



Issue Date: 09 May 2008

Case No: 2007-SOX-00075

In the Matter of:

JOSEPH C. JEFFERIS,
Complainant

v.

GOODRICH CORPORATION,
Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

**DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT**

This case arises out of a complaint of discrimination filed by Complainant, Joseph C. Jefferis, with the Occupational Safety & Health Administration (“OSHA”) on November 15, 2006, against Respondent, Goodrich Corporation, pursuant to the employee protection provisions of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, *et seq.* (“SOX”).

I. Procedural History

Mr. Jefferis filed a complaint with OSHA on November 15, 2006. On July 3, 2007, the OSHA Regional Administrator, acting on behalf of the Secretary of Labor, issued a decision finding that Jefferis’ protected activity was not a contributing factor in his reprimand, poor performance ratings, and harassment. OSHA further found that Jefferis voluntarily resigned and was not terminated. On August 2, 2007, Complainant, acting through counsel, objected to the Secretary’s findings and requested a hearing. The claim was then forwarded to the undersigned for a hearing.

On April 21, 2008, Respondent filed a Motion for Summary Decision. Complainant filed a responsive memorandum on April 29, 2008. Having carefully considered the arguments of the parties, I find that summary decision should be granted in Respondent’s favor.

II. Factual Background

Mr. Jefferis was hired by Goodrich in September 2003 as an “Accountant II, supervisor of accounts payable” in Goodrich’s Aircraft Wheels and Brakes Business Unit in Troy, Ohio. (Jefferis Dep. at 42). Jefferis’ supervisor was Steve Monnier, who reported to Michael DeBolt. (Jefferis Dep. at 43; Goodrich Memo., DeBolt Aff. ¶ 3). Jefferis’ mid-year review for 2004 was

generally positive, but noted the need for improvement in several areas. (Goodrich Hearing Ex. 12). Around July 2004, Jefferis was promoted to Manager of Payables/Payroll and continued to be under the supervision of Mr. Monnier. (Goodrich Memo., DeBolt Aff. ¶ 4).

In March 2005, Jefferis became concerned about payments totaling \$222,987.00 to a Goodrich supplier. (Jefferis Memo. at 11-12). After reporting the concern to Monnier, Monnier arranged a meeting with DeBolt on July 15, 2005, to discuss the issue. *Id.* Mr. Jefferis left the meeting abruptly and was issued a written reprimand for unprofessional conduct. *Id.*

In March 2006, Mr. Jefferis was offered and accepted a newly-created position as a “Risk and Control Specialist” (“RCS”). (Goodrich Memo., DeBolt Aff. ¶¶ 6-9). In his new position, Jefferis reported to Mark Sjobakken, who reported to DeBolt. (Goodrich Memo., DeBolt Aff. ¶ 9). In March 2007, Sjobakken left Goodrich, and DeBolt became Jefferis’ direct supervisor. (Goodrich Memo., DeBolt Aff. ¶ 18).

On May 31, 2006, Jefferis had an altercation with a coworker, Matt Besecker. (Jefferis Memo. at 17-18). Jefferis reported to Sjobakken that he believed that Besecker had assaulted him. *Id.* Sjobakken brought Besecker and Jefferis together to try to resolve the issue. *Id.* During this meeting, Jefferis attempted to leave the meeting early, but did not do so at Sjobakken’s request. *Id.* On July 5, 2006, Jefferis received another letter reprimanding him for unprofessional conduct during the meeting. (Goodrich Hearing Ex. 21). The letter also referred to the previous incident in 2005 when Jefferis abruptly left the meeting with DeBolt and Monnier. *Id.*

On July 14, 2006, one week after receiving the letter of reprimand from Sjobakken, Jefferis made a report to Goodrich’s ethics officer expressing his concern that Monnier and Sjobakken may be engaged in insider trading. (Jefferis Memo. at 8-9). His letter referred to three incidents over the previous two years, when Jefferis had heard Monnier or Sjobakken making comments which Jefferis believed indicated that the two were engaged in insider trading. (Jefferis Dep., Ex. 19).

On August 2, 2006, Jefferis filed an OSHA complaint alleging that Goodrich violated OSHA regulations by retaliating against him for reporting the alleged assault by Matt Besecker. (Jefferis Memo. at 9; Jefferis Dep., Ex. 20). The Secretary found that during the meeting with Sjobakken and Besecker, Jefferis recanted his allegation of workplace violence and agreed that the incident was actually incidental contact. (Jefferis Dep., Ex. 20).

In August 2006, Jefferis alleges that he became concerned with Goodrich’s treatment of a \$9.3 million ledger reconciliation item out of Goodrich’s Sante Fe Springs (“SFS”) facility. (Jefferis Memo. at 6-8). Jefferis and his superiors disagreed as to how the issue should be resolved, and Jefferis continued to express his concerns about the matter in the ensuing months. (Jefferis Memo. at 6-8; Goodrich Memo., DeBolt Aff. ¶¶ 12-16).

In March 2007, Jefferis received an “unacceptable” performance review for the year 2006. (DeBolt Dep., Ex. 3). In June 2007, Jefferis was placed on a Marginal Employee Action Plan (“MEAP”). (Jefferis Memo. at 19-20). Jefferis’ employment with Goodrich ended in June 2007. In a June 14, 2007, “Separation Agreement Proposal,” Jefferis proposed that he resign his employment with Goodrich and settle all potential legal claims against Goodrich in exchange for

one years' salary. (Goodrich Hearing Ex. 56). Jefferis' letter stated that he would resign within one week, even if Goodrich did not accept any of his terms. *Id.* In response, Goodrich wrote to Jefferis stating that the Company was accepting his resignation immediately and that he would be paid his salary through June 21, 2007. (Jefferis Dep., Ex. 44). Goodrich otherwise rejected the terms of Jefferis' separation proposal. *Id.*

III. Law and Analysis

A. Summary Decision

The Rules of Practice and Procedure for administrative hearings are set forth at 29 C.F.R. Part 18. Summary decision may be granted "if the pleadings, affidavits, material obtained by discovery . . . or matters officially noticed show that there is no genuine issue as to any material fact." 29 C.F.R. § 18.40(d). Respondent, as the moving party, has the burden to prove that Complainant lacks evidence to support his claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden then shifts to Complainant to bring forth evidence illustrating the existence of a genuine issue of material fact. *Id.* The Court must look at the record as a whole and determine whether a reasonable fact-finder could rule in Complainant's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If the non-moving party fails to sufficiently show an essential element of his case, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Reddy v. Medquist, Inc.*, ARB No. 04-123, Slip Op. at 5 (Sep. 30, 2005) (*citing Celotex*, 477 U.S. at 322-23).

B. Coverage Under Section 806 of the Sarbanes-Oxley Act

Section 806 of SOX, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. Section 1514A(a) states, in relevant part:

No [publicly-traded 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 -- (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 [18 U.S.C.] 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, when the information or assistance is provided to or the investigation is conducted by -- (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)

18 U.S.C. § 1514A(a)(1)(C).

The legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b), govern SOX whistleblower actions. 18 U.S.C. § 1514A(b)(2)(C). To prevail, an employee must prove by a preponderance

of the evidence 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. *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008) (citing 49 U.S.C. § 42121(b)(2)(B)(iii)); *Platone v. Flyi, Inc.*, ARB No. 04-154, Slip Op. at 16 (Sep. 29, 2006). If the employee establishes these four elements, the employer may avoid liability if it can prove “by clear and convincing evidence” that it “would have taken the same unfavorable personnel action in the absence of that [protected] behavior.” *Allen*, 514 F.3d at 476 (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

1. *Whether Mr. Jefferis engaged in protected activity under SOX*

SOX “does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills.” *Platone*, ARB No. 04-154, Slip Op. at 17. Rather, to constitute protected activity, an employee’s complaints must “definitively and specifically” relate to one of the six enumerated categories found in § 1514A. *Platone*, ARB No. 04-154, Slip Op. at 17; *Allen*, 514 F.3d at 477; *see also, Harvey v. Home Depot U.S.A., Inc.*, ARB No. 04-114, Slip Op. at 15 (June 2, 2006) (“SOX protected activity must involve an alleged violation of a federal law *directly related to fraud against shareholders.*”) (emphasis added). In addition to establishing that he made complaints which “definitively and specifically” related to a violation of one of § 1514A’s six enumerated categories, Jefferis must establish that he held “both a subjective belief and an objectively reasonable belief that the company’s conduct constitute[d] a violation of the relevant law.” *Livingston v. Wyeth*, __ F.3d __, Slip Op. at 13 (4th Cir. 2008) (citing 18 U.S.C. § 1514A(a)(1)); *Allen*, 514 F.3d at 477-78; moreover, the belief must relate to an “existing” violation of law. *Livingston*, __ F.3d __, Slip Op. at 13.

Respondent contends that Jefferis’ complaint must fail because he cannot establish that he engaged in protected activity under SOX. In response, Jefferis contends that he engaged in several instances of protected activity between 2005 and 2007. (Jefferis Memo. at 3). These allegations of protected activity will be addressed in turn. However, it is first necessary to address a general argument raised by Respondent.

Respondent argues that for Jefferis to have engaged in protected activity under SOX, he must have “gone beyond his assigned duties as an RCS.” The only authority cited for this proposition is *Robinson v. Morgan Stanley*, ALJ No. 2005-SOX-44, Slip Op at 115-116 (Mar. 26, 2007). In *Robinson*, the Administrative Law Judge held that “the report or complaint [of a SOX whistleblower] must involve action outside the complainant’s assigned duties.” The Court cited *Sasse v. U.S. Dep’t. of Labor*, 409 F.3d 773, 779-780 (6th Cir. 2005). In *Sasse*, the Court rejected the claim of an Assistant United States Attorney that he engaged in protected activity under federal environmental statutes when he investigated and prosecuted environmental crimes.

The Court cited *Willis v. Department of Agriculture*, in which the Federal Circuit held that a Department of Agriculture employee, whose job it was to review farms for compliance with USDA regulations, did not engage in a protected activity under the Whistleblower Protection Act (“WPA”), 5 U.S.C. § 2302(b)(8) by reporting that seven farms were out of compliance. *Sasse*, 409 F.3d at 779-780 (citing *Willis*, 141 F.3d 1139, 1145 (Fed. Cir. 1998)). The Sixth Circuit cited with approval the Federal Circuit’s holding that:

In reporting some of [the farms] as being out of compliance, [Willis] did no more than carry out his required everyday job responsibilities. This is expected of all government employees pursuant to the fiduciary obligation which every employee owes to his employer. Willis cannot be said to have risked his personal job security by merely performing his required duties.

Sasse, 409 F.3d at 780 (citing *Willis*, 141 F.3d at 1144). The Sixth Circuit then applied *Willis* to the case before it:

Willis's reasoning is equally applicable to the whistleblower provisions of the CAA, SWDA, and FWPCA. By their plain language, these whistleblower provisions protect employees who risk their job security by taking steps to protect the public good. *Sasse*'s job as an AUSA included the investigation and prosecution of environmental crimes, and he therefore had a fiduciary duty to carry out those investigations and prosecutions. Like *Willis*, *Sasse* cannot be said to have risked his personal job security by performing the duties required of him in that job. We therefore hold that in performing these duties, *Sasse* was not engaging in protected activities.

Sasse, 409 F.3d at 780. However, in a subsequent footnote, the Sixth Circuit seemed to limit the scope of its holding:

We are mindful of precedents such as *Marano v. Department of Justice*, which hold that disclosures of information "that is closely related to the employee's day-to-day responsibilities" may also be protected. 2 F.3d 1137, 1142 (Fed. Cir. 1993); *see also Watson v. Department of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995). We emphasize that we do not hold that *Sasse*'s activities were unprotected merely because they were related to his official duties. Rather, we hold that *Sasse*'s investigation and prosecution of environmental crimes were not protected activities because he had a duty, as an Assistant United States Attorney, to perform them.

Sasse, 409 F.3d at 780, n.2.

I am not persuaded that a SOX whistleblower must establish that he went beyond his ordinary duties in order to receive the statute's protections. First, the plain language of the statute requires only that the employee "provide information, . . . regarding any conduct which the employee reasonably believes constitutes a violation of [one of the enumerated statutes] when the information or assistance is provided to . . . a person with supervisory authority over the employee." 18 U.S.C. § 1514A. Had Congress wanted to impose the additional requirement that the information be provided outside the scope of the employee's ordinary responsibilities, it could have easily added language to this effect.

Moreover, *Sasse* does not compel reading such language into the statute. First, *Sasse* and its progeny involved government employees who had a public duty to perform their jobs, not a person employed by a private entity. Moreover, *Sasse* left open the possibility that even public employees performing their official duties may be protected under whistleblower statutes, although it did not identify the circumstances in which this would be the case. *Sasse*, 409 F.3d at

780, n.2. This case qualifies as one of these unspecified exceptions, as it is difficult to imagine why Congress would intend for employees who are hired to ensure compliance with SOX and other laws would be unprotected when doing so. Employees like Jefferis are in the best position to identify and report potential lawbreaking, which is what the employee protection provisions of SOX seeks to encourage. It would be anomalous if companies could inoculate themselves from SOX's whistleblower provisions simply by hiring employees to fulfill the statutory purpose. These employees, who are the most likely to report lawbreaking, could than be retaliated against with impunity for doing exactly what the statute seeks to encourage. Accordingly, I hold that Jefferis need not establish that he went beyond his usual job duties. I now turn to Jefferis' specific allegations of protected activity.

a. Report of \$9.3 million ledger entry to Michael DeBolt

Jefferis first argues that he engaged in protected activity when he reported to DeBolt that he believed that Goodrich was not properly handling a \$9.3 million ledger entry. (Jefferis Memo. at 6-8). Jefferis alleges that he reasonably believed that the entry was not being properly reported, which was causing Goodrich's financial statements to be inaccurate, which could cause shareholders to be misled. Jefferis further alleges that he investigated the issue and proposed a "simple and efficient solution," which would have caused the entry to be disclosed in a transparent manner. He further alleges that in the course of investigating and attempting to reconcile the issue, he reasonably believed that he was asked to conceal shareholder fraud when he was asked to acquiesce to his superior's proposed resolution of the issue. (Jefferis Memo. at 6-9).

Respondent counters that the \$9.3 million issue was actually minor, and that Jefferis could not have reasonably believed that its treatment violated SEC regulations or constituted shareholder fraud. Respondent argues that this is reflected by Jefferis' proposed solution, which was to merely document the existence of the issue and reflect that it was authorized to be adjusted in a certain manner each month. (Goodrich Memo. at 13-15).

DeBolt avers that the issue involved an intracompany offset that occurred between two different divisions of Goodrich's Sante Fe Springs Facility. The accounting system of one division had a payable entry of \$9.3 million, while another division had a receivable entry of \$9.3 million, which always netted to zero, but required manual inputs to correct and reconcile the balance. DeBolt avers that this reconciliation issue dated to as early as 1992, and possibly earlier, and had been approved by Goodrich's outside auditor in 2004, and Goodrich's internal audit department in 2007. DeBolt further avers that he and Sjobakken fully encouraged Jefferis to resolve the issue and travel to Sante Fe Springs to meet with the individuals involved in the issue, but that Jefferis declined to do so. (Goodrich Memo., DeBolt Aff. ¶¶ 12-16).

Jefferis argues that the problem was that another employee, Matt Besecker, was manually "plugging" intercompany accounts to force the equity section of the balance sheet into balancing. (Jefferis Memo. at 6). Jefferis recommended that the problem be reconciled by documenting the entry and creating a control that everyone was aware of. (Jefferis Dep. at 66-67). Jefferis wanted the documentation to reflect that Besecker was authorized to make the adjustments each month. (Jefferis Dep. at 210-211).

Jefferis alleges that he thoroughly researched the \$9.3 million issue, which included reporting his concerns to numerous Goodrich managers and seeking information and assistance from other Goodrich employees. (Jefferis Memo. at 6-7). At the end of all of this investigation, Jefferis concluded that the manual adjustment being made by Besecker was not improper in and of itself. Jefferis simply believed that the authority for the adjustment should be documented. Specifically, he urged that Goodrich:

... just to document its existence and give Matt Besecker work instructions that say, you know, you are expected to make this adjustment on the ledger each month, because that's what was missing all along who was authorizing Matt Besecker to make that adjustment in the consolidation process.

(Jefferis Dep. at 210-211). Jefferis' argument, then, is essentially that Goodrich's failure to document the authority for making the adjustment (but not the adjustment itself) caused Goodrich's financial statements to be false or misleading because the Company's statements represented that the Company was complying with Generally Accepted Accounting Principles ("GAAP"), and maintaining effective internal controls.¹ (Jefferis Dep. at 60-61). However Jefferis presents no evidence supporting the reasonableness of his belief that Goodrich's failure to "document" the authority for the manual adjustments violated GAAP or was an ineffective internal control. Jefferis presents no affidavits from himself or anyone else supporting his reasonable belief that Goodrich's failure to implement his solution violated GAAP or SOX, or otherwise rendered Goodrich's financial statements misleading. The only evidence submitted by Jefferis is deposition testimony that he thought that Goodrich's manner of dealing with the \$9.3 million issue was fraudulent or not transparent. These bare assertions, without any supporting evidence or explanation, are insufficient to show that material issue of fact exists as to whether he reasonably believed that Goodrich was handling the \$9.3 issue in a misleading or fraudulent manner.

However, even if Jefferis did reasonably believe that Goodrich was handling the \$9.3 issue in a manner that caused the financial statements to be inaccurate, he would still have to demonstrate that he "reasonably believed" that these inaccurate statements violated federal securities laws. This would require that he demonstrate that he reasonably believed that Goodrich's handling of the \$9.3 million issue was: "(1) a material misrepresentation (or omission) (2) with scienter (3) in connection with the purchase or sale of a security (4) on which the seller or purchaser reasonably relied, (5) causing economic loss." *Livingston*, __ F.3d __, Slip Op. at 16 (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005)).

Jefferis' allegations and evidence fail to demonstrate several of these elements. For example, he submits no evidence that he reasonably believed that anyone at Goodrich acted with scienter. In fact, the evidence shows that Goodrich employees, including DeBolt and Sjobakken worked to resolve the problem; they just chose not to adopt Jefferis' solution. This does not support a belief that Goodrich employees were acting with the intent to defraud. Moreover, Jefferis identifies no evidence supporting a reasonable belief that shareholders would view Goodrich's treatment of the \$9.3 million issue as "material" or that they would be likely to

¹ Section 302 of Sarbanes-Oxley requires certain corporate officers to execute certifications along with their financial reports. 15 U.S.C. § 7241. The certifications must "discuss the company's internal controls systems and must explain the effectiveness of those internal controls." *In re Scottish Re Group Securities Litigation*, 524 F.Supp 370, 390-91 (S.D.N.Y 2007) (citing 15 U.S.C. § 7241(a)(4)).

reasonably rely on the information to their detriment. Jefferis acknowledges that the money was not actually missing; he just thought it was not being accounted for properly. (Jefferis Dep. at 62-63). His solution was simply for Besecker to continue making the adjustment on the ledger each month, but to make a notation stating that Besecker was authorized to do so.

Accordingly, Jefferis has not submitted or identified evidence sufficient to create the existence of a material issue of fact as to whether he reasonably believed that Goodrich's treatment of the \$9.3 million issue and its refusal to adopt his proposed solution constituted shareholder fraud, or otherwise constituted a violation of one of the six enumerated categories found in 18 U.S.C. § 1514A.

b. Report of insider trading to ethics officer

Jefferis next argues that he engaged in protected activity when he reported insider trading by Monnier and Sjobakken to Ethics Officer Don Tighe in July 2006. Jefferis alleges that, at some unstated time, he heard Monnier talking about how he had profited by trading Goodrich stock. Jefferis alleges that he told Monnier that he should review Goodrich's employment materials concerning insider trading. Jefferis also alleges that he heard Sjobakken discuss how he had profited by trading Goodrich stock and that Sjobakken had shown him a model "demonstrating that if he bought and sold at the right times, he could profit by 10% in a short period." (Jefferis Memo. at 8-9).

In support of this allegation, Jefferis identifies deposition testimony, in which he testified that he thought Monnier possessed "inside knowledge of significant transactions and relationships within the military complex." (Jefferis Dep. at 180-182). Jefferis also testified that when Monnier discussed selling Goodrich stock, Jefferis advised him to read the company's code of conduct and training module on insider trading. (Jefferis Dep. at 168). Jefferis also testified that he heard Sjobakken talking about trading Goodrich stock, which Jefferis found "disturbing." (Jefferis Dep. at 184).

The record contains the letter that Jefferis faxed to the local ethics officer, Don Tighe, on July 14, 2006.² The letter identified three separate incidents relating to insider trading. The first incident occurred "two or more years ago," when Monnier told Jefferis that he had been able to make money by slipping in and out of Goodrich stock. Sometime in 2006, Jefferis heard Monnier discussing trading Goodrich stock to another employee. At that time, Jefferis told Monnier to read Goodrich's materials on insider trading. The final incident Jefferis reported occurred in May or June 2006, when Sjobakken told Jefferis that he had profited from swings in Goodrich stock and showed Jefferis a model with trends and pointed out that "if you bought and sold at the right times, it would be easy to make ten percent in a short period of time." After recounting these incidents, Jefferis wrote to the ethics officer that, "[s]ince both of these individuals [Monnier and Sjobakken] are signing quarterly representation letters, I find it very concerning behavior." (Jefferis Dep., Ex 19).

The relevant regulatory provision to this issue is 17 C.F.R. § 240.10b(5) ("Rule 10b-5"), which provides that:

² Goodrich maintains an "Ethics and Business Conduct Office," for employees to seek advice or assistance on issues of business conduct or to report concerns about potential violations of law or company policy. (Goodrich Hearing Ex. 2 at 7).

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

The Supreme Court has held that Rule 10b-5 is violated “when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information.” *U.S. v. O’Hagan*, 521 U.S. 642 (1997). Specifically, the Court has held that, “[t]rading on such information qualifies as a “deceptive device” . . . because a relationship of trust and confidence exists between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation.” *Id.* (quoting *Chiarella v. United States*, 445 U.S. 222, 228 (1980)).

Rule 10b-5 is clearly a “provision of Federal law relating to fraud against shareholders.” I find Jefferis’ complaint of “insider trading” to the ethics officer sufficiently specific to fall within the enumerated categories of protected activity under SOX. Therefore, Jefferis is protected under SOX if he “reasonably believed” that Monnier and Sjobakken were engaging in insider trading in violation of Rule 10b-5. *Livingston v. Wyeth*, ___ F.3d ___, Slip Op. at 13 (4th Cir. 2008) (citing 18 U.S.C. § 1514A(a)(1)); *Allen*, 514 F.3d at 477-78. Whether Jefferis “reasonably believed” that illegal insider trading was occurring is evaluated based on “the knowledge available to a reasonable person in the same factual circumstance with the same training and experience as the aggrieved employee.” *Allen*, 514 F.3d at 477 (citing *Welch v. Cardinal Bankshares Corp.*, ARB No. 05-064, ALJ No. 2003-SOX-15, Slip Op. at 10-11 (ARB May 31, 2007)).

At this stage in the litigation, Jefferis has presented sufficient evidence to demonstrate that he reasonably believed that illegal insider trading was occurring when he sent the July 14, 2006, letter to the ethics officer. Therefore, for purposes of summary decision, I find that this report was protected activity under SOX. However, as noted below, I find that Jefferis has not shown the existence of an issue of fact as to whether his superiors had knowledge of this report.

c. Filing of OSHA complaint in August 2006

Jefferis argues that he engaged in protected activity when he “filed a complaint with OSHA addressing the assault by Matt Besecker and retaliation of his actions relating to Sarbanes Oxley compliance issues.” (Jefferis Memo. at 9).

The record indicates that prior to the instant complaint, Jefferis filed a complaint with OSHA on August 2, 2006, alleging violations of 29 U.S.C. § 660(c). (Jefferis Dep., Ex. 20). However, that complaint related to an alleged physical assault, and is clearly not protected activity under SOX. Jefferis provides no evidence that this report involved anything other than the physical assault, or any conduct that Jefferis believed was a violation of one of the six enumerated categories found in 18 U.S.C. § 1514A(a)(1)(C). Thus, Jefferis has not established

the existence of a genuine issue of material fact as to whether he engaged in protected activity under SOX by filing an OSHA complaint in August 2006.

d. Report of kick-backs to Monnier

Jefferis next alleges that he reported suspected “kickbacks” in March 2005 after discovering transactions involving payments to Hitchiner Manufacturing, one of Respondent’s suppliers, totaling \$228,987. Jefferis considered the transactions to be improper and not in compliance with GAAP because the payments were not authorized and the payments were for a retroactive price increase. Jefferis alleged that he reported his concern to Monnier. A meeting was then held with Jefferis, Monnier, and DeBolt on or about July 15, 2005. Jefferis alleges that at the meeting he presented documents to DeBolt, but DeBolt pushed the documents onto Jefferis’ lap and told him to “get comfortable with it,” because further disclosure would make DeBolt look bad. Jefferis alleges that he interpreted this as a directive to conceal his concerns about the payments to Hitchiner. Jefferis’ memorandum also suggests that he believed these payments constituted “kickbacks,” but he did not explain the basis for this belief. (Jefferis Memo. at 10-11).

In support of his argument that this report constituted protected activity, Jefferis points to his deposition testimony, in which he testified that he thought the payments were accounted for “improperly.” He also testified that GAAP requires that this type of transaction be “expensed when it occurred,” and that the transaction “was not accounted for in this way.” Jefferis also testified that at some point the problem was ultimately expensed, but Jefferis believed that it was not expensed in the appropriate period. (Jefferis Dep. at 102-105).

Additionally, Jefferis points to a letter he wrote to Bill Huber. The letter was written to correct an “allegation of unprofessional behavior” that had apparently been placed in Jefferis’ personnel file as a result of the July 15 meeting with Monnier and DeBolt. In the letter, Jefferis states that he thought that the Hitchiner payments were “improper and not generally acceptable” and that he “expressed deep concern that the transactions had an appearance of impropriety” in the meeting with Monnier and DeBolt. Attached to the letter to Bill Huber was a letter Jefferis had written to Monnier and DeBolt on August 9, 2005, and emails from March 2005. (Goodrich Hearing Ex. 44).

Jefferis’ testimony indicates that he believed the treatment of Hitchiner payments violated GAAP and were “improper.” Although his brief suggests that he suspected that these payments were “kickbacks,” he has submitted no evidence that he, in fact, believed this to be the case or had any reasonable basis for believing that this was the case. In *Welch v. Cardinal Bankshares Corp.*, ARB No. 05-064, ALJ No. 2003-SOX-15 (ARB May 31, 2007), the complainant argued that accounting errors which violate GAAP standards are *ipso facto* violations of federal securities laws. The Board rejected this argument as a “wholesale re-writing of SOX’s section 1514A.” *Welch*, Slip Op. at 12. The Board reiterated that SOX only protects “whistleblowers who report about specifically enumerated employer conduct – violations of the Federal fraud statutes, SEC rules or regulations, or Federal laws relating to shareholder fraud.” *Id.*

Jefferis presents no evidence that his complaints “definitively and specifically” related to a perceived violation of one of the six enumerated categories found in 18 U.S.C.

§ 1514A(a)(1)(C). Additionally, Jefferis presents no evidence or argument that he reasonably believed that Goodrich's treatment of the Hitchiner expenses constituted fraud against the shareholders or otherwise violated one of the six enumerated categories found in 18 U.S.C. § 1514A(a)(1)(C). The evidence identified by Jefferis establishes only that he reported and believed that Goodrich's treatment of the Hitchiner expenses was "improper" and not in compliance with GAAP. He acknowledged that the expenditures were expensed, but believed that they had not been expensed in the proper year. Moreover, Jefferis presents no evidence supporting a reasonable belief that the reporting of the Hitchiner expenses, or the expenses themselves, were done with scienter or would be material and relevant to investors. Thus, Jefferis has not established the existence of a genuine issue of material fact as to whether he engaged in protected activity under SOX by reporting Goodrich's treatment of the Hitchiner expenses.

e. Report of \$825,000 wire transfer to Empressa

Finally, Jefferis alleges that he engaged in protected activity when he reported an \$825,000 wire transfer to Empressa, a Brazilian company. Jefferis contends that the wire transfer did not reference a purchase order, which led him to believe that the payment was for an "intangible." This led Jefferis to believe that the payment was suspicious and may have violated an agreement that Goodrich had entered with the Department of State concerning improper sales to foreign entities. Jefferis alleges that he reported these concerns to Dave Heffner, a Goodrich employee who specialized in export compliance issues, and local Ethics Officer Don Tighe. (Jefferis Memo. at 12-13).

Jefferis' claim that this constituted protected SOX activity fails on its face. SOX protects employees who report violations of specifically enumerated laws directly related to fraud against shareholders. *See Harvey*, ARB No. 04-114, Slip Op. at 15. Goodrich's alleged improper foreign payments and violation of an agreement with the Department of State would not be a violation of one of SOX's six enumerated categories. *See Livingston*, __ F.3d __, Slip Op. at 15.

2. *Whether Goodrich had knowledge of Mr. Jefferis' protected activity*

To prove that he was fired because of his protected activity, Jefferis must necessarily show that his employer knew of his protected activity. Specifically, he "must show that an employee with authority to take the adverse action, or an employee with substantial input in that decision, knew of the protected activity." *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, Slip Op. at 9 (Sep. 30, 2003).

Most of Jefferis' complaints were made directly to his superiors, such as Monnier, DeBolt, or Sjobakken. However, I have found that these complaints do not satisfy the statutory definition of protected activity. However, Jefferis has established, for purposes of summary decision, that his report of insider trading may be protected under SOX. This report was made in a letter to local Ethics Officer Don Tighe. (Jefferis Dep., Ex 19). Goodrich determined that the allegation was unsubstantiated because neither Monnier nor Sjobakken had access to non-public, material information. The document summarizing the investigation of Jefferis' report of insider trading contains no indication that either Sjobakken or Monnier were confronted with the allegations, or informed that Jefferis was the source of the allegations. (Jefferis Ex. 59). Rather the document suggests that the Company resolved the issue solely on the basis of Monnier and

Sjobakken's job titles, without engaging in any factual investigation. Additionally, both men aver that they had no knowledge that Jefferis had made any complaints concerning insider trading. (Goodrich Memo., Sjobakken Aff. ¶¶ 11; Monnier Dep. at 25-26).

Additionally, Jefferis testified that he had no reason to believe that either man had knowledge of his report other than the fact that he was subsequently disciplined. (Jefferis Dep. at 184-185). Accordingly, there is no evidence of any kind that either Sjobakken or Monnier knew of Jefferis' reports of insider trading. Jefferis cannot create a material issue of fact simply by hoping that the factfinder disbelieves their testimony. Thus, I find that Jefferis has not identified evidence creating a material issue of fact as to whether his superiors had knowledge of his report of insider trading. Accordingly, Jefferis necessarily cannot establish that this activity contributed to any adverse action that he endured.

3. *Whether Mr. Jefferis suffered an unfavorable personnel action*

Respondent argues that Jefferis cannot establish that he suffered an unfavorable personnel action. Neither the Board nor the Sixth Circuit has addressed the type of personnel action that qualifies as "unfavorable" under SOX. However, the Fifth Circuit has held that the "materially adverse" standard used in Title VII retaliation cases is applicable to SOX whistleblower cases. *Allen*, 514 F.3d at 476 n.2. Under this standard, the employee must establish that a reasonable employee would have found the challenged action materially adverse, meaning that that the employer's action "well might have dissuaded a reasonable worker from engaging in protected activity." *Id.* (citing *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)). However, in *Burlington*, the Supreme Court also held that "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.*

Jefferis cites several adverse actions that were taken against him and contends that these actions created a hostile work environment and amounted to a constructive discharge. The actions cited by Jefferis in support of his claim include: being shoved by a coworker in May 2006; being subjected to "disciplinary action" in July 2006; receiving a "smaller than average" merit increase in March 2006; being "harassed" about his usage of leave at an unstated time; being told not to discuss the \$9.3 million matter with anyone but DeBolt and being "scolded" for discussing the matter with another employee; having a "false and misleading" document placed in his personnel file related to his job classification; being ignored by human resources about a request to have rebuttal information placed in his personnel file; being issued a performance rating of unacceptable and not receiving a merit pay increase for 2007; and, being placed on a marginal employee plan of action (MEAP) in June 2007. (Jefferis Memo. at 19-20).

I will discuss each act in turn, and address whether it constitutes a materially adverse action in its own right. Then I will address Jefferis' allegation that the acts, taken together, created a hostile environment and amounted to a constructive discharge.

First, Jefferis alleges that he was shoved by a coworker, Matt Besecker, in May 2006. (Jefferis Memo. at 18). An employer's toleration of harassment or acts of violence by coworkers may qualify as a materially adverse employment action. *See Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321 (6th Cir. 2008). However, there is no evidence that Goodrich encouraged or

otherwise tolerated the incident. Sjobakken avers that upon learning of the incident, he quickly arranged a meeting with the two men to resolve the situation, and that during the meeting, Jefferis acknowledged that the alleged shoving was actually unintentional. (Goodrich Memo., Sjobakken Aff. ¶ 5). Further, Jefferis testified that he did state that the incident was unintentional “in an effort to keep the peace and reconcile.” (Jefferis Dep. at 157-158). Based on Jefferis’ acknowledgement that the shoving was actually unintentional contact, there was nothing further for Sjobakken to do. Accordingly, the evidence cannot support a finding that Goodrich tolerated acts of physical violence against Jefferis, and I find that this incident did not constitute a materially adverse action by Goodrich.

Jefferis’ next allegation, that he was reprimanded in July 2006, stems from the shoving incident and the ensuing meeting with Sjobakken. (Jefferis Memo. at 18). Sjobakken avers that during the meeting to resolve the shoving issue, Jefferis engaged in “unprofessional and volatile conduct” by abruptly standing up and shouting in a loud voice. (Goodrich Memo., Sjobakken Aff. ¶¶ 5-6). Jefferis, for his part, acknowledges that he did just that. (Jefferis Dep. at 157). The letter of reprimand refers to this “unprofessional and volatile conduct,” as well as a similar incident that occurred in August 2005 when Jefferis abruptly left a meeting with Monnier and DeBolt. The letter states that it is a “final warning and concern,” and that “future occurrences of this nature will lead to more severe corrective action, up to and including termination.” (Goodrich Ex. 21). I do not find this letter to be materially adverse action against Jefferis. The letter is specific to two incidents of unprofessional behavior by Jefferis, and Jefferis admitted that he acted inappropriately in the second incident. More significantly, the letter was received in July 2006 and is outside the 90-day period which Jefferis had to file his SOX complaint. *See* 20 C.F.R. § 1980.103(d). Jefferis did not file his complaint until November. Accordingly, I find that the July 5, 2006, letter of reprimand was not a materially adverse action, and that even if it was, Jefferis did not timely file a SOX complaint concerning the incident.

Jefferis next alleges various forms of harassment, such as being “harassed” about his usage of leave. (Jefferis Memo. at 18-19). The only evidence that Jefferis was harassed about leave time is Jefferis’ testimony that Sjobakken characterized his use of Family Medical Leave time as “extreme.” (Jefferis Dep. at 170-171). The record also contains a letter to Mr. Jefferis, in which Sjobakken notified Jefferis that he was using excessive “paid” leave and requests that he change certain leave to “unpaid” FMLA leave. (Goodrich Ex. 33). Jefferis presents no evidence or testimony that Sjobakken’s calculation of Jefferis’ entitlement to paid leave was illegal, inaccurate, or inappropriate. Accordingly, I find that the letter and the request that Mr. Jefferis record certain hours as unpaid leave was a proper and lawful application of Goodrich’s leave policy, and not a materially adverse employment action.

Jefferis also alleges that he was told not to discuss the \$9.3 million issue with anyone but DeBolt and that he was “scolded” for discussing the matter with another employee, both of which Jefferis alleges violated Goodrich’s free and open discussion policy. (Jefferis Memo. at 19). The only evidence of this is Jefferis’ testimony that “a whole slew of isolation techniques” were employed against him and that Sjobakken sent him an email telling him not to discuss the \$9.3 million matter with anyone other than DeBolt. (Jefferis Dep. at 170-171, 246-247). Jefferis has not identified the email in the record. I find that Jefferis has not created an issue of fact as to whether he was subjected to a materially adverse action when he was told not to discuss certain matters with other employees. This is a reasonable exercise of management prerogative, and not a materially adverse action.

Jefferis next alleges that a “false and misleading” document was placed in his personnel file which reflected that his transition from Accountant to Risk Control Specialist was a demotion. (Jefferis Memo. at 19). Jefferis testified that he was originally told that his new position would be classified as an auditor, but that Sjobakken put a document in his folder stating that the position had a different code. (Jefferis Dep. at 48-49). Jefferis also testified that his attempt to put a “rebuttal” in his personnel file was rebuffed. (Jefferis Dep. at 56-57). However, Jefferis provides no evidence that any documentation in his personnel file affected the terms or conditions of his employment in any manner or otherwise adversely affected him in any way. In fact, Jefferis testified that he was never promised that his transfer to a Risk Control Specialist would be a promotion, but only that a promotion was “in the realm of possibilities.” (Jefferis Dep. at 290-291).

Moreover, Stan Kresiburg, a human resources manager at Goodrich, avers that, at the relevant time, Goodrich did not even have a classification of “auditor,” and that he classified the position as “financial analyst.” (Goodrich Memo., Kreisberg Dep. ¶¶ 6-7). Kreisberg further avers that the classification had no bearing on Jefferis’ job title, pay, or responsibilities. *Id.* As Jefferis has presented no evidence to the contrary, or otherwise presented evidence indicating why this classification was materially adverse, he has not created an issue of fact as to whether any document placed in his personnel file was a materially adverse action that would dissuade a reasonable employee from engaging in protected activity.

Jefferis next alleges that he received a “smaller than average” merit increase for 2005 in March 2006. (Jefferis Memo. at 18). However, Jefferis testified only that he received a “smaller increase than what I . . . had hoped and what my understanding was across the board, that, you know, people were going to get three and a half, four percent. I think mine was on the lower end, if not below that.” (Jefferis Dep. at 108). Jefferis’ statement that he received a smaller pay increase than what he “hoped” and what he had speculated others were receiving is wholly insufficient to create an issue of fact. He provides no evidence that he actually received a smaller increase than what he was promised or what other employees received. Additionally, Jefferis did not timely file a SOX complaint concerning the incident which occurred more than 90 days prior to the filing of the instant complaint. Therefore, even if Jefferis’ 2005 pay increase was a materially adverse action, Jefferis did not file a timely complaint concerning the incident.

Next, Jefferis alleges that he was issued a performance rating of unacceptable and did not receive a merit pay increase for 2006. (Jefferis Memo. at 7). Jefferis’ year-end review for 2006 rated him as “unacceptable” in several categories. (DeBolt Dep., Ex. 3). Although Jefferis argues in his brief that this resulted in the denial of a pay increase, he presents no evidence that he was entitled to a pay increase, that similarly situated employees who did not engage in protected activity received a pay increase, or that he was denied a pay increase because of this unacceptable rating. Accordingly, he has not met his burden of presenting evidence to establish that his unacceptable rating for 2006 was a materially adverse action.

Jefferis next alleges that he was subjected to an adverse action when he was placed on a marginal employee plan of action (“MEAP”) in June 2007. (Jefferis Memo. at 19-20). The plan identified Jefferis’ performance deficiencies and outlined an action plan to address the performance deficiencies. (Goodrich, Ex. 61). Jefferis testified that he thought the MEAP was unreasonable because the deficiencies noted were either false or misleading. (Jefferis Dep. at

285-286). He also testified that he thought that portions of the MEAP were “unattainable.” (Jefferis Dep. 287). However, Jefferis also testified that DeBolt modified the document several times in an effort to clarify the plan and address Jefferis’ concerns. (Jefferis Dep. at 288-289). Jefferis further testified that he had no intention of signing the MEAP and that he was merely “stalling” for an opportunity to leave Goodrich. (Jefferis Dep. at 283). Although he argues that the plan posed unreasonable or unattainable goals, he also acknowledged that DeBolt was amenable to revising the document, but Jefferis did not act in good faith in attempting to resolve the issue. Accordingly, Jefferis cannot establish that the MEAP was a materially adverse employment action as he did not reasonably attempt to participate in the formation and revision of the MEAP. Furthermore, he has not provided any evidence as to how the MEAP imposed “unattainable” goals. Therefore, Jefferis has not shown the existence of a material issue of fact as to whether the MEAP was a materially adverse action.

Jefferis also alleges that these actions, taken together, created a hostile work environment. To prevail on a hostile work environment claim, a complainant must establish that the objectionable conduct was extremely serious or severe and pervasive. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Discourtesy or rudeness should not be confused with harassment; nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing, actionable. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). Jefferis’ allegations, taken together, amount to nothing more than the ordinary tribulations of the workplace. None of Jefferis’ allegations amount to severe or pervasive conduct, with the possible exception of being shoved by a coworker. However, this incident was promptly addressed by management, and Jefferis acknowledged that the alleged shoving was actually “incidental” contact.

Finally, Jefferis argues that he was both terminated and constructively discharged. In a June 14, 2007, “Separation Agreement Proposal,” Jefferis proposed that he resign his employment with Goodrich and settle all potential legal claims against Goodrich in exchange for one year’s salary. (Goodrich, Ex. 56). The letter states that if the offer is not accepted by June 21, 2007, Jefferis “will immediately resign from [his] position, and continue to pursue all legal claims and options available.” *Id.* In response, Goodrich wrote to Jefferis stating that the company was accepting his resignation immediately and that he would be paid his salary through June 21, 2007. (Jefferis Dep., Ex. 44). Goodrich otherwise rejected the terms of Jefferis’ separation proposal.

Jefferis argues that he was compelled to tender this letter of resignation as a result of the treatment he endured at Goodrich. To establish that he was constructively discharged, Jefferis must demonstrate that his employer “deliberately create[d] intolerable working conditions, as perceived by a reasonable person, with the intention of forcing the employee to quit and the employee must actually quit.” *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1080 (6th Cir. 1999). Jefferis’ allegations are insufficient to make this showing. Where an employee fails to establish that he was subjected to a hostile work environment, an allegation of constructive discharge predicated on the same conduct necessarily also fails. *Plautz v. Potter*, 156 Fed. Appx. 812 (6th Cir. 2005).

I further find that Jefferis was not “terminated.” His letter made it clear that he would resign effective June 21, 2007, regardless of what happened. In fact, on June 14, 2007, the same day of his proposal, he signed a letter accepting employment with another employer. (Jefferis

Dep., Ex. 45). Jefferis' argument is essentially that by not allowing him to work for the final week, *but continuing to pay him through this period*, Goodrich terminated him. This argument strains credulity. Goodrich continued to pay Jefferis through his proposed resignation date. This is not a termination, nor would a reasonable employee find it materially adverse that in response to a letter of resignation, his employer agreed to give him one week's severance pay. Therefore, I find that Jefferis was not terminated or otherwise subjected to a materially adverse action when Goodrich accepted his letter of resignation.

C. Conclusion

Jefferis has not established the existence of a genuine issue of material fact as to several essential elements of his SOX claim. Most of his allegations of protected activity fail. Furthermore, he has not created an issue of fact as to whether his complaint of insider trading was known to his superiors. Finally, he has not shown that an issue of fact exists as to whether he was subjected to a materially adverse action. A reasonable factfinder could not find in favor of Jefferis on any of these issues. Thus, summary decision for Respondent is appropriate. Accordingly,

It is HEREBY ORDERED that Respondent's Motion for Summary Decision is GRANTED and the Complaint of Joseph C. Jefferis is DENIED.

It is FURTHER ORDERED that the hearing scheduled for May 19, 2008 is CANCELLED.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the Administrative Law Judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC, 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC, 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and

the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the Administrative Law Judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the Administrative Law Judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).