U.S. Department of Labor

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Issue Date: 22 June 2005

Case No: 2005-SOX-0008

In the Matter of

HUNTER MARSHALL,
Complainant,

v.

NORTHRUP GRUMAN SYNOPTICS,
Respondent.

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

On April 21, 2005, Northrop Grumman Synoptics ("Respondent") filed a Motion for Summary Decision, pursuant to 29 C.F.R. §§ 18.40 and 18.41(a). Respondent argues that Hunter Marshall ("Complainant") raises no genuine issues of material fact and cannot make a prima facie showing that he engaged in protected activities within the meaning of § 806 of the Sarbanes-Oxley Act of 2002 ("SOX" or the "Act"). On May 17, 2005, Complainant filed a Response. Respondent then filed a Reply on May 27, 2005.

FACTS

The following facts are not disputed:

1. Respondent is an operating unit within Northrop Grumman Space Technology (NGST), which is an operating sector within Northrop Grumman Corporation, a publicly traded company. Respondent is an entity covered by the provisions of SOX.

2. Respondent grows and markets crystals for various commercial application.

3. Complainant was hired by Respondent on November 6, 2000, as a Growth Engineer.

4. Complainant was suspended from his employment on December 19, 2003.

5. Complainant was terminated from employment on February 26, 2004.

6. On May 26, 2004, Complainant filed a SOX complaint. Therein, Complainant alleges he was terminated due to his attempts to correct the inappropriate behavior of company directors with regard to the falsification of financial data at NGST. The complaint alleges three incidents that occurred prior to his termination:

   (a) Scott Gribbins, Respondent's Controller, falsified financial documents, willfully misclassified expenses and willfully misclassified labor reports in an attempt to misrepresent the financial performance of Respondent.
   (b) Joe Rutherford, Respondent's General Manager, violated Respondent's ethical policies by using company contractors for personal use.
   (c) Jerry Moore, Respondent's Operations Manager, falsified financial data within the Respondent's Production Control Department.

DISCUSSION OF LAW AND FACTS

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds "the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Id. Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. Lincoln v. Reksten Mgmt., 354 F.3d 262 (4th Cir. 2003); Green v. Ingalls Shipbuilding, Inc., 29 BRBS 81 (1995) (stating the purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact). However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

SOX provides protection for employees of publicly traded companies. Under the Act no such company or its officers, employees, contractors, subcontractors, or agents "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because the employee engaged in certain lawful acts:

> (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 [*fraud and swindles*], 1342 [*fraud by wire, radio, or television*], 1344 [*bank fraud*], or 1348 [*securities fraud*], 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 —
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> > (A) a Federal regulatory or law enforcement agency;
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> > (B) any Member of Congress or any committee of Congress; or
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> > (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
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> (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, 1342, 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).

To receive protection under the Act, a complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity under the Act; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action; and (4) circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. § 1980.104(b); Macktal v. U.S. Dep't of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1101-02 (10th Cir. 1999); Dysert v. Sec'y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997).

In order to prevail on its motion for a summary decision, Respondent has the initial burden of showing that undisputed facts establish that one or more of the aforementioned elements is not established. If Respondent succeeds, Complainant may rebut this showing by setting forth specific facts establishing that there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In its

motion for summary decision, Respondent asserts that Complainant's claim fails because he has not established that he engaged in protected activity.

Protected activity is defined under SOX as reporting an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. While the employee is not required to show the reported conduct actually caused a violation of the law, he must show that he reasonably believed the employer violated one of the laws or regulations enumerated in the Act. Thus, the employee's belief "must be scrutinized under both subjective and objective standards." Melendez v. Exxon Chemicals Americas, ARB No. 96-051 (July 14, 2000).

The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision. See, e.g., S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (explaining that the pertinent section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company.") The provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent." Id. In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." Ames Department Stores Inc., Stock Litigation, 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations). While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit.

Complainant alleges he engaged in protected activity by reporting to Respondent's management his concerns regarding improper financial accounting methods and ethical lapses. (RX 1).[1] Specifically, Complainant alleged that Joe Rutherford (Respondent's General Manager), Jerry Moore (Respondent's Operation Manager) and Scott Gribbins (Respondent's Controller) engaged in fraudulent accounting activity within the budget areas under Complainant's supervision. (RX 1). Complainant claims there was willful misclassification of labor hours, depreciation and capital expenses. According to Complainant's argument the reporting of these alleged violations is protected under the Act. I disagree. I find that Complainant has not established that he had an actual, subjective belief that the Respondent violated one of the provisions enumerated in the Act or committed any violation related to fraud against shareholders.

First, there is no basis to argue that Mr. Gribbins' internal accounting implicated fraud against shareholders. Complainant's allegation that certain expenses should have been charged to a different department, even if true, does not demonstrate fraud. Instead it merely demonstrates a grievance with internal company policy as opposed to actual violations of federal law. In fact, Complainant does not identify a specific law or

[1] Respondent submitted factual citations with its Motion for Summary Decision. These documents will be referenced as (RX).

regulation that Mr. Gribbins has violated. Complainant only alleges that Mr. Gribbins' actions could not be explained by generally accepted accounting principles. (RX 6 at 3). Raising a complainant about internal policy is not considered protected activity. See Reddy v. Medquest, Inc., 2004-SOX-35 (ALJ June 10, 2004) (finding a complaint to management regarding manipulation of line counts in documents was not protected activity because the complaint concerned internal policy). There is also no indication of any attempt, on the part of Mr. Gribbins, to misrepresent Respondent's financial situation. Complainant has merely established a disagreement with Mr. Gribbins' accounting methods and not that they could reasonably be perceived as unlawful.

Second, there is no basis to argue that Mr. Rutherford has implicated fraud against shareholders. Complainant complained that Mr. Rutherford was violating ethical policies by engaging a building contractor for home remodeling that performed contract services for Respondent and by failing to disclose the conflict in an annual report. (RX 1). Respondent conducted an investigation and found Complainant's allegations were creditable. (RX 8). However, the investigation also found that there were no invoice or expense irregularities affecting the company. According to the investigation, there was no evidence that Mr. Rutherford did not pay fair market value for the construction. (RX 11). There is no evidence of fraud to contradict this finding.

Furthermore, the complaint is based on an alleged violation of Respondent's ethics policies. As stated above, raising a complaint about a violation of an internal policy is not considered protected activity. There is no evidence in this complaint that there was a violation of sections 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.

Third, there is no basis to argue that Complainant's concerns about Mr. Moore's financial reports relate in any way to securities or fraud against shareholders. Complainant alleged that Mr. Moore or members of his department falsified financial data. (RX 1). The report Complainant was concerned about is a "Shop Floor Flash." This is a report that estimates the department's best guess about what sales will be for a month and also what the department will have in production by dollar to support sales. (RX 8 at 3). Complainant admitted that not only was the data merely estimates, but the reports are not intended for use outside of the department. Consequently, Complainant also conceded that the falsification of the report is not material. (RX 1 at 4). Instead, Complainant was concerned that Mr. Moore was violating Respondent's ethics policy. Raising a concern about a violation of an ethics policy is not protected activity. The fact that the concerns involved accounting and finances in some way does not automatically mean or imply that fraud or any other illegal conduct took place. Grant v. Dominion East Ohio, 2004-SOX-00063 (stating an accounting error does not amount to fraud under the Act and "raising questions and lodging complainants without reference to or suspicion of fraud against the shareholders is not protected activity.").

Therefore, the protected activity alleged in the complaint involves Complainant reporting to Respondent that certain accounting practices violated Respondent's

internal and ethical policies. The complaint does not address any kind of fraud or any transactions relating to securities. Moreover, there has been no allegation that the activities complained of resulted in a fraud against shareholders or investors. There is nothing in the complaint or in the Response to the Motion for Summary Decision indicating that Complainant objectively or actually believed that Respondent was committing a violation of any of the enumerated securities laws or that Respondent was committing fraud on its shareholders. The matters complained of do not fall within the purview of the employee protections provisions of the Act.

CONCLUSION

Based on the foregoing discussion, construing all facts in the light most favorable to Complainant, the Court finds that Complainant did not engage in activities protected under the Act. Respondent is thus entitled to summary decision as a matter of law.

RECOMMENDED DECISION AND ORDER

It is RECOMMENDED that Respondent's Motion for Summary Decision be GRANTED.

A

LARRY W. PRICE
Administrative Law Judge

LWP/TEH
Newport News, VA

NOTICE OF APPEAL RIGHTS: To appeal you must file a petition for review (Petition) within ten business days of the date of the administrative law judge's decision with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. Your Petition must specifically identify the findings, conclusions or orders you object to. You waive any objections you do not raise specifically.

At the time you file the Petition with the Board you must serve it on all parties, and the Chief Administrative Law Judge; the Assistant Secretary, Occupational Safety and Health Administration; and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If you do not file a timely Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110. Even if you do file a Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days after you file your Petition notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).