No. 13-51010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KEVIN WALLACE,
Plaintiff-Appellant

v.

TESORO CORPORATION,
Defendant-Appellee

On Appeal from the United States District Court
for the Western District of Texas, USDC No. 5:11-CV-99

Brief of the Secretary of Labor, Thomas E. Perez, as Amicus Curiae in Support of Plaintiff-Appellant and Requesting Reversal

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STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing Plaintiff-Appellant's Third Amended Complaint ("TAC") on the grounds that he did not properly exhaust his administrative remedies because he failed to sufficiently raise to the Occupational Safety and Health Administration ("OSHA") the facts that formed the basis of his protected whistleblowing under the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A(a).
2. Whether the district court erred in dismissing Plaintiff-Appellant's Second Amended Complaint ("SAC") on the grounds that the conduct alleged therein did not constitute protected whistleblowing under SOX, and in requiring Plaintiff to meet the heightened pleading standard of FED. R. CIV. P. 9(b).

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The Secretary of Labor ("Secretary") administers and enforces the whistleblower protections under section 806 of SOX, 18 U.S.C. § 1514A, which was enacted "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." Lawson v. FMR, LLC, 134 S. Ct. 1158, 1161 (2014), citing S. REP. NO. 107–146, at 2–11 (2002); see 18 U.S.C. § 1514A(b). SOX generally protects employees of publicly traded companies when (1) the employee engaged in protected activity, (2) the employer

knew that the employee engaged in protected activity, (3) the employee suffered an unfavorable personnel action, and (4) the protected activity was a contributing factor in the unfavorable action. Villanueva v. U.S. Dep't of Labor, 743 F.3d 103, 109 (5th Cir. 2014); Allen v. Admin. Review Bd., 514 F.3d 468, 475 (5th Cir. 2008). Protected activity includes providing information to the employer regarding any conduct which the employee reasonably believes violates 18 U.S.C. §§ 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud]; any rule or regulation of the Securities and Exchange Commission ("SEC"); or any provision of Federal law relating to fraud against shareholders." § 1514A(a)(1); Allen, 514 F.3d at 475. Protected activity also includes filing, testifying, assisting or participating in a proceeding relating to a violation of any of these six categories of law. § 1514A(a)(2).

To enforce their rights under the statute, complainants must file a complaint with the Secretary through OSHA. 18 U.S.C. § 1514A(b) (incorporating the procedures in 49 U.S.C. § 42121(b)); 29 C.F.R. § 1980.103. Following an OSHA investigation, a complainant may pursue his or her whistleblower claim within the Department of Labor ("Department" or "DOL") through a *de novo* hearing before the Office of Administrative Law Judges and an administrative appeal to the Administrative Review Board ("ARB"), which issues the final decision of the Secretary in SOX whistleblower cases. See 29 C.F.R. § 1980.105-.110.

Alternatively, if the Secretary does not issue a final decision within 180 days of the filing of the complaint, a complainant may file his or her complaint in the appropriate district court, which has *de novo* review over such complaints. 18 U.S.C. § 1514A(b)(1)(B).

While the specificity with which a complainant must describe claims to OSHA to fully exhaust administrative remedies under § 1514A is a question of first impression in this Court, the Department and those district courts which have considered the issue recognize that the complaint filed with OSHA need not meet formal pleading standards. Rather, its purpose is to trigger an investigation into the circumstances surrounding the alleged adverse action. See, e.g., Sharkey v. J.P. Morgan Chase & Co., 805 F. Supp. 2d 45, 53-54 (S.D.N.Y. 2011); Sylvester v. Parexel Int'l LLC, ARB Case No. 07-123, 2011 WL 2165854, at *9-10 (ARB May 25, 2011). Indeed, the Department's ARB recently clarified that it is improper for administrative law judges to dismiss whistleblower claims because the initial complaint filed with OSHA failed to meet formal pleading standards. Sylvester, 2011 WL 2165854, at *9-10; see also Evans v. EPA, ARB Case No. 08-059, 2012 WL 3255132, at *6 (ARB July 31, 2012). The ARB also revised and clarified the scope of protected activity under SOX, holding that a complainant need only report conduct that he reasonably believes violates one of the six categories of law listed in 18 U.S.C. § 1514A(a)(1). See Villanueva, 743 F.3d at 109-10 (utilizing revised

standard for protected activity stated in Sylvester, 2011 WL 2165854, at *15). Additionally, the Department issued regulations under SOX in 2011 making clear that the requirement to file an administrative complaint with OSHA is not a high hurdle. A complainant may make out a prima facie case of retaliation through the complaint filed with the agency supplemented by interviews, so the agency is not limited to the four corners of the complaint in making its determinations. 29 C.F.R. § 1980.104(e).[1] The Secretary has a substantial interest in ensuring that a complainant who files a complaint with OSHA under SOX in compliance with DOL regulations and administrative decisions will not be barred from later pursuing that same claim in federal court. The Secretary also has a strong interest in ensuring that SOX's whistleblower protections are applied consistently with the Secretary's interpretation of the statute in Sylvester and subsequent cases.

STATEMENT OF THE CASE

1. Statement of facts. Defendant-Appellee Tesoro Corp. is a publicly traded company that operates, through its subsidiaries, seven oil refineries in the United

[1] The Department's pre-2011 regulations were in effect when Wallace first filed his complaint, but in practice those regulations did not apply a higher pleading standard than the current regulations because the Department regarded an oral complaint that OSHA reduced to writing as meeting the "in writing" standard in the regulations. See Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as amended, 76 Fed. Reg. 68084, 68086 (Nov. 3, 2011).

States. Tesoro Refining and Marketing, a wholly owned subsidiary of Tesoro Corp., hired Plaintiff-Appellant Kevin Wallace on June 24, 2004. Claude Moreau was Wallace's direct supervisor and the Senior Vice President of Marketing. Wallace was the Vice President of Pricing and Commercial Analysis at the time of his termination on March 12, 2010. Record on Appeal ("ROA").791. Wallace alleges he was terminated for reporting the following to his employer: price-signaling and inconsistent discounts that amount to wire fraud; taxes being booked as revenues in violation of generally accepted accounting principles ("GAAP"); pricing collusion in Idaho Falls in violation of antitrust laws; and retaliation. ROA.791-95.

2. The OSHA complaint and investigation. On May 17, 2010, Wallace filed a complaint against Tesoro Corp. with the San Antonio district office of OSHA alleging whistleblower retaliation in violation of SOX. Wallace attached a 2008 Certificate of Compliance to his OSHA complaint in which he reported to Tesoro that he had "personally been asked by the VP Wholesale to participate in activity that [he] thought would result in market manipulation by altering [Tesoro's] publication practices of posting the Shell Wholesale branded price."[2] ROA.565.

[2] Tesoro requires its employees to complete an Annual Certificate of Compliance, certifying that they agree to comply with Tesoro's Code of Business Conduct. ROA.63. The Certificate of Compliance asks employees if they are aware of any unlawful or unethical conduct at Tesoro. See ROA.63-68.

In response to Tesoro's position statement to OSHA, Wallace alleged that he participated in a conference in which a marketing representative said that "Tesoro employees were providing early disclosure of Tesoro daily price moves to customers in exchange for competitors' price moves." ROA.1026. Wallace further stated that this was "the type of wrongful conduct that [he] reported to Tesoro through the Code of Conduct."[3] Wallace also told OSHA that Moreau and a "close friend" of Moreau's were "attempting to apply wholesale prices to retail locations in Southern California, incident to Tesoro purchasing Shell stations in that area," and Wallace was terminated soon after raising an objection to this practice to Moreau's friend. ROA.1027.

Wallace also alleged in his OSHA complaint that he discovered that "taxes collected by Tesoro were being booked as revenue" and that he was investigating an anti-trust issue in Idaho Falls in which there was an agreement with a customer to match prices with a particular station.

Wallace also claimed to OSHA that he reported retaliation to Tesoro twice: once in his 2008 Certificate of Compliance, and once in his 2009 Certificate of Compliance. Wallace was terminated on March 12, 2010, the same day he filed his 2009 Certificate of Compliance. ROA.190.

[3] Tesoro's Code of Business Conduct sets out the company's policies on business practices, compliance with laws, and ethics. ROA.63.

OSHA dismissed Wallace's complaint on October 22, 2010, finding that Wallace engaged in protected activity but that his protected activity was not a contributing factor in his termination. ROA.983.

3. District court proceedings. On February 3, 2011, Wallace filed a complaint in the Western District of Texas, San Antonio Division, more than 180 days after his initial complaint to OSHA and before the ARB issued a final decision in his case. Wallace filed an amended complaint soon after, on March 24, 2011. The district court denied a motion to dismiss this amended complaint because Wallace filed a second amended complaint ("SAC"), to correct any deficiencies, in response to Tesoro's motion to dismiss. ROA.412-13. Tesoro then filed a motion to dismiss the SAC, which Magistrate Judge Primomo recommended be granted in part and denied in part in his December 27, 2012 Memorandum and Recommendation. Magistrate Judge Primomo recommended denying the motion to dismiss the claims of retaliation based on wire fraud and instead ordered Wallace to submit a Third Amended Complaint ("TAC") with details sufficient to satisfy the Rule 9(b) requirement of pleading fraud with particularity.

Magistrate Judge Primomo then recommended that Wallace's claims of retaliation based on reporting taxes booked as revenue, reporting the Idaho Falls pricing issue, and reporting retaliation on the Certificates of Compliance be

dismissed. He based this recommendation in part on the absence of any allegation that Wallace cited a particular rule or regulation of the SEC when he reported to Tesoro that be believed that booking taxes as revenue was improper and the fact that the potential retaliation reported on Wallace's 2008 certificate of compliance was not a termination or other tangible employment action.

Wallace filed his TAC on January 15, 2013, in which he provided more detail about the claims of retaliation based on wire fraud. Magistrate Judge Primomo changed course regarding the pleading standard, holding that retaliation claims under SOX are not subject to the heightened pleading standard of Rule 9(b), and that even if the district judge held otherwise, Wallace met the heightened standard in his TAC. But Magistrate Judge Primomo then granted Tesoro's motion to dismiss on the basis that Wallace did not exhaust his administrative remedies. In a March 26, 2013 order, District Judge Biery adopted Magistrate Judge Primomo's Memorandum and Recommendations granting in part and denying in part the motion to dismiss the SAC, and in a September 27, 2013 order, District Judge Biery adopted Magistrate Judge Primomo's Memorandum and Recommendations dismissing the TAC. Wallace appealed both orders to this Court on October 25, 2013.

SUMMARY OF ARGUMENT

The district court erred in dismissing Wallace's TAC on grounds that he did not properly exhaust his administrative remedies because he failed to sufficiently raise to OSHA the facts that formed the basis of his protected whistleblowing under SOX. The district court also erred in dismissing Wallace's SAC on the grounds that the conduct alleged therein did not constitute protected whistleblowing under SOX, and that Wallace was required to meet the heightened pleading standard of FED. R. CIV. P. 9(b) when pleading retaliation.

The purpose of the SOX whistleblower provision's exhaustion requirement is to put OSHA on notice of the claims to investigate. Contrary to the magistrate judge's opinion, Wallace exhausted his administrative remedies with respect to his claims of retaliation for reporting wire fraud by price signaling and inconsistent discounts in his complaint to OSHA and subsequent communications with OSHA. He reported to Tesoro, in his 2008 Certificate of Compliance, which he attached to his OSHA complaint as a primary example of his protected activity, conduct he could reasonably have believed constituted instances of wire fraud by price signaling. This report was protected even though Wallace did not use the precise terms "price signaling" or "wire fraud." Wallace's subsequent district court complaint merely expanded upon the claims he raised in the OSHA complaint to provide detail sufficient to meet the pleading requirements of FED. R. CIV. P. 8(a).

The district court also erred in dismissing Wallace's claims in the SAC on grounds that there was no SOX-protected activity in Wallace's reports of both erroneous reporting of taxes as revenue and alleged retaliation for Wallace's prior reports to his supervisors. By requiring Wallace to provide information about conduct which he reasonably believed "definitively and specifically relates to one of the six enumerated categories found in § 1514A," and by requiring Wallace to have cited a specific SEC rule or regulation in his complaints to his employer regarding the booking of taxes as revenue, the magistrate judge took too limited a view of protected activity under SOX. Wallace v. Tesoro Corp., Civ. No. SA-11-CA-99-FB, at 10 (W.D. Tex. Dec. 27, 2012) (Primomo, Mag. J.) (hereinafter Memorandum I), *adopted by* Wallace v. Tesoro Corp., Civ. No. SA-11-CA-99-FB, at 10 (W.D. Tex. Mar. 26, 2013) (Biery, J.), ROA.798; see Villanueva, 743 F.3d at 109-10. To be protected under SOX, the employee, regardless of expertise, must only describe the conduct that he reasonably believes is illegal and need not cite the specific law that he believes was violated. See Villanueva, 743 F.3d at 109-10; Wiest v. Lynch, 710 F.3d 121, 133 (3d Cir. 2013).

With regard to Wallace's complaint of "potential" retaliation in his 2008 Certificate of Compliance, the magistrate judge erred in holding that the complaint could not be protected because the "potential" retaliation that Wallace reported was not a termination or other tangible employment action.

ARGUMENT

I. WALLACE EXHAUSTED HIS ADMINISTRATIVE REMEDIES WITH RESPECT TO HIS CLAIMS OF RETALIATION FOR REPORTING WIRE FRAUD.

SOX provides that "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," the complainant may bring "an action at law or equity for de novo review in the appropriate district court of the United States. . . ." 18 U.S.C. § 1514A(b)(1)(B).[4] This administrative exhaustion requirement gives the agency the first opportunity to resolve the whistleblower claim. Willis v. Vie Financial Group, No. Civ. A. 04-435, 2004 WL 1774575, at *3 n.5 (E.D. Pa. Aug. 6, 2004). Thus, a complainant's subsequent district court complaint may contain only those claims that were filed with the agency. Sharkey, 805 F. Supp. 2d at 51 (citing cases holding the same). However, a whistleblower complaint filed with OSHA need not meet formal pleading standards as its purpose is simply to trigger an agency investigation into whether there is reasonable cause to believe retaliation occurred. Id. at 53. In evaluating whether a complainant has exhausted

[4] Defendant claims this requirement is jurisdictional. Defendant's Motion to Dismiss the TAC at 10 n.10, ROA.935. The Fourth Circuit recently had the opportunity to decide whether the SOX whistleblower provision's exhaustion requirement was jurisdictional, but declined to do so. Feldman v. Law Enforcement Associates Corp., No. 13-1849, __ F.3d __, 2014 WL 1876546, at *4 & *4 n.7 (4th Cir. May 12, 2014) (noting that no other federal circuit courts have reached the issue). This Court should do the same because Tesoro clearly raised exhaustion, thus nothing turns on whether the requirement is jurisdictional.

his administrative remedies, "the appropriate inquiry under SOX is not whether every fact forming the basis for the belief that gave rise to a plaintiff's protected activity was previously administratively pled, but whether each separate and distinct claim was pled before the agency." Sharkey, 805 F. Supp. 2d at 53. A complainant properly exhausts his administrative remedies when he timely files a complaint with OSHA that includes "specific adverse employment actions, protected activity, and the general nature of the facts that formed [his] belief in violations of the enumerated statutes giving rise to the protected activity." Wong v. CKX, Inc., 890 F. Supp. 2d 411, 418 (S.D.N.Y. 2012); Sharkey, 805 F. Supp. 2d at 53-54. Wallace's complaint to OSHA was more than sufficient to exhaust his administrative remedies with respect to his allegations that he suffered retaliation for reporting conduct he believed constituted wire fraud.

A. Wallace engaged in alleged protected activity that formed the basis of the OSHA complaint.

Wallace reported to Tesoro, in his 2008 Certificate of Compliance, conduct he could reasonably have believed constituted instances of wire fraud by price signaling: "I have personally been asked by the VP Wholesale to participate in activity that I thought would result in market manipulation by altering our publication practices of posting the Shell Wholesale branded price. The circumstances surrounding this request suggest that this was in reaction to a competitor/customer's demands." ROA.445. He also heard from a Tesoro

marketing representative that "Tesoro employees were providing early disclosure of Tesoro daily price moves to customers in exchange for competitors' price moves," and notes that he previously reported this same conduct to Tesoro. ROA.1026. He reported similar conduct in relation to the Idaho Falls pricing issue. SAC ¶ 39, ROA.530 (detailing how Wallace discovered the issue of pricing collusion in Idaho Falls and reported this "newly-discovered anti-trust/wire fraud" issue to someone who reported it to Moreau). Although Wallace may not have used the terms "price signaling" or "inconsistent discounts" or "wire fraud" in his complaint to OSHA or his employer, OSHA found that he engaged in protected activity by reporting this conduct to his employer. ROA 983.

B. The OSHA complaint was sufficient to put OSHA on notice of the claims.

There are no formal pleading requirements for an OSHA complaint, and the federal pleading standards under Bell Atlantic v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2008), "do not apply to Sarbanes-Oxley whistleblower complaints filed with OSHA." Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as amended, 76 Fed. Reg. 68084, 68087 (Nov. 3, 2011); Sylvester, 2011 WL 2165854, at *9-10. In the preamble to the 2004 final regulations implementing the SOX whistleblower provision, the DOL explained that it intentionally did not require a detailed administrative complaint because its purpose is to trigger an

investigation, and even highly educated complainants may not have the legal expertise to plead the elements of a prima facie case. Day v. Staples, Inc., 555 F.3d 42, 55 n.11 (1st Cir. 2009), citing Procedures for the Handling of Discrimination Complaints Under the Sarbanes–Oxley Act, 69 Fed. Reg. 52106 (Aug. 24, 2004).

Wallace's complaint to OSHA was sufficient to exhaust his administrative remedies because it was sufficient to trigger an agency investigation into the communications with his employer that he alleges are protected. While Wallace was required to identify the conduct by his employer that he believed was illegal, he did not have to cite to his employer the law he believed was violated in order to be protected by SOX. Villanueva, 743 F.3d at 109-10. He was also not obligated to enumerate in his OSHA complaint the precise laws he believed Tesoro may have violated. See Evans, 2012 WL 3255132, at *7 (ALJ should not dismiss whistleblower complaint with the Department unless it fails to show "(1) some facts about the protected activity, showing some 'relatedness' to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought.").

Wallace provided OSHA with the "general nature of the facts that formed [his] belief in violations of the enumerated statutes giving rise to the protected

activity." See Wong v. CKX, Inc., 890 F. Supp. 2d 411, 418 (S.D.N.Y. 2012); Sharkey, 805 F. Supp. 2d at 53-54. In his initial complaint to OSHA, Wallace attached the 2008 Certificate of Compliance in which he reported instances of wire fraud by price signaling to Tesoro. ROA.565. In his August 10, 2010 letter to OSHA in response to the Tesoro position statement, Wallace described the information he heard from the Tesoro marketing representative about the early disclosure of price moves. ROA.1026. The August 10, 2010 response also discussed "further problematic activities occurring at Tesoro such as price discrimination" and notes that this is the conduct that the VP of Wholesale asked him to participate in, which he reported in the 2008 Certificate of Compliance to Tesoro.[5] ROA.565, 1027. These communications to OSHA show the general nature of the facts that formed Wallace's belief that Tesoro committed wire fraud violations and are consistent with the allegations made in his federal court complaints.

Furthermore, the magistrate judge's reliance on the fact that "[a]t no point does the OSHA report mention allegations of price signaling or inconsistent discounts" was an incorrect basis on which to support a finding that Wallace failed to exhaust his administrative remedies. ROA.1073. Whether OSHA mentioned all of Wallace's specific allegations in its findings or its written communications with

[5] Wallace mistakenly identifies this as the 2009 report. ROA.1027.

Wallace is of little relevance to whether Wallace properly raised those issues to OSHA. See Jones v. Southpeak Interactive Corp., __ F. Supp. 2d. __, No. 3:12CV443, 2013 WL 5837756, at *3-4 n.2 (E.D. Va. Oct. 29, 2013) (noting it would be unfair to impute OSHA's failures to complainant who adequately named defendants because OSHA's failure to investigate properly named defendants was irrelevant to exhaustion of administrative remedies); JDS Uniphase Corp. v. Jennings, 473 F. Supp. 2d 705, 711 (E.D. Va. 2007) (assuming plaintiff exhausted administrative remedies and noting that absence of OSHA investigation does not mean plaintiff did not do his part to exhaust).

C. The district court complaint expanded upon the claims raised in the OSHA complaint.

A plaintiff's federal court complaint, which must meet the pleading standards in Twombly and Iqbal, will not necessarily be identical to his OSHA complaint even where the plaintiff properly exhausts administrative remedies. A district court has subject matter jurisdiction over a SOX whistleblower complaint as long as the plaintiff's claims were timely presented in the OSHA complaint and the district court complaint contains more specific allegations naturally originating from those claims. Wong, 890 F. Supp. 2d at 418; Sharkey, 805 F. Supp. 2d at 53. To find that a plaintiff did not exhaust his administrative remedies because his detailed district court complaint did not mirror his OSHA complaint would frustrate the purpose of the relaxed pleading standards for OSHA complaints.

For example, Wallace referenced reports of market manipulation in his OSHA complaint. In the SAC, he detailed that the violations involved discriminatory pricing and price signaling. ¶ 24, ROA.418-19. Wallace then explicitly stated that Tesoro's conduct in price-signaling and inconsistent discounts amounts to wire fraud and detailed both violations. ¶¶ 25-27, ROA.419-20. He provided even more detail about the wire fraud in the TAC, including the time of the price posting, the channels by which prices are communicated to customers, the procedures by which Tesoro employees would engage in price signaling, and the procedures by which Tesoro employees would engage in providing inconsistent discounts. ¶¶ 31-34, ROA.851-54. Wallace's claim that he was retaliated against for reporting conduct that he reasonably believed constituted wire fraud amounts to a more specific allegation naturally originating from the allegations in the OSHA complaint, and the district court should not have dismissed the claim for failure to exhaust administrative remedies with OSHA.

D. The heightened pleading standard for fraud claims does not apply to district court complaints under SOX.

In reversing the district court's dismissal of the TAC, this Court should clarify that Wallace should not have been required to the meet the heightened pleading standards of FED. R. CIV. P. 9(b). The magistrate judge dismissed, with leave to amend, Wallace's claims in his SAC that he suffered retaliation for reporting suspected wire fraud because he had not met the heightened pleading

standards for fraud claims under Rule 9(b). The magistrate judge later reversed course in response to Wallace's opposition to Tesoro's motion to dismiss the TAC and correctly held that SOX retaliation claims are not fraud claims and not subject to Rule 9(b). To avoid further confusion on this issue, this Court should clarify that the magistrate judge's revised analysis was correct.

The only other court to directly address the issue, the Northern District of Texas, correctly found that the heightened pleading standard of Rule 9(b) did not apply to SOX whistleblower claims. Hemphill v. Celanese Corp., CIV.A.3:08CV2131-B, 2009 WL 2949759 (N.D. Tex. Sept. 14, 2009) aff'd, 430 F. App'x 341 (5th Cir. 2011) (finding heightened pleading standard did not apply because allegations involved wrongful termination and discrimination, not fraud or mistake); ROA.818. As the magistrate judge here eventually recognized, SOX whistleblower claims are analogous to retaliation claims under the False Claims Act ("FCA") and do not actually involve alleging fraud. While the heightened pleading standard of Rule 9(b) governs allegations that an individual made a false claim in violation of the FCA, "all federal circuit courts of appeal that have faced this issue have reached the conclusion that retaliation claims under [the FCA] need only meet the Rule 8(a) standard." Wallace v. Tesoro Corp., Civ. No. SA-11-CA-99-FB, at 18 (W.D. Tex. Feb. 28, 2013) (Primomo, Mag. J.) (hereinafter Memorandum II), *adopted by* Wallace v. Tesoro Corp., Civ. No. SA-11-CA-99-

FB, at 18 (W.D. Tex. Sept. 27, 2013) (Biery, J.), ROA.1079; Guerrero v. Total Renal Care, Inc., EP-11-CV-449-KC, 2012 WL 899228, at *3 n.2 (W.D. Tex. Mar. 12, 2012) (citing cases from 1st, 4th, 9th, 10th, and 11th Circuits holding same). Thus, as the magistrate judge found in his revised analysis, there is "no reasonable basis" for treating SOX whistleblower claims differently from FCA retaliation claims. Memorandum II at 19-21, ROA.1080-82.

II. THE DISTRICT COURT ERRED IN DISMISSING THE CLAIMS IN WALLACE'S SAC AS UNPROTECTED UNDER SOX.

The district court erred in dismissing Wallace's claims in the SAC on grounds that there was no SOX-protected activity in Wallace's reports of (1) erroneous reporting of taxes as revenue; and (2) alleged retaliation for Wallace's report of retaliation in his 2008 Certificate of Compliance. In doing so, the district judge erred by relying on the magistrate judge's application of too stringent a standard for protected activity under SOX.

By requiring Wallace to provide information about conduct which he reasonably believed "definitively and specifically relates to one of the six enumerated categories found in § 1514A," and by requiring Wallace to have cited a specific SEC rule or regulation in his complaints to his employer, the magistrate judge took too limited a view of protected activity under SOX. Memorandum I at 10, ROA.798. Under both recent Fifth Circuit case law and recent ARB decisions, Wallace only had to report conduct to his employer that he reasonably believed

constituted a violation of one of the six categories of law listed in SOX. Villanueva, 743 F.3d at 109, citing Sylvester, 2011 WL 2517148, at *15; see also Wiest, 710 F.3d at 130-31 and n.4 (according Chevron deference to Sylvester and citing post-Sylvester ARB decisions); see Lockheed Martin Corp. v. Admin. Rev. Bd., 717 F.3d 1121, 1129-1133 (10th Cir. 2013) (according Chevron deference to Sylvester's holding that protected conduct can involve a reasonable belief of a violation of any of the six categories of law listed in SOX). Requiring communications to the employer to "definitively and specifically" implicate one of these categories is inconsistent with the "plain language of the SOX whistleblower protection provision, which protects 'all good faith and reasonable reporting of fraud.'" Sylvester, 2011 WL 2517148, OALJ Reporter at *17, quoting 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002); accord Wiest, 710 F.3d at 131 ("We conclude that the ARB's rejection of Platone's 'definitive and specific' standard is entitled to *Chevron* deference."); Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432, 443 (S.D.N.Y. 2013) ("this Court agrees with the ARB that the 'definitive and specific' test is inapplicable to SOX violations"). Furthermore, "an employee need not cite a code section he believes was violated in his communications to his employer but the employee's communications must identify the specific conduct that the employee believes to be illegal." Villanueva, 743 F.3d at 109-10.

Additionally, as explained below, the magistrate judge erred in summarily dismissing Wallace's specific complaints regarding retaliation based on reporting the booking of taxes as revenue and prior retaliation reported in his 2008 Certificate of Compliance.

A. The Fifth Circuit should reverse the dismissal of Wallace's claims involving booking taxes as revenue.

The magistrate judge erred in finding that Wallace could not have had an objectively reasonable belief of the violation because Wallace did not cite a specific rule or regulation of the SEC that he believed Tesoro violated, and because as an accounting expert he would have known to do so.[6] ROA.808. SOX protects employees who complain of conduct based on a reasonable, if mistaken, belief that the conduct constitutes a violation of one of the enumerated categories of law in § 1514A. To be protected, the employee need not cite the specific law that he

[6] Wallace argues that the magistrate judge wrongly leapt to the conclusion that Wallace was an accounting expert based on his job duties. Wallace's experience and expertise as a long-time employee of Tesoro undoubtedly factor into a court's evaluation of the objective reasonableness of his beliefs. But the level of that expertise and its bearing on the reasonableness of Wallace's beliefs would be an issue to be resolved after discovery or at trial, not at the motion to dismiss stage. See, e.g., Allen, 514 F.3d at 477-78 ("the objective reasonableness of an employee's belief cannot be decided as a matter of law if there is a genuine issue of material fact"); Welch, 536 F.3d at 277 n.4 ("objective reasonableness is a mixed question of law and fact"); Hemphill v. Celanese Corp., 3:08CV2131-B, 2010 WL 2473845, at *5 (N.D. Tex. June 16, 2010) aff'd, 430 F. App'x 341 (5th Cir. 2011) (declining to grant summary judgment where a material issue of fact existed as to what a reasonable auditor would believe). The Secretary thus agrees with Wallace that the district court was wrong to dispose of this claim on a motion to dismiss. Wallace Br. at 57.

believes was violated but must describe the conduct that he believes is illegal. See Villanueva, 743 F.3d at 109-10; Wiest, 710 F.3d at 133; Day v. Staples, Inc., 555 F.3d 42, 55 (1st Cir. 2009). Furthermore, while the employee must have a subjectively and objectively reasonable belief that one of the provisions of law listed in SOX was violated, the employee need not communicate the reasonableness of his belief to his employer in order to engage in SOX-protected activity. See Wiest, 710 F.3d at 134 (noting the whistleblower's "communication itself need not reveal all the facts that would cause a reasonable person with the whistleblower's training and background to conclude that a referenced federal law has been or will be violated"); Sylvester, 2011 WL 2165854, at *12. Thus, contrary to the to the magistrate judge's recommendation, Wallace was not required to cite, in his communications to his employer, the rule or regulation he believed was violated in order to demonstrate an objectively reasonable belief that a violation had occurred. Nor was he required to communicate the reasonableness of his belief to his employer.

While Wallace did not formally cite the rule or regulation he believed Tesoro violated, Wallace alleges that he did identify to his employer that he had concerns regarding the reporting of taxes as revenue and the effect that this practice had on the accuracy of Tesoro's financial statements. SAC ¶ 38, ROA.253. Wallace alleges that he reported this problem to Tesoro VP of Internal

Audit, Tracy Jackson; Director of Commercial Accounting, Greg Belisle, and Moreau, and that Belisle told him that the booking of taxes as revenue was contrary to GAAP. Id. In his SAC, Wallace specifically noted that the practices at issue "artificially inflat[ed] the profitability of certain segments of Tesoro" and involved "numbers … reported to the SEC in the company's annual 10-K filing and quarterly 10-Q filings." He also alleged that Tesoro was "knowingly reporting inaccurate information on its SEC-required reporting and in violation of GAAP accounting standards (also an SEC requirement)." SAC ¶ 38, ROA.253.[7]

Reports of conduct that an employee reasonably believes violates GAAP can amount to reports of conduct that an employee reasonably believes violate SEC rules. See SEC Brief as Amicus Curiae in Welch v. Chao, No. 2007-1684, 2008 WL 4185028, at *2-5 (4th Cir. Apr. 24, 2008) (explaining the relationship between GAAP and SEC rules and regulations).[8] The First Circuit in Day v. Staples found

[7] Wallace did cite to the specific SEC regulations in his objections to the magistrate judge's recommendation to dismiss the SAC claims: "This conduct, as discovered and reported by Wallace, violates the provisions of Section 13a of the Securities Exchange Act of 1934 and Rule 13a-15 to maintain and ensure accurate financial reporting and to 'devise and maintain a system of internal controls[]' and Section 13b of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(b)(2)(B) requirements that no person shall knowingly falsify any book, record, or account. *See* 17 C.F.R. § 240.13b2-1." ROA.822. Wallace also raised these facts in the TAC but the magistrate judge declined to evaluate these facts because he previously recommended dismissal of the claim.

[8] The Fourth Circuit in Welch v. Chao ultimately declined to consider whether reporting a violation of GAAP was sufficient to show a violation of §1514A

that violations of GAAP are not in themselves sufficient to establish an objectively reasonable belief of fraud against shareholders without additional evidence of intent. 555 F.3d 42, 57 (1st Cir. 2009). But here, Wallace did allege facts to establish intent: that Tesoro was "knowingly reporting inaccurate information" with the intention of artificially inflating its profitability. SAC ¶ 38, ROA.253. Furthermore, to the extent that Wallace was alleging violations of SEC rules, which he understood as requiring conformance with GAAP, he was not necessarily required to show that he believed Tesoro was violating those rules with the intent to defraud shareholders. See Hemphill, 2010 WL 2473845 at *6. The ARB examined this issue in Vannoy v. Celanese and held that an employee "alleged facts sufficient to sustain his claim that he engaged in protected activity under Section 806" when he complained about accounting discrepancies that he reasonably believed amounted to violations of federal securities laws. ARB Case No. 09-118, 2011 WL 4690624, at *8-9 (ARB Sept. 28, 2011). The ARB noted that while the complainant did not allege shareholder fraud specifically, he was not required to do so under SOX and his "complaints concerning Celanese's business practices, assertions as to misstated financial records, and shortcomings in the

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because the plaintiff did not explain the basis for his alleged objectively reasonable belief of a violation of § 1514A to the ARB. The court did not reject that argument on its merits, but rather declined to consider it because it had not been raised in proceedings below. 536 F.3d 269, 279 (4th Cir. 2008).

company's 'accounting controls' support the reasonableness of his belief that the company was engaging in accounting misconduct in violation of SOX." Id. at *9.

Viewed in the light most favorable to the plaintiff, as is required on a motion to dismiss, Wallace's allegations in his SAC regarding retaliation based on his complaints that taxes were being misreported as revenue in violation of GAAP are more than sufficient to withstand a motion to dismiss. See Wiest, 710 F.3d at 135 n.5. This claim should be resolved on the merits after Wallace has had the opportunity to present evidence that he reported to Tesoro conduct that a reasonable person with his training and experience could believe violated SEC rules and regulations.

B. The district court erred in dismissing Wallace's allegations that his disclosures of retaliation in his 2008 Certificate of Compliance were protected under SOX.

In the SAC, Wallace alleges that his 2008 Certificate of Compliance raised allegations that he believed his supervisor was retaliating against him for raising complaints. SAC ¶¶ 21, 32, 50, ROA.245, 250, 261. The magistrate judge dismissed these allegations on the grounds that the potential retaliation noted in the 2008 Certificate of Compliance was unrelated to the "terms and conditions" of Wallace's employment. ROA.810. In dismissing these allegations, the magistrate judge interpreted SOX's protections against retaliation too narrowly.

Complaints to an employer regarding conduct that the employee reasonably believes is retaliation in violation of § 1514A are themselves protected under

§ 1514A. See McClendon v. Hewlett Packard, Inc., ALJ Case No., 2006-SOX-00029, 2006 WL 6577175 at *76 (ALJ Oct. 5, 2006) (holding that filing a SOX whistleblower complaint is in itself a protected activity).[9] Such reports fall under § 1514A(a)(1)'s catch-all protection for reports regarding conduct that the employee reasonably believes violates "any provision of Federal law relating to fraud against shareholders ." Indeed, Congress' primary concern in passing § 1514A was to protect whistleblowers who report securities rule violations and fraud that can harm investors. See Lawson v. FMR LLC, 134 S. Ct. 1158, 1162 (2014) (describing § 1514A as a addressing the concern that a "corporate code of silence," intended to discourage "employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally," allowed Enron to perpetuate "massive shareholder fraud") (internal quotations omitted); S. REP. NO. 107-146, at 19 (2002) ("U.S. laws need to

[9] The Secretary has reached a similar conclusion in every case he has faced under any of the whistleblower protection statutes that the Secretary enforces. The Secretary has consistently held that providing information to the employer or filing a complaint of retaliation under a whistleblower protection statute is itself protected by the relevant whistleblower statute. See, e.g., Benjamin v. Citationshares Mgmt, ARB No. 12-029, 2013 WL 6385831, at * (ARB Nov. 5, 2013) (noting "an employee engages in protected activity if he attempts to provide information of retaliation that violates AIR 21" and holding that employee's recording of information in support of his retaliation claim was protected); Diaz-Robianas v. Fla. Power & Light Co., DOL No. 92-ERA-10, 1996 WL 171408, at *5 (Off. Admin. App. Jan. 19, 1996) (noting under prior version of Energy Reorganization Act that the statute "requires employers to refrain from unlawfully motivated employment discrimination, and a complaint that an employer has violated this requirement is protected").

encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies."). This protection necessarily includes protecting employees who provide information to the employer that they or others are suffering retaliation for reporting corporate fraud or securities violations.

Wallace's 2008 Certificate of Compliance supplemented by further communications with OSHA described conduct that Wallace alleged was potential retaliation. ROA.1021 (Wallace statements to OSHA describing contrast between his prior supervisor and Moreau as "experiences that led up to my termination and are the foundation of my annual reporting that Moreau was retaliating against me."). Even if the conduct he complained of did not meet the standard for adverse action, a reasonable but mistaken belief of retaliation is sufficient for a report of retaliation to be protected activity under SOX. See Allen, 514 F.3d at 477 (noting that reasonable but mistaken belief of a violation is protected).

Whether Wallace reasonably believed that Moreau retaliated against him in violation of SOX when he allegedly criticized Wallace for raising concerns regarding pricing practices and later when he allegedly treated Wallace with hostility is a fact-intensive inquiry. However, the magistrate erred in dismissing Wallace's claim simply because the "potential" retaliation described in the 2008 certificate of compliance did not amount to a termination or other tangible

employment action. Adverse action under SOX does not have to be a tangible employment action. SOX provides that a covered company or person may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because of protected conduct. 18 U.S.C. § 1514A(a). The plain language of the statute prohibits harassment in retaliation for an employee's protected complaints. The Secretary, in both ARB case law and the SOX whistleblower provision implementing regulations, has additionally stated that SOX prohibits intimidating, threatening, restraining, coercing, blacklisting, disciplining or in any manner retaliating against an employee. 29 C.F.R. § 1980.102(a); Menendez v. Halliburton Inc., ARB Case Nos. 09-002, 09-003 2011 WL 4439090, at *9-12 (ARB Sept. 13, 2011), appeal pending 13-60323 (5th Cir.). Furthermore, this Court has recognized that the standard for adverse action articulated for Title VII retaliation claims under Burlington Northern & Santa Fe Rwy. Co. v. White, 548 U.S. 53 (2006), may be applied to SOX whistleblower cases. Allen, 514 F.3d at 476 n.2. Thus, it is clear that SOX's reference to the "terms and conditions of employment" is not a significant limitation on the severity of an adverse action under SOX but merely a reference to the scope of SOX's protections—i.e. the alleged adverse action must be connected to the plaintiff's employment. Menendez, 2011 WL 4439090, at *11. As a result, it was improper for the

magistrate judge to dismiss this claim on grounds that the retaliation alleged in the 2008 Certificate of Compliance was not a termination or other tangible employment action.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court reverse the decision of the district court.

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Dated: June 2, 2014

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I certify that on this 2nd day of June, 2014, I caused the Brief of the Secretary of Labor as Amicus Curiae to be electronically filed via the Court's CM/ECF system. I further certify that I caused 7 copies of the Brief to be dispatched to the Clerk of this Court by United Parcel Service. I certify that I served of this Brief electronically on all counsel of record through the Court's electronic filing system, and by U.S.P.S. first class mail for those counsel not registered with the Court's electronic filing system.

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