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Issue Date: 13 January 2009

CASE NO: 2009-SOX-00003

***In the Matter of*:**

ROBERT W. REAMER,
Complainant,

v.

FORD MOTOR COMPANY,

FORD MOTOR CREDIT COMPANY, ET AL,
***Respondents*.**

SUMMARY DECISION, ORDER DISMISSING COMPLAINT AND ORDER CANCELLING HEARING

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 CFR 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[1] by the Ford Motor Credit Company ("FMCC") on September 22, 1994. At the time of his termination on January 18, 2008, the Complainant was the Supervisor of Dealer Field Credit Department, Global Risk Management Department.

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

The Complainant filed his complaint on March 28, 2008, and alleged that an adverse personnel action had occurred on January 18, 2008, when he was terminated from his employment. The complaint was denied by the Regional Administrator, Occupational Safety and

[1] He was actually re-employed on that date.

Health Administration, Chicago, IL, on September 25, 2008. The Complainant filed a subsequent request for hearing before an Administrative Law Judge on October 10, 2008.[2]

By Order dated October 22, 2008, a formal *de novo* hearing was scheduled by the undersigned for February 17, 2009, in Dearborn, MI.

On December 18, 2008, Respondents' counsel filed a Motion to Dismiss the Complaint with an attendant Brief in Support of Motion to Dismiss. Respondents moved for dismissal of all claims against Ford Motor Company ("FMC") averring that the Complainant was at all times employed by Ford Motor Credit Company ("FMCC"), an indirect, wholly-owned subsidiary of Ford Motor Company.

Respondents also averred that the Complainant's allegations do not on their face establish "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. The Respondents also argued that the Complainant's "allegations, explanations and elaborations" cannot transform his actions into "Protected Activity."

Respondents also averred that the individual who made the decision to discharge the Complainant had no knowledge of the Complainant's purported "protected activity" and that the Complainant failed to identify any competent, admissible evidence of record tending to show that the alleged "protected activity" was a contributing factor in his termination.

In the alternative, Respondents argued that Complainant fails to state a claim upon which relief may be granted under the Act and that he has failed to establish a genuine issue of material fact that his termination was connected to his alleged protected activity.

On December 24, 2008, Complainant filed an Opposition to Respondents' Motion to Dismiss. Complainant argued that FMC should not be dismissed from the proceedings and averred that FMCC employees are required to follow policies of FMC, share the same benefits programs, are paid from the same bank accounts as FMC employees and that FMCC employee paychecks include the Ford "Logo" and printed words "Ford Motor Company."

Complainant additionally argues that "the facts and evidence" show that he was "being coerced to make fraudulent representations to the FBI" regarding the "illegal activities" and a "material breakdown of internal control within the company." He states that he engaged in

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

"protected activity" and conduct that involved "corporate fraud, wire fraud[3] and other illegal activities committed by company employees that could result in government sanctions directly impacting shareholders."

Complainant also argued that the "hostile work environment issues" were not created by his actions.

Complainant's Affidavit in Support of Motion lists forty-four (44) parts and several sub-parts consisting of arguments/incidents/events that he alleges support his position.[4]

Respondents filed a Reply to Complainant's Opposition to Respondents' Motion to Dismiss on January 6, 2009. Respondents argue that FMC should be dismissed as Complainant was never employed by FMC and that FMC was neither involved in, nor exercised control over FMCC's decision to terminate the Complainant; that Complainant did not engage in Protected SOX Activity; that the individual who made the decision to discharge the Complainant had no knowledge of his "protected activity"; that Complainant has failed to establish that his purported "Protected Activity" was a contributing factor to his termination; and that FMCC has identified legitimate, non-discriminatory reasons for Complainant's termination which the Complainant cannot rebut as pretextual.

Discussion

Respondents have requested the case be dismissed through summary decision. Summary judgment is proper if the pleadings, discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of establishing that there is no genuine issue of material fact when the material submitted for consideration is viewed in a light most favorable to the non-moving party. *Celotex Corp. v. Catrett*, 477 US 317, 106 S.Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 US 242 (1986).

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:

[3] Complainant did not make any allegations of "wire" or "corporate fraud" in either his original Complaint or his Request for Hearing.

[4] A thorough review of each of the parts and sub-parts clearly shows that not a single one could remotely be characterized as the type of activity prohibited under the Act.

> 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 (internal quotation marks, omissions, and citations omitted).

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*, __ F.3d __, 2008 WL 2971800 (4th Cir., Aug. 5, 2008).

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. <u>The Complainant has failed to establish that his communications constituted protected activity.</u>

The Complainant alleges that adverse employment action[5] was taken against him in violation of the Act due to a host of allegations raised in a variety of communications (emails, letters, etc.) to several FMC and FMCC officials and supervisors and to the FBI. The Complainant alleges that FMC, FMCC and twelve (12) individuals participated in the "reprisals" against him for his "whistleblower activities."[6]

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*, ___ F.3d ___. 2008 WL 2971800 (4th Cir., Aug. 5, 2008); see also *Henrich v. ECOLAB, Inc.*,

[5] His termination for violation of the anti-harassment policies of FMCC on January 18, 2008, is the alleged adverse personnel action.

[6] Recitation of all the different allegations is not particularly productive or necessary in the context of this decision. However, a brief synopsis of his allegations as noted in his Complaint is illustrative. Complainant alleged in his letters to the FBI that he was not aware of any fraud involving the pending investigation into one of FMCC vendors, but that he felt it (the investigation) was in "retaliation against the customer." He alleged in emails to Tom Schneider, William Clayton Ford and the Board of Directors, that he was concerned that Mr. Schneider might be involved in "illegal activities." Complainant variously "complained" about "trumped up charges of sexual harassment"; acts of "public humiliation"; "feeling pressured into making a claim of fraud against customers"; concern about an early retirement offer that was made to him; his 2007 budget was cut by 50%; he was not provided notice of a "major policy change" that "got him fired"; that the company was conducting a "covert" investigation of him; that he had received a "threatening" telephone call; that he was not paid his 2007 performance bonus; and that they (the Respondents) failed to pay his business expenses for 2008. See Complaint at 2, 3.

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 Complainant has submitted copies of all his communications in this matter.[7] He alleges that these constitute support for his allegations of "protected activity" in this cause of action.

The unfavorable employment action in this case was the termination of employment that took place on January 18, 2008, when the Complainant was notified that his employment was being terminated for violation of the anti-harassment policies of FMCC.

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. The Complainant's communications were, at best, general inquiries about the conduct of an investigation into one of FMCC's vendors, or complaints about the manner in which his conduct was investigated and not specific complaints of fraudulent conduct covered by the Act. No reasonable person could believe otherwise.

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 utterly 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

[7] There are 33 Exhibits to his Affidavit in Support of Motion which this Court has thoroughly reviewed without finding even a scintilla of support for his proposition that they comprise "protected activity" under the Act.

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. **For purposes of the Motion for Summary Decision, the Complainant has established that the Respondents are employers/individuals under the Act.**

The documentary evidence submitted by the Parties, when viewed in the light most favorable to the nonmoving party, establishes that FMCC was the Complainant's employer and subject to the Act. Determination of the status of FMC as an employer in this case is not necessary since the case is being dismissed as to all Respondents involved for reasons described hereinabove. It is a moot issue at this time. However, for the purposes of this decision, FMC and the remaining individual Respondents are considered, *arguendo,* to be the Complainant's employer/supervisors, as well as FMCC.

III. The remaining issues raised by the Parties are moot.

In that the Complainant has failed to establish a *prima facie* case, due to the lack of proof he engaged in any protected activity, the remaining procedural issues raised by the Parties are now moot.

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/individuals/supervisors within the meaning of the Act.

2. The Complainant submitted written communications to company and government personnel/supervisors, which are the bases of the Complainant's request for relief under the Act.

3. The Complainant suffered an adverse employment action on January 18, 2008, 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 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 cause of action is **DISMISSED.**

The hearing previously scheduled for February 18, 2009 is **HEREBY CANCELLED.**

IT IS SO ORDERED.

A

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).