



In the Matter of:

MARGOT GETMAN,

ARB CASE NO. 04-059

COMPLAINANT,

ALJ CASE NO. 2003-SOX-8

v.

DATE: July 29, 2005

SOUTHWEST SECURITIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Margot Getman, pro se, Plattsburgh, New York

For the Respondent:

***Stuart E. Blaugrund, Esq., Celeste Yeager Winford, Esq.,
Gardere Wynne Sewell, L.L.P., Dallas, Texas***

FINAL DECISION AND ORDER

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 (SOX), 18 U.S.C.A. § 1514A (West Supp. 2005), and its implementing regulations. 29 C.F.R. Part 1980 (2004). Margot Getman¹ filed a complaint alleging that Southwest Securities, Inc. violated the SOX by harassing and firing her in retaliation for refusing to change her rating of a stock. On February 2, 2004, an Administrative Law Judge (ALJ) issued a [Recommended] Decision and Order (R. D. & O.) holding that Southwest retaliated against Getman in violation the SOX. For the reasons stated below, we reverse the ALJ's ruling and dismiss the complaint.

¹ When she filed her complaint on November 1, 2002, the Complainant's name was "Margot Durow." See Discrimination Case Activity Work Sheet, Complainant Information, Box 7d.

BACKGROUND

Southwest is a full service broker-dealer and investment adviser offering a range of investment services to individual and institutional investors. In October 2000, Southwest hired Getman, pursuant to a three-year contract, to work in its Investment Research Department as an equity research analyst. Transcript (Tr.) 16. Getman reported to Ozarslan Tangun, Southwest's director of research, and her area of responsibility was the healthcare technology sector. Tr. 9, 96, 133. Getman's responsibilities included analyzing industry trends and making specific stock recommendations to Southwest's clients. Complainant's Exhibit (CX) 5 at A4-A5.

Analysts at Southwest were responsible for gathering information and writing reports on companies within their area of specialization. Reports resulting in the recommendation of a company's stock allowed Southwest to generate income through either sale of the stock or participation in a public offering of the stock. Tr. 10, 12-14. Prior to publishing a report, Southwest's analysts would meet with a review committee to discuss and scrutinize the report and the analysts' findings:

The purpose of [Southwest's] Review Committee is to prepare analysts to present their stocks to the sales force as well as to SWS' clients. The Committee studies each company report and provides analysts with feedback on their reports and valuations. Committee members challenge the analysts' decisions to determine whether their ratings and recommendations are accurate and supported by concrete evidence. Analysts are expected to provide justification and documentation to support their recommendations during Review Committee presentations.

CX 5 at A4.

One of the companies Getman covered was Cholestech Corporation, a company that developed products and services for the alternative-site diagnostic testing market. CX 13. Getman researched and composed a report on Cholestech that she presented to Southwest at a review committee meeting in November of 2001. According to Getman, the committee consisted of Tangun, Don Hultgren (Southwest's head of capital markets), Christopher "Kit" Case (Southwest's associate director of research), Pat Jakely and Larry Wile (two of Southwest's bankers), and Rob Blakney (Getman's assistant). Tr. 27-28.

Getman asserted that she presented the Cholestech report to the committee. The text of the report did not contain Getman's rating of the stock, but Getman said she informed the committee that she recommended the stock be given an "accumulate" rating. Tr. 29. According to Getman, Hultgren asked her why she gave the stock an

“accumulate” and not a “strong buy.”² Getman supported her rating by contending that Cholestech’s stock had greatly increased in value since she started her research, and she did not believe that this increase would continue. Tr. 29, 34-35. Based on her interpretation of what the members said during the meeting, Getman believed that the committee was not pleased with her rating for the stock. Tr. 34. Getman testified that Hultgren, in particular, questioned her rating of the stock:

Q Now Mr. Hultgren, what did he say to you and what did you say to him?

A I don’t remember Oz [Ozarslan Tangun] making any comments during the review committee meeting. I remember –

MS. WINFORD [counsel for Southwest Securities]:
Objection, Your Honor. I believe you asked about Mr. Hultgren.

BY JUDGE TEITLER:

Q Mr. Hultgren is –

A I thought you said Oz.

Q No.

A I remember Don Hultgren, and this is going back quite sometime, Your Honor, obviously, but I remember him saying to me you don’t know the stock isn’t going to go up, do you? You don’t know that that the stock is going to go down, do you? You can’t see into the future kind of thing, and he was making it quite clear that he wanted a strong –

MS. WINFORD: Objection, Your Honor. She is speculating about what Mr. Hultgren thought or felt. She – I mean she can testify as to what she recalls him saying but she can’t testify as to someone else’s – what’s inside their head.

JUDGE TEITLER: Well, okay. I’ll sustain it as far as that goes.

BY JUDGE TEITLER:

Q Did he say anything to indicate to you that he was happy or unhappy relative to this particular accumulate decision?

A Yes, Your Honor.

Q What did he say to you?

A It was what he said, his tone, his face.

Q Answer the question one at a time. What

² While a rating of “accumulate” indicates a recommendation that a stock should be purchased, a rating of “strong buy” represents a more concrete conclusion by the analyst that the stock should be purchased. Tr. 34-35.

did he say to you?

A He said that am I sure about the rating. Why, why did I have an accumulate and not a strong buy on it. I defended my rating and he made it clear he was not

MS. WINFORD: Objection, Your Honor. She cannot testify as to what he was thinking.

JUDGE TEITLER: Well, she said he – she said he asked her why she made the rating and she defended her rating.

MS. WINFORD: Correct.

JUDGE TEITLER: Okay. That's admissible.

MS. WINFORD: That is admissible, Your Honor.

JUDGE TEITLER: Okay. Fine. That's what we were admitting.

Tr. 30-32.

Although she believed the committee was displeased with her conclusion, no one at the meeting asked her to change her rating of the stock:

Q Let's talk about what he didn't ask you. Mr. Hultgren didn't ask you to upgrade your accumulate rating – claimed accumulate rating from accumulate to buy, did he?

A He didn't tell me to.

Q All right. Any of the other people you claim were present at this review meeting, Mr. Tangun, did he ask you to upgrade your rating from accumulate to buy?

A If he did, I don't remember that, no.

Q Okay. Kit Case, was he present at this meeting?

A I believe him to be present.

Q All right. Did he ask you to upgrade your rating from accumulate to buy?

A I don't believe so.

Q All right. Larry Wile, he's an investment banker. Was he present at this meeting?

A Yes.

Q All right. Did Mr. Wile ask you to upgrade your rating from accumulate to buy?

A No.

Q All right. Was Pat Jakeley at this meeting, another investment banker?

A Yes.

Q Okay. Did Mr. Jakeley ask you to upgrade

your rating from accumulate to buy?

A He did not tell me to.

Q Did he ask you to?

A Did he say the words? No.

Q So have we gone over everyone you think was there at the review committee meeting?

A Rob Blakney was there.

Q And he's your junior analyst, correct?

A That's correct.

Q Okay. Did your junior analyst ask you to upgrade your rating from accumulate to buy?

A Hardly, no.

Q Okay. So when you left the review committee meeting, that you believed occurred in November of 2001, your rating or recommendation which doesn't appear on the report remains accumulate, correct?

A That's right.

Tr. 115-117.

Getman further testified that toward the end of the meeting she felt compelled to tell the committee that it could put a "strong buy" rating on the stock if it wanted to, but that she would then not sign her name to the report:

Q Okay. Did Mr. Hultgren disagree or agree? Or did he say anything about – did he take a position one way or the other?

A The only thing I can remember about – other than the comments I just told Your Honor, about what was said at that meeting, was the very last comment which was mine, and I remember putting my desk table like this and saying, you can publish the report if you want, but I'm not putting my name on it. And that was the end of the meeting and –

Q Well, what do you mean you can publish the report if you want?

A Well, I let them know that I would not put my name to the report if they wanted to publish it with a strong buy.

Q Okay.

Tr. 32-33.

Although her reports prior to November 2001 had been published, Southwest did not publish Getman's Cholestech report. Tr. 37-38.

Getman testified that following the Cholestech review committee meeting, Tangun began to engage in a pattern of harassing behavior by questioning her attendance in the office and disparaging her performance as an analyst. Tr. 39-42. Getman contends that Tangun had not harassed her prior to the Cholestech meeting. Tr. 40. On July 31, 2002, Getman met with Tangun and Jim Zimcosky, Southwest's head of human resources. Tangun told Getman that Southwest decided to terminate her employment because of her performance as an analyst and because she had referred one of Southwest's clients to a competitor. Respondent's Exhibit (RX) 11; Tr. 42-43. In conjunction with the termination, Southwest had prepared and filed a Securities and Exchange Commission (SEC) Uniform Termination Notice for Securities Industry Registration Form U-5, indicating that Getman's employment had been terminated as the result of "personnel issues."³ CX 14.

CASE HISTORY

On November 1, 2002, Getman contacted the Occupational Safety and Health Administration (OSHA) to file a complaint pursuant to the SOX.⁴ In her complaint, she alleged that her employment with Southwest was terminated because she "was reluctant to endorse the [Cholestech] report as a 'strong buy' and declined to affix her signature to a revised report."⁵ OSHA investigated her complaint and concluded that Getman engaged in protected activity, but failed to prove that her protected activity was the reason for her firing.⁶ Getman objected to OSHA's findings and requested a hearing, which was held on August 26 and 27, 2003.

On February 2, 2004, the ALJ issued an R. D. & O., concluding that Southwest retaliated against Getman in violation of the SOX. The ALJ found that Getman engaged in protected activity by refusing to change her rating of Cholestech's stock, and she proved by a preponderance of the evidence that her protected activity was a contributing factor in the termination of her employment with Southwest. D. & O. at 22, 26. He awarded back pay and other relief. *Id.* at 30-31. Southwest submitted a timely appeal of the ALJ's decision to this Board pursuant to 29 C.F.R. § 1980.110(a).

³ The ALJ found that the form said "personal reasons." R. D. & O. at 26. The error is not material.

⁴ In October 2002, Getman attempted to file her SOX complaint by contacting the New York State Attorney General's Office, the Ft. Worth, Texas office of the SEC, and Congressman Michael Oxley. Southwest does not appeal the timeliness of her complaint with OSHA.

⁵ See Discrimination Case Activity Worksheet, Allegation Summary.

⁶ OSHA Final Investigative Report, February 6, 2003.

ISSUE BEFORE THE BOARD

The issue we consider is whether the ALJ erred as a matter of law in holding that Getman's refusal to change her rating, done in the presence of her managers, was an act of whistleblowing protected under the SOX.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. *See* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); *see also* 29 C.F.R. § 1980.110.

Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard. *See* 29 C.F.R. § 1980.110(b). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). However, the Board reviews an ALJ's conclusions of law de novo. *Cf. Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) (analogous provision of Surface Transportation Assistance Act); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991) (same).

DISCUSSION

The employee protection provision of the SOX prohibits employers from retaliating against employees for providing information or assisting in investigations related to securities fraud:

(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 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, 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); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 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.

18 U.S.C.A. § 1514A.

Actions brought pursuant to the SOX are governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code (the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, (AIR 21), 49 U.S.C.A. § 42121 (West 2005)). 18 U.S.C.A. § 1514A(b)(2)(C). Accordingly, to prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) she engaged in a protected activity or conduct; (2) the respondent knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See* AIR 21, § 42121(a)-(b)(2)(B)(iii)-(iv). *See also* *Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-10 (ARB Jan. 30, 2004). The respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. § 42121(a)-(b)(2)(B)(iv); *Peck*, slip op. at 10.

In reviewing the case before us, we look first to the ALJ's recommended decision. The ALJ began his analysis by finding that Southwest had engaged in a pattern of pressuring its analysts to provide "strong buy" ratings on stocks. R. D. & O. at 17. The ALJ also found that Southwest presented inconsistent testimony in an attempt to prove that the review committee meeting never occurred. *Id.* The ALJ found that, because Southwest had pressured other analysts and presented unreliable testimony regarding the review committee meeting, Southwest had pressured Getman to change her rating of Cholestech. *Id.* at 17, 20. The ALJ then concluded that Getman engaged in protected

activity by refusing to change her rating, and she proved by a preponderance of the evidence that her protected activity was a contributing factor in the termination of her employment with Southwest. R. D. & O. at 22, 26.

Although we are required to affirm the ALJ's findings of fact that are supported by substantial evidence, we nevertheless hold that the ALJ erred as a matter of law by concluding that Getman engaged in "protected activity" as defined by the SOX.

The SOX prohibits employers from discriminating against employees "because of any lawful act done by the employee ... to provide information ... to ... a person with supervisory authority over the employee ... regarding any conduct which the employee reasonably believes constitutes a violation of ... any provision of Federal law relating to fraud against shareholders." 18 U.S.C.A. § 1514A(a). The only act that Getman contends is protected under the SOX is her refusal to raise her rating of Cholestech's stock during the review committee meeting.⁷ We therefore look to the record evidence deemed credible by the ALJ to decide whether Getman's statements or actions during the meeting are protected.

Getman conceded that the review committee helps ensure the quality of stock reports by asking questions, requesting further research by the analyst who wrote the report, suggesting additions to the report, and "testing" the analyst's knowledge of the information contained in the report. Tr. 100-102. Getman admitted that no one on the review committee stated that they wanted her to change her rating. Tr. 33. Getman contends that, while no one told her to change her rating, she interpreted their questioning as an indication that they wanted a "strong buy" rating for the stock. Tr. 34. However, instead of telling the review committee she believed she was being pressured and relating that pressure to potential fraud against shareholders, Getman simply told the committee that they could issue the Cholestech report without her name on it. The ALJ did not conclude that that statement was an act of whistleblowing; nor do we.

The ALJ did not find that Getman was ordered to change her recommended rating of Cholestech stock, but he found that she was pressured to change the rating and that she refused to change it. *See* R. D. & O. at 17, 22. We accept those findings under the substantial evidence test. However, we do take issue with his legal conclusion that her "refusal" to raise her rating during the meeting was her act of whistleblowing and was protected activity. *Id.* at 22. The question the ALJ did not address, and which must be addressed in ruling on this case, is whether, assuming the facts that he found, Getman "provid[ed] information" at the meeting that she reasonably believed Southwest Securities was about to commit fraud against shareholders or some other securities violation. In our view, her unspecified "refusal" was not sufficient to "provide information" to a person with supervisory authority relating to a violation. In the context

⁷ *See* Complaint; Tr. 6. Getman testified that, besides other analysts (who were not above her in Southwest's chain-of-command), she did not complain to anyone about being pressured to change stock ratings until after she was fired. Tr. 117-119.

of a review committee meeting between an analyst and her supervisor, where disagreement over a rating may be a normal part of the process, the analyst must communicate a concern that the employer's conduct constitutes a violation in order to have whistleblower protection. While there may be times where only refusal is sufficient to provide information, reviewing Getman's evidence in the light most favorable to her, it was not in this case.

In drafting whistleblower protection laws, Congress, after all, has drawn the distinction between notifying the employer of a violation and refusing to commit a violation. *See, e.g.*, Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851(a)(1)(A), (B) (West 2003) (extending coverage to an employee who "notified" his employer of an alleged violation **or** "refused" to engage in an unlawful practice **if** the employee has "identified the alleged illegality to the employer"); Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105(a)(1) (West 1997) (providing protection for an employee who files a "complaint" related to a motor vehicle safety regulation **or** "refuses to operate" a vehicle **because** it would violate a safety regulation or the employee reasonably believes the vehicle is unsafe). If Congress had wanted to protect a refusal as distinct from providing information, it could have done so in drafting the SOX. We therefore conclude that Getman's unexplained refusal to change her recommended rating of the Cholestech stock was not protected activity.

Because we have held that Getman did not engage in protected activity, she failed to establish an essential element of her case and her whole case fails. Accordingly, we do not adopt the ALJ's remaining conclusions, i.e., that Getman's protected activity was a contributing factor in her termination; that Southwest Securities failed to demonstrate by clear and convincing evidence that it would have discharged her notwithstanding her protected activity; and that she is entitled to back pay and other relief the ALJ recommended. R. D. & O. at 23-31.

CONCLUSION

Margot Getman did not, prior to termination of her employment with Southwest Securities, engage in activity protected by the SOX. She therefore has failed to satisfy one of the fundamental elements of her claim. Her complaint is therefore **DISMISSED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge