

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 24 November 2004**

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CASE NO.: 2004 SOX 77

In the Matter of

**COLIN M. HARVEY**  
Complainant

v.

**THE HOME DEPOT, INC.**  
Respondent

Appearances: Mr. Colin M. Harvey  
*Pro Se*

Ms. Leslie M. Turner, Attorney  
For the Respondent

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

**INITIAL DECISION AND ORDER-  
DISMISSAL OF DISCRIMINATION COMPLAINT**

In a complaint, dated June 28, 2004, Mr. Harvey alleged Home Depot had violated the employee protection provisions of Section 806 of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C. § 1514A, ("Act" or "SOX") as implemented by 29 C.F.R. Part 1980. Following the dismissal of his complaint by the Regional Administrator, Occupational and Safety Health Administration ("OSHA"), Mr. Harvey requested a hearing with the Office of Administrative Law Judges ("OALJ"). On September 16, 2004, I was assigned to conduct a hearing and render a decision in this case. Based on my review of the complaint's contents, on September 30, 2004, I issued a Show Cause Order on whether Mr. Harvey's June 28, 2004 SOX complaint should be dismissed for failure to state a cause of action. Both parties have responded to the show cause order.

**Background**

Procedural History

In his June 28, 2004 complaint, Mr. Harvey alleges that the Home Depot vice president for legal matters has continued to discriminate against him by refusing to accept delivery of his certified, restricted delivery, mail to the vice president, containing legal matters, thereby causing

the correspondence to be returned as “unclaimed.” By refusing to accept Mr. Harvey’s legal correspondence, including petitions for review in other SOX cases and notices of service regarding complaints under other employment laws, the vice president has endangered the company’s interests and failed in his fiduciary duties to the company and its shareholders. Through his inaction, the vice president has also perpetrated a fraud on the company and shareholders. The vice president’s refusal to accept Mr. Harvey’s mail “is an adverse and unfavorable personnel action,” which denies Mr. Harvey “due process in the pursuit of protected activities” under SOX.

On July 2, 2004, the Regional Administrator received Mr. Harvey’s June 28, 2004 SOX complaint. After consideration, the Regional Administrator advised Mr. Harvey on August 11, 2004 that his SOX complaint failed to meet all four requisite elements of a *prima facie* case of discrimination under SOX.

On September 9, 2004, Mr. Harvey appealed the adverse decision and requested a hearing with the OALJ.<sup>1</sup> Because Mr. Harvey had several SOX complaints pending with the Regional Administrator and was not certain which complaint had been dismissed, he attached copies of his SOX complaints, dated May 20, 2004, June 28, 2004, July 16, 2004, and August 31, 2004. The only complaint before me involves the June 28, 2004 complaint.

#### Parties’ Positions

##### Complainant

In his October 20, 2004 response, Mr. Harvey maintains that his June 28, 2004 complaint states a cause of action under the SOX statute. Specifically, by refusing to accept Mr. Harvey’s certified mail, the vice president is engaged in retaliatory discrimination against Mr. Harvey due to his other SOX complaints before OSHA, OALJ and the Administrative Review Board and his federal civil law suit. Further, “the retaliation and discrimination against Complainant. . . has been the reason for [the vice president] and the Home Depot to blacklist Complainant in his efforts at re-employment and possible conditions of any subsequent employment.” Such blacklisting of a former employee is a recognizable adverse and unfavorable personnel action.

To support his assertion that Home Depot has interfered with his attempt at re-employment, Mr. Harvey attached a) a civil complaint against Home Depot and certain individuals that he filed in U.S. District Court seeking \$2.5 million in compensatory and \$25 million dollars in punitive damages for alleged violations of civil rights and equal employment statutes; and b) Home Depot’s answer to the complaint. In paragraph three of his civil suit complaint, Mr. Harvey asserted that after nine years of employment with the company, he was “illegally and extortionately [sic] fired.” In its answer to paragraph three, Home Depot denied the allegations that Mr. Harvey worked for the company for nine years and was “illegally and extortionately [sic] fired.” According to Mr. Harvey, Home Depot’s denial of his claim of nine years employment with the company will hamper his ability to obtain re-employment. By its denial in the answer, Mr. Harvey believed Home Depot was blacklisting him. He explained:

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<sup>1</sup>The appeal was received by OALJ on September 16, 2004.

Therefore, in a subsequent employment application process when Complainant states that he had been employed with Home Depot for 9 years only for such to be denied when a possible subsequent employer is conducting an employment history background check, Complainant is made out to be making false statements in the application process and will therefore never receive any subsequent employment.

As part of the same pattern, in various other proceedings and documents, Mr. Harvey claims Home Depot individuals and its counsel have misrepresented other details about his employment positions and locations with Home Depot.

Despite their denials, Mr. Harvey also believes Home Depot and the vice president have been telling prospective employers that he has been harassing them. On at least one occasion, after a potential employer conducted a pre-interview employment history check, Mr. Harvey's interview was cancelled.

Home Depot has also interfered with Mr. Harvey's ability to obtain re-employment by characterizing his separation as job abandonment/resignation, deeming him ineligible for re-employment with the company.<sup>2</sup> According to Mr. Harvey, he neither abandoned nor resigned his position as a Home Depot employee. Instead, he attempted to comply with the company's request to clarify his employment intentions. The company and its representatives have consistently misrepresented his efforts to respond to that request. These misrepresentations constitute criminal fraud.

In summary, Mr. Harvey believes he has established all four elements necessary for relief under SOX. First, through pursuing his corporate fraud, discrimination and SOX complaints in various forums, Mr. Harvey engaged in SOX protected activities. Second, Home Depot and its vice president were aware of these activities. Third, Mr. Harvey has suffered an adverse and unfavorable personnel action "by being blacklisted." And, fourth, his protected activities were a contributing factor in the decision by Home Depot and its vice president to take unfavorable personnel action. Specifically, due to numerous complaints by Mr. Harvey about corporate fraud at Home Depot, the vice president, "discriminated and retaliated against Complainant by refusing to accept, claim and respond to the documents mailed to him for which he was blacklisted. . . ." Accordingly, Mr. Harvey's SOX complaint should not be dismissed and a hearing date should be established.

#### Respondent

In her November 5, 2004 response, counsel for the Respondent asserts Mr. Harvey's complaints should be dismissed for three reasons. First, Mr. Harvey is a former employee of Home Depot, who last worked for Home Depot in August 2002. The subject of his June 28, 2004 SOX complaint involves the alleged failure by the company's vice president two years later, in the summer of 2004, to accept certified mail sent by Mr. Harvey. Under these facts, since Mr. Harvey is no longer an employee of Home Depot, he can not establish that the vice

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<sup>2</sup>Mr. Harvey attached a Home Depot Associate Action Notice indicating Mr. Harvey was terminated on August 14, 2002 for "job abandonment."

president's current inaction adversely affected the terms and conditions of his prior employment with Home Depot.

Second, in regards to any post-employment continuing discrimination, Mr. Harvey's complaint also fails to establish any connection between the vice president's inaction and Mr. Harvey's efforts to seek re-employment.

Third, Mr. Harvey's complaint does not allege conduct covered by SOX. The SOX protected activities relate to complaints of corporate conduct involving mail, wire, bank and securities fraud, and violations of SEC rules, regulations, and other federal laws concerning fraud against shareholders. The alleged refusal of the vice president to accept and respond to Mr. Harvey's mail does not fall within the type of conduct addressed under SOX.

Since the present alleged discriminatory conduct set out in the complaint neither affected Mr. Harvey while he was a Home Depot employee, nor interfered with his ability to obtain re-employment, nor involved SOX-controlled conduct, his SOX complaint is deficient. As a result, Mr. Harvey's SOX complaint should be dismissed.

### **FINDINGS AND CONCLUSIONS OF LAW**

In determining whether a complaint states a cognizable cause of action, the Federal Rules of Civil Procedure are applicable because neither 29 C.F.R. Part 1980 (SOX whistleblower proceedings) nor 29 C.F.R. Part 18 (proceedings before the OALJ) addresses this issue. *See* 29 C.F.R. § 18.1 (a) and *Freels v. Lockheed Martin Energy Sys.* 1995 CAA 92 and 1994 ERA 6 (ARB Dec. 4, 1996). Federal Rule of Civil Procedure 12 (b) (6) provides that an action may be dismissed if it fails to state a claim upon which relief can be granted. Under this rule, dismissal of a claim is appropriate if the complaint fails to allege "a set of facts, which if proven, could support [Complainant's] claim of entitlement to relief." *Freels*, at pages 10 and 11.

To determine whether Mr. Harvey's complaint states a claim for which relief under SOX is available, I must first review the employee protection provisions in SOX and establish the requisite elements in a claim for relief. Subsection 1514A (a) of the Act and 29 C.F.R. § 1980.102 of the implementing regulations prohibit a company with either 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)) from discharging, demoting, suspending, threatening, harassing or in any manner discriminating against an employee in the terms and conditions of employment because an employee engaged in any lawful act to provide information, cause information to be provided, or otherwise assist in an investigation, regarding any conduct the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud), or any rule or regulation of the Securities and Exchange Commission or any provision of federal law relating to fraud against shareholders, when the information is provided to a federal regulatory or law enforcement agency, any member of congress, or a person with supervisory authority over the employee.

Further, by reference,<sup>3</sup> SOX incorporates the procedural provisions and rules of the employee protection provisions of the Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121 (b). According to 49 U.S.C. § 42121 (b) (2) (B) (iii) and 29 C.F.R. § 1980.109 (a), a violation of SOX employee protection provision will be established if the complainant establishes through the preponderance of the evidence that his protected activity was a contributing factor in the alleged unfavorable personnel action. That is, the complainant must prove that:

1. He engaged in a protected activity or conduct under the Act;
2. The respondent knew the complainant engaged in the protected activity;
3. He suffered an unfavorable personnel action; and,
4. The protected activity was a contributing factor in the respondent’s decision to take the unfavorable personnel action.<sup>4</sup>

With these principles in mind, I first note in his response to the Show Cause Order Mr. Harvey presented several additional allegations of corporate fraud, malfeasance, and blacklisting. However, for the purposes of determining whether his June 28, 2004 SOX complaint states a cause of action, I must focus specifically on the allegations contained in the complaint and determine whether Mr. Harvey would be entitled to relief under SOX if the allegations in his complaint were true.

Essentially, Mr. Harvey’s complaint sets out one fact: the vice president of Mr. Harvey’s former employer, Home Depot, refused to accept and respond to certified mail sent to him by Mr. Harvey. Standing alone, the vice president’s inaction obviously did not affect Mr. Harvey’s past employment conditions with Home Depot. Additionally, within the complaint, Mr. Harvey failed to allege that the vice president’s refusal to accept mail sent to him by Mr. Harvey adversely affected his ability to obtain re-employment. Subsequently, in his response to the Show Cause Order, Mr. Harvey appears to link the vice president’s refusal of his mail with allegations of blacklisting and specifically mentioned one cancelled interview following a prospective employer’s check of his employment history. However, as set out in the complaint, the vice president’s refusal to accept Mr. Harvey’s mail is not an act of blacklisting. Further, Mr.

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<sup>3</sup>18 U.S.C. § 1541A (b) (2) (A).

<sup>4</sup>This fourth element differs from the fourth element of a *prima facie* case mentioned by the Regional Administrator. The *prima facie* analysis is conducted at the investigative phase of a whistleblower complaint to determine whether the case will even be investigated. 20 C.F.R. § 1980.104 (b) (2). At that stage of the inquiry, an inference of discrimination is sufficient to permit an investigation of the complaint unless the Respondent provides clear and convincing evidence it would have taken the same adverse action in the absence of the complainant’s protected activity. 20 C.F.R. § 1980.104 (c). In contrast, if the case proceeds to an administrative law judge, to establish entitlement to relief under the employee protection provisions of SOX, a complainant must prove by a preponderance of the evidence that his or her protected activity was a contributing factor to the adverse action. 20 C.F.R. § 1980.109 (a).

Harvey did not allege in his complaint that the vice president's mail refusal caused his cancelled interview.

In summary, the asserted refusal of the Home Depot vice president to accept Mr. Harvey's certified mail was not an action that caused an adverse impact on the terms and conditions of his employment with Home Depot or his ability to obtain subsequent employment. Consequently, Mr. Harvey's June 28, 2004 SOX complaint lacks the third requisite element - an adverse or unfavorable personnel or employment action. In the absence of that third element, Mr. Harvey's June 28, 2004 SOX complaint fails to state a cause of action upon which relief under SOX may be granted. Consequently, his June 28, 2004 SOX complaint must be dismissed.

### **ORDER**

Accordingly, the June 28, 2004 SOX complaint by Mr. COLIN M. HARVEY is **DISMISSED**.

**SO ORDERED:**

**A**

RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: November 24, 2004  
Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on 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. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).