UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KARAMCHAND SAMAROO,

Plaintiff,

-against-

THE BANK OF NEW YORK MELLON,

Defendant.

REPORT AND RECOMMENDATION ON MOTION TO DISMISS

21-CV-02441 (AT) (KHP)

TO: THE HONORABLE ANALISA TORRES, UNITED STATES DISTRICT JUDGE
FROM: KATHARINE H. PARKER, UNITED STATES MAGISTRATE JUDGE

Plaintiff Karamchand Samaroo, proceeding pro se, brings this action against his former employer, Defendant Bank of New York Mellon ("BNYM"). Plaintiff alleges Defendant unlawfully terminated his employment because he engaged in protected whistleblowing activity, in violation of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. § 1514A. Defendant moves to dismiss the Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[1]

For the reasons set forth below, I respectfully recommend that Defendant's motion to dismiss be GRANTED and that Plaintiff's Complaint be dismissed without prejudice.

BACKGROUND

Plaintiff's Complaint in this matter states only that BNYM retaliated against Plaintiff in violation of SOX after he "raised internal complaints and concerns about fraud . . . that resulted

[1] In the alternative, Defendant moves for summary judgment. However, Defendant did not comply with Local Rule 56.1 or 56.2. Therefore, the Court evaluates the motion as one pursuant to Rule 12 only.

in adverse actions including but not limited to removing and changing role and responsibilities, removing access to meetings, limiting access to systems," and terminating his employment in August 2018 within days after Plaintiff made a final complaint of fraud. (ECF No. 2 at 5.)

Plaintiff attaches to his Complaint a letter he received from the United States Occupational Safety and Health Administration ("OSHA") dated November 27, 2018 stating that it had investigated his complaint against BNYM and found that Plaintiff did not engage in any activities protected by SOX and therefore had failed to establish a prima facie allegation of a SOX violation. (ECF No. 2-2.) The letter further advised Plaintiff that there was no reasonable cause to believe that BNYM violated SOX and that OSHA was therefore dismissing Plaintiff's complaint.

In connection with its motion, BNYM submitted additional documents from the administrative proceeding before OSHA, including signed statements Plaintiff submitted to OSHA (ECF Nos. 14-7 at 7-9; 14-10 at 2-10), OSHA's Decision & Order Granting BNYM's Motion for Summary Decision (ECF No. 14-9) and Order Dismissing Plaintiff's Complaint (ECF No. 14-12), and the transcript from a deposition of Plaintiff taken on November 5, 2019 (ECF No. 14-13). The Court does not rely on these submissions in making its recommendation because they are outside of the Complaint and not incorporated by reference in the Complaint.

Plaintiff also submitted various documents in opposition to the present motion including, among other things, various internal BNYM documents pertaining to various internal projects, Plaintiff's performance reviews for 2016 and 2017, copies of internal complaints Plaintiff made to BNYM through its ethics hotline from in or about August 2017 through in or about August 2018, BNYM's position statement submitted to OSHA in opposition to Plaintiff's

SOX claim, a sworn statement by a BNYM Employee Relations employee describing the internal investigation into Plaintiff's ethics complaint and the results of the investigation, a sworn statement from BNYM's Chief Administrative Officer for its Corporate Trust Technology Group and Plaintiff's former manager, Howard Charny, describing Plaintiff's performance problems starting in or around July 2017, and a sworn statement of Plaintiff providing additional details about his employment and complaint against BNYM. (*See generally* ECF No. 18.) Apart from Plaintiff's internal ethics complaints, these documents are not incorporated by reference in the Complaint. The do, however, provide some clarity about the background of the instant dispute.

1. Plaintiff's Employment at BNYM

Plaintiff worked as a full-time employee for BNYM from February 20, 2007 until his termination on August 6, 2018, initially as an Application Architect and later as a Senior Information Risk Officer—both technology roles. (ECF No. 18, Ex. 34.) Charny became Plaintiff's manager in or around July 2017, apparently as part of an internal reorganization of the Corporate Trust Technology Group. According to Charny, because various projects that Plaintiff had worked on were winding down, he asked Plaintiff to take on new projects. However, Plaintiff refused to do the work and, as a result, Charny gave Plaintiff a below expectations rating for his year end 2017 performance review. In March 2018, Charny warned Plaintiff again about failing to perform tasks and improperly attempting to shift his work to others. According to Charny, Plaintiff's performance did not improve thereafter and three other managers with whom Plaintiff interacted provided negative feedback about his performance. Ultimately, Charny terminated Plaintiff's employment effective August 7, 2018, citing poor performance as the reason.

2. Plaintiff's Internal Ethics Complaints

Plaintiff disagrees with his former manager's characterization of events. Rather, his submissions indicate that shortly after Charny became his manager, and continuing through August 2018, Plaintiff filed various ethics complaints through BNYM's internal incident report system. The complaints identified members of BNYM's management whom Plaintiff accused of nepotism, corruption, and other forms of misconduct. (*See, e.g.*, ECF No. 18, Ex. 25.)

Specifically, Plaintiff reported that multiple members of BNYM management appointed friends to positions at the company, which created a toxic work environment. (*Id.*) Additionally, Plaintiff complained that BNYM "employees collaborated with one another to conspire to defraud BNYM, its clients, and shareholders and breach BNYM's fiduciary responsibility and obligations by impairing, obstructing, and defeating the lawful functions in the BNYM organization." (*Id.*)

Among other complaints, Plaintiff reported that BNYM management and/or employees allegedly: (1) Manipulated the BNYM system to launder money and to commit fraud and other financial crimes through the hiring of their friends (*Id.*, Exs. 14, 21.); (2) "[M]isled and fraudulently overcharged and received federal funding from the U.S. Government" (*Id.*, Ex. 14); (3) Engaged in fraud by approving "timesheets for contractors being overbilled to the U.S. Government" and through the "inflation of time reporting in PPM for CAPEX financial reporting" (*Id.*, Ex. 12); (4) Created false and misleading business cases to meet quotas (*Id.*, Ex. 23); and (5) Failed to keep accurate records and to maintain appropriate risk control monitors and fraud detection procedures (*Id.*, Ex. 19).

Plaintiff stated in his ethics complaints that the misconduct he was reporting would lead to "regulatory findings and financial loss due to inter alia fraud, litigation, and negative publicity." (*Id.*, Ex. 19.)

Plaintiff asserts that his manager, Charny, was aware of his ethics complaints, gave him a poor rating, and ultimately terminated Plaintiff's employment in retaliation for Plaintiff making ethics complaints, in violation of SOX.

3. Plaintiff's Administrative Claim

On August 10, 2018, within days after being discharged from employment, Plaintiff filed a complaint with OSHA alleging that BNYM unlawfully retaliated against him for having engaged in protected activity—namely, filing the aforementioned internal complaints. (*Id.* at 2 ¶ 7.) As noted above, OSHA dismissed Samaroo's claim, finding it to be without merit. Plaintiff appealed that initial dismissal of his claim. (*Id*. ¶¶ 12-13.) An Administrative Law Judge denied Plaintiff's appeal and granted summary decision in favor of BNYM, finding that Samaroo failed to establish a *prima facie* SOX claim. (ECF No. 14-9 at 12.)

LEGAL STANDARD

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court accepts all factual allegations as true and draws all reasonable inferences in favor of the plaintiff. *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.,* 553 F.3d 187, 196 (2d Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim of relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The plausibility standard is met when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Id*. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation omitted).

Furthermore, the Court interprets pro se complaints liberally by inferring the strongest possible legal arguments suggested therein. *Hill v. Curcione,* 657 F.3d 116, 122 (2d Cir. 2011) (noting that in "review of the sufficiency of a *pro se* complaint . . . [courts] are constrained to conduct [their] examination with 'special solicitude'") (citing *Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 474 (2d Cir. 2006)); *see also Tracy v. Freshwater,* 623 F.3d 90, 101 (2d Cir. 2010) (discussing reasons why "a court is ordinarily obligated to afford a special solicitude to *pro se* litigants").

When adjudicating a motion to dismiss, a district court must confine its consideration to facts stated on the face of the complaint, documents appended to the complaint or incorporated in the complaint by reference, and documents that the plaintiff "either possessed or knew about and upon which [he] relied in bringing the suit." *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000). Moreover, when the plaintiff is proceeding pro se, as is the case here, the Court may also consider "materials outside the complaint to the extent that they are consistent with the allegations in the complaint," *Alsaifullah v. Furco*, No. 12-cv-2907, 2013 WL 3972514, at *4 n.3 (S.D.N.Y. Aug. 2, 2013) (cleaned up), such as "documents that [the] pro se litigant attaches to his opposition papers." *Agu v. Rhea*, No. 09-cv-4732, 2010 WL 5186839, at *4 n.6 (E.D.N.Y. Dec. 15, 2010). The Court may take judicial notice of and consider records from prior

administrative proceedings in ruling on a motion to dismiss. *See Evans v. New York Botanical Garden*, No. 02-cv-3591, 2002 WL 31002814, at *4 (S.D.N.Y. Sept. 4, 2002).

DISCUSSION

Section 806 of SOX protects employees of publicly traded companies who are retaliated against for reporting what they reasonably believe to be fraudulent behavior. Section 806 provides that it is unlawful for companies to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" based on the fact that the employee:

> provide[s] information, cause[s] information to be provided, or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . .

Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 219 (2d Cir. 2014) (citing 18 U.S.C. § 1514A(a)(1)).

To prevail on a SOX retaliation claim, Plaintiff must first prove that (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Tonra v. Kadmon Holdings, Inc.*, 405 F. Supp. 3d 576, 589 (S.D.N.Y. 2019) (citing *Bechtel v. Admin. Review Bd., U.S. Dep't of Labor*, 710 F.3d 443, 447 (2d. Cir. 2013)). Defendant's motion is premised on Plaintiff's failure to set forth facts that would plausibly support an inference that he engaged in protected activity and that such activity was a contributing factor to his termination from employment.

To demonstrate that he was engaged in protected activity, Plaintiff does not need to prove that the employer actually violated the law. "Rather, he must show that he held a

reasonable belief that Defendants were engaged in conduct that violated one of the enumerated federal laws" in SOX § 806. *Ashmore v. CGI Grp.*, 138 F. Supp. 3d 329, 342 (S.D.N.Y. 2015). "In other words, the plaintiff must demonstrate that he actually believed that the defendants violated a relevant law and that a reasonable person in his position would have believed that the conduct constituted a violation." *Tonra*, 405 F. Supp. 3d at 589 (cleaned up); *see also Guyden v. Aetna*, Inc., 544 F.3d 376, 384 (2d Cir. 2008).

Defendant asserts that the Complaint should be dismissed because it contains only Plaintiff's conclusory allegation that he raised "internal complaints and concerns about fraud." However, the Court may also consider the internal complaints Plaintiff submitted in opposition to the motion to dismiss in determining whether Plaintiff has sufficiently alleged that he engaged in protected activity under SOX. *Agu*, 2010 WL 5186839, at *4 n.6.

After carefully reviewing the exhibits Plaintiff provided, it appears that Plaintiff's ethics complaints primarily concern alleged nepotism or favoritism at BNYM. Nepotism does not violate any of the laws listed under SOX § 806 and does not form the basis of a valid SOX complaint. Nor, as a matter of law, can Plaintiff show it was reasonable for him to have believed nepotism could form the basis of a SOX complaint. *Diaz v. Transatlantic Reinsurance Co.,* No. 16-cv-1355, 2016 WL 3568071 at *5 (S.D.N.Y. June 21, 2016) (holding that it was not objectively reasonable for the plaintiff to believe her employer's practice of nepotism and preferential treatment violated the SOX securities laws). To the extent Plaintiff also complains that various managers were poor managers and mismanaged projects, those allegations likewise cannot form the basis for a SOX complaint. *See Andaya v. Atlas Air, Inc.*, No. 10-cv-7878, 2012 WL 1871511, at *4 (S.D.N.Y. Apr. 30, 2012) (requiring "criminal conduct,

shareholder fraud, or fraudulent intent" to sustain a SOX whistleblower retaliation claim). Thus, the bulk of the alleged activity about which Plaintiff complained is not protected activity under SOX.

The internal complaints that Plaintiff attached to his opposition papers also reference fraud, money laundering, violation of the Foreign Corrupt Practices Act, and financial crimes in connection with government contracts. Based on the totality of Plaintiff's submissions, it appears that these assertions, though labeled as something different, also relate to alleged nepotism or favoritism by Plaintiff's former managers. However, to the extent these allegations concern conduct that Plaintiff reasonably believed constituted "a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders" they could potentially form the basis of a SOX claim.

Defendant also argues that Plaintiff has failed to plead causation — that is, that there are no facts supporting a plausible inference that Plaintiff's employment was terminated due to SOX-related complaints. The Complaint is sparse on such facts. However, based on Plaintiff's submissions in opposition to the Motion to Dismiss, he alleges that he showed his manager his complaints within a month before his termination from employment. (ECF No. 18, Ex. 34 ¶ 27.) If, in fact, Plaintiff amends his complaint to provide sufficient facts rendering it plausible that he engaged in protected activity for purposes of SOX and that he informed his manager of his SOX-related complaints (as opposed to complaints about nepotism and favoritism) within a month of his termination, then it is possible that Plaintiff may also be able to support a plausible claim of retaliation. This is because, at the pleading stage of a case, temporal proximity between

protected activity and an adverse employment action can be sufficient to demonstrate causation. *See Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 845 (2d Cir. 2013) (holding that three-week period between protected activity and termination was sufficient "to make a prima facie showing of causation . . . through temporal proximity").

For these reasons, I recommend that the Complaint be dismissed without prejudice to allow Plaintiff an opportunity to include in an amended complaint facts that would support his belief that Defendant engaged in mail, wire, bank or securities fraud or a violation of the rules and regulations of the SEC or a provision of law relating to fraud against shareholders, that he complained about this type of conduct, and that he was discharged because of his complaints. Any amended pleading should omit and not include any allegations about nepotism or favoritism because complaints about this type of conduct is not protected activity within the meaning of SOX. I recommend that Plaintiff be encouraged to schedule an appointment with the pro se legal clinic, the New York Lawyers Assistance Group, to see whether its staff can assist him in preparing an amended pleading.

CONCLUSION

For the reasons set forth above, I respectfully recommend that Defendant's motion to dismiss (ECF No. 12) be GRANTED and that Plaintiff's Complaint be dismissed without prejudice.

Dated: October 5, 2021
New York, New York

Respectfully submitted,

Katharine H Parker

KATHARINE H. PARKER
United States Magistrate Judge

NOTICE

The Plaintiff shall have seventeen days from the service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three additional days only when service is made under Fed. R. Civ. P. 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to by the parties)). Defendants shall have fourteen days from the service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure.

If Defendants file written objections to this Report and Recommendation, the Plaintiff may respond to Defendants' objections within seventeen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Alternatively, if Plaintiff files written objections, Defendants may respond to such objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(a), (d). Such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Analisa Torres at the United States Courthouse, 500 Pearl Street, New York, New York 10007, and to any opposing parties. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Torres. The failure to file these timely objections will result in a waiver of those objections for purposes of appeal. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn*, 474 U.S. 140 (1985).