UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| FERNANDO PORTES, | : | |
| Plaintiff | : | 06 Civ. 2689 (WHP) |
| -against- | : | MEMORANDUM AND ORDER |
| WYETH PHARMACEUTICALS, INC., | : | |
| Defendant. | : | |

WILLIAM H. PAULEY III, District Judge:

Plaintiff Fernando Portes ("Portes") brings this action against Defendant Wyeth Pharmaceuticals, Inc. ("Wyeth") pursuant to the whistleblower provision of the Corporate and Criminal Fraud Accountability Act, Public Law 107-204, codified at 18 U.S.C. § 1514A, also known as the Sarbanes-Oxley Act ("SOX"). Portes allegedly suffered retaliation and unlawful termination in response to protected disclosures made by him to company officials and to the Occupational Safety and Health Administration ("OSHA"). Defendant moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). For the following reasons, Defendant's motion is granted.

## BACKGROUND

The Court assumes the following allegations are true for purposes of the instant motion: Wyeth is a pharmaceutical corporation that has issued securities registered under Section 12 of the Securities Exchange Act of 1934. (Complaint, dated Apr. 24, 2006 ("Compl.") ¶¶ 9, 193.) In 2000, after Wyeth failed to comply with various regulations, including good manufacturing practices ("GMP") for the production of pharmaceutical and biological products, the Food and Drug Administration ("FDA") issued a Consent Decree (the "Consent Decree")

governing the conduct of its operations. (Compl. ¶¶ 24-25, 27.) To comply with the Consent Decree, Wyeth implemented a corporate program known as the Sustainable Compliance Initiative ("SCI"). (Compl. ¶ 35.)

On September 22, 2003, Wyeth hired Portes as principal project manager for the SCI Department at its Pearl River facility. (Compl. ¶¶ 45-47, 72.) In this capacity, he reported directly to Cybil Robbins ("Robbins"), head of the SCI Department, who in turn reported to Maura Corcoran ("Corcoran"), Wyeth's Director of Quality. (Compl. ¶¶ 12, 49-50.)

Around June 2004, Wyeth assigned Portes to spearhead the implementation of standards for vaccine testing. (Compl. ¶¶ 89-90.) Portes uncovered numerous problems attributable to Robbins' work, leading him to believe that Wyeth's lab operations were in violation of the Consent Decree, federal regulations, EU regulations, and the provisions of the Barr Mandate.[1] (Compl. ¶ 94.) Portes communicated his findings to Corcoran, asserting that Robbins was not qualified to supervise the implementation of the standards and that she had incorrectly certified that a "vast number" of standard operating procedures conformed with GMP. (Compl. ¶¶ 99-100, 103.) Portes informed Corcoran that although he was confident that he could correct the problems, he would need an extension of time to complete that task. (Compl. ¶ 101.)

Following Portes' statements to Corcoran, Wyeth allegedly retaliated against him and attempted to impede his efforts to rectify the problems he had uncovered. (Compl. ¶¶ 109-

[1] According to the Complaint, the Barr Mandate arose from United States v. Barr Labs., Inc. and prohibits the averaging of test data in drug manufacturing. 812 F. Supp. 458 (D.N.J. 1993). (Compl. ¶ 94 n.1.) The federal regulations cited by Portes are 21 C.F.R. § 210 (Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding of Drugs; General), 21 C.F.R. § 211 (Current Good Manufacturing Practice for for Finished Pharmaceuticals), and 21 C.F.R. § 600 (detailing general regulations for biological products). (Compl. ¶ 94.) Portes does not refer to specific EU regulations, but rather to the European Medicines Agency (EMEA) and its drug manufacturing rules. (Compl. ¶¶ 83, 94, 100, 117.)

111.) Portes was berated by Corcoran for criticizing Robbins. (Compl. ¶¶ 112-113.) Corcoran did not respond to Portes' request for an extension of deadlines, and at least four subsequent requests for deadline extensions also received no response from either Corcoran or Robbins. (Compl. ¶¶ 112, 114.)

In October 2004, Corcoran pressured Portes to resign for allegedly failing to meet intermediate deadlines in implementing SCI standards – the same deadlines for which Portes had previously requested an extension. (Compl. ¶¶ 121-122.) Portes objected that he was being treated unfairly, because other project managers had missed more important deadlines, and he refused to resign. (Compl. ¶ 126.) Corcoran then placed Portes on a Performance Improvement Plan ("PIP"), an administrative measure normally used to address unsatisfactory work. (Compl. ¶¶ 128-129.) Other SCI project managers who failed to meet project deadlines were not placed on PIPs. (Compl. ¶¶ 154-157).

On November 3, 2004, Portes e-mailed Jeff Hutt, Wyeth's Vice President of Quality asking him to rescind the PIP and again asserting that Wyeth had violated federal regulations and the Barr Mandate. (Compl. ¶¶ 11, 145-146.) Hutt did not respond to the e-mail, but Portes nonetheless corrected all of the alleged violations he had uncovered earlier in 2004. (Compl. ¶¶ 118, 147, 152-153.)

Thereafter, Portes filed additional complaints through various channels at Wyeth, alleging that the company was violating regulations relating to the manufacture of pharmaceuticals and complaining of "whistleblower retaliation." (Compl. ¶¶ 164-175.) As a consequence of Portes' disclosures and complaints of retaliation, Wyeth terminated Portes on February 23, 2005. (Compl. ¶ 176.)

Portes filed a SOX whistleblower complaint with OSHA on March 23, 2005. He claims that Wyeth has continued to harass him since his termination. (Compl. ¶ 181.) Specifically, Portes reports that Wyeth's response to his OSHA complaint contained false allegations regarding his work performance. (Compl. ¶¶ 183-185.)

Having made no final determination regarding Portes' claim within 180 days of filing pursuant to 18 U.S.C. § 1514A(b)(1)(B), the Secretary of Labor issued a notice on October 26, 2005 affirming that Portes has a statutory right to pursue his claims in this action.

## DISCUSSION

### I. Standard on a Motion to Dismiss

When deciding a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the Court must "accept[] all factual allegations in the complaint as true and draw[] all reasonable inferences in the plaintiff['s] favor." Ganino v. Citizens Utils. Co., 228 F.3d 154, 161 (2d Cir. 2000). Nonetheless, "factual allegations must be enough to raise a right of relief above the speculative level, on the assumption that all of the allegations in the complaint are true." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007). "The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995) (quotations and citation omitted); accord Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002).

II. SOX Claims

A. Section 1514A(a)(1)

Plaintiff alleges that Defendant violated SOX § 1514A(a)(1), which provides, in relevant part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(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 . . . 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). To assert a whistleblower claim under § 1514A(a)(1), a plaintiff "must show by a preponderance of the evidence that (1) [he] engaged in a protected activity; (2) the employer knew of the protected activity; (3) [he] suffered from an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action." Fraser v. Fiduciary Trust Co. Int'l, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006) (citing Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1375 (N.D. Ga. 2004)); see also Bishop v. PCS Admin. (USA), Inc., No. 05 Civ. 5683 (WTH), 2006 WL 1460032, at *1 (N.D. Ill. May 23, 2006).

In addition, "before an employee can assert a cause of action in federal court under [SOX], the employee must file a complaint with [OSHA] and afford OSHA the opportunity to resolve the allegations administratively." Willis v. Vie Fin. Group, Inc., No. Civ.A. 04-435 (MAM), 2004 WL 1774575, at *3 (E.D. Pa. Aug. 6, 2004). A plaintiff alleging a violation of § 1514A(a)(1) must file a complaint with the Secretary of Labor not later than 90 days after the date of the alleged violation.[2] 18 U.S.C. § 1514A(b)(1)(A) and 18 U.S.C. § 1514A(b)(2)(D). "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 claimant," then a plaintiff is entitled to bring an action in federal district court. 18 U.S.C. § 1514A(b)(1)(B).

B. Scope of Protected Activity

Defendant challenges Plaintiff's claim solely on the basis of the first element of the Fraser test, contending that, as a matter of law, Plaintiff cannot show he engaged in protected activity. Specifically, Defendant argues that none of Portes' reports were sufficiently related to securities fraud or any violation enumerated in § 1514A(a)(1) to give rise to a SOX claim.[3]

SOX protects employees who report activity that they "reasonably believe[] constitutes a violation" of the enumerated code sections, any SEC rule or regulation, or "any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1). A whistleblower need not cite the specific law or regulation that he believes is being violated in his report. Fraser, 417 F. Supp. 2d at 322. Rather, the "context" of the disclosure and "the

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[2] The Secretary of Labor has delegated responsibility for administrative complaints to OSHA. See 29 C.F.R. § 1980.103(c) (2006).

[3] Defendant also contends that SOX does not protect disclosures made by an employee in the course of his routine job duties. However, because the Court concludes that Portes has failed to state a claim for other reasons, it need not address this argument.

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. Fraser, 417 F. Supp. 2d at 323.

Nonetheless, disclosures are protected only when they "implicate the substantive law protected in Sarbanes-Oxley 'definitively and specifically.'" Fraser, 417 F. Supp. 2d at 322 (citing Am. Nuclear Res., Inc. v. United States Dep't of Labor, 134 F.3d 1292, 1295 (6th Cir. 1998) (requiring that protected disclosures under the Energy Reorganization Act "definitively and specifically" relate to safety)).[4] Where a communication is "barren of any allegations of conduct that would alert [a defendant] that [the plaintiff] believed the company was violating any federal rule or law related to fraud against shareholders," the reporting is not protected by SOX. Fraser, 417 F. Supp. 2d at 322; see also Livingston v. Wyeth, Inc., No. 1:03CV00919 (PTS), 2006 WL 2129794, at *10 (M.D.N.C., July 28, 2006) ("To be protected under [SOX], an employee's disclosures must be related to illegal activity that, at its core, involves shareholder fraud."); Platone v. FLYi, Inc., 2003-SOX-27, 2006 WL 3246910, at *8 (Dep't Labor, Sept. 29, 2006) ("[The] relevant inquiry is not what [is alleged in the complaint filed with OSHA], but [what was] actually communicated to [the] employer prior to . . . termination.").

1. Disclosures to Supervisors

Plaintiff allegedly made in-person and e-mail disclosures to his supervisors at Wyeth that "definitively and specifically" implicate the substantive law protected in SOX.

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[4] Given the relative scarcity of caselaw interpreting SOX, courts also "look to caselaw applying provisions of other federal whistleblower statutes for guidance . . . . The [SOX] Regulations [state expressly] that consideration was given to the regulations implementing the whistleblower provisions of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century . . . the Surface Transportation Assistance Act . . . and the Energy Reorganization Act." Collins, 334 F. Supp. 2d at 1374.

(Compl. ¶¶ 99-100, 145-148, 164-172, 174-175.) Portes argues that, if Wyeth had violated regulations, the company faced fines and other penalties that might have significantly affected share prices. (Compl. ¶¶ 37-39, 58, 82-83, 97.) Portes asserts that, in light of Wyeth's prior references to the Consent Decree in its financial reports, he had a reasonable belief that the company was obligated to report the violations to the FDA, SEC and shareholders. (Compl. ¶¶ 36, 41-44, 196-197, 201.) Therefore, Portes argues, his reporting constituted protected activity under SOX.

Plaintiff does not allege that he explicitly referred to fraud, shareholders, securities, statements to the SEC, or SOX in his disclosures to superiors at Wyeth. The purported violations involved the Consent Decree, FDA regulations, EU regulations, and other drug manufacturing guidelines, not SEC rules or other federal law related to fraud against shareholders. Thus, the disclosures were not sufficiently related to shareholder fraud to constitute protected activity.

In Fraser, the plaintiff, a vice president at an investment management company, alleged four instances of protected activity under § 1514A(a)(1). The second instance involved an e-mail sent by the plaintiff to the company president, in which he reported "that the New York office's decision to sell WorldCom bonds from New York-based ERISA and trust management accounts was not equally disseminated to all accounts firm-wide." Fraser, 417 F. Supp 2d. at 316. The plaintiff wanted to communicate this information to all firm offices, but was instructed not to do so by another company officer. As a result, he alleged, the company's Los Angeles office continued to hold WorldCom bonds, resulting in "substantial losses in [LosAngeles]-ERISA and trust accounts holding WorldCom bonds." Fraser, 417 F. Supp 2d. at 316. The plaintiff "characterized this conduct as a breach of fiduciary conduct and evidence of a conflict

of interest," and alleged that corporate officers retaliated against him for making the report. Fraser, 417 F. Supp 2d. at 316.

In refusing to grant the defendant's motion to dismiss with regard to the e-mail disclosure, the court characterized the decision as a "close call," and noted:

> While Fraser does not expressly state in this e-mail that Defendants are engaged in illegal conduct related to fraud on shareholders, given the context of the e-mail and the circumstances giving rise to the communication – i.e., clients of the New York office benefited from a prudent decision to sell WorldCom bonds, whereas the Los Angeles clients suffered losses related to these holdings, which losses they might have avoided had the New York office communicated the decision to sell – the e-mail is sufficient to satisfy the pleading requirement for a SOX whistleblowing claim.

Fraser, 417 F. Supp 2d. at 323.

Portes' claim falls well outside the envelope established in Fraser. His disclosures to personnel at Wyeth were concerned exclusively with violations of regulations governing the manufacture of pharmaceuticals. The circumstances of the disclosures do not suggest a concern that Wyeth was being unfair to its investors, that its lack of compliance with FDA regulations might have implications for its reports to investors and the SEC, or that it was engaged in other conduct "that would alert [a defendant] that [the plaintiff] believed the company was violating any federal rule or law related to fraud against shareholders." Fraser, 417 F. Supp 2d. at 322 (emphasis added).

Moreover, Portes was employed as a chemist and project manager implementing standards for drug manufacturing, not as an investment analyst at a financial services firm. No inference that Portes was concerned with shareholder fraud could have been derived from his job responsibilities or the nature of his work. In this context, his disclosures to Wyeth are outside the scope of protected reporting under SOX.

2. Disclosure to the Department of Labor

Portes also alleges that Wyeth retaliated against him after he filed his administrative SOX complaint with OSHA.[5] Specifically, Portes contends that in Wyeth's response to his OSHA complaint, the company "disparaged [his] reputation and character" by "falsely claiming that he had demeaned his supervisor and co-workers and 'generally damaged relationships with key internal clients of his department.'" (Compl. ¶ 183.)

Section 1514A(b)(1) requires that allegations of violations of § 1514A(a) first be presented by filing a complaint with the Department of Labor. Section 1514A(b)(1)(B) empowers a federal district court to hear only those claims for which this administrative remedy has been exhausted. "The administrative scheme underlying [SOX] is judicial in nature, and designed to resolve the controversy on its merits." Willis, 2004 WL 1774575, at *5. While Portes' claim that he was harassed in response to his OSHA complaint could not have been included in his original complaint, he does not allege that he amended it or otherwise reported his retaliation claim to OSHA. Accordingly, Portes cannot assert the claim in federal court. See Willis, 2004 WL 1774575, at *6 (dismissing a plaintiff's SOX claim where he had failed to amend an OSHA complaint to allege retaliation).

[5] Section 1514A(a) prohibits retaliatory action against any "employee." Although Portes was no longer employed by Wyeth when he filed his complaint with OSHA, 29 C.F.R. § 1980.101 defines "employee" to include "an individual presently or formerly working for a company." See also Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (holding in the Title VII context that an employee may sue in the event of retaliation against him for filing an administrative complaint).

## CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is granted. Plaintiff's retaliation claim under SOX concerning his filing of a complaint with OSHA is dismissed with leave to replead within fourteen days of the date of this Memorandum and Order. The remainder of Plaintiff's claims are dismissed with prejudice. The Clerk of the Court is directed to mark this case closed.

Dated: August 20, 2007
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

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