UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ROBERT J. MAHONY,

Plaintiff,

-against-

KEYSPAN CORPORATION,

Defendant.
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04 CV 554 (SJ)

MEMORANDUM AND ORDER

APPEARANCES:

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By: Edward Westfield, Esq.
Attorney for Plaintiff

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By: Thomas B. Wassel, Esq.
Attorneys for Defendant

JOHNSON, Senior District Judge:

Plaintiff Robert J. Mahony filed this action under 18 U.S.C. §1514A (the Sarbanes-Oxley Act or "SOX"), which provides whistleblower protection to employees of publicly traded companies. Defendant KeySpan Corporation ("KeySpan") now

moves for summary judgment. For the following reasons, Defendant's Motion is DENIED.

A. Background[1]

Plaintiff was employed by KeySpan and its predecessor company, Brooklyn Union Gas Company ("BU"), from 1988 until his termination in May 2003. During Plaintiff's tenure at the company, he was in charge of media relations until he was promoted in September 2001, to the position of Director of Strategic Planning of the Corporate Affairs Department (Fanning Aff. at ¶ 4).

In June 1998, Frank Fanning, KeySpan's Director of Accounting Research, told Plaintiff that he had learned that Dr. William Catacosinos, then KeySpan's chairman and Chief Executive Officer ("CEO"), had received much more severance compensation than the $42 million that was publicly reported (Mahony Aff. at ¶ 3; Mahony Dep. at 127:1-128:12). That year, the Attorney General for the State of New York conducted an investigation into the actual amount given to Catacosinos (Mahony Dep. at 129:20-130:13). Fanning did not ask Plaintiff to report the excess at that time and Plaintiff played no role in the Attorney General's investigation (Mahony Dep. at 130:20-131:11). Plaintiff and Fanning had no other conversations regarding Catacosinos' compensation in 1998 or 1999 (Mahony Dep. at 132:10-18).

[1] Unless otherwise indicated, the following facts are undisputed and taken in the light most favorable to Plaintiff.

In July 2001, Fanning told Plaintiff that he was concerned about several serious accounting issues, including the Catacosinos compensation and that the company was not properly reporting "other post-employment benefits" ("OPEB") (Mahony Dep. at 141:5-10). Fanning also informed Plaintiff that a KeySpan receivable of $250 million had no corresponding Long Island Power Authority ("LIPA") payable and that LIPA believed that it did not have any financial obligation to KeySpan (Mahony Dep. at 143:2-8). Fanning explained to Plaintiff that the accounting errors resulted in KeySpan's assets being overstated by approximately $150 million (Mahony Aff. at ¶ 5).

Plaintiff had no knowledge of the company's accounting practices other than what Fanning told him (Mahony Dep. at 157:19-158:2). Plaintiff's knowledge of accounting was limited to a few nonprofessional courses he took while working for KeySpan (Mahony Dep. at 27: 22 - 28:17). However, based on those courses, Plaintiff thought that the accounting scenarios that Fanning pointed out were in violation of General Accepted Accounting Principles (Mahony Dep. at 144:21-24; Mahony Aff. at ¶ 7). Further, because Fanning was the "director of financial reporting," was responsible for the publication of the company's financial statements, and reviewed the financial information contained in the company's press releases, Plaintiff trusted his judgment and expertise (Mahony Dep. at 120:20-121:7; Mahony Aff. at ¶ 9).

Fanning also showed Plaintiff a series of emails Fanning wrote to officers of the company advising them of accounting errors (Mahony Aff. at ¶ 10). After Plaintiff saw

these emails, he believed that "top management was more interested in covering up than uncovering fraud" (Mahony Aff. at ¶ 10). Fanning told Plaintiff that he was concerned that if KeySpan did not rectify the accounting errors, its public financial disclosures would be false and misleading (Mahony Aff. at ¶ 5). Plaintiff agreed to help Fanning have his concerns addressed by upper management (Mahony Aff. at ¶ 8).

In the late summer of 2001, Plaintiff had a conversation with Steven Zelkowitz, KeySpan's general counsel, during which Zelkowitz expressed concern that Fanning might take "information outside the company" (Mahony Dep. at 162:1-16). Plaintiff told Zelkowitz that Fanning would inform the press that KeySpan was involved in accounting frauds and that such information could be damaging to the company (Mahony Dep. at 186:2-8). Zelkowitz described Fanning as a disgruntled employee (Mahony Dep. at 162:16-24). Although Plaintiff did not discuss the substance of Fanning's allegations with Zelkowitz, it was clear to Plaintiff that Zelkowitz knew about Fanning's allegations (Mahony Dep. at 163:6-9).

In March 2002, Plaintiff reached out to Fred Lowther, KeySpan's outside legal counsel, and told him that he hoped KeySpan would not "hurt [Fanning's] efforts to make this information known" (Mahony Dep. at 164). Plaintiff expressed concern that the stress Fanning was under because of his discussions with KeySpan officials about the accounting frauds would negatively impact Fanning's health (Mahony Dep. at 164:2-165:15). Lowther told Plaintiff, "Bob, you shouldn't be doing this," (Mahony

Dep. at 168:19), and that Fanning had gone "outside the company with" information, (Mahony Dep. at 168:22-23). Plaintiff did not discuss the nature of the accounting frauds that Fanning was concerned about, but believed that Lowther knew of the allegations because of a planned meeting between Lowther and Fanning (Mahony Dep. at 165:16-18).

Shortly before April 5, 2002, Plaintiff told Robert Catell, KeySpan's CEO, that there was a meeting scheduled between Frank Fanning, Steve Zelkowitz, and Fred Lowther (Mahony Aff. at ¶ 13). Plaintiff recommended to Catell that he attend the meeting to "hear directly from Frank Fanning the details of accounting frauds at the company" (Mahony Dep. at 155:2 1). Catell asked Plaintiff why he believed that it was important to attend the meeting, and Plaintiff briefly told Catell about Fanning's allegations (Mahony Aff. at ¶ 13). Catell responded by saying, "[s]ometimes my people keep too much away from me" (Mahony Aff. at ¶ 13). Catell attended the meeting with Fanning, Lowther, and Zelkowitz on April 5, 2002 (Catell Dep. at 13:14-6). Two days after the meeting on April 5, 2002, David Manning, the person who would eventually choose to fire Plaintiff, received a document detailing Fanning's allegations and marked it to be placed in Plaintiff's personnel file (Mahony Aff. Ex. L).[2]

[2] Elaine Weinstein, KeySpan's Senior Vice President for Human Resources, stated that the document was placed in Plaintiff's personnel folder by someone in the company but could not explain why the document was there. Weinstein Dep. at 81.

After April 5, 2002, Plaintiff experienced a change in the company's attitude towards him (Mahony Aff. at ¶ 14). Plaintiff observed that he was being isolated within the company, (Mahony Aff. at ¶¶ 14-15), that his performance evaluations changed dramatically, (Mahony Aff. at ¶¶ 16-17; Pl.'s Ex. H, I, and J), and that his previously close relationship with Catell became nonexistent (Mahony Aff. at ¶¶ 19-21). KeySpan's cooling attitude towards Plaintiff continued until he was terminated on May 16, 2003, although the decision to terminate Plaintiff was made in March 2003 (Manning Aff. ¶ 7; Manning Dep. at 81-85, 101). Plaintiff was terminated as part of a company-wide budget cut during which 55 non-union employees were also let go (Weinstein Dep. at 46-47).

On August 12, 2003, Plaintiff filed a complaint with the Department of Labor, Occupational Health and Safety Administration (DOL/OSHA) pursuant to 18 U.S.C. §1514A against Defendant alleging violations of the "whistleblower" provisions of SOX. Plaintiff's complaint was dismissed by the DOL/OSHA on December 12, 2003. Plaintiff filed timely objections, but then sought to withdraw his complaint on February 10, 2004, because the arbitrator had not rendered a decision 180 days after Plaintiff's complaint was filed (Def.'s Ex. K). Plaintiff then commenced this action.

B. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. Fed. R.

Civ. P. 56(c). Material facts are those that may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court should view the evidence and any inferences that may be drawn in the most favorable light to the nonmovant. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). If there is enough evidence such that a jury could return a verdict for the nonmoving party, then there is a genuine dispute as to a material fact. Id.

A party seeking summary judgment bears the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The movant must identify the portions of the pleadings and discovery that demonstrate the absence of a genuine dispute of material fact. Id. When the movant's opponent will bear the burden of proof at trial, as is the case here, the movant can prevail merely by demonstrating a lack of evidence to support the opponent's claim. Id. at 325. If the moving party meets its initial burden, the opposing party must then "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

C. The Sarbanes-Oxley Act

The Sarbanes-Oxley Act protects employees that:

> [P]rovide 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 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).

Therefore, in order to recover under SOX, a plaintiff must show by a preponderance of the evidence that (a) he engaged in protected activity; (b) his employer was aware of the activity; (c) he suffered an adverse employment action; and (d) that the protected activity was a contributing factor to the unfavorable employment action. Fraser v. Fiduciary Trust Co. Int'l, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006).

1. Protected Activity

SOX protects an employee who assists in investigations into matters which the employee "reasonably believes constitute 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." 18 U.S.C. § 1514A(a)(1). Defendant argues in its Motion that Plaintiff did not engage in protected activity because Plaintiff cannot show (a) that there was any investigation to assist; (b) that he provided information or actually assisted in an investigation into corporate conduct; or (c) that he reasonably believed there was a violation of any federal law that protects shareholders.

a. The Existence of an Investigation

As an initial matter, Defendant's contention that there was no investigation at all is without merit. Zelkowitz stated that he consulted with KeySpan employees to follow

up on Fanning's allegations. Zelkowitz Dep. at 14:23-15:4; 28:5-17. Further, Lowther wrote a letter to Plaintiff's attorney which stated that Plaintiff was "helpful in identifying issues and concerns, and his actions were appreciated." Pl.'s Ex. M. A reasonable juror could consider the above-mentioned facts and conclude that there was, in fact, an investigation being conducted.

b. Assistance in an Investigation

Defendant next argues that it is entitled to summary judgment because Plaintiff did not personally investigate any matter, provide information to an investigator, or assist in an investigation. Plaintiff's position is that he assisted in Fanning's investigation into accounting frauds in three ways: (a) having conversations with Zelkowitz regarding Fanning's claims and the detrimental effect they could have on the company; (b) having a conversation with Lowther in which he informed Lowther that he was concerned about Fanning's health and that Fanning was a "good man"; and (c) urging Catell to attend a meeting with Fanning, Lowther, and Zelkowitz to ensure that Fanning's concerns were heard by KeySpan's highest corporate officer.

Plaintiff's first two claims fail as a matter of law. Merely expressing concern or support for a whistleblower cannot be considered to be protected activity under SOX. Plaintiff's conversations with Lowther and Zelkowitz did nothing to advance the investigation. Indeed, Lowther and Zelkowitz already knew about Fanning's allegations when they spoke to Plaintiff. Whether a whistleblower provides

information to or assists in an investigation, a plaintiff must point to affirmative acts that advance the investigation. Accordingly, there is no interpretation of SOX under which Plaintiff's conversations with Lowther or Zelkowitz constitute providing information, causing information to be provided, or otherwise assisting in an investigation.

Plaintiff's third contention is more persuasive. If Fanning experienced difficulty having his concerns addressed or heard by officers of the company, then Plaintiff's assistance in opening a channel of communication with the company's CEO would constitute assistance to the investigation. Indeed, Plaintiff's close relationship with Catell was the reason why Fanning sought his assistance. Fanning believed that Plaintiff's relationship with Catell put Plaintiff in a position to suggest to Catell that he remove the "filter" and hear Fanning's allegations directly. This is exactly what Plaintiff did.

In order to reach the conclusion that Defendant wishes this Court to reach, this Court would have to hold that SOX applies only to those who blow the whistle but not to those who make the whistle audible. This interpretation not only flies in the face of the plain language of the statute, which clearly includes those who assist in an investigation, but also leads logically to a point that isolates the whistleblower in a way that Congress could not have intended. See Hendrix v. American Airlines, Inc., 2004-AIR-10, 2004-SOX-23 (Dec. 9, 2004). Given that SOX is a statute designed to

promote corporate ethics by protecting whistleblowers from retaliation, it is reasonable to construe the statute broadly. See 149 Cong. Rec. S1725-01, S1725, 2003 WL 193278 (Jan. 29, 2003)("The law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market"). Therefore, although Plaintiff's actions clearly did not rise to the level of Enron whistleblower Sherron Watkins, the "mere fact that the severity or specificity of [his] complaints does not rise to the level of action that would spur Congress to draft legislation does not mean that the legislation it did draft was not meant to protect [him]." Collins v. Beazer Home USA, Inc., 334 F. Supp. 2d 1365, 1375-76 (N.D. Ga. 2004). As a result, Defendant cannot establish that, as a matter of law, Plaintiff did not assist in an investigation.

c. Reasonable Belief

Defendant further contends that Plaintiff did not engage in protected activity because Plaintiff could not have reasonably believed that KeySpan was engaging in fraud. To satisfy this prong of protected activity, a plaintiff need only show a reasonable belief that his employer violated a federal law relating to fraud against shareholders. Beazer Homes, 334 F. Supp. 2d at 1375. A plaintiff need not show an actual violation of law, nor must a plaintiff cite a particular statute that he believed was being violated. Id. "The reasonableness of a complainant's belief regarding illegality of a respondent's conduct is to be determined on the basis of the knowledge available to

a reasonable person in the circumstances with the employee's training and experience." Lerbs v. Buca Di Beppo, Inc., 2004-SOX-8 at 31 (June 15, 2004).

Under this standard, Plaintiff can demonstrate that he was reasonable in his belief that there were accounting irregularities. Although Plaintiff admits he had neither personal knowledge of the fraud nor the educational background to discover the fraud on his own, there is no requirement that a whistleblower have any particular expertise. Plaintiff understood the basic accounting principles that Fanning believed were violated while compiling a fraudulent financial statement. Plaintiff's lack of expertise was supplemented by the credibility Fanning derived from his position as director of financial accounting. Further, Plaintiff was shown emails which confirmed Fanning's allegations. In short, a fair and reasonable juror could find that Plaintiff reasonably believed that the company was engaging in accounting practices that needed to be corrected before its financial statements misled shareholders.

In sum, the Court finds that Defendant cannot establish as a matter of law that Plaintiff did not engage in protected activity under SOX. "Though this is a close case, considering the posture of the case, the lack of guidance in the caselaw and the broad remedial purpose behind SOX, the Court finds that there is a genuine issue of material fact whether Plaintiff engaged in protected activity." Beazer Homes, 334 F. Supp. 2d at 1375.

2. Causation

Defendant also contends that even if Plaintiff engaged in protected activity, Plaintiff cannot show a causal relationship between that protected activity and his termination. Defendant claims that the 13-month gap in time between the protected activity and his termination indicates that the two events were unrelated. However, employment actions for retaliation have been sustained even when the gap between the alleged protected activity and the adverse employment action has been substantial. See Getman v. Southwest Sec., Inc., 2003-SOX-8 (Feb. 2, 2004)(sustaining action involving 8 month gap between protected activity and adverse employment action); Thomas v. Arizona Pub. Serv. Co., 89-ERA-19 (Sept. 17, 1993)(sustaining action involving a 12 month gap between protected activity and adverse employment action).

In any event, the gap in time between protected activity and adverse employment action is merely one factor which a jury can consider when determining causation. A jury may look to other facts to decide whether the protected activity precipitated the adverse employment action, including evidence of a strained relationship between the parties that portended the employee's termination. See, e.g., Halloum v. Intel Corp., 2003-SOX-7 (Mar. 4, 2004)("An employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures. A complainant need not prove termination or suspension from the job, or a

reduction in salary or responsibilities.")(citing Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000)).

In this case, Plaintiff states that he began to experience retaliation almost immediately after the meeting between Fanning, Lowther, Catell, and Zelkowitz. Plaintiff observed that he was being isolated within the company (Mahony Aff. at ¶14 and 15), his performance evaluations changed dramatically (Mahony Aff. at ¶¶ 16-17; Pl.'s Ex. H, I, and J), and he fell out of favor with Catell (Mahony Aff. at ¶¶ 19-21). Although Defendant focuses on the gap in time between the protected activity and Plaintiff's termination, a reasonable juror could conclude that the temporal proximity of the April 5, 2002, meeting and the shift in attitude towards Plaintiff indicates that Plaintiff was the victim of retaliation. See Beazer Home, 334 F. Supp. 2d at 1375-76 (citing Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926, 933-34 (11th Cir. 1995)). A reasonable juror could find that the string of retaliatory acts culminating in Plaintiff's termination is evidence that Plaintiff's protected activity was a contributing factor in the adverse employment action. See, e.g., Fraser, 417 F. Supp. 2d at 322; see also Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993)("[T]he words 'a contributing factor' [...] mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision").

3. Defendant's Non-Retaliatory Explanation

In a SOX action, an employer can defeat the claim by demonstrating with clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of [protected] behavior." 49 U.S.C. §42121(b)(2)(B)(iv). This standard is even more stringent that the already "tough standard" that employers face in other employment discrimination cases. See Beazer Homes, 334 F. Supp. 2d at 1380 (noting the different evidentiary standards in a SOX claim)(quoting Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1572 (11th Cir. 1997)).

Defendant points out that Plaintiff was terminated along with 54 other non-union employees in a company-wide downsizing. Defendant contends that this demonstrates that Plaintiff was not a victim of retaliation. However, Defendant fails to establish that any employees that were similar to Plaintiff were also fired. The Court is left to guess as to the salaries, titles, and seniority of these employees. That is, if Defendant showed that other employees that were similar to Plaintiff were also terminated, this argument would carry more weight; Defendant has not done so.

Defendant also contends that Plaintiff's termination was nonretaliatory because Manning, the person who decided to fire Plaintiff, was unaware of Fanning's allegations and Plaintiff's attempt to help Fanning. However, the discovery process has revealed that two days after the meeting on April 5, 2002, Manning received a document detailing Fanning's allegations and marked it to be placed in Plaintiff's

personnel file. This fact not only calls Manning's credibility into question, it also acts as evidence of retaliation. As a result, this Court will to defer to a jury's judgment whether Defendant establishes by clear and convincing evidence that Plaintiff's termination was non-retaliatory.

D. Reputational Damages

Section 18 U.S.C. §1514A(c)(2) states that relief for any SOX action:

> shall include (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; (B) the amount of back pay, with interest; and (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

18 U.S.C. §1514A(c)(2). Defendant contends that Plaintiff's request for reputational damages must be stricken because "special damages" do not include reputational damages. In Murray v. TXU Corp., 03 CV 0888, 2005 U.S. Dist. LEXIS 10945 *8 (N.D. Tex. 2005), the court held that "special damages" were limited to "litigation costs, expert witness fees, and reasonable attorney fees." This Court disagrees with that interpretation and finds that §1514A(c)(2)(C) comprises an illustrative list of the types of special damages that may be recovered rather than an exhaustive list.

In Hanna v. WCI Communities, Inc., 348 F. Supp. 2d 1332 (S.D.Fla. 2004), the court held that the SOX's language stating that "[a]n employee prevailing in any action under subsection (b)(1) shall be entitled *to all relief necessary to make the employee whole*" should be read to include damages for loss of reputation. 18 U.S.C. §

1514A(c)(1) (emphasis added). The court reasoned that "[w]hen reputational injury caused by an employer's unlawful discrimination diminishes a plaintiff's future earnings capacity, [he] cannot be made whole without compensation for the lost future earnings [he] would have received absent the employer's unlawful activity." 348 F. Supp. 2d at 1334 (quoting Williams v. Pharmacia, Inc., 137 F.3d 944, 953 (7th Cir. 1998)). Therefore, the court held that a successful SOX plaintiff cannot be made whole without being compensated for damages for reputational injury that diminished plaintiff's future earning capacity. This Court adopts the reasoning in Hanna and denies Defendant's request to strike Plaintiff's demand for damages to his reputation.

Conclusion

For the above-mentioned reasons, Defendant's Motion for Summary Judgment is DENIED and Defendant's Motion to Strike is also DENIED.

SO ORDERED.

s/SJ

Dated: March 1, 2007
Brooklyn, New York

Sr. U.S.D.J.