Lockheed Martin v. Administrative Review Board

717 F.3d 1121 (10th Cir. 2013)

OPINION BY CIRCUIT JUDGE MURPHY:

Lockheed Martin Corp. ("Lockheed") seeks to set aside a decision of the Administrative Review Board of the Department of Labor (the "ARB" or the "Board") concluding Lockheed violated . . . the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Act"). The Board affirmed the decision of an administrative law judge ("ALJ"), who concluded Lockheed violated the Act by constructively discharging employee Andrea Brown after she had engaged in protected activity. . . . [T]his court **affirms** the decision of the Board.

Brown worked as Communications Director for Lockheed from June 2000 to February 2008. In 2003, she became the Director of Communications in Colorado Springs, Colorado. In that position, she reported to Wendy Owen, Vice President of Communications, and Ken Asbury, President of Lockheed Martin Technical Operations. In May 2006, Brown began having difficulty getting responses from Owen on work-related matters. She discussed the problem with Asbury as well as Tina Colditz, a coworker and personal friend. Colditz was a longtime Lockheed employee who reported directly to Owen. Colditz also ran a pen pals program for the company, through which Lockheed employees could correspond with members of the U.S. military deployed in Iraq. Colditz told Brown that Owen had developed sexual relationships with several of the soldiers in the program, had purchased a laptop computer for one soldier, sent inappropriate emails and sex toys to soldiers stationed in Iraq, and traveled to welcome-home ceremonies for soldiers on the pretext of business while actually taking soldiers to expensive hotels in limousines for intimate relations. Colditz told Brown she was concerned Owen was using company funds for these activities, and Brown understood that most employee expenses incurred were passed on to Lockheed's customers, in this case the government. Brown thus became concerned Owen's actions were fraudulent and illegal and that there could be media exposure which could lead to government audits and affect the company's future contracts and stock price.

Brown brought her concerns to Jan Moncallo, Lockheed's Vice President of Human Resources. Moncallo told Brown she would submit an anonymous ethics complaint on Brown's behalf, and that she would be protected from retaliation because no one would know her identity. On May 25, 2006, Moncallo sent an email to Jean Pleasant, the office Ethics Director, for an investigation. The email detailed Brown's allegations, including, . . . the purchase of a laptop with company funds, the use of company funds to rent limos to transport soldiers, the use of company funds for lodging with soldiers, the use of company funds to purchase gifts for soldiers, communications with staff stating she was meeting with generals when in fact she was meeting with soldiers, not responding to calls from staff due to non-business related meetings with soldiers, having affairs with soldiers, sending pornographic material to soldiers, using her position to influence staff to cover for her, and tarnishing Lockheed's image. The email identified Brown as an individual who should have some knowledge about the allegations.

Lockheed investigated Owen from May 2006 to August 2006. Within a few days of Brown's anonymous complaint, the pen pal program was discontinued. Owen later changed positions but remained a vice president. Apparently believing Colditz to have reported her, Owen began to treat Colditz unfairly. Brown recalled an email from Colditz indicating Owen had told Colditz she would soon be out of work. In the fall of 2006, Brown revealed to Asbury and Colditz that it was she who made the complaint. On December 19, 2006, Owen called Brown to try to find out who had reported her. According to Brown, Owen told her she had lost her annual bonus due to the complaint. Brown revealed to Owen that Brown had told Moncallo "a few things," but stated she was not sure if her comments had resulted in the complaint. Brown reported the phone call with Owen to Asbury and Moncallo. Prior to 2006, Brown received a "high contributor" or "exceptional contributor" rating in her performance evaluations. In late 2006, and thereafter, however, Brown received a lower rating of "successful contributor."

On February 22, 2007, Lockheed announced to all employees it was undergoing a corporate-structure reorganization. On March 1, 2007, Lockheed's Communications Department announced that further reorganizations would be made. Brown began reporting to Judy Gan, the Senior Vice President of Communications. Owen became Gan's assistant, but retained her title as Vice President. According to Brown, Gan's attitude toward her was negative from the beginning of their professional relationship. * * * On June 12, 2007, Brown received a phone call from Owen who announced that Brown's job had been posted on the internet and that she should get her resume together. Distraught, Brown told Asbury and Gan about the phone call in an email.

At this point, Brown first began discussing with Moncallo the possibility of leaving the company. However, she instead decided to apply for the new Director of Communications position. In the course of applying, she learned that the newly-posted position was classified as "Level 6." Brown held a "Level 5" position at the time she applied. Brown sent an email to Gan, Asbury, Owen, and a more senior manager in the communications department, informing them she was applying for the position. Shortly after sending the email, Brown received a phone call from Gan, who lambasted her for applying. Gan told Brown she was not qualified for the position, that she had performed poorly since she had been with Lockheed, and that she had hurt her future with Lockheed by applying. Brown thereafter withdrew her application for the position.

In September 2007, Lockheed hired David Jewell as the new Director of Communications. Owen had a good relationship with Jewell prior to his hiring and had told him to apply for the position. Owen was also a member of the selection committee which considered Jewell. Jewell sought Owen's advice regarding his position and his employees, and was told that Brown had received less-than-perfect evaluations in the past. Shortly after Jewell assumed his new position, Brown was asked to vacate her office and either work from home or use the visitor's office. The visitor's office doubled as a storage room for office supplies, files, and canned food donations that were being collected for a food drive. Brown also lost her title and her supervisory responsibilities over four employees. Further, Gan told Brown she could not attend an annual communications conference, which she had always attended previously, even though she was to receive an award at the conference. Around this time, Brown repeatedly requested information as to the nature of her position and future with Lockheed, but received no answer. Jewell informed her that either she or a Lockheed employee in Houston would be laid off, but would not provide her with any additional information. On January 3, 2008, Brown came into the office at Jewell's request and found someone else working in the visitor's office. When she asked Jewell what she should do, he told her he was looking for a cubicle for her. Brown protested that, as a Level 5 employee with a leadership position (L-Code), she was entitled to an office. Jewell responded that he was in the process of removing her L-Code. Brown then had an emotional breakdown, fell into a deep depression, and took medical leave.

Brown brought a complaint with the Occupational Safety and Health Administration (OSHA) on January 25, 2008, alleging violations of Sarbanes-Oxley. * * * [After a hearing] the ALJ found that Brown had engaged in protected activity; she suffered materially adverse employment actions, including constructive discharge; and her engagement in protected activity was a contributing factor in the constructive discharge. The ALJ awarded reinstatement, back pay, medical expenses, and non-economic compensatory damages in the amount of $75,000. Lockheed timely appealed the ALJ's decision to the Administrative Review Board of the Department of Labor, which affirmed. * * *

[T]he anti-retaliation provision of Sarbanes-Oxley, provides, in relevant part:

> **Whistleblower protection for employees of publicly traded companies.—** *No [publicly traded] company . . . , or any officer [or] employee . . . of such company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—*
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> *(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of . . . [federal laws regarding various types of criminal fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—*
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> *. . . . [among other parties]*
>
> *(C) a person with supervisory authority over the employee . . . .*

. . . [To] establish . . . a prima facie claim . . . [a] claimant must show: (1) she engaged in protected activity or conduct; (2) the employer knew of her protected activity; (3) she suffered an unfavorable personnel action; and (4) her protected activity was a contributing factor in the unfavorable personnel action. * * *

Protected Activity

The ALJ concluded Brown established by a preponderance of the evidence that she (1) reasonably believed Owen had committed mail or wire fraud, and (2) communicated that belief "definitely and specifically" to Lockheed. The ALJ also concluded, however, that Brown "fail[ed] to establish protected activity under a general shareholder fraud theory on the basis of loss of shareholder value." * * *

Lockheed argues the ALJ's uncontested finding that Brown's complaint did not relate to shareholder fraud is fatal to her retaliation claim because [the SOX Act's] protection of employees who report conduct reasonably believed to constitute mail or wire fraud applies only if such conduct "relat[es] to fraud against shareholders." Thus, under Lockheed's reading . . . , the phrase "relating to fraud against shareholders" modifies not only the clause which immediately precedes it, "any provision of Federal law," but also the other enumerated protected activities. * * * This interpretation of the statute is incorrect.

The plain, unambiguous text of [the SOX Act] establishes six categories of employer conduct against which an employee is protected from retaliation for reporting: . . . (mail fraud), . . . (wire fraud), . . . (bank fraud), . . . (securities fraud), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. Because [the categories of employer conduct] are all clearly provisions of federal law, Lockheed's reading of the statute would render their enumeration . . . wholly superfluous. * * * Congress could have accomplished the more limited purpose attributed to it by Lockheed by limiting whistleblower protection under Sarbanes-Oxley only to an employee who reports conduct "the employee reasonably believes constitutes a violation of any provision of Federal law relating to fraud against shareholders." Because Congress did not so phrase the statute, the proper interpretation . . . gives each phrase distinct meaning and holds a claimant who reports violations of [federal laws against mail, wire, bank, or securities fraud] need not also establish such violations relate to fraud against shareholders to be protected from retaliation under the Act. Even if the language . . . were ambiguous, Lockheed's interpretation of the statute is inconsistent with the interpretation of the agency charged with its enforcement. * * *

Reasonable Belief

. . . [T]to be protected from retaliation, an employee must "reasonably believe" the conduct she reports violates one of the enumerated federal statutes or regulations. Further, the ALJ required Brown to prove she "definitively and specifically" communicated her belief Owen had engaged in illegal activity to her supervisor. The Board has defined "reasonable belief" to include both a subjective and an objective component; an employee must actually believe in the unlawfulness of the employer's actions and that belief must be objectively reasonable. * * * "Objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."

* * * Brown testified that, based on her experience as a Lockheed employee, costs incurred by Lockheed employees were billed back to the customer, often the government. She further testified she reported these concerns to Asbury, who could not recall speaking to her, and Moncallo, who could. The ALJ found Moncallo's testimony to be "essential." Moncallo agreed employee travel expenses and purchases of equipment are generally billed to the government. Further, while Moncallo testified Brown did not use the words "fraud" or "illegal," Moncallo recognized that some of the actions Brown complained of could be considered fraudulent and illegal. * * * Thus, the ALJ found Brown communicated a reasonable belief that Owen was fraudulently and illegally diverting company funds for her personal use, and that she was using the company's pen pal program to perpetuate the scheme. This finding was heavily and explicitly based on a credibility determination, i.e., the ALJ chose to place more weight on Brown's testimony that she used the terms "fraud" and "illegal" than on the contrary testimony of Asbury and Moncallo. * * *

Lockheed also argues any belief Owen's activities amounted to fraud is objectively unreasonable as a matter of law due to a lack of evidence Owen acted with specific intent to defraud. Specifically, Lockheed argues Owen's lack of attempts to conceal her involvement with the pen pal program negate any inference she acted with the requisite intent. While attempted concealment is one method of proving specific intent in a fraud case, it is not essential. For example, this court has also recognized intent can be inferred from whether a defendant "profited or converted money to his own use." Brown's allegations clearly amounted to a claim that Owen had converted company money to her own use. There was thus substantial evidence supporting the ALJ and Board's findings that Brown reasonably believed Owen had committed fraud and that she definitely and specifically communicated that belief to her superiors.

Constructive Discharge

. . . "Constructive discharge occurs when an employer unlawfully creates working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign. The plaintiff's burden is substantial. The standard is objective: the employer's subjective intent and the employee's subjective views on the situation are irrelevant." * * *

Lockheed's challenge to the Board's conclusion that Brown suffered an adverse personnel action because she was constructively discharged is twofold. First, Lockheed argues the ALJ applied the wrong legal standard to Brown's constructive discharge claim. . . . Second, Lockheed argues there is insufficient record evidence to support the conclusion that Brown was constructively discharged. These arguments are unpersuasive.

Regarding Lockheed's first argument, . . . the ALJ recited the correct legal standard for a claim of constructive discharge and concluded, after reciting the litany of adverse circumstances Brown faced following her ethics complaint, "a reasonable person such as Complainant would see resignation as her only option under these circumstances." While portions of the ALJ's opinion also analyze whether Lockheed's actions were "materially adverse" to Brown, that is, "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination" [which is more properly considered as an element in a Title VII retaliation claim], that analysis does not conflict with the ALJ's ultimate conclusion that Brown's working conditions became objectively intolerable so as to constitute a constructive discharge. * * *

As to Lockheed's second argument, numerous facts cited by the ALJ and Board are indicative of constructive discharge. Prior to making an ethics complaint, Brown held a leadership position, had her own office, and received consistently high performance ratings. After her complaint, Brown received lower performance ratings. A position with an identical job description to the job Brown had been performing for the previous five years was posted on Lockheed's website. When Brown indicated she would apply for the new position, Gan strongly discouraged her from doing so and told her she was not qualified. When Jewell was selected for the new position, Brown lost her title, office, supervisory responsibilities, and L-code. Brown was made to work from home or out of the visitor's office, which doubled as a storage room. She was also denied permission to attend an annual communications conference which she had attended in the past and where she was scheduled to be recognized with an award. Most importantly, Brown was told she would be one of two employees considered for a layoff and kept in a constant state of uncertainty as to whether she would continue to have a job and, if so, what her job would be. That uncertainty continued when, after taking medical leave due to the stress and uncertainty regarding her job situation, she received no response to her inquiries as to whether she was laid off. * * *

Lockheed's attempts to undercut the Board's findings are unavailing. Lockheed argues Brown had alternatives to quitting, and left prematurely before the details of those alternatives were revealed to her. . . . [H]owever, Lockheed points to no evidence in the record that Brown was ever made aware of any purported alternatives. Even before this court, Lockheed does not identify any alternatives available to Brown. * * * Lockheed further argues Brown herself had repeatedly given notice that she intended to resign and that her final resignation notice, which was prepared with the assistance of counsel, indicates she was in control of the circumstances of her resignation. Even assuming Lockheed's account of the record is correct, Brown's attempts to stay at Lockheed are irrelevant to the question of whether conditions were so intolerable that she had no alternative but to quit. * * *

Contributing Factor

To establish a prima facie case under [the SOX Act], a complainant must show her protected activity was a contributing factor in the unfavorable personnel action. This element is broad and forgiving: the Board has defined a "contributing factor" as "any factor, which alone or in combination with other factors, tends to affect *in any way* the outcome of the decision." "[T]he contributing factor standard was 'intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.'" Temporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributing factor test.

The conclusion that Brown's protected activity was a contributing factor in her eventual constructive discharge was supported by the Board's finding that the adverse employment actions Brown experienced began shortly after the conclusion of the investigation against Owen. * * * The investigation into Brown's allegations against Owen concluded with the preparation of a formal written report on August 21, 2006. In December 2006 Owen called Brown several times, attempting to determine who had reported her. Eventually, Brown revealed to Owen that she may have shared some information with Moncallo regarding Owen's activities. Shortly thereafter, the cascade of difficulties which culminated in Brown's constructive termination—her lower performance ratings, Gan's harsh treatment of her, and the loss of her privileges and responsibilities as Director of Communications—began.

Lockheed seeks to discredit this conclusion by arguing a significant amount of time passed between Brown's report of Owen's activities and her ultimate constructive discharge. Specifically, Lockheed argues more than twenty months passed between Brown's ethics complaint in May 2006 and her departure from the company in January 2008. Even if the time is calculated from December 2006, when Owen became aware it was Brown who made the ethics complaint against her, Lockheed argues the adverse action and the protected activity are still separated by a full calendar year. * * * [W]hen evaluating temporal proximity for purposes of determining whether Brown's protected activity was a contributing factor in her constructive discharge, the relevant time frame is not when the constructive discharge occurred, but when the conduct leading up to the discharge began. Moreover, . . . Brown's showing that her protected activity was a contributing factor in her constructive discharge was not based solely on temporal proximity.

The Board also concluded that, although neither Gan nor Jewell knew of Brown's ethics complaint against Owen, both were poisoned against Brown by Owen's biased reports regarding Brown's professional competence. This court has applied the subordinate bias, or "cat's paw" theory of liability in other employment discrimination contexts. * * * [T]he required showing to establish causation for a claimant under [the SOX Act] is less onerous than the showing required under Title VII, the ADEA, or USERRA. We thus must determine whether the ALJ's finding that Owen "poisoned" Gan and Jewell's opinion of Brown is supported by substantial evidence, keeping in mind that Brown satisfies the causation element of her . . . claim by demonstrating merely that her ethics complaint contributed to the adverse employment actions taken against her.

We conclude it is. The ALJ accepted as credible Brown's testimony that Gan was inexplicably hostile to her from their first encounter following the reorganization of the company in early 2007. Further, the ALJ accepted as credible Brown's account of Owen placing a phone call to Brown in which she mockingly advised her that her job had been posted on the company website and she needed to get her resume together. The ALJ also relied upon Moncallo's testimony that it was normal for new supervisors to consult with old supervisors regarding employee performance. Moncallo further testified that she did not discuss with Gan whether she knew about the ethics complaint or advise Gan she should not be seeking Owen's input into Brown's performance. The ALJ also relied on Gan's deposition testimony that she had a high opinion of Owen and relied on her for input into personnel matters. Jewell's deposition testimony was similar. He testified that he discussed the employees under his supervision in his new position with Owen, who told him Brown "had received a less-than-perfect performance appraisal." * * * [A] reasonable fact finder could easily conclude Brown's ethics report was a contributing factor in her ultimate termination from Lockheed. * * *

CASE QUESTIONS

1. What were the legal issues in this case? What did the court decide?
2. What are the elements of a whistleblower protection (retaliation) claim under the SOX Act? What arguments does the employer make in its attempt to show that the plaintiff failed to establish the necessary elements of her claim?
3. Why does the court reject the employer's arguments and rule for the plaintiff?
4. Do you agree that the plaintiff was constructively discharged? Why or why not? That she reasonably believed that she was reporting fraud of the type covered by the SOX Act? Why or why not?
5. Why do you suppose the managers at Lockheed Martin acted as they did? What are some practical implications of this case for employers?