

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 08-60132-CIV-JORDAN

MARY J. GAREY)
)
Plaintiff)
)
vs.)
)
BEST BUY COMPANY, INC., et al.)
)
Defendants)
_____)

ORDER DENYING MOTION TO DISMISS

In Count I, a claim under the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, Ms. Garey alleges that she was terminated in retaliation for complaining about the defendants' purported violations of the securities laws. In Count II, Ms. Garey alleges that Best Buy violated her rights under the Family and Medical Leave Act, 29 U.S.C. § 2601. Pending is the defendants' motion to dismiss the Sarbanes-Oxley claims (Count I) as time-barred. For the reasons stated below, the defendants' motion to dismiss [D.E. 8] is DENIED.

I. FACTUAL ALLEGATIONS

For purposes of this motion, I assume that Ms. Garey's well-pleaded allegations are true and draw all reasonable inferences from these allegations in favor of Ms. Garey. *See Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir. 1998).

Ms. Garey worked for over twenty-two years for Best Buy. During her employment, she occupied different administrative positions, e.g., general manager, director of retail sales and operations, and field director. Her last position was territory services director. *See* Compl. at ¶¶ 17-19.

In 2005, Ms. Garey became aware of poor accounting and potential fraud in Best Buy's transportation contracts. Concerned that this fraud could cost the company significant losses, Ms. Garey reported it to Best Buy's chief financial officer - defendant Darren Jackson. But Mr. Jackson took no immediate action. Ms. Garey also reported the fraud to various Best Buy directors and managers to no avail. *See id.* at ¶¶ 25-33.

Notwithstanding, almost two years after Ms. Garey's initial complaints, Best Buy terminated over 35 employees, who were "apparently involved in the fraud." Best Buy, however, took no further action to ensure that the fraud would not occur again. The defendants did not disclose the fraud to investors. See *id.* at ¶ 34.

In September of 2006, Ms. Garey's severe depression - which had been diagnosed in 2001 - worsened as a result of job stress and extensive job-related travel. She was not able to sleep and could not concentrate in her work. She requested medical leave, but Best Buy's human resources managers denied her requests, presumptively in retaliation for Ms. Garey's fraud complaints. See *id.* at ¶¶ 36-44.

In January, 2007, Ms. Garey requested permission from Best Buy to seek an alternative position in the company. This request was not uncommon in Best Buy as employees were regularly allowed to move between departments and jobs within the company without any time limits. See *id.* at ¶ 46. Best Buy, however, informed Ms. Garey on February 6, 2007 that "she would have only sixty days, until on or about April 6, 2007, to find a new job role, and thereafter she would be 'voluntarily terminated.'" See *id.* at ¶ 48.

Ms. Garey did not accept this time limit, but she started applying for different available positions. Ms. Garey was instructed to report to Beth Smits - Best Buy's vice-president of operations - during the job search period. Ms. Garey complained to Ms. Smits about the alleged fraud and accounting problems, but Ms. Smits discontinued her communication with Ms. Garey, presumably to avoid the fraud complaints. See *id.* at ¶ 55.

On April 10, 2007, Paul Greene - Best Buy's human resources manager - informed Ms. Garey that "Best Buy decided to extend her termination to April 20, 2007 because she was in the interview process" for an alternative job in the company. See *id.* at ¶ 59. Mr. Greene reiterated that "if she was unable to secure a permanent position by April 20, 2007, she would be 'voluntarily separated' from Best Buy." See *id.* at ¶ 59.

On April 23, 2007, Mr. Greene asked Ms. Garey to return her computer and her badge as she had failed to obtain a new position. Ms. Garey asked Mr. Greene if she could keep the computer for "a few days" to complete job reviews. Mr. Greene granted this request. See *id.* at ¶ 62. From April 27, 2007 through May 3, 2007, Ms. Garey continued to operate 'as an employee of Best Buy,' with

access to Best Buy's computers and system. *See id.* at ¶ 67. On April 27, 2007, Best Buy's vice-president of the women's leadership forum told Ms. Gary that she had open positions in her team and that Ms. Garey would be a great fit. *See id.* at ¶ 65.

On April 30, 2007, Ms. Garey met with her psychiatrist, who recommended short-term disability leave. When Ms. Garey informed Best Buy about the psychiatrist's recommendation on May 3, 2007, she was unexpectedly told that she had been terminated as of April 27, 2007. *See id.* at ¶¶ 69-74.

On July 26, 2007, Ms. Garey filed a complaint against Best Buy with the United States Department of Labor, Occupational Safety and Health Administration. *See id.* at ¶ 14. Ms. Garey filed this action on January 29, 2008 as more than 180 days had passed after the filing of the complaint and OSHA had not issued a decision.

II. STANDARD

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir.2001). The complaint's factual allegations are accepted as true and all reasonable inferences from these allegations are drawn in favor of the plaintiff. *See Roberts*, 146 F.3d 1305 at 1307. However, a plaintiff must allege more than "labels and conclusions." *See Financial Sec. Assur., Inc. v. Stephens, Inc.*, 2007 WL 2700280, *3 (11th Cir. 2007) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (May 21, 2007)). The factual allegations in a complaint must "possess enough heft" to set forth "a plausible entitlement to relief." *Id.*

Dismissal on statute of limitations grounds is appropriate under Rule 12(b)(6) "only if it is 'apparent from the face of the complaint' that the claim is time-barred.'" *See La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845-46 (11th Cir. 2004) (internal citations omitted). A statute of limitations bar is an affirmative defense, and as such it does not need to be negated in the complaint. *See id.*

III. ANALYSIS

At this stage of the proceedings, I cannot conclude that Ms. Garey's action is time barred.

The Sarbanes-Oxley Act prohibits any company subject to the Securities Exchange Act of 1934 from retaliating "against an employee who lawfully cooperates with an investigation concerning violations of the Act or fraud on the shareholders." *See Hanna v. WCI Cmtys., Inc.*, 348 F.Supp.2d 1322, 1326 (S.D.Fla. 2004) (*citing* 18 U.S.C. § 1514A). An employee alleging retaliation under Sarbanes-Oxley may file an action with the Secretary of Labor within 90 days after the date on which the violation occurs. If the Secretary has not issued a decision within 180 days of the filing of the complaint, she may file an action in district court "for *de novo* review" of her complaint. *See* 18 USC § 1514A(a)-(b).

There is no dispute that the Secretary of Labor/OSHA did not issue a decision on Ms. Garey's case within 180 days. As such, Ms. Garey exhausted her administrative remedies. But, the defendants argue that Ms. Garey's complaint with OSHA was filed more than 90 days after the date on which the alleged violation occurred. According to the defendants, the 90-day limitation period commenced on February 6, 2007 - when Ms. Garey was told that she would be terminated if she did not find an alternative position by April 6, 2007. I disagree.

The first step in determining the timeliness of an employment discrimination or retaliation complaint is to "identify precisely the 'unlawful employment practice'" alleged by the plaintiff. *See Delaware State Coll. v. Ricks*, 449 U.S. 250, 257 (1980). The limitations period generally begins when the alleged unlawful employment practice is communicated to the plaintiff. *See id.* at 257-58.

Ms. Garey alleges that after she was given an indefinite extension of "a few days" to review and consider available positions within Best Buy, she was told on May 3, 2007 that she had been terminated on April 27, 2007. *See* Compl. at ¶¶ 62, 73. The unlawful employment practice at issue here, therefore, is not the notification that Ms. Garey was to be terminated if she did not find an alternative position by April 6, 2007, as the defendants suggest, but rather the notification that the indefinite extension of the time for her to find an alternative position had been revoked and that she had been terminated effective April 27, 2007. As such, reading Ms. Garey's allegations in the light most favorable to her, a reasonable trier of fact could conclude that the 90-day limitations period commenced on May 3, 2007 - when she was told that the indefinite extension had been revoked.

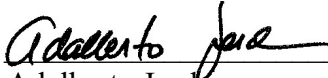
The defendants argue that Ms. Garey was never granted an indefinite extension to find an alternative position and that she concocted this theory in response to the motion to dismiss. Whether Ms. Garey's version of the facts is accurate is obviously a question for another day. But Best Buy will be hard pressed to show that the termination deadline was not extended if, as Ms. Garey claims, she continued discussing employment possibilities and acting as an employee after April 20, 2007.

I understand that OSHA found - after the expiration of the 180 day period - that Ms. Garey's claims were time barred. But OSHA's findings do not have preclusive effect until an evidentiary hearing is conducted. See *Hanna*, 348 F.Supp.2d at 1330-31.¹ As such OSHA's untimely findings have little legal significance - if any - in this case. In any event, at this stage, I conclude that Ms. Garey's complaint was not untimely.

IV. CONCLUSION

Accordingly, the defendants' motion to dismiss Count I of the complaint is denied. The defendants shall file their answer to the complaint by July 8, 2008 and the parties shall file a joint scheduling report as required by Local Rule 16.1 by July 15, 2008.

_____DONE and ORDERED in chambers in Miami, Florida, this 27th day of June, 2008.


Adalberto Jordan
United States District Judge

Copy to: All counsel of record

¹As in *Hanna*, no evidentiary hearing took place here because OSHA did not issue its decision within 180 days of the filing of the complaint, and Ms. Garey filed this action before she received OSHA's decision.