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ADMITTED IN: DC, MARYLAND AND VIRGINIA

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VIA ELECTRONIC MAIL

Samantha L. Jarman
Regional Investigator
USDOL/OSHA
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Re: Secure Democracy/New Venture Fund/Walker/3-0050-22-190

Dear Ms. Jarman:

This letter contains the response of New Venture Fund (NVF) [1] to the Complaint filed by Sarah Walker (Ms. Walker or Complainant) under the Taxpayer First Act of 2019 (TFA) (26 U.S.C. § 7623(d)). As an initial matter, the Complaint is time-barred. None of the alleged adverse actions complained of occurred within 180 days prior to the filing of the Complaint. Second, even if the Complaint was not time-barred, it lacks merit and should be dismissed. Ms. Walker did not engage in protected activity within the meaning of the TFA. Ms. Walker also did not suffer any adverse action within the meaning of the TFA, and all actions taken by NVF with respect to Ms. Walker were taken for legitimate nondiscriminatory reasons. For all of these reasons, the USDOL should dismiss Ms. Walker's Complaint.

I. Facts

New Venture Fund (NVF) is a charitable and educational organization that is tax exempt as a public charity under section 501(c)(3) of the Internal Revenue Code. It acts as a fiscal sponsor for projects initiated by philanthropic donors. NVF executes some of

[1] Secure Democracy, a social welfare organization separately incorporated pursuant to Internal Revenue Code § 501(c)(4) and the other respondent in this matter, dissolved on December 20, 2021.

philanthropy's most complex domestic and international projects and partners with many of the nation's leading foundations. It supports (is a fiscal sponsor to) a number of donor-driven projects ranging in interests from conservation and global health to public policy and education.

Fiscal sponsorship is a relationship where an existing nonprofit that is exempt under section 501(c)(3) as a public charity, like NVF, serves as a host for various projects and initiatives that align with and further NVF's mission. Fiscal sponsors receive tax deductible contributions that are then allocated in support of projects. The board of directors of the fiscal sponsor is responsible for how the funds are used.

NVF is a fiscal sponsor to its various projects around the country. At all times, NVF (1) retains control and discretion over the use of the funds contributed by donors; (2) maintains records establishing that the funds were used for exempt purposes; and (3) ensures distributions further NVF's and each of its project's charitable purposes.

Each NVF project has its own advisory board, internal structure, and leadership driving its operations. Each project has been delegated authority by the NVF board of directors and has some autonomy to make certain decisions, including hiring and compensation of its employees. Most projects are led by an executive director who is an NVF employee. While staff work for a specific project, NVF typically hires all employees and contractors working on that project, and provides HR, compliance, financial, legal, and operational support across all projects.

Until June 16, 2022, one of NVF's projects was Voting Rights Lab (VRL). VRL is a nonpartisan project accelerating the movement for free and fair elections through expert analysis, research, and innovations. Fiscally sponsored projects such as VRL are not legal entities. Instead, they derive legal non-profit corporate status from the fiscal sponsor, here NVF. VRL tracks election-related legislation and current law in all 50 states and the District of Columbia. It focuses on policies that restrict or expand voting access and policies that interfere with the nonpartisan administration of our elections.

Ms. Walker was hired by NVF on February 19, 2020 as the Associate Director, State Affairs for VRL. She was promoted to Vice President (VP), Advocacy on December 15, 2020. As VP, Advocacy, Ms. Walker was responsible for VRL's policy change advocacy at the federal, state, and local levels. She was the head of the Advocacy Department, which includes regional, campaign, program, engagement, and administrative staff. The VP of Advocacy is a member of VRL's Leadership Team and reports to VRL's Executive Director. In her role, Ms. Walker was required to demonstrate proficiency in voting policy and a deep expertise in political analysis and campaign strategy. At the time she was hired, she had been a lobbyist for several years. She was to collaborate with other departments to develop VRL's annual policy agenda, along with other responsibilities.

Throughout her employment with NVF/VRL, Ms. Walker was a part-time employee of NVF and was simultaneously employed by Secure Democracy (SD) as Executive Director. She spent 50% of her time working for the VRL project and the other 50% working for SD. SD is a separate nonprofit corporation exempt from taxation under Internal Revenue Code Section 501(c)(4) as a social welfare organization, with its own board of directors and separate legal status. Its mission is to promote and protect voting rights and restore confidence in the U.S. electoral system.

As is common within the nonprofit sector and because of the shared mission and goals of fighting voter suppression and transforming America's voting systems, NVF/VRL and Secure Democracy worked closely together and certain shared staff. The IRS requires 501(c)(3) and 501(c)(4) organizations that share staff or resources to institute procedures for tracking the use of each organization's resources, including staff time, and to take reasonable steps to ensure that the 501(c)(3) organization is fully reimbursed and is not assuming these costs for any use of its resources by a 501(c)(4) organization. NVF maintains these procedures and trained the NVF/VRL staff, including Ms. Walker, on these procedures. VRL project staff also created a manual for employees to use on an ongoing basis, which was reviewed by NVF. As a department head who was trained and responsible for herself and her subordinate staff, Ms. Walker was or should have been well-versed in the content of this manual. NVF's procedures required use of the employees' time sheets to calculate reasonable allocations of NVF resources being used by SD and then to reimburse NVF for that use from SD funds. Shared staff, including Ms. Walker, were paid directly by each organization (e.g. NVF and SD) for the time spent on each respective organization's activities.

Ms. Walker was well aware of the steps taken to ensure appropriate accounting between SD and NVF. Ms. Walker was not a low-level employee without sufficient knowledge of these matters; as mentioned above, she was a highly skilled, experienced member of VRL's Leadership Team.

On October 28, 2021, at 6:06 p.m., Ms. Walker sent an email to NVF's General Counsel (GC), Andrew Schulz, raising a number of concerns.[2] She described her concerns as involving "accounting controls and procedures, conflicts of interest, EEO and legal compliance." For example, she expressed concern that two employees spent the majority of their time on matters related to SD but they were 100% paid by NVF.[3] Ms. Walker stated that she had recommended that both of those employees cease their work for SD "until a point that the costs are shared between the two entities." She

[2] Because her email was after-hours, Mr. Schulz was not at work the following morning, he did not see Ms. Walker's email until approximately 11:15 a.m. the next day, after she had already been placed on paid administrative leave for other nondiscriminatory reasons.

[3] As noted above, the relevant question is not which entity paid the individuals, but instead whether the 501(c)(3) organization is fully reimbursed and therefore is not assuming these costs for use of its resources by the 501(c)(4) organization.

referred to other examples of interactions between NVF and SD, and she described these issues as "legal compliance failures."[4] As NVF understands it, based on Ms. Walker's communications during this time period, she expressed concerns that:

- NVF allegedly was paying for staff time that she thought SD should be paying for. These included certain SD employee wages, including those of NVF employees who substantially worked for SD and including NVF employees who were publicly identified as affiliated with SD;
- NVF was allegedly subsidizing certain other SD expenses that should have been allocated for payment by SD;
- NVF was allegedly making impermissible payments for lobbying and political campaign intervention; and
- NVF employees were allegedly exercising too much legal, financial, and operational control over operations of SD.

Three days later, on November 1, 2021 at 8:45 a.m., Ms. Walker raised these same issues with Heather Smith, the Chair of the Board of Directors for SD, and asserted that having sought "whistleblower status" with NVF she sought "whistleblower status" with SD.

Around this time, Ms. Walker also raised concerns about race and disability discrimination. NVF immediately commenced an investigation of her claims using an outside investigator, Crystal Twitty.

On October 29, 2021, at 9:36 a.m., Ms. Walker was placed on paid administrative leave by Anthony Dale, Vice-President of Operations & Chief of Staff for VRL. NVF took this action because (1) Ms. Walker stated in an email to Anthony Dale on October 29 at 8:57 a.m. that she did not intend to continue performing her job duties; and (2) to insulate her from further alleged harassment or discrimination while her claims were investigated by Ms. Twitty.

On November 11, 2021, SD counsel and board members met, and upon the recommendation of Ms. Walker, dissolved SD. Ms. Walker immediately informed staff, instructed them to tell vendors, and took other steps to wind down operations. By December 1, 2021, SD had no remaining employees other than Ms. Walker, who remained to assist with the dissolution.

Ms. Walker refused to cooperate with the investigator who had been retained to investigate her claims of discrimination, so the investigation was discontinued on

[4] NVF is confident that Ms. Walker's complaints have no merit. However, the ultimate merits of her complaints are irrelevant to her claim under the TFA so they are not addressed here.

November 12, 2021. Ms. Walker remains employed by NVF, and on paid administrative leave, to this day.[5]

II. Legal Analysis

Under 26 U.S.C. § 7623(d), no employer or employee may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in reprisal for any lawful act done by the employee to provide information regarding underpayment of tax or any conduct that the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud, when the report is made to any person with supervisory authority over the employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct. The "TFA provides for employee protection from retaliation when the employee engages in protected activity pertaining to underpayment of tax or any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provisions of Federal law relating to tax fraud." 29 CFR § 1989.100(a). An action under subparagraph (A)(i) of section 7623(d) is governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code, the Wendell H. Ford Aviation Investment and Reform Act. Accordingly, courts look to similar or analogous whistleblower programs managed by the Occupational Safety and Health Administration, including the Wendell H. Ford Aviation Investment and Reform Act and the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A.

In order to demonstrate a prima facie whistleblower retaliation claim under 49 U.S.C. § 42121, a claimant must show that: (i) she engaged in protected activity; (ii) her employer knew of the protected activity; (iii) she suffered an adverse employment action; and (iv) the protected activity was a contributing factor to the adverse action. *See* 29 CFR § 1980.104(e)(2); *Taylor v. Fannie Mae*, 65 F. Supp. 3d 121, 125 (D.D.C. 2014) (applying this standard in a SOX case). To demonstrate that the protected activity was a contributing factor to the unfavorable action, a showing of retaliatory intent is required. *Murray v. UBS Securities, UBS AG,* Docket Nos. 20-4202 and 21-56 at 12 (2d Cir. August 5, 2022) (citing *Bechtel v. Admin. Rev. Bd.*, 710 F3d 443 (2d Cir. 2013).

Ms. Walker cannot demonstrate prongs i, iii, and iv. Moreover, all of her claims are time-barred. Accordingly, her Complaint should be dismissed.

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5 Ms. Walker alleges in her Complaint that she was terminated by NVF on or about June 16, 2022. This is untrue. Ms. Walker remains on administrative leave and continues to collect her paycheck from NVF.

A. Ms. Walker's Complaint is Time-Barred in its Entirety

To seek redress for retaliation under the TFA, an employee must file a complaint not later than 180 days after the date on which the violation occurs. 26 U.S.C. § 7623(d)(2)(iv). The procedures for adjudicating such a claim are found in 26 U.S.C. § 7623(d) and 49 U.S.C. § 42121(b).

Ms. Walker filed the instant Complaint on June 10, 2022. One hundred and eighty days before June 10, 2022 is December 12, 2021. Therefore, all of the incidents Ms. Walker complains of must have occurred after December 12, 2021.

Ms. Walker's own complaint states that she was placed on paid administrative leave, and restricted from performing her work activities, on October 29, 2021. Accordingly, these actions occurred too long ago to be included in her June 10, 2022 Complaint.

In addition, Ms. Walker claims she was terminated from employment with NVF on June 16, 2022. Ms. Walker was not terminated from employment; she remains on administrative leave and continues to collect a paycheck from NVF.[6]

In addition, prior to the 180 day window, all SD staff were separated from employment, at Ms. Walker's recommendation, because the organization was winding down. Ms. Walker remained employed to help complete the dissolution. Accordingly, Ms. Walker can make no claims based on her separation from SD.

For all of these reasons, Ms. Walker did not experience any adverse actions during the 180 days prior to her Complaint, and her Complaint should be dismissed.

B. Ms. Walker's Complaint Lacks Substantive Merit and Should Be Dismissed

1. Ms. Walker Did Not Engage In Protected Activity Under The TFA.

To demonstrate that a claimant engaged in protected activity under the analogous procedures and precedents applicable to SOX complaints, she must show that she reasonably believed the employer's conduct violated an enumerated federal fraud provision set out in 18 U.S.C. § 1514A.[7] Reasonable belief requires both a subjective and an objectively reasonable belief that "the conduct ... complained of constituted a violation of relevant law." *Taylor,* 65 F. Supp. 3d at 125 (quoting *Sylvester v. Paraxel*

[6] It is unclear how Ms. Walker could be alleging that she was terminated on June 16, 2022 when her Complaint purportedly was filed on June 10, 2022, but in any event her employment with NVF has not been terminated.

[7] For the TFA, this would mean a reasonable belief that the employer's conduct was an underpayment of tax or any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provisions of Federal law relating to tax fraud. 26 U.S.C. § 7623(d).

Int'l LLC, No. 07-123, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *14-15 (DOL Adm. Rev. Bd. May 25, 2011)); *see also Welch v. Chao*, 536 F. 3d 269, 275 (4th Cir. 2008); *Livingston, v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008). While the employee "does not need to prove an actual violation, the employee does need to prove that [her] belief was objectively reasonable under the circumstances." *Allen v. Admin. Review Bd.,* 514 F.3d 468, 480, n.9 (5th Cir. 2008).[8] An employee must show both that she actually believed the conduct complained of constituted a violation of pertinent law and that "a reasonable person in [her] position would have believed that the conduct constituted a violation." *Livingston,* 520 F.3d at 352. Mere speculation of a violation of law is not sufficient to meet the objectively reasonable belief standard. *Ronnie v. Office Depot, Inc.,* No. 2019-0020, 2020 DOL Ad. Rev. Bd. LEXIS 303, *6 (Admin. Rev. Bd. September 29, 2020); *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) ("While a plaintiff need not show an actual violation of law, or cite a code section he believes was violated, 'general inquiries' ...do not constitute protected activity.").

Objectively reasonable belief 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. *Taylor*, 65 F. Supp. 3d at 125. Sophisticated whistleblowers are held to a higher standard in establishing SOX's "objectively reasonable belief" requirement. *See Wallace v. Andeavor Corp.*, 916 F.3d 423 (5th Cir. 2019) (concluding plaintiff lacked an objectively reasonable belief that company violated the law where the plaintiff was the Vice President of Pricing and Commercial Analysis, and a sub-certifier of defendant's financial statements, and could have conducted a limited investigation to determine that defendant properly disclosed its treatment of certain taxes as revenue in an SEC filing). For example, in *Allen*, the plaintiff claimed she had engaged in protected activity when she reported her belief — based on assumption — that the company's financial statements included accounting information she considered materially false, when in fact the false information was not included in the reported statements. The Fifth Circuit held that her belief was not objectively reasonable, taking into account the specialized knowledge attendant to her profession, because she had the ready ability to test her assumption by basic research. *Allen,* 514 F.3d at 477, 479. In *Taylor*, 65 F. Supp. 3d at 126-127, the court found no reasonable belief of a violation of SOX where "[a] reasonable person would not consider" the "mistaken use of" an incorrect statistic "as anything more than a misunderstanding," especially, when the mistake was discovered and retracted. *Id.* Of note, that court based its decision at least in part on the fact that the plaintiff and the person he made his report to about another's use of the statistic were both operational risk professionals who had knowledge of the various mechanisms for reporting illegal or potentially fraudulent activity at Fannie Mae. *Id.*

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[8] The objective reasonableness standard applicable in SOX whistleblower claims is similar to the objective reasonableness standard applicable to Title VII retaliation claims. *Sylvester*, 2011 DOL Ad. Rev. Bd. LEXIS 47, at*33.

In this case, Ms. Walker alleged problems with "accounting controls and procedures, conflicts of interest, EEO and legal compliance." A series of emails sent by Ms. Walker in the days leading up to her complaint on October 28, 2021, showed that, in sum, her complaints were:

- NVF allegedly was impermissibly subsidizing certain SD employee wages, including those of NVF employees who substantially worked for SD and including NVF employees who were publicly identified as affiliated with SD;
- NVF was allegedly subsidizing certain other SD expenses that should have been allocated for payment by SD;
- NVF was allegedly making impermissible payment for lobbying and political campaign intervention; and
- NVF employees were allegedly exercising too much legal, financial and operational control over operations of SD.

But as VP, Advocacy, Ms. Walker had numerous high-level responsibilities. She was responsible for VRL's policy change advocacy at the federal, state, and local levels, and she was the head of the Advocacy Department and a member of VRL's Leadership Team. She reported to the VRL Executive Director. In her role, Ms. Walker was required to demonstrate proficiency in voting policy and a deep expertise in political analysis and campaign strategy. She was to collaborate with other departments to develop VRL's annual policy agenda, along with other responsibilities.

Importantly, she had received training in the procedures instituted for tracking the use of each organization's resources, including staff time, and to take reasonable steps to ensure that NVF, as the 501(c)(3) organization, would be fully reimbursed in due course and not assuming these costs for use of its resources by SD. At minimum, she knew from her experience that these are complex accounting and legal issues. She should have understood that the procedures adopted were designed for compliance in conjunction with sophisticated tax and legal advice from accounting and law professionals with expertise she does not possess.

Given her level of sophistication, Ms. Walker cannot have had an objectively reasonable belief that VRL had violated tax laws. Although NVF/VRL and SD worked closely together and shared certain staff, NVF maintained strict procedures to track the use of each organization's resources, including staff time, and to ensure that the 501(c)(3) organization is fully reimbursed and is not assuming these costs for any use of its resources by a 501(c)(4) organization. NVF trained the NVF/VRL staff, including Ms. Walker, on these procedures, and VRL staff also created a manual for employees to use on an ongoing basis, which was reviewed by NVF. Ms. Walker was or should have been well-versed in the content of this manual. NVF's procedures required use of the employees' time sheets to calculate reasonable allocations of NVF resources being

used by SD and then to reimburse NVF for that use from other funds. Certain staff, including Ms. Walker, were paid by NVF for the time spent on VRL activities. SD paid staff, including Ms. Walker, directly for time they spent on SD activity.

Ms. Walker was not a low-level employee without sufficient knowledge of these matters; she was a member of VRL's Leadership Team. She certainly knew the difference between 501(c)(3) and 501(c)(4) organizations. She is not herself a tax accounting or tax law expert, but she is a seasoned executive who has worked and managed in the tax-exempt arena. As such, she knew that even if she had questions, she did not have answers. At the same time, because Ms. Walker was, or should have been, well aware of the steps taken to ensure appropriate accounting between SD and NVF, whatever questions she may have had about why (or even whether) the procedures already in place were sufficient, a reasonable person in her position cannot have had an objectively reasonable belief that NVF was violating tax laws and her claim should be dismissed. *See, e.g., Wallace, Allen*, and *Taylor*, discussed above.

2. Ms. Walker Was Not Subjected To An Adverse Action Within The Meaning Of The TFA.

An adverse employment action includes "actions short of an outright firing," "but not all lesser actions by employers count." *Forkkio v. Powell*, 306 F.3d 1127, 1130 (D.C. Cir. 2002). "Purely subjective injuries, such as dissatisfaction with a reassignment ... or public humiliation or loss of reputation ... are not adverse actions." *Id.* at 1130-31 (internal citations omitted). Where reassignment of duties does not result in loss of pay or change in benefits, it is not an adverse action. *Forkkio*, 306 F.3d at 1131; *see also Weigert v. Georgetown Univ.*, 120 F. Supp. 2d 1, 19 (D.D.C. 2000) (less substantial work assignments not an adverse action in ADA retaliation claim).

Ms. Walker alleges that in retaliation for making her complaint to the NVF GC, she was "placed on administrative leave, restricted from work functions, terminated and was refused to be rehired." None of these allegations has merit.

As an initial matter, certain of her allegations are untrue. Ms. Walker remains employed by NVF, collecting her full paycheck while on paid administrative leave. Moreover, Ms. Walker did not suffer any adverse action by SD. Indeed, Ms. Walker recommended the dissolution of SD during a November 11, 2021 Board meeting, and she was instrumental in winding down and dissolving this entity, resulting in the termination of all employees from SD.

As for her placement on paid administrative leave, this is not an adverse action. *See Joseph v. Leavitt*, 465 F.3d 87, 90-91 (2d Cir. 2006) (placement on paid administrative leave does not constitute adverse action in the Second, Fourth, Fifth, Sixth, and Eighth Circuits). Ms. Walker also alleges that she has been restricted from her work duties in

retaliation for raising concerns. But if being placed on administrative leave is not an adverse action, then being restricted from work activities – which necessarily follows from being placed on administrative leave – also cannot qualify.

For all of these reasons, Ms. Walker was not subjected to an adverse action within the meaning of the TFA and her Complaint should be dismissed.

3. No Alleged Protected Activity Was A Contributing Factor To Any Unfavorable Action.

In order to demonstrate that protected activity was a contributing factor to the unfavorable action, a showing of retaliatory intent is required. *Murray* at 12 (citing *Bechtel v. Admin. Rev. Bd.*, 710 F3d 443 (2d Cir. 2013). A mere temporal connection between the alleged protected activity and the retaliatory act is not sufficient to show liability. *Id.* at 16. Even if Ms. Walker had engaged in protected activity and had been subjected to adverse action(s) after submitting her email to the NVF GC and VRL's Chief of Staff, there is no nexus between those adverse actions and any such protected activity. All of the actions Ms. Walker complains of were the result of legitimate business decisions and not due to any retaliation under the TFA.

First, Ms. Walker was placed on paid administrative leave because (1) Ms. Walker stated in an email to Anthony Dale on October 29 at 8:57 a.m. that she did not intend to continue performing her job duties; and (2) to insulate her from further alleged harassment or discrimination while her claims were investigated by Ms. Twitty.

Second, Ms. Walker was restricted from performing her work activities because she was on paid administrative leave. Because the reasons she was placed on administrative leave are legitimate business reasons unrelated to her protected activity, her claims cannot succeed.

Third, as noted above, Ms. Walker was not terminated from employment with NVF. From the date of her email to the GC and Chief of Staff, to the present day, Ms. Walker consistently has been employed by NVF.

Finally, Ms. Walker's employment with SD was never "terminated"; rather, it ended when that organization dissolved at her recommendation.

III. Conclusion

For all of the foregoing reasons, Complainant's Complaint should be dismissed. All of the actions she complains of are time-barred, and even if the Complaint was not time-barred, it lacks merit. Ms. Walker did not engage in protected activity within the meaning of the TFA, and she did not suffer any adverse action within the meaning of the TFA.

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Finally, all actions taken by NVF with respect to Ms. Walker were taken for legitimate discriminatory reasons. For all of these reasons, Ms. Walker's Complaint should be dismissed.

Very truly yours,

JACKSON LEWIS PC

Teresa Burke Wright