U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 December 2006

CASE NO. 2005-SOX-00025

In the Matter of:

CHRIS ESPINOZA
Complainant,

v.

SYSCO CORPORATION,
Respondent.

Appearances: Chris Espinoza
Pro Se

Robin E. Weideman, Esq.
Carlton DiSante & Freudenberger LLP
For the Respondent

RECOMMENDED DECISION AND ORDER GRANTING MOTION FOR SUMMARY DECISION

Chris Espinoza ("Complainant") brought this action pro se against his former employer, Sysco Food Services of Sacramento, Inc. ("Sysco"), under the whistleblower protection provisions of Section 806 of the Sarbanes-Oxley Act ("Sarbanes-Oxley" or "the Act"), 18 U.S.C. § 1514A, which prohibits retaliatory actions by publicly traded companies against employees who provide information about the alleged violation of federal laws relating to fraud against shareholders. Sysco filed this Motion for Summary Decision, arguing that Complainant cannot establish a prima facie case of retaliation because he did not engage in an activity protected under the Act.

FACTUAL BACKGROUND

Complainant was hired by Sysco in August 2001 as lead diesel mechanic in its facility in Sacramento, California.[1] Complainant alleges that in May 2002, his direct supervisor, Dennis

[1] Who was Complainant's employer is ambiguous. OSHA Regional Administrator found he was an employee of Sysco Corporation, a publicly traded company and the captioned Respondent here. Carlton Disante & Freudenberger LLP appeared on behalf of "Sysco Food Services of Sacramento, Inc., (erroneously sued as Sysco Corporation." Sysco Corporation's website, of which I take judicial notice for this collateral purpose, shows that it has 40,000 employees engaged in food distribution in 161 "locations" in the U.S. and Canada, and lists Sysco Food Services of Sacramento, Inc. as one of its "locations." I infer that the Sacramento "location" is not a publicly traded company. The pleadings filed by the Carlton firm refer to its client simply as "Sysco," without making any distinction between the two entities. While Carlton averred that Complainant was employed by the Sacramento

Wirth, asked him to repair Mr. Wirth's personal vehicle. Exhibit A to Sysco's Motion for Summary (Espinoza Deposition dated April 7, 2005) ("EX A"), at 69. Complainant testified that he did not "feel right" about Mr. Wirth's request, but felt "pushed to do it." EX A at 75. Complainant also alleges that Mr. Wirth directed him to repair the personal vehicle of another Sysco manager on at least one other occasion. According to Complainant, Mr. Wirth told him to "blend" the labor time spent working on the personal vehicle with the time spent working on company vehicles. EX A at 70. Finally, Complainant avers that Mr. Wirth used a company phone to order an engine for the personal vehicle of the "Company President."

On March 30, 2004, another Sysco employee, Tim McDaniel, reported to Sysco's human resources department that vehicles belonging to company managers were being repaired in Sysco's Sacramento shop on company time.[2] When Sysco's vice-president of human resources, Sandy Forseth, asked Complainant in early April 2004 whether McDaniel's allegations were true, Complainant confirmed them and gave Ms. Forseth additional details she asked for, including names of the managers who had vehicles repaired. Complainant testified that personal vehicles were no longer repaired at the company facility after his discussion with Ms. Forseth.

In June 2004, at the time of Complainant's yearly performance evaluation, Mr. Wirth demoted him from "lead mechanic" to "mechanic." He explained that Complainant was being demoted because he had been ineffective as lead mechanic in that he failed to quell the festering discord among himself and the two other mechanics in the shop. In December 2004, Ms. Forseth investigated complaints made by the other two mechanics against Complainant. After conferring with Mr. Wirth and Mark Tuttle, Sysco's Vice President of Operations, Ms. Forseth terminated Complainant's employment in early January 2005.

Complainant filed a timely complaint before the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") alleging that Sysco terminated his employment in violation of Sarbanes-Oxley because he had made internal complaints that management employees were having vehicles serviced on company time. On January 13, 2005, the Regional Administrator dismissed the complaint, finding that Complainant's report of unauthorized vehicle repairs is not a protected act under Sarbanes-Oxley. Thereafter, Complainant requested a hearing before the Office of Administrative Law Judges. Presently before me is Sysco's Motion for Summary Judgment.

DISCUSSION

Section 806 of the Sarbanes-Oxley Act provides that no publicly traded company covered by the Act may

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entity, it did not deny that Complainant was an employee of the publicly traded company. Under these circumstances, I see no need to sort out the ambiguity in ruling on this motion. I make no distinction between the two entities, and proceed on the assumption that Respondent, which I will also designate simply as Sysco, is a publicly traded company which employed Complainant. This order of dismissal is intended to dismiss the captioned complaint regardless of whether Complainant's employer was Sysco Corporation or Sysco Food Services of Sacramento, Inc.

[2] Tim McDaniel also filed a whistleblower complaint against Sysco here, which was dismissed by my order dated December 15, 2005.

> discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee . . . because of any lawful act done by the employee 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 [mail fraud], 1343 [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.

18 U.S.C. § 1514A(a)(1). Sarbanes-Oxley was enacted in July 2002, in the wake of the collapse of Enron, "to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." *See Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002*, 148 Cong. Rec. S7418, 7420 (daily ed. July 26, 2002).

In order to make out a prima facie case for whistleblower protection under Sarbanes-Oxley, a complainant must establish that: (1) he engaged in a protected activity; (2) the employer knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. *Collins v. Beazer Homes USA, Inc.,* 334 F.Supp.2d 1365 (N.D. Ga. 2004). In its Motion for Summary Decision, Sysco argues that Complainant cannot establish the first element of a prima facie case of retaliation because he did not engage in an activity which is protected under the Act. Whether Complainant engaged in protected activity is an "essential, material fact which [he] must show if challenged to do so on a motion for summary judgment." *Reddy v. Medquist*, ARB Case No. 04-123, 2004-SOX-35 (ARB Sept. 30, 2005).

Sarbanes-Oxley's whistleblower provisions protect employees from retaliation for providing information about something the employee reasonably believes constitutes a violation of federal securities laws or regulations. *See* 18 U.S.C. § 1514A; *Tuttle v. Johnson Controls*, 2004-SOX-0076 (ALJ Jan. 3, 2005). "The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision. The provision is designed to protect employees involved in detecting and stopping actions which they reasonably believe are fraudulent." *Tuttle v. Johnson Controls*, 2004-SOX-76, at 3 (ALJ Jan. 3, 2005). Accordingly, to fall under Sarbanes-Oxley, there must be "an element of intentional deceit that would impact shareholders or investors." *Id*. *See also*, *Platone v. FLYi, Inc.*, ARB Case No. 04-154, 2003-SOX-27, at 15 (ARB Sept. 29, 2006) (although federal mail and wire fraud statutes are not limited to fraudulent activity that affects investors' interests, when allegations of mail or wire fraud arise under the employee protection provisions of Sarbanes-Oxley, the conduct must be of a type that would be adverse to investors' interests).

In *Tuttle v. Johnson Controls*, the complainant alleged that his employer, a battery manufacturing company, retaliated against him for reporting that significant numbers of the company's batteries were defective. In granting the employer's motion for summary decision, the administrative law judge held that the complainant had not engaged in protected activity, explaining: "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 involved intentional deceit or resulted in a fraud against shareholders or investors." *Tuttle,* 2004-SOX-76,

at 3-4. The judge noted that nothing the complaint or the response to the motion for summary decision indicated that Complainant actually believed that "Respondent was committing a violation of any of the enumerated securities laws or . . . fraud on its shareholders." *Tuttle,* 2004-SOX-76, at 3-4. Therefore, the judge concluded that "the matters complained of do not fall within the purview of the employee protection provisions of the Act." *Id*.

Summary decision was similarly granted in favor of the employer in *Minkina v. Affiliated Physicians Group*, 2005-SOX-19 (ALJ Feb. 22, 2005). In *Minkina*, the complainant alleged that she was retaliated against for reporting a workplace ventilation problem. The administrative law judge concluded that the complainant's alleged protected activity was outside the purview of Sarbanes-Oxley "because her reports were not in any way related to fraud." *Minkina,* 2005-SOX-19, at 6. The judge explained that, "While the complainant may have had a valid claim of poor air quality, Sarbanes-Oxley . . . was enacted to address the specific problem of fraud in the realm of publicly traded companies and not the resolution of air quality issues, even if there is a possibility that poor air quality might ultimately result in financial loss." *Id*. at 6-7.

In the recent case *Platone v. FLYi, Inc.*, ARB Case No. 04-154, 2003-SOX-27 (ARB Sept. 29, 2006), the Administrative Review Board ("the ARB") confirmed that Sarbanes-Oxley "does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills." *Platone*, 2003-SOX-27, at 17. In defining the scope of protected activity under Sarbanes-Oxley, the ARB explained that the employee's communications must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1). *Id.* The ARB also stated that in determining whether the complainant engaged in protected activity, "the relevant inquiry is not what she alleged in her [OSHA complaint], but what she actually communicated to her employer prior to [her] termination." *Id.*

Here, Complainant opposes Sysco's Motion for Summary Decision, arguing that his disclosures to Ms. Forseth about the repairs he performed on managers' personal vehicles are within the coverage of Sarbanes-Oxley because he "reasonably believed that this was a fraud on shareholders." Specifically, he argues that he reasonably believed that: (1) "section 1341 (frauds and swindles) was violated" when Mr. Wirth ordered him to "fluff" his "work time onto company vehicles;" (2) "section 1342 [*sic*] [fraud by wire, radio, or television] was violated when [Mr. Wirth] used the company phone to order the engine for the Company Presidents [*sic*] personal vehicle and to order parts on company accounts;"[3] and (3) the "Securities and Exchange Act of 1934 was violated by the SYSCO Corporation statement that it has internal controls to prevent the unauthorized use of company assets which is stated in the annual report." Under *Platone*, however, the above-mentioned allegations contained in Complainant's opposition to Sysco's summary decision motion, including his recitation of laws covered by Sarbanes-Oxley, are not relevant to the question of whether he engaged in protected activity. Rather, it must be determined what he actually communicated to Sysco, and whether his communications "definitively and specifically" related to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1). *See Platone*, 2003-SOX-27, at 17.

[3] In light of the reference to Mr. Wirth's use of the telephone, I presume that Complainant intended to allege the violation of 18 U.S.C. § 1343 (fraud by wire, radio, or television), rather than 18 U.S.C. § 1342, which deals with use of fictitious names and addresses for purposes of executing a scheme to defraud.

It is noteworthy that Complainant testified under oath at deposition that he believes he was retaliated against for working on personal vehicles in the company shop, not for providing information about those activities. This is reflected in the following exchange:

> Q: So is it your belief that you were terminated for actually doing the work on the vehicles?
>
> A: Uh-huh.
>
> Q: Or telling [Ms. Forseth] that you did it?
>
> A: No. Just working on the vehicles. Bottom line, just working on the vehicles.
>
> Q: Okay. Same thing with your demotion?
>
> A: Yeah. I was demoted for working on the vehicles.

EX A at 186. *See also*, EX A at 106 and 107. Working on personal vehicles in the company facility is not a protected activity within the meaning of Sarbanes-Oxley, which protects "any lawful act done by the employee *to provide information, cause information to be provided, or otherwise assist in an investigation*" with regard to conduct which is believed to violate any of the laws listed in the Act. *See* 18 U.S.C. § 1514A(a)(1) (emphasis added). Accordingly, based on his own deposition testimony, Complainant's alleged protected activity is outside the purview of Sarbanes-Oxley's employee protection provisions.

At other times during his deposition, however, Complainant does appear to allege that he was retaliated against for *providing information* about personal vehicles being serviced. *See* EX A at 108 (A: "—like I said, I felt when I gave the information [about the vehicles] to Sandy [Forseth] I felt I was going to get retaliated. That's why I didn't give it out in the first place."). Complainant appears to make a similar allegation in his pre-trial statement filed in February 2005, although the statement is difficult to decipher. In fact, when asked what that portion of his pre-trial statement meant, Complainant was unable to explain it.[4] EX A at 173-179. Even assuming that Complainant has alleged that he was retaliated against for providing information about working on personal vehicles, however, I find that Complainant did not, at the time he provided information about the repairs to Ms. Forseth, hold the belief that the conduct he referred to violated any of the laws listed in the Act.

Protected activity is defined under Sarbanes-Oxley as "reporting an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders." *Tuttle,* 2004-SOX-76, at 3; *Marshall v. Northrup Gruman*

[4] The third paragraph on the first page of Complainant's pretrial statement reads: "In late March, early April 2004 after a complaint was filed by a fellow employee who the complainant sought for help and provided information in what the complainant believed to be criminal act on stockholders and employees and a violation under Sysco Corporation Code of Business of Conduct."

Synoptics, 2005-SOX-8, at 4 (ALJ June 22, 2005). "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.'" *Tuttle,* 2004-SOX-76, at 3 (quoting *Ames Department Stores, Inc., Stock Litigation*, 991 F.2d 953, 967 (2nd Cir. 1993)). As reflected by the following exchange, Complainant's testimony establishes that he did not have even a subjective belief that the repair of personal vehicles was a violation of any laws or regulations related to fraud against shareholders:

> Q: At the time that [Wirth] asked you to do the work on his Suburban in May 2002, why did you feel like it was something you shouldn't be doing?
>
> A: I just – for me, working on the equipment and having that in there, it didn't seem right.
>
> Q: How come?
>
> A: It just didn't seem right working on somebody else's equipment at the time. I don't – just didn't seem right. In the way he approached it, just the way he – I felt like I was, you know, pushed to do it.
>
> Q: Did you feel like you were busy and didn't have time for it and that's why you were upset about it or for some other reason?
>
> A: No. I just didn't want to work on it. We had better things to do than work on the Suburban.
>
> Q: So it wasn't that you felt like, you know, it was a violation of the law or company policy doing this; it was just you didn't feel right about it?
>
> A: I didn't feel right about it.

EX A at 74-75. In my view, this deposition testimony, given under oath, pretty conclusively establishes that Complainant did not subjectively believe that the servicing of personal vehicles was a violation of federal laws pertaining to fraud against shareholders, or of any other law. Fairly construed, it appears that when Complainant cooperated with Ms. Forseth's investigation he merely felt that it was against his employer's interests to have personal cars repaired by company mechanics. That is a far cry from the having the subjective belief what Sarbanes-Oxley requires, i.e., what he was told to do constituted a violation a federal law relating to fraud against Sysco's shareholders. Thus, I find that the essentially undisputed evidence is that Complainant did not have a subjective belief that his employer was engaged in a violation of law when personal vehicles were repaired at the company facility. This is fatal to his claim. *See Tuttle,* 2004-SOX-76, at 3-4; *Marshall*, 2005-SOX-8, at 4, 6.

I further find that, like the alleged protected activity at issue in *Tuttle* and *Minkina*, Complainant's alleged protected activity—either working on personal vehicles or providing information to Sysco's representative about personal vehicles being serviced—has nothing to do with fraud against shareholders. Complainant provided information about a particular use of a company resource whereby he may have raised a possible violation of some internal company policy, but he has identified nothing even approximating fraud against shareholders. Even if the servicing personal vehicles cost the company the value of labor performed, it does not translate into any sort of transaction involving fraud against shareholders or intentionally deceitful statements made to actual or potential investors about the value of the company, or anything else that could reasonably and objectively be deemed a fraud against shareholders. Contrary to what Complainant alleged in his opposition to Sysco's Motion for Summary Decision, there is no evidence that he provided Ms. Forseth or anyone else with information which "definitively and specifically" related to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1). *See Platone*, 2003-SOX-27, at 17. Accordingly, because Complainant did not engage in any activity protected under the employee protection provisions of the Sarbanes-Oxley Act, it is my conclusion that his claim fails as a matter of law and must therefore be dismissed.

RECOMMENDED ORDER

Having considered the evidence and concluded that Sysco is entitled to a decision as a matter of law, it is recommended that Sysco's Motion for Summary Decision be GRANTED.

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ALEXANDER KARST
Administrative Law Judge

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