

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GEORGE B. SKIDMORE,)
)
 Plaintiff,)
)
 v.)
)
 ACI WORLDWIDE, INC.,)
)
 Defendant.)
_____)

8:08CV1

MEMORANDUM AND ORDER

This matter is before the court on defendant ACI Worldwide Inc.’s (“ACI”) motion for judgment on the pleadings pursuant to Fed. R Civ. P. 12(c). Filing No 21. This is an action for wrongful discharge under the Sarbanes-Oxley Act of 2002 (“SOX”), [18 U.S.C. § 1514A](#). Jurisdiction is premised on [28 U.S.C. § 1331](#) (federal question jurisdiction). Defendant initially filed a motion to dismiss, Filing No. [10](#), as to the initial complaint. The court granted the motion, Filing No. [17](#), and allowed plaintiff to amend. Plaintiff filed an amended complaint, Filing No. [19](#), which defendant alleges is likewise deficient. Defendant argues the allegations in the amended complaint fail to state a SOX whistleblower claim as a matter of law due to lack of specificity. In opposition to the motion, Skidmore claims the complaint is specific enough and asks this court to overrule ACI’s motion for judgment on the pleadings.

I. Background

As in the initial complaint, the following facts are included in the amended complaint. Skidmore was a former employee of ACI and worked in its Omaha office. Skidmore reported directly to Henry Lyons (“Lyons”) who was the Chief Financial Officer, Senior Vice President, and Treasurer of ACI. According to plaintiff’s complaint, Skidmore had a

conference call with Lyons on January 18, 2007. During this conference, Lyons told Skidmore to book an estimated tax rate for the forecasted budget for the end of the first quarter of the fiscal year. Skidmore refused to do this without supporting information, because he believed the actual numbers did not justify the estimated tax rate. Skidmore contends he reported this matter to Dennis Byrnes (“Byrnes”), who was General Counsel and Chief Compliance Officer for ACI. Skidmore alleges Byrnes was in a supervisory capacity over him. Byrnes asked Skidmore to prepare a written report of the incident. Skidmore prepared the report. Skidmore was then terminated on April 11, 2007, shortly after he tried to submit the report to Byrnes.

Plaintiff has added the following facts to its amended complaint. Plaintiff alleges that the tax rate defendant instructed plaintiff to use was fraudulent; that the fraudulent numbers would have been included in government documents; and that the fraudulent numbers would have been disseminated in shareholder information and shareholders would have relied upon such information. Filing No. [19](#) at 2.

II. Discussion

1. Rule 12(b)(6) - Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A

Under the Federal Rules, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The rules require a “‘showing,’ rather than a blanket assertion, of entitlement to relief.” [*Bell Atlantic Corp. v. Twombly*, 550 U.S. —, —, 127 S. Ct. 1955, 1964 \(2007\)](#). “Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” [*Erickson v. Pardus*, — U.S. —, —, 127 S. Ct. 2197, 2200](#) (quoting *Bell Atlantic*, 550 U.S. at —, 127 S. Ct. at 1964). In order to survive

a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the plaintiff's obligation to provide the grounds for his entitlement to relief necessitates that the complaint contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic*, 550 U.S. at —, 127 S. Ct. at 1965.

When ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Id.* "On the assumption that all the allegations in the complaint are true (even if doubtful in fact)," the allegations in the complaint must "raise a right to relief above the speculative level." *Id.* In other words, the complaint must plead "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974. Thus, the court must find "enough factual matter (taken as true) to suggest" that "discovery will reveal evidence" of the elements of the claim. *See id.* at 1965; [Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 \(2005\)](#) (explaining that something beyond a faint hope that the discovery process might lead eventually to some plausible cause of action must be alleged). When the allegations in a complaint, however true, cannot raise a claim of entitlement to relief, the complaint should be dismissed for failure to set a claim under Fed. R. Civ. P. 12(b)(6). *Bell Atlantic*, — U.S. at —, 127 S. Ct. at 1966. "A court should not dismiss a complaint for failure to state a claim unless it is 'beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief.'" [Sommers Oil Co. v. U.S., 241 F.3d 1375, 1378 \(Fed. Cir. 2001\)](#) (quoting [Hamlet v. U.S., 873 F.2d 1414, 1416 \(Fed. Cir. 1989\)](#)).

18 U.S.C. § 1514A ("§ 1514A") is entitled "Civil action to protect against retaliation in fraud cases." The statute says:

(a) Whistleblower protection for employees of publicly traded companies.--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 section 1341¹, 1343², 1344³, or 1348⁴, 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)(A)-(C).

An employee asserting a claim under § 1514A must first file a complaint with the Secretary of Labor. 18 U.S.C. § 1514A(b)(1)(A). This action must be brought “no later than 90 days after the date on which the violation occurred.” 18 U.S.C. § 1514A(b)(2)(D).

A person who alleges discharge or other discrimination under the statute may seek relief by “bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the

¹18 U.S.C. § 1341. Frauds and swindles

²18 U.S.C. § 1343. Fraud by wire, radio, or television

³18 U.S.C. § 1344. Bank fraud

⁴18 U.S.C. § 1348. Securities fraud

amount in controversy,” “if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the complainant.” [18 U.S.C. § 1514A\(b\)\(1\)\(B\)](#); see [29 C.F.R. § 1980.114\(a\)](#). An employee must file a complaint with the Occupational Safety and Health Administration (“OSHA”) and allow time for OSHA to resolve the issue before filing a complaint in federal court. [Willis v. Vie Fin. Group, Inc., No. Civ.A. 04-435, 2004 WL 1774575, at *3 \(E.D. Pa. August 6, 2004\)](#).⁵

To prevail in a SOX whistleblower claim, complainant/employee must prove by a preponderance of the evidence that: (1) he engaged in protected activity or conduct; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. [Richards v. Lexmark Int’l, Inc., 2004-SOX-00049, 2006 WL 3246874, at *24 \(ALJ June 20, 2006\)](#); [Collins v. Beazer Homes USA, Inc., 334 F.Supp.2d 1365, 1375 \(N.D. Ga. 2004\)](#). “Protected activity’ . . . includes providing to an employer information regarding any conduct which the employee reasonably believes constitutes a violation of various criminal fraud provisions, any rule or regulation of the SEC, or any provision of Federal law relating to shareholders.” [Richards, 2006 WL 3246874](#), at *25.

An employee receives protection under SOX if the reported information has a degree of specificity. [Lerbs v. Buca Di Beppo, Inc., 2004-SOX-8, 2004 DOLSOX LEXIS 65, at *33 \(ALJ June 15, 2004\)](#). “General inquiries do not constitute protected activity.” *Id.* at *34. There has to be particular concerns the employee possesses that reasonably identify illegal activity on the part of the employer. *Id.* The employee is not required to

⁵The Secretary of Labor has delegated that a SOX complaint must be filed with OSHA. See 29 C.F.R. § 1980.103(c).

show an actual violation of the law. [Collins, 334 F. Supp.2d at 1376](#). The test for the employee's belief is both subjective and objective: the employee must have "actually and reasonably believed the employer violated one of the laws and regulations enumerated in SOX." *Lerbs*, 2004 DOLSOX LEXIS 65, at *30-31; [Bishop v. PCS Admin. \(USA\), Inc., No. 5 C 5683, 2006 WL 1460032](#), at* 5 (N.D. Ill. May 23, 2006). Disclosures are considered protected activity "only when they implicate the substantive law protected in SOX relating to fraud against shareholders definitely and specifically." [Portes v. Wyeth Pharm., Inc., No. 6 Civ. 2689\(WHP\), 2007 WL 2363356, at *4 \(S.D. N.Y. August 20, 2007\)](#) (quoting [Fraser v. Fiduciary Trust Co. Int'l, 417 F. Supp.2d 310, 322 \(S.D. N.Y. 2006\)](#)). Employee disclosures must be related to illegal activity and involve shareholder fraud. [Livingston v. Wyeth, Inc., 520 F.3d 344, 353 \(4th Cir. 2008\)](#).

In order for a SOX claim to survive a Rule 12(b)(6) motion to dismiss (or for purposes of this motion, a motion for judgment on the pleadings under Rule 12(c)), a complaint must state a cause of action where an employee reasonably believed that the reported conduct was violating the provisions of § 1514A relating to shareholder fraud. See [Smith v. Corning Inc., 496 F.Supp.2d 244 \(W.D. N.Y. 2007\)](#) (holding plaintiff's complaint can survive a Rule 12(b)(6) motion because plaintiff reasonably believed defendant's actions were in violation of the provisions of § 1514A and the violation was related to shareholder fraud.); [Bishop, 2006 WL 1460032](#), at *9 ("Since plaintiff has not pleaded any facts that would objectively support a belief that fraud had occurred, the allegations do not support that plaintiff was engaging in protected activity."); [Fraser, 417 F. Supp.2d at 322](#) (holding claims of violations under SOX relating to shareholder fraud must be definite and specific); [Portes, 2007 WL 2363356](#), at *4 ("The 'context' of the

disclosure and ‘the circumstances giving rise to the communication,’ if closely related to potential fraud against shareholders, may be sufficient to satisfy the pleading requirements of a SOX whistleblower claim.”) (*quoting Fraser, 417 F. Supp.2d at 323*).

III. Analysis

In his amended complaint, Skidmore claims Lyons, who was ACI’s Chief Financial Officer, told him to book an estimated tax rate for the forecasted budget for the end of the first quarter of the fiscal year. Skidmore now alleges he believed this rate was fraudulent based upon the actual numbers and refused to perform this request without supporting information. Lyons did not provide this information. He further alleges that these fraudulent numbers would have appeared on federal documents and would go to shareholders. Skidmore alleges he prepared a report to be given to ACI’s General Counsel Byrnes. Skidmore claims his submission of the report to Byrnes was a protected activity and his termination of employment was a result thereof. Skidmore alleges that ACI’s conduct is a violation of § 1514A. ACI argues that the allegations of fraud in the amended complaint are a bad faith attempt to save his amended complaint. ACI further argues that plaintiff’s allegations are mere conclusion and are not supported by facts. ACI finally argues that this court should dismiss the complaint, because the first complaint is inconsistent with the amended complaint.

In its order granting defendant’s motion to dismiss, this court instructed plaintiff that his amended complaint “must allege specific facts showing how ACI’s purported actions constitute a violation of the rules and regulations relating to fraud against the shareholders under SOX.” Filing No. at 9-10. Plaintiff made the above changes in his amended complaint. Plaintiff alleges he was asked to use fraudulent numbers that would have been

placed on federal documents and provided to the shareholders. Plaintiff reported this request to his supervisor and attorney/compliance officer. Thereafter, plaintiff was fired. The court finds these allegations are sufficient under SOX. *Bell Atlantic Corp*, 550 U.S. at —, 127 S. Ct. at 1964.⁶ Accordingly, the court will deny the motion for judgment on the pleadings.

THEREFORE, IT IS ORDERED that:

1. ACI Worldwide, Inc.'s motion for judgment on the pleadings, Filing No. [21](#), is denied; and
2. The stay is lifted and the magistrate judge is ordered to progress this case.

DATED this 7th day of October, 2008.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States District Judge

⁶The defendant asks the court to dismiss on the basis that plaintiff has changed the language from his first complaint to his current amended complaint and that such changes are inconsistent and transparent. The court will not dismiss on that basis; however, if at a later date after sufficient discovery has occurred the defendant finds it appropriate to file a Rule 11 motion pursuant to Fed. R. Civ. P. 11, the court will entertain such a motion.