate" to a listed law, the "relevant inquiry" is what an employee "actually communicated to [his] employer prior to the . . . termination"; it is *"not* what [is] alleged in [the

employee's] OSHA complaint." *Platone,* ARB Case No. 04-154, slip op. at 17. (Emphasis added). The "definitively and specifically" language clearly does not impose a heightened pleading standard in Sarbanes-Oxley whistleblower cases. *See Welch v. Chao,* 536 F.3d 269 (4th Cir. 2008).

Discussion

Accordingly, we turn to the central issue in this case - whether the Complainant established that his communications constituted activity protected by §l5l4A.

For an employee to prove that he engaged in protected activity, he must show that he possessed both a subjective belief and an objectively reasonable belief that the conduct complained of constituted a violation of relevant law. *Livingston,* 520 F.3d at 352; *Melendez v. Exxon Chems. Ams.,* ARB Case No. 96-051**,** slip op. at 25-29 (ARB July 14, 2000). Thus, the employee must show both that he actually believed the conduct complained of constituted a violation of *pertinent law* (emphasis added) and that "a reasonable person in his position would have believed that the conduct constituted a violation." *Livingston,* 520 F.3d at 352; *accord Allen,* 514 F.3d at 477.

I. The Complainant has failed to establish that his communications constituted protected activity.

In order to establish a prima facie case under the Act, the Complainant must show, by a preponderance of the evidence when viewed in a light most favorable to him, that (1) he engaged in "protected activity" by providing information or a complaint to a covered supervisor or other individual authorized to investigate and correct misconduct where such information or complaint regarded conduct that he reasonably believed constituted one of six violation types enumerated in §1514A(a) of the Act; (2) the covered Respondent knew, actually or constructively, of the "protected activity"; (3) the covered Respondent discharged him or took another unfavorable personnel action against him; and (4) his providing the information or making the complaint was a contributing factor to the discharge or other adverse personnel action taken by the covered Respondent.

The Complainant must show not only that he believed that the described conduct constituted a violation, but also that a reasonable person in his position would have believed that the described conduct constituted a violation. The described conduct which constitutes the violation must have already occurred or be in the progress of occurring based on circumstances that the Complainant observes and reasonably believes at the time the information or the

complaint was provided. *Livingston v. Wyeth, Inc*., 520 F.3d 344 (4th Cir., 2008); *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008); *see also Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006); *Getman v. Southwest Sec., Inc*., ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB, July 29, 2005)

While the Complainant need not cite a code section he believes was violated in his communication to the supervisor or other individual authorized to investigate and correct misconduct, the communication must identify the specific conduct that the employee reasonably believes to be illegal, even if it is a mistaken belief. General inquiries do not constitute protected activity. The communication only involves what is actually communicated to the covered employer prior to the unfavorable employment action and not what is alleged in the complaint filed with OSHA. *Welch v. Chao, surpa*, 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)

The unfavorable employment action in this case was the termination of employment that took place on February 27, 2009, when the Complainant was notified that his employment was being terminated because his position was being eliminated due to the ongoing reduction in force.[5]

When all the communications are viewed in a light most favorable to the Complainant, there is no manifestation of specific conduct that had occurred or was in the process of occurring that constituted a fraudulent activity encompassed by the Act. "Fraud" has a defined legal meaning and in the context of SOX is not a "colloquial term" and the "hallmarks of fraud are misrepresentation and deceit." *Day v. Staples*, 2009 WL 294804 (1st Cir. Feb. 9, 2009) at 11 quoting *Ed Peters Jewelry Co., v. C.J. Jewelry Co.,* 215 F.3d 182 (1st Cir. 2000). The employee need not reference a specific statute, or prove actual harm, but he must have an objectively reasonable belief that the company intentionally misrepresented or omitted certain facts to investors, which were material and which risked loss. *See* Day, at 11.

The Complainant's communications were not specific complaints of fraudulent conduct covered by any of the statutes covered under the Act. No reasonable person could believe otherwise. The Complainant had been tasked to correct certain pay discrepancies that had been in existence prior to the purchase of BFGW by Broadwind. His performance in the handling of

[5] The Complainant's performance in dealing with the pay scale revisions also played a role in the decision to eliminate his position. Mr. Taggert states in his affidavit that he had already assumed most of the duties assigned to the Complainant.

this task (good or bad) is not relevant to this decision, only whether the activities he engaged in were "protected" under the Act.

The Complainant seems to be confused between the terms "SOX compliance" as it refers to the ongoing process of transitioning BFGW from a private to public company, and conduct which would constitute a violation of one of the six types of violations enumerated in §1514A(a) of the Act. The Respondents were actively working to rectify any discrepancies referred to in the audit that the company itself initiated. That was precisely why the Complainant was tasked to rectify the problems. The mere fact that there were some pay variances between the old and new company did not cause them to be in violation of any of the six areas of violations. No "fraud" as described in the Act in this area was indicated by any of the evidence. Indeed, the Respondents were concerned with the amount of time the Complainant was taking to resolve the problems because of the excessive number of union grievances they were receiving.

As to the additional labor costs the Complainant refers to in his brief, the Act does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills. *See Platone, supra* at 17.

The Complainant has failed to explain how he could have had an objectively reasonable belief that these actions violated any of the laws listed in § l5l4A. He failed to explain how any of the Respondents' alleged conduct could reasonably be regarded as violating any of the laws listed in §1514A.

After deliberation on the arguments, supporting briefs, and supporting documents submitted by the parties, the undersigned finds that the Complainant has failed to establish that he communicated to appropriate personnel that fraudulent activity within the scope of the Act had occurred, or was ongoing, and, as such, has failed to establish he engaged in "protected activity" as required by the Act.

Accordingly, the Respondents are entitled to summary decision and dismissal of the complaint.

II. Reason for Termination

The Respondents also seek summary judgment on the ground that they would have terminated Complainant's employment absent any alleged protected activity due to the "massive" reduction in force necessitated by the recession. In support of this position, Respondents provided affidavits from Dennis Taggert, Vice President of Human Resources for

Broadwind. This evidence indicates that there were over three hundred employees laid off between November 2008 and July 2009. According to Taggert, the significant reduction in the workforce resulted in the lack of a continuing need for both a Director of Human Resources (Complainant) and a Vice President of Human Resources (Taggert).

Complainant offers no evidence to refute the RIF statistics or the justification for the elimination of his position.

Respondents have, therefore, established that Complainant would have been discharged regardless of any "protected activity." The Complainant has not met his burden to counter the Respondents' evidence and the Respondents are entitled to summary decision and dismissal of the Complaint on this basis as well.

FINDINGS OF FACT

After deliberation on all the submissions of the Parties, and a thorough review of the case law, statutes and regulations pertinent to the Act, the undersigned finds, for the sole purposes of the Motion to Dismiss, that:

1. The Respondents are employers within the meaning of the Act.
2. The Complainant suffered an adverse employment action on February 27, 2009, when his employment was terminated.
4. The Complainant's communications were not communications that rose to the level of "protected activity" under the Act.
5. The Complainant has failed to establish a *prima facie* case for relief under the Act.
6. The Complainant's position would have been eliminated regardless of any "protected activity."
6. The Respondents are entitled to a summary decision in the form of Dismissal of the cause of action.

ORDER

The Respondents' Motion for Summary Decision is **GRANTED** and the Complaint is **DISMISSED.**

The hearing previously scheduled for November 17, 2009 is **HEREBY CANCELLED.**

IT IS SO ORDERED.

ROBERT B. RAE
U. S. Administrative Law Judge

Washington, D.C.

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).