U.S. Department of Labor

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Issue Date: 16 November 2018

Case No.: 2018-SOX-00037

In the Matter of:

MARTIN CONROY
Complainant

v.

AFLAC, INC., AFLAC, KEN MEIER, TREVOR FENNELL and RICK WHELAN
Respondents

ORDER DENYING RESPONDENTS' LEAVE TO FILE REPLY AND ORDER DENYING RESPONDENTS' MOTION TO DISMISS

The above-captioned matter arises from a complaint filed by Martin Conroy (" the Complainant") against Aflac, Inc., *et al* ("Respondent[1]") under Section 806 (*i.e.*, the employee protection provision) of the Sarbanes-Oxley Act of 2002, as amended ("SOX," "the Act," or "Section 806"), 18 U.S.C. § 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. The Department of Labor's "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges," ("the Rules") set out at 29 C.F.R. Part 18, also apply.

For the reasons discussed below, Respondent's request for leave to submit a reply to Complainant's opposition to Respondent motion to dismiss, as well as Respondent's motion to dismiss are denied.

I. Procedural Background

On February 28, 2017, Complainant filed a claim with the Occupational Safety and Health Administration ("OSHA") alleging that Respondent terminated his employment in retaliation for his protected activity under SOX. By letter dated June 28, 2018, OSHA dismissed Complainant's complaint.

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[1] The case caption in this matter includes numerous entities designated as Respondents; however, for ease of discussion, the Order will employ the term "Respondent" to refer to Complainant's former employer, Aflac, Inc.

On July 30, 2018, Complainant appealed OSHA's dismissal and requested a hearing with the U. S. Department of Labor Office of Administrative Law Judges ("OALJ" or "Office"). On August 27, 2018, the case was subsequently assigned to the undersigned, who issued a September 5, 2018 Notice of Hearing setting the currently scheduled March 21, 2019 hearing in New York City.

On October 2, 2018, Respondent submitted a "Motion to Dismiss and to Stay Discovery" ("Respondent's Motion"), which included a memorandum of law in support of Respondent's Motion. Complainant replied in opposition on October 16, 2018.

An October 19, 2018 Order denied the discovery stay request included in Respondent's Motion but reserved on Respondent's dismissal request which is now addressed herein.

On November 5, 2018, the undersigned received—without prior leave to file—Respondent's "Motion for Leave to File Reply and Reply in Support of Respondent's Motion to Dismiss."

II. Factual Allegations

Taking as true the allegations contained in Complainant's Response,[2] the facts are as follows. *See* Complainant's Response at 3–6.

Complainant worked for Respondent for 12 years prior to his termination in 2015. In 2014, Complainant recognized an alleged "fraud" on [Respondent's] New York SBA account," and reported it to Rick Peterson—Complainant's immediate supervisor—as well as Respondent's Territory VP, Ken Meier, and Daniel Amos, Respondent's CEO. *Id.* at 3; Complainant's February 8, 2017 complaint to OSHA. Complainant alleged to Amos that "fraudulent insurance applications were submitted and approved via mail and wire;" he also generally discussed his impressions of "fraud and theft . . . rampant in New York." *Id.* at 3–4.

Respondent appointed an investigator, Bill Capps, to investigate Complainant's allegations. Capps' investigation confirmed Complainant's allegations: "[Respondent] had been knowingly issuing policies to New York City employees not qualified for such policies in violation of the state insurance regulations." *Id.* at 4. As a result of the investigation, Respondent created three reports. *Id.* at 5. The February 2018 report acknowledged the deficient policies and stated that "these sales have not caused harm to [Respondent]." *Id.* at 5. Respondent took affirmative steps to mitigate reoccurrence of the erroneously issued policies. *Id.* at 6. Complainant was terminated on August 17, 2016. *See* Complainant's February 8, 2017 complaint to OSHA.

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[2] In consideration of a motion to dismiss, a court must accept as true all well-pleaded facts alleged in the complaint and must draw all reasonable inferences in the plaintiff's favor. *See Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (a court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine, whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief."). In consideration of a motion for summary decision, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

III. The Parties' Positions

a. Respondent's Motion

Respondent requests dismissal with prejudice under 29 C.F.R. § 18.70 "for failure to state a claim." *See* Respondent's Motion at 1. Respondent argues that Complainant is unable to make out a prima facie case; specifically, Respondent contends Complainant is unable to show protected activity under the Act. *Id.* at 2. According to Respondent's Motion, Complainant has provided "no allegation . . . that [Respondent] made a misrepresentation to any person or entity—including, in particular, [Respondent's] shareholders—which was relied upon to their detriment and/or caused any injury that SOX is intended to prevent." *Id.* Rather, Respondent argues it was the "victim of the purported fraud," because its independent contractors provided misinformation to Respondent. *Id.* at 2–3.

Respondent contends that "reporting to a public company one's suspicions of a fraud being perpetrated *against* it by another party does not constitute protected activity under any interpretation of SOX." *Id.* at 3, 8–9. Respondent substantially discussed the case of *Gibney v. Evolution Marketing Research, LLC*, 25 F. Supp. 3d 741 (E.D. Pa. 2014) for the proposition that SOX applies only to disclosures aimed at "preventing fraud perpetrated by, rather than against, publicly-traded companies." *Id.* at 8–9. Respondent applied *Gibney* to the current situation, which involved "misrepresentation made *to* [Respondent], not *by* [Respondent]—*i.e.*, alleged misrepresentations made to [Respondent] by the police officers, which were then allegedly transmitted by the [Respondent'] associates . . . to [Respondent] itself." *Id.* at 9. Thus, Respondent was not the agent of any purported "fraud or other misrepresentation." *Id.*

Respondent's Motion further argues that Complainant is unable to establish that Respondent suffered a financial loss due to such fraud which could harm it or its shareholders. *Id.* at 3. Respondent notes that "SOX is not a general anti-retaliation statute." *Id.* Because Complainant is unable to establish that the complained of activities could harm Respondent or its shareholders, Respondent asserts dismissal of the complaint is appropriate. *Id.*

According to Respondent, Complainant "has failed to plead sufficient facts to demonstrate an objectively reasonable belief that the complained-of conduct constituted a fraud on [Respondent's] shareholders." *Id.* at 7–8. Respondent quoted the legislative purpose of SOX, "[t]o *protect investors* by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." *Id.* at 7 (quoting Pub. L. No. 107-204, 116 Stat. 745 (2002)). Respondent maintained that to plead an objectively reasonable belief of shareholder fraud, Complainant must "allege facts showing a misrepresentation to shareholders." *Id.* (citing *Day v. Staples, Inc.*, 555 F.3d 42, 56 (1st Cir. 2009); *Lamb v. Rockwell Automation, Inc.*, 249 F. Supp. 3d 904, 208–09 (E.D. Wis. 2017); *Beacom v. Oracle Am., Inc.*, No. CIV. 13-985 DWF/FLN, 2015 WL 2339558, at *5 (D. Min.. Mar. 11, 2015)). The "mere possibility" that a company's financial condition could be impacted "is not enough." *Id.* at 8 (quoting *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-00023, slip op. at 8 (Sep. 29, 2006); *Safarian v. Am. DG Energy Inc.*, No. 10-6082, 2014 U.S. Dist. LEXIS 59684, 2014 WL 1744989, at *5 (D.N.J. Apr. 29, 2014) ("[A]pplying the Sarbanes-Oxley Act to any fraudulent

actions that might lead to misstatements in the accounting records or tax submissions would unduly expand the Act to a general anti-retaliation statute."). Complainant also did not provide any connection between the allegedly fraudulent insurance policies and shareholder fraud. *Id.* at 9–10.

Aside from shareholder fraud, Respondent argues that the alleged fraud Complainant reported also fails to constitute any of the other six enumerated categories of violations discussed in Section 806. *Id.* at 10 –11. Notably, Complainant did not allege that the complained of activity involved a "scheme to steal money or property by anyone, let alone one perpetrated by [Respondent]." *Id.* at 12. Respondent again maintains it was "tricked into providing insurance coverage to a number of police officers based on false representation regarding their eligibility to purchase the coverage." *Id.*

Respondent's Motion argues a SOX claim "fails when the allegedly improper activity is too trivial to constitute fraud." *Id.* at 10 (citing *Beacom*, 2015 WL 2339558, at *5; *Hill v. Komatsu Am. Corp.*, No. 14-cv-02098, 2015 U.S. Dist. LEXIS 116611, at * 15–18 (N.D. Ill. Aug. 26, 2015); *Day,* 555 F.3d at 54; *Welch v. Chao,* 536 F.3d 269, 275 (4th Cir. 2008)). Here, Complainant allegedly is unable to show that the complained of issues is anything "more than a trivial issue compared to [Respondent's] overall revenues and operations, nor that it would have any material impact on [Respondent's] share price that could detrimentally affect [Respondent's] investors." *Id.* at 12. Because SOX is not a "general anti-retaliation statute," Respondent requested dismissal of Complainant's complaint.

b. The Complainant's Response

In opposing Respondent's Motion, Complainant maintains he is able to make out a prima facie case under the Act. *Complainant's Response* at 1–2. Complainant argues that his protected activity involved allegations of (1) fraud against Respondent's shareholders; and (2) mail and wire fraud. *Id.* at 11. Complainant contends the complained of mail and wire fraud need not relate to shareholder fraud to rise to the level of protected activity. *Id.* at 2 (citing *Lockheed Martin Corp. v. Administrative Review Bd.*, 717 F.3d 1121, 1132 (10th Cir. 2013)). He maintains that, nonetheless, the complained of activity constituted shareholder fraud because Respondent reported such underpriced insurance policies to its shareholders as "key operational metrics." *Id.* at 3 (citing Exhibits A and B to *Complainant's Response*). Complainant contends that in November 2015, he complained about the underpriced insurance policies to Respondent's CEO, Daniel Amos; in response, Respondent conducted an investigation which allegedly confirmed the erroneously issued policies. *Id.* at 3–4. According to Complainant, Respondent eventually published two reports on the issue, which allegedly confirmed Complainant's allegations. *Id.* at 4–6.

Complainant's response to Respondent's Motion also addressed Respondent's assertion that its contractors, not Respondent, perpetrated the alleged fraud. Complainant counters with legislative policy underlying the Act. *Id.* at 7–8 (*citing Gibney,* 25 F. Supp. 3d at 747 ("Congress was specifically concerned with preventing shareholder fraud either by the public company itself or through its contractors . . . ."); *Lawson v. FMR LLC*, 571 U.S. 429, 447 (2014) ("Congress plainly recognized that outside professionals—accountants, law firms, contractors, agents, and

the like—were complicit in, if not integral to, the shareholder fraud and subsequent cover-up [Enron] officers . . . perpetrated.")). Thus, Complainant argues his complaint involved activity protected under the Act.

The Complainant further argues that the complained of activities qualify as mail or wire fraud. *Id.* at 8–10. Complainant attached as Exhibit C to his response an attestation that the applicant for the discounted policy is a member of the police force and eligible to receive discounted premiums; attestations like the one contained in Exhibit C were allegedly sent by Respondent's agents and approved by Respondent "by wire and/or mail." *Id.* at 9. Complainant quoted *Lockheed*, 717 F.3d at 1130–31 for the proposition that the other prohibited conducts enumerated in Section 806 do not require a separate showing of fraud against shareholders. *Id.* at 9–10 (also citing *O'Mahony v. Accenture Ltd*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008) and *Reyna v. Con Agra Foods, Inc.*, 506 F. Supp. 2d 1363 (M.D. Ga. 2007) ("[t]he statute clearly protects an employee against retaliation based upon that employee's reporting of mail fraud or wire fraud regardless of whether that fraud involves a shareholder of the company.")).

Complainant also attached to his response to Respondent's Motion as Exhibits A and B Annual Reports Respondent issued for FY2015 and FY2016, respectively. Such reports disclosed to Respondent's shareholders "policies and certificates in force," "annualized premiums in force," and "total new annualized premiums," and characterized such information as "key operational metrics" and "key sales metrics." According to Complainant, such "key operational metrics" include the fraudulently written policies that allegedly serve as the basis of Complainant's protected activity. *Id.* at 11–12 (citing SOX Preamble, Pub. L. I 07-204, 116 Stat. 745 (2002) (SOX was enacted "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.")). Because Respondent's investigations bore out Complainant's concerns, Complainant maintains that his alleged protected activities were objectively and subjectively reasonable. *Id.* at 12.

Complainant also argues that he notified Respondent of his protected activity, and therefore fulfilled another element of his prima facie case. *Id.* at 12–13. Complainant then contends that there are "clear temporal links" between his reporting and a number of adverse employment actions, eventually leading to his termination. *Id.* at 13. Complainant therefore concludes he can establish a prima facie case under the Act. *Id.* at 14–15.

IV. Respondent's "Motion for Leave to File Reply"

The undersigned received Respondent's "Motion for Leave to File Reply" almost three weeks after Complainant submitted his response to Respondent's motion to dismiss. The governing regulations mandate that "[u]nless the judge directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing." Respondent cited two cases—*Shelton v. Time Warner Cable*, 2006 WL 6576815 (U.S. Dept. of Labor SAROX) and *Jordan v. Sprint Nextel Corp.*, 2006 WL 6576787 (U.S. Dept. of Labor SAROX), both of which allowed the respondents opportunity to reply concerning the complainants' responses to the respondents motions for summary decision, under 29 C.F.R. § 18.72. The cases are not directly applicable here, as Respondent seeks dismissal. Moreover, the undersigned recognizes the notice the ALJ provided to the parties in *Jordan*, that it would not allow such replies in the future "absent

exceptional circumstances." *See* 2006 WL 6576787 at n.5. Exceptional circumstances do not exist in the instant matter which would necessitate the opportunity for reply Employer seeks.

Here, because the undersigned did not direct the Respondent to file a reply—and Respondent filed its reply many weeks after Complainant submitted his response and provided inapplicable case law in support of its filing—Respondent's "Motion for Leave to File Reply" must be denied.[3] Respondent's reply brief has not been considered in the issuance of this Order.

V. Motion to Dismiss

Under the governing procedural regulation, "[a] party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness." 29 C.F.R. § 18.70(c).

a. Standard of Review

The Board has emphasized that "SOX claims are rarely suited for Rule 12 dismissals," because they "involve inherently factual issues such as reasonable belief. *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-00039, 42, slip op. at 13 (ARB May 25, 2011); *Brady v. Genesis Energy LP*, ALJ No. 2017-SOX-00046, slip op. at 5 (quoting *Sylvester*, ARB No. 07-123, slip op. at 13)). The Board continued noting that "Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge (OALJ) rules." *Id.*

The Board has held that because "federal litigation materially differs from administrative whistleblower litigation within the Department of Labor . . . a different legal standard for stating a claim" is required in cases pending before the agency. *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 6 (ARB Jul. 31, 2012) (citing *Sylvester*, ARB No. 07-123, slip op. at 12–13). The Board explained that, unlike litigation arising in federal district court, "[a] SOX claim begins with OSHA, where 'no particular form of complaint' is required." *Sylvester*, ARB No. 07-123, slip op. at 12 (quoting 29 C.F.R. § 1980.103(b)). Thus, the heightened pleading standard established in federal courts does not apply to SOX claims initiated with OSHA. *Sylvester*, ARB No. 07-123, slip op. at 12.

To survive a motion to dismiss in an administrative proceeding, a complaint is reviewed to determine whether it provides "fair notice of [Complainant's] claim." *Johnson v. The Wellpoint Companies, Inc.*, ARB No. 11-035, ALJ No. 2010-SOX-038, slip op. at 6 (ARB Feb. 25, 2013) (citing *Evans*, ARB No. 08-059). A complainant's claim provides fair notice by encompassing:

> (1) some facts about the protected activity and alleging that the facts relate to the laws and regulations of one of the statutes under the ALJ's jurisdiction, (2) some

[3] Respondent's "Motion for Leave to File Reply" is also procedurally deficient as it is not "accompanied by affidavits declarations, or other evidence" as the Rules require. 29 C.F.R. § 18.33(a)(4).

facts about the adverse action, (3) an assertion of causation, and (4) a description of the relief that is sought.

Evans, ARB Case No. 08-059, slip op. at 11; *Oberg v. Quinault Indian Nation*, ALJ No. 2017-ACA-00003, slip op. at 2 (citing *Evans*, ARB Case No. 08-059, slip op. at 11). This "is not a demanding standard." *Gallas v. Medical Center of Aurora*, ARB Nos. 15-076/16-012, ALJ Nos. 2015-ACA-005/2015-SOX-013, slip op. at 10 (ARB Apr. 28, 2017). The ARB's requirement that Complainant must have a "reasonable" belief that protected activity involved a violation of SOX, therefore, is not at issue in assessing if fair notice has been provided Respondent of Complainant's claim under SOX. *Sylvester*, ARB No. 07-123, slip op. at 14–16.

Additionally, the Board requires ALJs to "freely grant parties the opportunity to amend their initial filings to provide more information about their complaint before the complaint is dismissed." *Sylvester*, ARB No. 07-123, slip op. at 13; *Evans*, ARB Case No. 08-059, slip op. at 6 (noting that whistleblower complaints issued to OSHA are "informal documents that may not fully comprise the facts supporting the complaint's claims.").

b. Discussion

Complainant's 17-page "retaliatory complaint" filed with OSHA put Respondent on "fair notice" of the details of Complainant's claim. In that complaint filed with OSHA, Complainant averred that he worked as an employee of Respondent and initially reported concerns of "fraudulent enrollment"—enrollment presumably made via U.S. mail or via wire—to Rick Peterson, Respondent's New York Regional Sales Coordinator. *See* Complainant's Complaint to OSHA at 2. The OSHA complaint further states that Complainant later reported the alleged fraud to Ken Meier, Vice President for the Northeast Territory, Dan Amos, Respondent's CEO, and Thomas McDaniel, Respondent's Chief Compliance Officer. *Id.* at 2–3. Complainant also alleged immediate retaliation and eventual termination. *Id.* at 2–4. Complainant sought reinstatement and other economic damages. *Id.* at 4.

Application of the standard in *Evans*, ARB No. 08-059, slip op. at 11, discussed, *supra*, supports finding Complainant's complaint is sufficient to survive Respondent's Motion to Dismiss. 29 C.F.R. § 18.70(c). First, Complainant sufficiently connected his alleged protected activity to two of the prohibited conducts enumerated in Section 806. Specifically, he alleged—and provided documentary evidence in support of such allegations—that his complaints involved fraud against Respondent's shareholders, as well as mail and wire fraud.[4] *See Complainant's Response* at 1–3; Exhibits A, B, and C to *Complainant's Response*. Second, Complainant averred to OSHA that he was fired on August 17, 2016, which occurred "within a month" after Mr. Capps completed his investigation in Complainant's allegations. *See* Complainant's February 8, 2017 complaint to OSHA; Complainant's Response at 13. Thus, Complainant has

[4] It is noted that Respondent contends its agents—not Respondent—committed shareholder fraud at issue and that the subject of Complainant's concerns was *de minimis*. Such allegations are addressed in the section which construes Respondent's Motion as a motion for summary decision, *infra*.

alleged an adverse employment action and a causal connection based on temporal proximity between his protected activity and his termination.

Reviewing the case in a light most favorable to the nonmoving party, Complainant has pleaded sufficiently to fulfill the ARB's requirements to withstand a motion to dismiss under 20 C.F.R. § 18.70. *Evans*, ARB Case No. 08-059, slip op. at 11.

VI. Conclusion

Respondent's Motion for Leave to File Reply is denied. The circumstances presented in this matter do not warrant the reply Respondent seeks to provide.

Viewing the evidence in the light most favorable to Complainant, the record supports concluding that Respondent has "fair notice of [Complainant's] claim." *Johnson*, ARB No. 11-035, slip op. at 6. Thus, Respondent is unable to establish, as a matter of law, that the requested dismissal in Respondent's Motion is appropriate.[5]

VII. Order

Respondent's Motion for Leave to File Reply and Motion to Dismiss are hereby DENIED.

SO ORDERED.

Digitally signed by LYSTRA HARRIS
DN: CN=LYSTRA HARRIS, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill New Jersey

[5] Additionally, Respondent's Motion to Dismiss is also procedurally deficient as it is not "accompanied by affidavits declarations, or other evidence" as the Rules require. 29 C.F.R. § 18.33(a)(4).

SERVICE SHEET

Case Name: **CONROY_MARTIN_v_AFLAC_INC_ET_AL_**

Case Number: **2018SOX00037**

Document Title: **ORDER DENYING RESPONDENTS' LEAVE TO FILE REPLY AND ORDER DENYING RESPONDENTS' MOTION TO DISMISS**

I hereby certify that a copy of the above-referenced document was sent to the following this 16th day of November, 2018:

Digitally signed by Barbara J. Emmons
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