U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 January 2008

Case No. 2007-SOX-74

In the Matter of
ANTHONY JOY,
Complainant

v.

ROBBINS & MYERS, INC.,
Respondent

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION TO AMEND THE COMPLAINT AND GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND CANCELLATION OF HEARING

This case arises out of a complaint of discrimination filed by the Complainant, Anthony Joy, with the Occupational Safety & Health Administration's ("OSHA") Cincinnati Office dated October 23, 2006, against the Respondent, Robbins & Myers, ("Employer" or "Respondent") pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A et seq. ("Sarbanes-Oxley Act" or "SOX") enacted on July 30, 2002. The present proceeding was initiated before the Office of Administrative Law Judges ("OALJ") on July 25, 2007 when Mr. Joy ("Complainant") timely filed objections to the Administrator's findings of his complaint dated June 28, 2007.

Complainant originally filed a motion to amend the complaint on September 24, 2007. Respondent requested time to file a motion to dismiss on September 28, 2007, which was granted. Respondent then submitted a memorandum in opposition to Complainant's motion to amend the complaint on October 10, 2007. A formal motion to dismiss was subsequently submitted by Respondent on October 26, 2007. Complainant then submitted a motion to stay the motion to dismiss for discovery purposes on November 7, 2007. On the same day, Complainant filed a memorandum in reply to Respondent's memorandum in opposition to the original motion to amend the complaint. The following day on November 8, 2007, Complainant requested an extension of time to answer Respondent's motion to dismiss. Complainant then requested another extension on November 20, 2007 and finally filed a memorandum in opposition to Respondent's motion to dismiss on December 26, 2007.

Upon consideration of the matter, I have concluded for the reasons set forth below that the motion to amend should be granted. Furthermore, I also have concluded that Complainant has failed to demonstrate for purposes of § 18.41 that he engaged in protected activity, even when the facts are examined in a light most favorable to the Complainant. Therefore, the Respondent's motion for summary decision should be granted.

FACTS

The following are the undisputed facts between the parties. Complainant filed a Complaint with the Secretary of Labor on October 20, 2006, alleging the Respondent terminated him because he engaged in protected activity under SOX. A formal OSHA statement was submitted to the Secretary of Labor on November 30, 2006 discussing specific details about the allegations in the Complaint. While Respondent asserts it filed a "position statement" with the Secretary of Labor on October 20, 2006 – Complainant claims it never saw a copy of this statement until he requested it from the OSHA investigator on March 9, 2007.[1] Three and a half months later on June 28, 2007, the Secretary issued an order, finding that Complainant failed to establish the elements of a SOX claim. Complainant timely appealed and requested a hearing on July 27, 2007.

In the original complaint, Complainant alleged that he held the position of Director of Audit of Robbins & Myers for one year and ten months. (Original Compl. ¶ 4). Complainant alleged that he expressed concerns beginning in December of 2004 regarding possible violations of SOX requirements and federal export regulations because of its failure to have an export compliance management program in place.[2] Complainant further alleged he wrote an audit report concerning a subsidiary on June 21, 2006 that asserted Respondent was helping facilitate the fulfillment of orders for shipment to embargoed countries. Complainant also claimed that in accordance with his position, he "aggressively" pressed for compliance – so Respondent would complete its certification of SOX Year II. Complainant claimed that on June 26, 2006, he recommended to Respondent that it "self disclose" to the government of possible export compliance violations, and that if it failed to do so, he would.[3] Two days later, Complainant stated he was given a discipline report which stated he made intimidating, derogatory statements, raising issues with management, and improperly going "public" with issues. The result of this report was being placed on three months probation. On July 24, 2006, Complainant was terminated. Complainant asserted that his termination would have cleared the way for Respondent to receive SOX Year II certification, as the export issues would be viewed as "material weakness" under SOX. Finally, the complaint alleges his termination was in violation of the whistle-blowing provisions and employee protection section of the SOX of 2002, 18 U.S.C. § 1514A.

[1] Employer also claims it submitted a supplemental response on December 19, 2006 – but Complainant states in his brief he has never seen a copy. (Compl. Reply Brief Motion to Amend at 1).
[2] He states in his complaint that these SOX concerns proved to be correct based upon an internal audit. I note that there is no evidence to support this claim.
[3] Complainant claims he made his intentions known after this meeting that he would "blow the whistle."

DISCUSSION AND APPLICABLE LAW

Motion to Amend the Complaint

The Rules and Practice and Procedure for Administrative Hearings before the OALJ permit the amendment of complaints pursuant to 29 C.F.R. § 18.5(e). In pertinent part, an administrative law judge may permit a complaint to be amended when "the amendment is reasonably within the scope of the original complaint, the amendment will facilitate a determination of a controversy on the merits of the complaint and there is no prejudice to the public interest and the rights of the parties." *Gonzalez v. Colonial Bank*, ARB No. 05-060, 2004-SOX-00039 (ARB May 31, 2005); *McClendon v. Hewlett-Packard Co.* No. CV-05-087-S-BLW, 2006 WL 318813, at *2 (D. Id. Feb. 9, 2006); 29 C.F.R. § 18.5(e)(2006). The general rule is that amendments to complaints should be "freely granted." *Forman v. Davis*, 371 U.S. 178, 182 (1962); *Reno v. Westfield Corporation, Inc.*, 2006-SOX-00030 (ALJ February 23, 2006).

Respondent argues that under Fed.R.Civ.P. 15(a), Complainant's ability to amend a complaint as a matter of right cuts off once an answer is filed. However, Respondent asserts that SOX proceedings do not follow the traditional litigation route, in that no particular form of complaint is required, except that a complaint must be in writing under 29 C.F.R. § 1980.103(b). Respondent notes that it filed a position statement with the Secretary of Labor pursuant to 29 C.F.R. § 1980.104, which it believes serves as a responsive pleading. Thus, under Respondent's reasoning, Complainant may no longer amend his complaint as a matter or right. However as 29 C.F.R. § 18.5 governs practice and procedure before the office of administrative law judges, its authority trumps 29 C.F.R. § 1980.104, which governs the practice and procedure for handling "complaints, investigations, findings, and preliminary orders" before OSHA, not the office of administrative law judges. To give § 1980.104 procedural weight before the undersigned would go against the policy that such claims are reviewed *de novo* before this office. Furthermore, to read § 1980.104 in such a manner would put it at conflict with 29 C.F.R. § 18.5.[4]

Twenty-Nine C.F.R. § 18.5(a) requires that within thirty days after the *service of a complaint*, each respondent file an answer (*emphasis added*). The problem here is that no initial complaint is ever filed with this office – so one must reconcile this rule with subpart E, which allows a complainant to amend his complaint once "as a matter of right prior to the answer."[5] The text of § 18.5(a) does not use the language "filing of a complaint" before the office of administrative law judge, but rather uses "service of a complaint." Thus the only way to reconcile § 18.5(e) with § 18.5(a) is to read "service of a complaint" under § 18.5(a) as the initial

[4] It is a fundamental principal of statutory construction that laws should be read harmoniously. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291 (2000) (where the Court states it is the responsibility of the judiciary to interpret statutes as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole); *See also Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998) (where the Supreme Court says courts should be hesitant to adopt interpretation of congressional enactment which renders superfluous another portion of that same law).

[5] This rule is crafted in conjunction with Fed.R.Civ.P. 15(a), which also allows for an amendment as a matter of right prior to the filing of an answer. However, the federal rules only apply where 29 C.F.R. § 18 fails to provide for a given situation. 29 C.F.R. § 18.1(a). As noted above, 29 C.F.R. §18.5 does provide for this situation.

service of the complaint before the office of administrative law judges. Thus, under § 18.5(e), a complainant may amend his complaint as a matter of right prior to the answer.[6]

In this case, the motion to amend the complaint was filed on September 24, 2007, four days before any motion or response was submitted by the Respondent. When considering whether to allow amendment, courts have considered whether the original complaint is of a completely different nature than the amended complaint and the stage at which the possible amended action is introduced to the opposite party. An amendment cannot be an attempt by a party to completely change theories after the hearing, where they have "reassessed the field, decided [their] old argument was lame, and now seek a fresh mount in a new direction." *U.S. v. Slade*, 980 F.2d 27, 30 (1st Cir. 1992); *see also Kelly v. Heartland Express Inc. of Iowa*, 1999-STA-00029 (ALJ March 24, 2000) (holding that amendment would not be permitted where the complaint made no reference to additional protected activities in his complaint, interrogatories, or at the hearing and only brought up the additional issues in his post-hearing brief).

While it may be argued at this point that Complainant did not use the precise language regarding concerns surrounding stock prices in his initial complaint before OSHA, because this is a *de novo* proceeding, it is difficult to characterize the motion to amend as untimely as it was submitted only two months after the case was received in this office. Furthermore, the motion was filed before any formal communication was received from the Respondent.[7] As Complainant's amended complaint deals with the same set of facts and circumstances and only seeks to "reframe" the complaint, Respondent's alleged "prejudice" (which is de minimus at best) is outweighed by the necessity of facilitating a determination of this controversy on the merits.[8] Therefore, Complainant's motion to amend the complaint is granted.

Motion to Dismiss/for Summary Decision

A 12(b)(6), a motion to dismiss for failure of the complaint to state a claim upon which relief can be granted is to be treated as a motion for summary judgment as provided in Rule 56. Fed.R.Civ.P. (12)(b)(6).[9] The standard for granting summary judgment (summary decision as applied to administrative law) in whistleblower cases is analogous to the rules governing

[6] The answer is to be filed 30 days after receipt of the complaint, or as articulated above, 30 days after this office receives the complaint from OSHA, under § 18.5(a).

[7] Outside of our initial pre-hearing conference call on August 29, 2007.

[8] Complainant stated that the "amendment is reasonably related to the original complaint and merely spells out the potential shareholder fraud implicit in the originally complaint…[it] merely spells out that Complainant reasonably believed the failure of the Company to respond to Complainant's reports, disclosures and complaints constituted fraud on the shareholders and investors because of the nature of the disclosures." Motion to Amend at 4.

[9] Complainant asserts that Respondent is attempting to "convert the 12(b)(6) Motion to a Rule 56 motion" as sufficient time has yet to pass to allow such a motion. *See Compl. Motion in Opp*. at 3. I would encourage counsel to read Fed.R.Civ.P. 12(b)(6), which specifically states a 12(b)(6) motion is to be treated as a motion for summary judgment under Rule 56. In such an instance, the judge is to provide the parties with a reasonable opportunity to present material to defend such a motion. In that spirit – I have granted counsel's every request for extension of time to submit a response. This should have allowed evidence to be developed to survive a motion for summary decision (affidavits, etc.). In fact, while a response was technically due in ten days from the date the original motion to dismiss was submitted under 29 C.F.R. § 18.6(b), I allowed counsel for the Complainant two months to respond. Nevertheless, a 12(b)(6) motion to dismiss falls under 29 C.F.R. § 18.40-41 – which governs all motions for summary decisions (the administrative equivalent of a motion for summary judgment).

summary judgment under the Federal Rules of Civil Procedure. *Bushway v. Yellow Freight, Inc*., ARB No. 01-018, ALJ No. 2000-STA-52, slip. op. at 1 (ARB Dec. 13, 2002); Fed.R.Civ.P. 56(e). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); 29 C.F.R. § 18.40(d). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has produced evidence to show that it is entitled to summary judgment, the party seeking to avoid such judgment must affirmatively demonstrate that a genuine issue of material fact remains for trial. *LINC Fin. Corp. v. Onwuteaka*, 129 F.3d 917, 920 (7th Cir.1997).

In deciding a motion for summary judgment, a court must "review the record in the light most favorable to the nonmoving party and … draw all reasonable inferences in that party's favor." *Vanasco v. National-Louis Univ*., 137 F.3d 962, 964 (7th Cir.1998). *See also Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). Nevertheless, the nonmovant may not rest upon mere allegations, but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). *See also LINC Fin. Corp*, 129 F.3d at 920. A genuine issue of material fact is not shown by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, 106 S.Ct. 2505, 91 L.Ed.2d 202, or by "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson*, 477 U.S. at 252. Therefore, if the court concludes that "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" and summary judgment must be granted. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, (*quoting First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

The Sarbanes-Oxley Act prohibits discriminatory actions by publicly traded companies against an employee who provides, causes to be provided, or otherwise assists in an investigation concerning any conduct which the employee reasonably believes constitutes violations of certain provisions of the Sarbanes-Oxley Act, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1); *Klopfenstein v. PCC Flow Techs. Holdings Inc*., ARB No. 04-149 (May 31, 2006). The Sarbanes-Oxley Act extends such protection to employees of companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781, or that are required to file reports under Section 15(d) of the Securities Exchange Act of 1934. 15 U.S.C. § 780(d); 18 U.S.C. § 1514A(a).

Respondent has moved under 12(b)(6), specifically alleging that "a careful review of this claim reveals that it must fail as a matter of law because Complainant did not engage in any protected activity under SOX."[10] Complainant asserts that he engaged in protected activity and should be covered under the act.

[10] This assertion is made even with the motion to amend being granted.

i. Elements of SOX

The employee protection provision of the SOX prohibits covered employers from retaliating against employees for providing information or assisting in investigations related to listed categories of fraud or securities violations:

> (a) Whistleblower Protection For Employees Of Publicly Traded Companies.–No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee:
> (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 Section 1341, 1343, 1344, or 1348, 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:
> (A) a Federal regulatory or law enforcement agency;
> (B) any Member of Congress or any committee of Congress; or
> (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); or
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of Section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A. Specifically, Section 806 of the SOX protects employees who provide information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission (*see, e.g.,* 17 C.F.R. Part 210 (2005), Form and Content of the Requirements for Financial Statements), or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such alleged violation. 68 Fed. Reg. 31864 (May 28, 2003). *See* 18 U.S.C.A. § 1514A(a).

Actions brought pursuant to the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005). 18 U.S.C.A. § 1514A(b)(2)(C). Accordingly, to prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent 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. *Getman v. Southwest Sec., Inc*., ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005). *Cf.* 29 C.F.R. §§ 1980.104(b), 1980.109(a). *See* AIR 21, § 42121(a)-(b)(2)(B)(iii)-(iv). *See also Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-10 (ARB Jan. 30, 2004).

In order to survive a motion for summary decision, a complainant's allegations must "'definitively and specifically' relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1)." *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006). The complainant must "implicate the substantive law protected in [SOX] 'definitely and specifically.'" *Portes v. Wyeth Pharmaceuticals*, No. 06-2689, 2007 U.S. Dist. LEXIS 60824, *10 (S.D.N.Y. 2007). It is not enough to disclose possibilities that a challenged practice could adversely affect the corporation which could be intentionally withheld from investors. *Harvey v. Home Depot U.S.A. Inc.*, ARB No. 04-114, ALJ No. 04-SOX-20 (ARB June 2, 2006).

Respondent has conceded for the purposes of this motion, and I so find that the Respondent is a publicly-traded company on the New York Stock Exchange and is subject to rules and regulations promulgated by the Securities and Exchange Commission.

Protected Activity

An employee's reasonable belief of a potential violation is sufficient to protect the employee from retaliation for reporting it. *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170 (2nd Cir. 1996); *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996). In *Platone v. FLYi, Inc*., ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006), the ARB held that in defining the scope of protected activity under other Federal whistleblower protection provisions, the Board has held that an employee's protected communications must relate "definitively and specifically" to the subject matter of the particular statute under which protection is afforded. The Corporate and Criminal Fraud Accountability Act of 2002 does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills. Rather, under the SOX, the employee's communications must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1). Thus, for example, an employee's disclosure that the company is materially misstating its financial condition to investors is entitled to protection under the Act. USDOL/OALJ Reporter at 17 (footnote omitted). In *Platone*, the Complainant's actions in raising a possible issue that might affect the Respondent's ability to collect a debt, working with a senior manager to try to resolve the billing problem, and continued efforts to address the billing issues -- none of which provided specific information regarding fraud against shareholders -- were not protected activity. Furthermore, the ARB indicated that in determining whether a complainant engaged in protected

activity, the relevant inquiry is not what was alleged in the complaint, but what was actually communicated to the respondent prior to the adverse action.

In examining Complainant's amended complaint in conjunction with the original, he made the following allegations:[11]

1. He recommended that the Company adopt an export compliance program to ensure federal regulations were being followed "as recommended by the U.S. Government." (Original Compl. ¶ 5). Complainant felt the company was less than diligent in pursuing his proposal. *Id*.
2. He reported the facilitation of restricted export transactions by a foreign subsidiary, which constituted possible violations of internal policies and federal export laws. (Original Compl. ¶7; Amend. Compl. ¶1).
3. He recommended that Respondent self-disclose possible violations of export laws to the federal government. (Original Compl. ¶ 9). If the company failed to do so, then Complainant stated he would. *Id.* In his amended complaint, Complainant asserted that disclosure of these facts, he believed, would affect stock price. (Amend. Compl. ¶1)[12]
4. He reported that Respondent's failure to complete its certification of SOX Year II rules would impact the price of the Company's stock. (Amend. Compl. ¶ 4).
5. Complainant asserted Respondent's Belgium facility had, at one time, engaged in accounting practices leading to what he called "premature revenue recognition" which Complainant believed constituted fraud." (Amend. Compl. ¶2).

Export Compliance

Regarding export compliance, Complainant fails to touch or concern an SEC rule or concern that the Respondent was engaging in shareholder fraud. In his emails (and presentations), Complainant noted in June of 2006 that "possible" export violations had the ability to put the Respondent out of business. (Exhibit A& C to Compl. Motion in Opp.). In his brief in opposition, Complainant asserted that if the public knew of the serious export compliance issues involving Iran and Syria were made to the public – it would have affected stock prices. It is noteworthy that in his email, he makes no such reference to stock or concerns for shareholders. Under *Platone*, it is not enough to have a subjective belief that stock prices will be affected – but that belief must be communicated. Furthermore under *Harvey*, it is not enough to disclose possibilities that a challenged practice could adversely affect respondent's business. Rather, it must specifically relate to shareholder fraud or a violation of an SEC rule. In *Bishop*, the court noted that a "reasonable belief that … certain procedures will be insufficient to prevent violations is not, by itself, a reasonable belief that a violation has occurred or been attempted … Plaintiff does not support her conclusory contentions with an explanation of how exactly the compliance program with which she disagreed violated §§ 1341, 1343, or an SEC

[11] Rather than submit an entire new complaint with the added amendments, which is standard practice, Complainant has simply submitted what appears to be an "addendum" that merely expands upon the first complaint without providing specifics as to what is being amended. Therefore, I shall consider the allegations in both complaints in tandem.

[12] I note that even though the amended complaint makes no assertion that he recommended such disclosures be made, given that he made such an assertion in the first complaint, I shall consider that he did.

regulation related to fraud." *Bishop v. PCS Admin. Inc.*, No. 05-5683, 2006 U.S. Dist. LEXIS 37230 (N.D. Ill. 2006). Here, even in looking at the evidence before the undersigned in a manner most favorable to the Complainant – he has not established protected activity.

Reporting Possible Violations to the Government

The belief of fraudulent activity under SOX must be both objective and subjectively reasonable. *Reed* 95 F.3d 1170; *Platone v. FLYi, Inc*., ARB No. 04-154. In *Bishop*, the court noted that a reasonable person must believe an actual violation (or attempt) has occurred. *Bishop* 2006 U.S. Dist. LEXIS at *19. As asserted by the Respondent, the mere fact that Respondent lacked an export compliance program and that he believed they were less than diligent in implementing one is not a reasonable basis for believing that actual SOX violations occurred. Indeed, *Bishop* makes it clear that any internal compliance programs cannot be reasonably viewed as actual SOX violations, unless such compliance programs are required by one of the statutes enumerated in SOX. Also, Complainant stated he believed there were "possible" violations – not actual violations. (Original Compl. ¶9). This was even after having received assurances the previous week by outside counsel who concluded that the questioned transactions raised by the Complainant did not violate federal export laws. (Motion to Dismiss Exhibit C). As such, Complainant's belief that these practices violated SOX was not reasonable. As such, he has not established protected activity.

SOX Year II Certification

In his amended complaint, Complainant asserted that he "repeatedly reported and complained of the Company's failure to complete … certification of SOX year II rules as required by SEC rules which, if not corrected would also have a serious negative impact on the financial condition of the Company and on the price of the Company's stock." In his brief, Complainant alleged he pressed for compliance to ensure the Respondent completed its certification of SOX Year II as required by SEC rules. (Compl. Motion in Opp. at 7). As noted above, Section 806 of the SOX protects employees who provide information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission. In his complaint, Complainant alleges that he warned Respondent that if it failed to complete the certification – it would have a negative impact upon the price of the Respondent's stock. As noted in *Bishop*, the court stated a reasonable person must believe an actual violation (or attempt) has occurred. Here, Complainant alleges he was warning about a *possible* violation which *could* occur in the future *if* Respondent failed to act. This complaint does not relate to an actual violation that actually occurred. The SOX whistleblower provisions protect individuals who blow the whistle on a violation of the law – not those who warn of possible violations that occur in the future. Furthermore, there is no evidence in the complaint that Complainant believed that Respondent was taking steps to ensure certification was not completed.[13] Also, there is no evidence in the complaint that Complainant believed if

[13] In fact, Complainant noted in his statement to OSHA that "senior finance management was under extreme pressure from Brown and the Board of Directors that they must pass SOX Year 2 certification this year." Emp. Ex. B.

Respondent failed to complete this certification, that there were plans for a cover-up (i.e., fraud from shareholders). As such, Complainant has not established protected activity.

Premature Revenue Recognition

Complainant stated in his amended complaint that he believed that the reports from Respondent's Belgium facility showed revenue before it was earned – and this was never reported to the Respondent's external creditors. However, in his statement to OSHA, Complainant noted "there was a *possible* premature revenue recognition" of nearly $400 thousand – a practice which Complainant noted has been discontinued at the Board's request. (Emp. Ex. B, *emphasis added*). Following the statement of possible premature revenue recognition, Complainant goes on to state to OSHA "these non-export issues clearly have SOX exposure, and at this stage in the Annual SOX certification process, would pose a big problem" for the Respondent if not reported. *Id*. However, while Complainant may have believed that this practice may have SOX implications, the evidence suggests that while Complainant discussed this matter with management (See Compl. Ex. A, C, and Emp. Ex. B), there is no evidence he communicated a belief of a violation (i.e., "blew the whistle") to management. It appears from the OSHA statement that Complainant did not blow the whistle, or even threaten to blow this whistle on this issue until after his termination.[14] Finally, in the statement to OSHA regarding this issue, Complainant only stated that this was a *possible* violation.[15] As noted in *Harvey, supra*, it is not enough to disclose possibilities that a challenged practice could adversely affect the corporation which could be intentionally withheld from investors. *Harvey* ARB No. 04-114. As such, even in examining the facts in a light most favorable to the Complainant, he has not established protected activity.

Conclusion

In review of the law and the facts of this case, even in constructing the facts in a light most favorable to the Complainant, I find there is no genuine issue of material fact, and summary decision is appropriate.

DECISION AND ORDER

Therefore, IT IS ORDERED that Respondent's Motion for Summary Decision is hereby GRANTED.

[14] His OSHA statement indicates the fact that this practice has "SOX exposure," not that he reported this exposure to Respondent. Not even an affidavit was submitted to this effect.
[15] Again, I note there is no evidence this statement was made to Respondent.

Furthermore, IT IS ALSO ORDERED that the hearing in this matter scheduled for March 24-28, 2008, is hereby canceled.

A

THOMAS F. PHALEN, JR.
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).