NO. 08-2058

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TORINA A. COLLIS,

Plaintiff-Appellant

v.

BANK OF AMERICA, NATIONAL
ASSOCIATION

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT GREENBELT

(Peter J. Messitte, District Judge)

BRIEF OF APPELLANT

Torina A. Collis, Pro Se
13240 Star Gazer Place
Waldorf, Maryland 20601
301-843-0532

JURISDICTIONAL STATEMENT

This case arises under the Sarbanes-Oxley Act, 18 U.S.C. 1514A. The United States District Court for the District of Maryland properly had jurisdiction over this matter pursuant to 29 U.S.C. 1331, because it arises under the laws of the United States, thus presenting a federal question. Venue was proper in that court because the acts complained of occurred in the state of Maryland, within the jurisdiction of the District Court.

On August 13, 2008, the United States District Court for the District of Maryland issued a final order granting the Defendants' Motion for Summary Judgment, which, barring review, would dispose of all parties claims.

Notice of appeal was timely filed on September 12, 2008. This Court has jurisdiction pursuant to 28 U.S.C. 1291, which empowers it to review final decisions of District Courts.

Statement of the Issues

1) Whether the District Court erred in granting summary judgment contending “that the allegations are not of the sort of protected activity that Sarbanes-Oxley is intended to address”, that it “is not an allegation that’s ultimately related to shareholder fraud,” “it’s really an allegation that some customers are being unfairly treated in one fashion or another,” leaving genuine issues of material facts in dispute even as to the District Court‘s impression that Collis only mentions a few customers if that.

2) Whether the District Court erred in granting summary judgment by misunderstanding the level at which fraud is actually taking place and customers are being defrauded of their money, at the same time shareholders are being led to believe through false reports that the revenue being reported is legitimate.

3) Whether the reporting to a supervisor, with authority to investigate, of personal bankers throughout the Metropolitan area changing customer’s bank accounts without their knowledge, causing them to incur fees of

$20.00 a month, setting up additional accounts without the customers knowledge, which increases the bank's revenue, is at the core, fraud on shareholders and protected activity under Sarbanes Oxley.

4) Whether the reporting of personal bankers setting up online bill pay, without the customers knowledge, deducting a dollar from their account, which generates a check to be mailed to the customer through the United States postal service, is protected activity under Sarbanes Oxley.

5) Whether or not there are reasonable inferences from the evidence such that a reasonable jury could conclude that Collis complained of this fraudulent activity on a larger scale than Bank of America is portraying and on a larger scale than the District Court concluded.

6) Whether the District Court should revisit issues in this case, specifically the issues raised in Collis's Rule 60(b) motion addressing the nationwide level at which customers are being defrauded.

STATEMENT OF THE CASE

This case started when Collis, on or about May 24, 2005, filed a complaint with the U.S. Department of Labor, pursuant to the Sarbanes-Oxley Act (SOX) after she was terminated.(App. 10) Collis was representing herself until she retained Rex Fuller who entered his appearance and withdrew Collis's case. On May 26, 2006, Mr. Fuller, on Collis's behalf, filed suit against Bank of America, N.A. and sought damages for wrongfully and unlawfully terminating Collis from her employment and retaliating against her for reporting fraudulent conduct in violation of the Sarbanes-Oxley Act, 18 U.S.C. 1514A. Shortly after, Mr. Fuller filed a motion to withdraw his appearance due to stress/medical related issues. (App. 18) Collis then retained John Singleton in July 2007. Bank of America filed a motion for summary judgment on February 4, 2008.(App. 22) Mr. Singleton failed to reply to the summary judgment. Mr. Singleton then filed to withdraw off the case after Collis asked why he was not keeping Collis informed of her cases. Collis then retained Mr. Morris Fischer who filed a response to the summary judgment. At the motion's hearing, the District court, finding "that the allegations are not of the sort of protected activity that Sarbanes-Oxley is intended to address", that it "is not an allegation that's ultimately related to shareholder fraud," "it's really an allegation that some customers are being unfairly treated in one fashion or another," dismissed the claims against Bank of America. (App. 223,225)

Collis is now left representing herself against the largest bank in the United States. Collis' own attorneys were putting obstacles in her way of seeking justice. Due to foul play in the discovery process, Collis did not obtain the discovery she requested, not even a single deposition.

STATEMENT OF THE FACTS

Collis is seeking damages for violations of her rights under Sarbanes-Oxley to not be retaliated against for reporting fraudulent conduct.

Collis was employed at Bank of America as a personal banker from October 2000 until she was terminated on February 25, 2005.

In approximately December of 2003, Collis approached Michael Joy, the then banking center service manager of 20 plus years. Collis told Mr. Joy that she noticed customers accounts were being changed to Advantage without their knowledge and they were incurring fees of $20.00 a month. (App. 96) Additional accounts were opened under the customer's name without their knowledge. Mr. Joy told Collis "don't waste your breath, they know it's going on, (meaning corporate) but they would have to get rid of 90% of the bank to stop it." Collis told Joy "there has to be a way to stop it". Time went by and Collis kept seeing the same illegal activities. Collis remembered what Joy told her, but she knew there has to be a way to stop this.

In approximately June of 2004, a customer came in the banking center and asked why she had a dollar withdrawn from her account and mailed to her in the form of a check. Online banking with bill pay was set up without the customer's knowledge. The customer would realize at a later date when they received the check for their own dollar in the mail. The dollar was mailed to the customer as if they were paying a bill.

The previous banking center manager, Satish Peters, told the personal bankers of this scheme to generate online sales. Collis did not participate in the scheme. Peters said "we are all shareholders". In other words, if we increase sales, we will all benefit. The personal banker would get credit for setting up the online banking and additional credit once the first bill was paid. Once the personal bankers set up so many accounts and meet their goals, they would get bonuses "$".

The customer had a savings account that had zero dollars in it. The customer responded "what savings account, I told him I did not want a savings account." Collis responded "then I guess you are not planning on keeping the Advantage account." The customer responded "what Advantage account?" The customer was irate. Collis closed the savings, advantage, and online banking accounts. Collis immediately gave the customer's information to her new manager, Melody Vaughn, and told her that the personal banker that set it up was Jean Rene Tchoski. Vaughn told Collis she would investigate it.

In approximately June of 2004, Collis mentioned at the Personal Banker's meeting in Greenbelt, MD the fraudulent activities that were taking place and that it needed to be addressed. Personal bankers were nodding their heads as if in agreement. The fraud occurred not just in the Beltsville branch, but throughout Maryland, Virginia and Washington, DC. Collis gave Larry Parrish (Regional Sales Manager) and Derrick Harris (Regional Service Manager) Jean Rene's name after the meeting because Parrish said "if you know of who is doing this, give us their names." Instead of investigating the matter, Vaughn, Parrish, and Harris promoted him to manager. (App. 100) Ironically, this was the last meeting Collis was aloud to attend.

On July 8, 2004 Collis complained to Larry Parrish about the harassment she was receiving from Melody Vaughn . On July 9, of 2004, Collis and Tchoski happened to both call out sick. Rakesh Raina, personal banker, told Collis he saw a copy of an email sent to numerous banking centers from Melody Vaughn stating "We need help in Beltsville since Jean Rene Tchoski called out sick and Torina Collis went AWHOL". Collis called Vaughn asking why she would send an email that Collis went AWHOL when she had called out sick. Vaughn responded "if you ever contact another member of my peers again I will write you up." Carmen Soria, head teller, notified Collis that she saw an email on the printer as well. This one was from the Regional Service Manager, Derrick Harris stating "Collis had a nervous breakdown, we need help in Beltsville."

Collis filed a complaint to personnel in North Carolina on approximately July 13, 2004. Vaughn started retaliating by giving Collis bad performance reviews without cause and reducing Collis's quarterly bonuses.(App. 101)

On approximately November 18, 2004, Collis met Scott Meehan (New Regional Sales Mgr from North Carolina) at the corporate office in Greenbelt, Maryland to inform him of the fraudulent activities, repeated harassment, emails sent about her and reduced commissions. (App. 85,98) Meehan brought Harris to the meeting. Meehan told Collis he needed to investigate the matters she brought before him and it would take awhile. Meehan informed Vaughn and Holloway of Collis's complaints. On December 8, 2004 Collis again complained to Scott Meehan about continued harassment she was receiving from Vaughn and Holloway. Meehan told Collis to wait for a response.

On February 15, 2005, Vaughn said in a loud voice at Collis's desk " "there are discrepancies with your time sheets" accusing Collis of falsifying them. (App. 176) Collis explained quietly and said they were not falsified. Collis had worked late to make up time one day. Since Collis worked 50 hours a week any way, without overtime compensation, Collis did not know why Vaughn was accusing her of all people and humiliating her in front of people.

On February 16, 2005, Collis asked Vaughn if she could leave early, instead of 6:30pm, 5:30 pm, since she worked over an hour early on February 14. Vaughn said no. At 4:30pm, Vaughn told Ricardo Grant and Tara Gallman (personal bankers) to leave early. This was unusual for her to do, and there were customers in the lobby. They were scheduled until 5:15pm. The Bank closes at 5pm. At approximately 6:05p.m. Collis left the bank. She was struggling in pain due to a nerve disease. Collis didn’t think anything of it since she always worked over time and since Vaughn let Grant and Gallman leave early as well. (App. 104)

On February 17, 2005, Collis complained to Meehan on her cell phone at 8:00 am about the harassment Vaughn subjected her to and stated she could not take it anymore. Collis asked Meehan when he would be finished investigating. He said he was still waiting to hear from Walter Frye (New Regional Account Executive Manager from North Carolina as well) and it was taking a while to investigate. Collis told Meehan she might have to take alternative measures and go to Corporate in North Carolina because it was getting bad. All the while customers accounts were still being changed without their knowledge.

On February 23, 2005, at approximately 1:30, Holloway was monitoring the front service desk and Gallman was at lunch for and hour, which was unusual since we only get ½ hour. Collis had not eaten lunch yet. Holloway phoned Collis at her desk to inform her there was a customer to open an account. Collis asked Holloway if Collis could get Tara downstairs in the break room and switch with her. The following conversation took place:

Lisha: Just go to lunch. (In a rude voice)

Torina: (quietly) Lisha, I do not want to go to lunch with Tara, I'd just like to switch with her.

Lisha: I saaiidd, go to lunch. (she hangs up phone)

Collis walks to the front desk by the podium sign in sheet.

Torina: Lisha, I'll just go ahead and help the customers and wait for Tara.

Lisha: I saaiidd, go to lunch.

Torina: Who will help the customer?

Lisha: I will help them up here.

Collis did not want the elderly lady standing up front so she said "don't worry Lisha, it's not a big deal." Collis proceeded to take the customer back to her desk and help them. Lisha let Collis take the customer back.

On February 24, 2005 Collis was working on a wire transfer and told Holloway it would be a while. A customer comes in the banking center. Holloway is in the lobby gossiping with Carmen Soria and belittling tellers. Holloway calls Collis's desk "Torina, you have a customer" and hangs up. It was not a moment later and she barges in Collis's cubicle yelling. "I said you have a customer, now get back to my office right now!"

Collis, confused, complies. Lisha screams "you're dismissed for the day". Collis said (in a normal tone voice) "what, dismissed for the day, Lisha, I didn't do anything." Holloway said "I said you're dismissed for the day". Collis said "Lisha, I have work to do". Collis never once yelled at Holloway. Holloway immediately calls Anita Horace at corporate in Washington, D.C. Horace told Holloway to let Collis stay and finish her work instead of sending Collis home. Collis called Personnel to place another complaint. Collis told personnel she needed to call back when she got off. Later at approx. 4:30pm Vaughn shows up and goes to her office with Holloway. They called Collis back at approximately 5:30pm and bombarded her with write ups. Vaughn's write up was back dated for the 22nd of February. (App. 39)This write up was given 9 days after Vaughn said on the 15^{th} "I'll let it slide this time" agreeing that Collis did not falsify her time sheets. Holloway then handed Collis her write up of Collis. (App. 41) Collis told them she did not want to sign because they were false. Vaughn told Collis to bring it in the morning when she comes to work. Collis went back to her desk to finish work and left at approximately 6pm.

Once outside, she called personnel in North Carolina from her cell phone and filed another formal complaint with Dina Rutherford. Collis informed her about the write ups, harassment, discrimination and fraudulent activities and that ever since she started complaining, she has been harassed. Rutherford said she needed to talk to Scott Meehan and investigate but it will take some time.

The next morning, February 25, 2005 Collis called out sick at 8:00 am due to much physical pain. Meehan happened to be there and said "Torina, due to your write ups this week, you are terminated." Collis said "What, Scott, you know I have been complaining to you and you know what they have done to me. You won't hear my side of the story?" Meehan would not listen and told Collis to arrange to have her items either mailed or picked up. Meehan's last words to Collis on the phone were "Now you can take whatever alternative measures you need to take."

Shocked and crying, Collis called Personnel within the hour to inform them of her termination. Collis was devastated. Her life was flashing before her eyes. Personnel responded “he did what?” Personnel investigated Collis’s. Rutherford said “we are not so much investigating discrimination as we are your separation from the bank”. Vaughn admitted to Rutherford she did not give Collis the write up on the 22nd but in fact the 24th evening. Meehan told Rutherford that Collis did tell him about fraudulent activities and he was addressing it. (App. 191) Collis tried to contact Meehan to pick up her belongings at the bank and was told Meehan was out for a couple of weeks. Rutherford investigated Collis’s termination until April 2005. Meehan was gone from the bank in April 2005. Bank of America needed an affidavit from Meehan for the instant case. Meehan is now employed back at bank of America. Collis requested Meehan’s personnel file in discovery and never received it.

SUMMARY OF THE ARGUMENT

No one should have to endure the pain and humiliation that Collis has had to endure for reporting fraudulent activities in her work place and trying to put an end to corporate corruption and deceit. That is the very essence of the protection of the law. Collis’ own attorneys were putting obstacles in her way of seeking justice. Due to foul play in the discovery process, Collis did not obtain the discovery she requested, not even a single deposition.

Bank of America states they would have taken action anyway. Bank of America can not show proof of anyone terminated basically on the spot for supposed inappropriate behavior. Even the write up states, you are to show improvement or it could lead to termination. Improve overnight? In fact, Vaughn was not terminated for sending a defamatory email about Collis, nor was Holloway for pushing an employee and threatening to run over with a car. The bank is trying to show through self serving affidavits, that Collis had blatant disrespect for her associates and management, when in fact she did not. It was a cover up and conspiracy to rid her of the bank for her repeated complaints of the fraudulent activities that she was exposing that affects not only customers nationwide and their hard earned money but shareholders will be defrauded. Stocks were a major incentive for employees as well as Ken Lewis, who made millions a year in stocks.

Throughout the record, Collis stated that the fraudulent activity was taking place not just in Beltsville, Md but throughout the region. The District Court in the Motions hearing, stated Collis only mentions it was happening to a few customers. (App. 223)

Summary Judgment is appropriate where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ .P.56. The material facts are those identified by controlling law as essential elements of claims asserted by the parties. A genuine issue as to such facts exists if the evidence forecast is sufficient for a reasonable trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 l. Ed. 2d 202 (1986) . "The complaint should not be dismissed unless it appears that no set of facts can be proven in support of the claim set forth there in" *Ungar v. State* 63 Md app 472, 479, 492 A. 2d 1336 (1985) cert denied 475 Us 1066, 1065 Ct 1379. Accordingly, such a motion should not be granted unless it appears "beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 46 (1957).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

In the instant case, there are genuine issues of material facts. Collis did not have inappropriate behavior and she did not falsify her time sheets.

The bank is committing fraud on a nationwide level. (App. 239-257) Collis reported these fraudulent activities were occurring not only in her banking center but from around the Metropolitan area. At her deposition she gave at least four concrete examples that stood out in her head. There were hundreds that Collis encountered. She should not be expected to remember names and all dates. Collis kept a folder at her desk for management with all of the customers this was happening to. Collis did not take the folder when she was terminated. Collis filed a motion 60 (b) which the District Court denied. (App. 229-257) (App. 258-259) Collis has attached copies of customers from around the United States complaining of the fraudulent activities years after Collis's retaliatory termination. (App. 239-257)

Collis submitted correspondence to the Honorable Judge Messitte on March 13, 2009 and sent Bank of America counsel a copy. (App. 260-262). The District Court never responded.

In December 2007, Mr. Singleton and Elena Marcus, counsel for Appellee, filed a joint status report stating discovery was complete, when in fact it was not. Collis did not receive the discovery she requested and relied on. Collis waited for discovery.

Meehan declared under penalties of perjury numerous false statements. (App. 34) He did not tell me I was not meeting my goals. When

I first met him, he came to my banking center telling me since I am number one in the region, he counted on me to be a role model in helping others increase their sales. That's when I told him we needed to meet outside of the banking center because I needed to explain the seriousness of the fraudulent activities in the region. He states in his affidavit, that in the fall and winter of 2004 and 2005 he spoke with Vaughn about Collis' rude behavior. So right after he meets with me and I complain about fraud, and that Vaughn was committing this herself, and he was suppose to "look into it" they decide to make a story that Collis has inappropriate behavior. This contradicts the letters Collis received from not only Ken Lewis, but other associates and Vaughn and Holloway themselves. Collis was framed.

Lisha Thorne Holloway declared under penalties of perjury that during the fall and winter of 2004 and 2005, Collis acted disrespectfully towards her fellow associates and managers. (App. 37) This contradicts letters from management and associates. (App.126-145)Isn't it ironic when Collis told Meehan in the fall of 2004 about the fraud, all of sudden, Collis has rude behavior in the fall of 2004. Collis was framed.

Furthermore, Collis requested in discovery documents that would prove this was taking place and never received them. She had to do her own discovery since she was not getting it from the bank. Most people have bank accounts. There are a lot of investors in this country. If we took a poll and asked if they believed this was fraud and ultimately fraud on shareholders, I am certain they will agree with Collis.

Vaughn declared under penalties of perjury that Collis falsified her time sheets and was counseled for her inappropriate behavior. Collis was framed. (App. 195-197)

I. **Burden of Proof for SOX Claims**

Collis's claims arise under the whistleblower provision of the Sarbanes-Oxley Act. Pursuant to Section 806 of the Act (18 U.S.C. 1514A), an employer may not discriminate against an employee in the terms of conditions of employment because of any lawful act that is done by the employee to provide information regarding any conduct which the employee reasonably believes constitutes a violation of 18 U.S.C. 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), or 1348 (security fraud), any rule or regulation of the SEC, **or** any provision of federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-- (A) a Federal regulatory or law enforcement agency; (B) any member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

In order to establish a prima facie case under Sarbanes-Oxley, an employee must prove that she (1) reasonably believed that her employer was breaking the law; (2) engaged in whistle blowing activity as defined by the statue; 3) suffered an adverse employment action; and (4) that there was a causal connection between the whistle blowing activity and the adverse employment action. *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 at 35 (ALJ 2004). Once an employee has met this burden, he is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity. Id As the statutory language makes clear, the first element does not require the employee to prove that the employer actually violated the law. Welch, supra, at 36.

Welch's complaints about Cardinal's lack of internal controls were also not protected activity since "(a)lthough having a deficient internal control may make an institution more vulnerable to fraud, in itself is not fraudulent." *Welch v. Cardinal Bankshares Corp*, ARB Case 05-064 (ARB, May 31, 2007)

Shareholders would think twice if they knew the revenue reported was illegally obtained. The primary objective of Sarbanes-Oxley is to reinforce confidence in the securities markets and catch fraud before shareholders are defrauded. Sarbanes-Oxley protects employees who in good faith report or complain about corporate activities inconsistent with the interests of the company's shareholders.

Section 806 does not require whistleblowers to identify the statutory provisions they believe are being violated. "If Congress had intended to limit the protection of Sarbanes Oxley…or to have required complainants to specifically identify the code section they believe was being violated, it would have done so." Id

A "good faith" standard is also entirely sensible. Given the complexities of the violations that employees may complain about an employee should not be required to have a professional's sophisticated understanding of the intricacies of federal securities and criminal law to be protected from retaliation.

Protected activity was a contributing factor one could infer that if there was an investigation and found no fraud Meehan came back and terminated Collis for even making the accusation or that there was fraud and they wanted to rid of the whistleblower.

Clear and convincing evidence that the employer would have taken the same adverse action even if the employee never engaged in protected activity. The evidence is not clear. Collis was never written up until the day before her termination (and given two write ups at that). Her write ups came approximately 8 days after she told Meehan she would have to take alternative measures even if that meant going to north Carolina to inform corporate of the fraud and harassment herself. Collis received all sorts of praise in the form of certificates from fellow associates, managers and Ken Lewis in the fall of 2004 and winter of 2005 contradicting the affidavits presented to the court. There is nothing in Collis's record to suggest she was less than an exceptional employee of the bank, except the evaluations given by Vaughn, suggesting Collis did not meet a behavioral standard for the quarter. This evaluation was in retaliation for Collis complaining to personnel that Vaughn sent an email to numerous banking centers that Collis went AWHOL when Collis called out sick. The next quarter evaluation came when Collis complained that Vaughn herself was changing customer's accounts without their knowledge.

Bank of America has not produced any evidence that it took a similar action against other employees who were not whistleblowers but who are otherwise similarly situated.

It is easier to rid of the whistleblower than to correct internal controls because it is impossible on the face to see who set up Adantage accounts unless the Adantage account was set up the same day as the new account. You would have to go through each personal bankers reports of what they set up and when to determine when the Adantage was set up. Violation of Sarbanes Oxley has serious penalties including, jail time and fines. Motive for bank to rid of whistleblower.

After, having corporate security investigate, Meehan comes back and terminates Collis. That alone is an inference that it was a contributing factor.

A reasonable jury could discount the testimony of Vaughn, Holloway, and Meehan that Collis in the fall and winter of 2004 and 2005, had inappropriate behavior with her associates and management.

A reasonable jury could conclude that Collis complained of fraudulent activities that affected a significant amount of customers, whereby would ultimately affect shareholders.

A reasonable jury could conclude that mailing a check through the United States Postal Service of the customer's own money without their knowledge is considered mail fraud.

A reasonable jury could conclude that Collis had a reasonable belief that the bank was committing mail fraud, bank fraud, securities fraud, wire fraud, or fraud against shareholders.

Employee whistleblowers are often accused of personality problems, criticized for not being able to "get along with" "co-workers," *Kansas Gas & Elec. Co. versus Brock*, 780 f.2d 1505, 1507 (10th Cir. 1985).

The bill makes it easier for an individual (or the Special Counsel on individual's behalf) to prove that a whistleblower reprisal has taken place. To establish a prima facie case, an individual must prove that the whistleblowing was a factor in the personnel action. This supersedes the existing requirement that the whistleblowing was a substantial, motivating or predominant factor in the personnel action. One of many possible ways to show that the whistleblowing was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. The bill establishes an affirmative defense for an agency. Once the prima facie case has been established, corrective action would not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. Clear and convincing evidence is a higher standard of proof than the preponderance of the evidence standard now used. 135 **Congressional Record S2784 (1989)**

II. <u>Section 301 of the Sarbanes Oxley Act</u>

This section requires that every publicly traded corporation have an independent “audit committee” which "establish procedures for (A) the receipt, retention, **and treatment** of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; 15 U.S.C. § 78f(m). and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." It also requires that employee complaints be handled independently from the management of the publicly traded company in a professional and effective manner. Congress also provided that any company that fails to establish the procedures required by SOX Section 301 would be “de-listed” as a publicly traded company from the stock exchanges.

The company policy must clearly inform employees of their right to file a retaliation case with the U.S. Department of Labor under Section 806 of the SOX. The investigative authority should regularly communicate with the employee to provide feedback and to ensure they are investigating on the right track. No one ever got back to Collis.

It will not be sufficient for audit committees to simply refer complaints to company management or corporate counsel to investigate. Meehan's own affidavit stated he gave it to corporate security to investigate. Corporate Security was in the regional office of Bank of America in Greenbelt, Md. Outside technical experts should have been hired to evaluate the merits of Collis complaint. There should be no conflict of interest. Of corporate security will say no fraud. He did not want to lose his job.

The audit committee should regularly publicize to all employee their rights under SOX to report misconduct. Employees should know of existence of the audit committee procedures that are created to comply with SOX section 301. Collis's report should have been confidential. (App.173)

The failure of the company to properly maintain confidentiality of a whistleblower who contacts the audit committee, constitutes separate and independent violations of the SEC Act of 1934.

III. <u>Sarbanes Oxley Act Section 302</u>

This section is listed under Title III of the act, and pertains to 'Corporate Responsibility for Financial Reports' which states that the periodic statutory financial reports are to include certifications that :

-The signing officers have reviewed the report, the report does not contain any material untrue statements or material omission or be considered misleading

-A list of all deficiencies in the internal controls and information on any fraud that involves employees who are involved with internal activities

-The financial statements and related information fairly present the financial condition and the results in all material respects

“A potential $5 million fine and up to 20 years in prison as penalties for violations." The Sarbanes-Oxley Act,The First Year, House Committee on Financial Svcs, at 5.(Good enough reason to rid of the Whistleblower)

IV. Legal Arguments

Fraud is an essential element of a Sarbanes-Oxley claim. Implicit in the concept of “fraud” is an element of intentional deception that would impact shareholders or investors. *Wengender v. Robert Half Int’l, Inc.*, 2005-SOX-59, at 15 (ALJ Mar. 30, 2006). In Collis’s case, customer’s accounts are being changed without their knowledge (intentional deception) and incurring fees of $20.00/month. The illegal revenue generated is being reported to shareholders (that would impact shareholders).

In *Allen v. Administrative Review Board*, No. 06-60849,   A (DOL) ALJ found no merit to the complaints and the appeals court agreed, dismissing the claims. The court said that one of the employees, who was an accountant, should have known the errors she alleged did not violate federal securities laws. In *Allen v. Stewart Enterprises*, Inc., the ALJ found the "concerns about possible violations of state laws which could result in sanctions and revocation of respondent's state license" not protected activity because Section 806 only provides protection for reporting violations of the enumerated fraud provisions, and the ARB affirmed. 2004-SOX-60, 61 & 62 (ALJ Feb. 15, 2005).

"Considering the fact that Stewart (Enterprises) did not intentionally cause the (computer) problem, did not conceal it, and attempted to correct it, a reasonable person could conclude that Stewart's conduct…did not violate some provision of federal law relating to fraud against shareholders." The Court said that going forward it would use "both a subjective and an objective standard" to determine whether an employee's mistaken belief that an action violates securities laws is "reasonable."   The Allen court held: "Importantly, an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected." The Allen Court, however, has held that while the objective reasonableness of an employee's belief can be decided as a matter of law in some cases, "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….(and if) reasonable minds could disagree on this issue," the objective reasonableness of an employee's belief should not be decided as a matter of law." *Allen v. ARB*, 514 F.3d 468 (5th Cir. 2008) . The Fourth Circuit has specified that the objective reasonableness inquiry is a mixed question of law and fact which can be decided as a matter of law in particular cases, and that it would be error to hold that it is always decided as a matter of law. *Welch v. Chao*, 536 F.3d 269, at 278 n.4 (4th Cir. 2008).

In Collis's case, Bank of America did not attempt to correct it, and is concealing it, therefore is inapposite and Collis had a reasonable belief that Bank of America engaged in conduct that constitutes a violation of one of the six enumerated categories.

In *Frederickson v. Home Depot U.S.A., Inc.*, 2007-SOX-13 (ALJ July 10, 2007), complainant claimed that respondent had a policy of recording items as damaged instead of for "store use" in order to defraud vendors out of refunds. The complainant had not engaged in protected activity because he did not have a reasonable basis to believe that the policy extended beyond the store he worked in or that the policy was of a magnitude sufficient to support a reasonable belief that a reasonable investor would rely upon such information, according to the ALJ.

Collis had reasonable basis to believe this was a massive scheme as her then supervisor, Michael Joy, employed over 20 years at Bank of America, revealed the fraudulent activities had been occurring during his tenure, that corporate knew and conveyed to Collis not to waste her breath, moreover, Collis witnessed customers accounts being changed without their knowledge from all over the Metropolitan area.

In *Taylor v. Wells Fargo*, Texas, 2004-SOX-43 (ALJ Feb. 14, 2005), aff'd ARB 05-062 (ARB June 28, 2007), an ALJ found that complainant reasonably believed backdating the letters of credit constituted falsifying a bank document, which she believed "would constitute an illegal and criminal act." Respondent argued there was no specific evidence it was committing fraud, the ALJ noted that an actual violation of the law is not required. On appeal, both the ALJ and the ARB found that complainant did not prove other elements of her prima facie case relating to causality, and the Fifth Circuit approved of those determinations upon its review. *Taylor v. Admin. Rev. Bd.*, 288 Fed. Appx. 929 (5th Cir. 2008).

In *Livingston v. Wyeth* July 28, 2006 U.S District Ct N.C., 4th Circuit, his colleagues and subordinates complained to the Human Resources Director that Livingston was a poor leader, was often unavailable or absent, routinely lost his temper, was argumentative and unstable, had an inability to relate to his colleagues and regularly abused his subordinates. Based on Livingston's own testimony, no reasonable trier of fact could disagree that Livingston would have been discharged for his insubordination at the holiday party, irrespective of his alleged protective activity.

On May 13, 2002, Wyeth issued Livingston a written warning for use of "foul and abusive behavior" toward subordinates. The written warning stated that "further difficulties in this area will result in further discipline up to and including termination." (Id.) Shortly thereafter, on or about May 15, 2002, Livingston sent identical e-mail apologies to eight Wyeth employees regarding his "inappropriate language," "salty remarks," "intense debating style," and behavior "which may have caused (them) personal pain and discomfort."

"Moreover, even if there were protected activity, Defendants have pointed to clear and convincing evidence that Livingston would have been terminated for insubordination unrelated to the protected activity."

In Livingston v. Wyeth, Inc. No. 06-1939, 2008 WL 756068 (4th Cir. March 24, 2008), Livingston alleged that Wyeth violated Section 1514A by terminating his employment in retaliation for expressing concerns about training. This case is inapposite Collis's, as training deficiencies is entirely different than defrauding customers of their money at a bank and ultimately, at the core, affect shareholders. Furthermore, Livingston does not dispute his behavior as Collis is disputing the allegations that she had inappropriate behavior.

The Fourth Circuit found that, even if Wyeth made any of the allegedly false statements, none would be "material." Under Supreme Court authority, for information to be material, there must be a "substantial likelihood that a reasonable shareholder would consider (the matter) important to his decision to invest." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976)

In *Livingston v. Wyeth, Inc.*, (M.D. N.C. July 28, 2006), (4th Cir. 2008) the court found that "[t]o be protected under Sarbanes-Oxley, an employee's disclosures must be related to illegal activity that, at its core, involves shareholder fraud". *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008) (noting that "[Section 806] clearly protects an employee against retaliation based upon the whistleblower's reporting of fraud under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud").

In *Reyna v. Conagra Foods, Inc.*, 506 F. Supp. 2d 1363 (M.D. Ga. June 11, 2007), parties debated whether reports of mail and wire fraud were protected activity regardless of whether that fraud relates to fraud against shareholders. In reading the plain meaning of the statute, the court in Reyna concluded that "[t]he statute protects an employee against retaliation based upon that employee's reporting of mail fraud regardless of whether that fraud involves a shareholder of the company."

In *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004), the district court denied defendants' motion for summary judgment because it found a genuine issue of material fact existed whether the plaintiff had engaged in protected activity. The plaintiff contended that these disclosures were protected because they alleged attempts to circumvent the company's system of internal accounting controls and therefore stated a violation of Section 13 of the Exchange Act, 15 U.S.C. § 78m(b) ("no person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls").

The court rejected the company's assertion that the complaints were too vague to constitute protected activity, noting that the company had taken the allegations seriously and investigated the claims. Moreover, although the court agreed that "the connection of Plaintiff's complaints to the substantive law protected in Sarbanes-Oxley [wa]s less than direct," it found that "the mere fact that the severity or specificity of her complaints does not rise to the level of action that would spur Congress to draft legislation does not mean that the legislation it did draft was not meant to protect her." 334 F. Supp. 2d at 1377.

In *Reddy v. MedQuist*, Inc., 2004-SOX-35, at 3 (ALJ June 10, 2004), the ALJ dismissed a SOX whistleblower retaliation claim because the complainant's communications to management "concerned internal company policy as opposed to actual violations of federal law." The ARB affirmed the ALJ's decision on appeal, ruling that the complainant's communications failed to "provide information (about conduct) she reasonable believed constituted violations of the federal fraud statutes, or an SEC rule or regulation, or any federal law pertaining to shareholder fraud." *Reddy v. MedQuist, Inc.*, ARB Case No. 04-123, at 7 (Sept. 30, 2005).

In *Johnson v. Stein Mart, Inc.*, No. 3:06-cv-00341 (M.D.Fla. June 20, 2007) the Employee Plaintiff had been hired as a Buyer at the Defendant's corporate headquarters, and was later promoted to be a Planner. While there she complained to management about (1) the collection of markdown allowances from vendors, (2) the changing of season codes on older inventory, and (3) the accounting for the value of inventory.

The Defendant argued that the Plaintiff failed to establish a prima facie case on the element of protected activity because she did not have a reasonable belief that these practices were illegal because she had no accounting background and had no knowledge of the Defendant's accounting practices. The district court rejected Defendant Stein Mart's argument because the Defendant had treated the Plaintiff's complaints reasonable enough to have warranted an internal investigation.

Per Meehan, Bank of America's corporate security investigated Collis's allegations. Collis was terminated after the investigation. (App.34-36)

On February 7, 2008, Judge Marrero held in *O'Mahony v. Accenture Ltd.*, 2008 WL 344710 5th Cir. (S.D.N.Y 2008) that SOX "contains six provisions that enumerate six specific forms of misconduct which, if reported by an employee, protect the whistleblower from employer retaliation: (1) $1341 (mail fraud); (2) $1343 (wire fraud); (3) 18 U.S.C. $ 1344 (bank fraud); (4) 18 U.S.C. $1348 (securities fraud); (5) any rule or regulation of the SEC; **or** (6) any provision of federal law relating to fraud against shareholders." Judge Marrero rejected the employer's contention that the phrase "related to fraud against shareholders" modifies each of the preceding phrases.

In *Welch v .Cardinal Bankshares Corp*, ARB Case 05-064 (ARB, May 31, 2007) his court commented that it's ruling "does not suggest that a whistleblower must identify specific statutory provisions or regulations when complaining of conduct to an employer, nor do we address the burden upon the parties in the proceedings before the ALJ."

Congress passed Sarbanes-Oxley to combat financial crimes and fraud committed by corporate insiders.

Senator Patrick Leahy, the principal sponsor of the whistleblower law, explained its meaning on the floor of the Senate:

> We included meaningful protections for corporate whistleblowers, as passed by the Senate. We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. Enron wanted to silence her as a whistleblower because Texas law would allow them to do it. Look what they (Enron) were doing on this chart. There is no way we could have known about this without that kind of a whistleblower…The provisions Senator Grassley and I worked out in Judiciary Committee make sure whistleblowers are protected. See 148 Congressional Record, pp. S7358 (July 25, 2002).

DOL Judge Stuart A. Levin rejected a corporate request to dismiss a

SOX whistleblower case on a narrow technicality by referencing the legislative history that gave rise to the corporate reform law:

> Shortly before, and contemporaneous with, its enactment, accounting scandal in some circles were causing painful economic dislocations among investors, lenders, and employees of several major firms and undermining investor confidence in the integrity of financial markets. Finding the status quo unacceptable, Congress set about to refashion the regulatory and private sector environments which had failed to detect or affirmatively allowed deception in reporting of corporate value and performance and permitted the types of shenanigans which brought several large concerns down in ruins and rocked others to their very foundations. To prevent the recurrence of such chicanery in the future, Congress examined the ethical standards and accounting and reporting systems flaws and failures which, in some instances, allowed fraud to flourish. Intent upon reforming the regulatory and private sector environments which allowed the fleecing to take place, Congress was determined to reassure the markets that effective preventive and exposure measures could be formulated, and it turned, among other remedies, to a valuable deterrent resource it had used in the past to help insure compliance with its mandates: employees

> within an organization who were willing to blow the whistle. Congress has long employed the inside whistleblower as a first line defense against various types of abuses which it deems unacceptable. Moreover, it understands the risks it beckons the whistleblower to accept, and it endeavors to protect them. Under such circumstances, it does not serve the purpose or policies of the act to take too pinched a view of the remedial statue when it comes to protecting those in an organization who can address the concerns Congress sought to correct. See *Morefield v. Exelon Services, Inc.*, 2004-SOX-2, D & O of

ALJ, p. 2 (January 28, 2004) citing Representative Bentsen, 148 Cong. Rec. H5462-02, at *H5467.

This bill would create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent. (Senate report No. 107-146, p. 19)

Under established case law, the DOL prohibits employers from discharging employees even if they only suspect that the employee engaged in protected conduct. *Smith v. ESICORP, Inc.* 93-ERA-16, D&O of Remand by SOL, at 9-11 (March 13, 1996) (discussing circumstances behind management suspicion that employee engaged in protected activity).

Congress looked toward whistleblowers. They were not only concerned about corrupt accounting practices that harmed innocent investors, but also a “culture of silence” that allowed unethical corporate misconduct to go unreported and allowed illegal conduct to remain undetected. Employees are in a position to learn about unethical or illegal practices. An investor will naturally be nervous and probably sell his stock if he knew the company he invested in is defrauding customers and not accurately reporting revenue. Collis believes Congress intended to protect such a whistleblower as herself who was and still is concerned about hard working citizens of this country being out right defrauded of their hard earned money from underneath their nose and at it’s core defrauds shareholders. Collis does not believe Congress could have intended that a “reasonable belief” in corporate wrongdoing would require the employee to correctly access every element of securities, mail, bank or wire fraud claim. Collis noticed fraudulent activities and tried to correct it internally, and is equally deserving of protection. Whistleblowers are frequently “the only firsthand witnesses to the (activity). They are the only people who can testify as to ‘who knew what, and when….” Senate Report No. 107-146, at

10 (2002)

This process requires “careful evaluation of all evidence pertinent to the mind-set of the employer and its agents regarding the protected activity and the adverse action taken.” *Timmons v. Mattingly Testing Services*, 95-ERA-40, D& O of Remand by ARB, at 10 June 21, 1996.

Congressional Record p. S7420 states:

Section 806 of the Act would provide Whitstleblower 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. Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors. With an unprecedented portion of the American public investing in these companies and depending upon their honesty, this distinction does not serve the public good.

In addition, corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state (e.g., Texas, see supra) may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions.

Unfortunately, companies with a corporate culture that punishes whistleblowers for being “disloyal” and “litigation risks” often transcend state lines, and most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law. U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies. The Act is supported by groups such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, all of whom have written a letter placed in the Committee record calling this bill “the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation’s financial markets.”

This provision would create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent. Since the only acts protected are “lawful” ones, the provision would not protect illegal actions, such as the improper public disclosure of trade secret information. In addition, a reasonableness test is also provided under the subsection (a)(1), which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts (See generally Passaic alley Sewerage Commissioners versus Department of Labor, 992 F. 2d 474, 478). Certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief. The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence.

Under new protections provided by the Act, if the employer does take illegal action in retaliation for such lawful and protected conduct, subsection (b) allows the employee to elect to file an administrative complaint at the Department of Labor, as is the case for employees who provide assistance in aviation safety. Only if there is not final agency decision within 180 days of the complaint (and such delay is not shown to be due to the bad faith of the claimant) may he or she bring a de novo case in federal court with a jury trial available (See United States Constitution, Amendment II; Title 42

United States Code, Section 1983). Should such a case be brought in federal court, it is intended that the same burdens of proof which would have governed in the Department of Labor will continue to govern the action. Subsection (c) of this section requires both reinstatement of the whistleblower, back pay, and all compensatory damages needed to make a ictim whole should the claimant prevail. The Act does not supplant or replace state law, but sets a national floor for employee protections in the context of publicly traded companies. **Congressional Record S7420.**

In summary judgment, the bank repeatedly states Collis only mentioned one personal banker opening accounts without customer' knowledge and in the Beltsville branch only.

Throughout the record, the evidence shows Collis stating it happened often and did not have other associates names as it was difficult to tell who opened the Adantage accounts if they were not opened with the initial account, she gave Jean Rene's name because she knew he did it when he initially opened the customers accounts. (App. 68,69,70,72,161,167,168,169,170,171,172,177,178) Collis tried to tell counsel for Bank of America at Collis's deposition (App.76 line 4) that when she got discovery she could prove it, however, counsel cut her off. Bank of America is trying to say Collis just mentioned it happened in

Beltsille, Md. The record clearly refutes that whereby, Collis clearly states Virginia as well. Bank of America is trying to show that the temporal proximity when Collis complained was too long of a time span to be retaliation. Collis mentioned to Joy in December of 2003. Nothing was done. Once Collis told Meehan in November of 2004 he needed to investigate and then 8 days before her termination she told him she would have to take alternative measures, there is an inference that contributed to Collis's termination.

After Collis met with Meehan in Greenbelt, later in December 2004, she was to be set up as if she was trying to look in Ricardo Grants account. Meehan knew that was one way to get Collis terminated. Their scheme did not work. (App. 105-106, 146-148)

Collis was an exceptional employee. She received many letters from customers as well as recognition from associates. (App. 126-145, 149)

Bank of America states Collis neer mentioned or referenced stockholders. In Collis's deposition, Collis states employees were reminded they were shareholders and had an interest in increased sales. (App.179)

CONCLUSION

Collis needs her day in court. This Country needs Collis's day in court. No one at the bank listened to her complaints and took them seriously as required by the law and took any measures to correct the fraud. The bank needs to be put in a position where they will have to answer in court once and for all and start to not only take whistleblower complaints seriously, but take this whistleblower's complaints seriously.

All Collis would ask for is the opportunity to prove she did not have inappropriate behavior and that the bank tried to cover up a massive scheme that is defrauding customers nationwide and is giving the shareholders a misstatement of the actual revenue. She would ask that the order of the District Court dismissing her case be reversed and let a jury of her peers decide if the acts of the bank were retaliatory and in violation of Sarbanes-Oxley.

Respectfully Submitted,

Torina A. Collis
13240 Star Gazer Place
Waldorf, Md 20601
301-843-0532

<u>Certificate of Service</u>

I, Torina Ann Collis, certify that on this 15th day of May, 2009, I caused a copy of the foregoing to be mailed first class postage addressed to:

Elena D. Marcuss-Counsel for Appellees

McGuire Woods LLP

7 Saint Paul Street Ste 1000

Baltimore, Md 21202-1671