



**In the Matter of:**

**AMMAR HALLOUM,**

**ARB CASE NO. 04-068**

**COMPLAINANT,**

**ALJ CASE NO. 2003-SOX-7**

**v.**

**DATE: January 31, 2006**

**INTEL CORPORATION,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

***Ammar Halloum, pro se, Tempe, Arizona***

***For the Respondent:***

***Michael D. Moberly, Esq., Andrea G. Lisenbee, Esq., Ryley Carlock & Applewhite, Phoenix, Arizona***

**FINAL DECISION AND ORDER**

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (West Supp. 2005), and its implementing regulations at 29 C.F.R. Part 1980 (2005). Ammar Halloum filed a complaint alleging that Intel Corporation retaliated against him in violation of the SOX. On March 4, 2004, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) recommending dismissal of the complaint. For reasons stated below, we affirm the ALJ's ruling and dismiss the complaint.

## BACKGROUND

The record supports the ALJ's findings of fact, *see* R. D. & O. at 2-13, and we summarize them here. Halloum began work at Intel's FAB 12 computer chip manufacturing facility in Chandler, Arizona on October 23, 2000. Paul Callaghan, head of FAB 12's Manufacturing Systems Group, hired and supervised him. Halloum served as one of five Spares Group Leaders, and his primary task was to reduce costs in Intel's chip manufacturing budget. Transcript (Tr.) 11, 18-20; R. D. & O. at 2. Halloum was occasionally required to acknowledge receipt of parts or services before a supplier's bill would be paid, and he provided feedback on purchase requests. Tr. 1173. He was not responsible for the actual payment of invoices received from suppliers. Tr. 543-45.

During the first nine months of Halloum's employment at Intel, Callaghan concluded that Halloum needed to improve in the areas of "Leadership, Circle of Influence, Process/Business Knowledge and Team Development." Respondent's Exhibit (RX) 7. In September and October of 2001, Callaghan again informed Halloum that he needed to improve his performance. Tr. 336-37, 692-93. During that same period Halloum opined that, following the attacks on September 11, 2001, Callaghan began harassing him based on his faith and national origin. Complainant's Exhibit (CX) 6. Halloum took a four-week leave of absence from late November 2001 until December 17, 2001. During that period Callaghan informed Kendall McNail, FAB 12's human resources manager, of Halloum's inadequate performance. Tr. 699-700. McNail recommended that Callaghan prepare a Corrective Action Plan (CAP) for Halloum. Tr. 585-86. The CAP required Halloum to achieve four specific goals within 90 days or his employment would be terminated. CX 10.

On January 2, 2002, Halloum informed Sherry Jacob, an employee in Intel's human resources department, that Callaghan was harassing him. Tr. 51. Halloum requested that Jacob fire Callaghan. Tr. 845. Later that day, Callaghan presented Halloum with the CAP. Tr. 768; CX 6. At some point during the month of January 2002, Halloum began to surreptitiously tape-record conversations with other Intel employees. Tr. 405. Halloum knew that, under Intel's "Discharge and Discipline" guidelines, taping conversations could result in immediate discharge. Tr. 407.

Jacob initiated an investigation of Halloum's harassment claim. In conjunction with her investigation, Jacob asked three analysts who reported to Halloum to complete anonymous evaluations of Halloum. Tr. 845-46. The analysts told Jacob that Halloum pressured them to provide favorable evaluations. Tr. 849; RX 15. Callaghan warned Halloum on January 25, 2002, that further efforts to pressure the analysts could be grounds for termination. Tr. 851-52. Jacob met with Halloum on January 28, 2002, and informed him that she found no support for his harassment claim. Tr. 847; RX 16.

Halloum went on medical leave on February 1, 2002, due to stomach symptoms and work-related stress. CX 3. On March 14, 2002, Halloum called the Securities and Exchange Commission (SEC) and complained that Callaghan had instructed him to delay payment on invoices. Tr. 143-144. Halloum alleges that he was told to do this in order

to increase cash on Intel's balance sheet, thereby allowing it to meet Wall Street expectations. CX 5. On April 16, 2002, Halloum reiterated his allegations in a letter to Craig Barrett, Intel's CEO. CX 6. Intel retained an independent consulting firm to investigate Halloum's complaint to Barrett. Tr. 1157-58. The SEC instructed Intel to conduct an internal investigation focusing on FAB 12's payment of invoices. Tr. 1158-60. The two investigations were eventually merged.

During Halloum's medical leave of absence, Jacob met with Halloum's subordinates to discuss their feelings about Halloum's return. These discussions resulted in the preparation of several documents, including a document entitled "MSG – Spares Team - Hopes and Fears Regarding A. Halloum's Return to Work" and another entitled "Ammar Halloum Return to Work Integration Plan." CX 9. The latter document contained a portion entitled "Ground Rules Going Forward," which listed "unacceptable behaviors that will result in further disciplinary action up to and including termination of employee." *Id.*

Callaghan and Jodi Jacobs, another employee in Intel's human resources department, met with Halloum on April 29, 2002. They gave Halloum copies of the "Hopes and Fears" and "Ground Rules" documents and informed Halloum that he needed to clarify his medical status. Over the next several weeks Halloum and Intel exchanged a series of letters and e-mails regarding Halloum's return to work. Halloum provided documentation from a medical doctor and a licensed psychologist indicating that, after his return to work, he should not be required to complete the CAP. CX 13-24. Jacob e-mailed Halloum on July 18, 2002, to inform him that his refusal to work under the CAP constituted resignation from his employment. CX 28. Halloum responded on July 19, 2002, that he did not want to resign, and he that he would report to work on July 22, 2002. CX 29.

Intel took Halloum off medical leave on July 22, 2002, and placed him on administrative leave so he would be available to speak to the team investigating his allegations of shareholder fraud. Tr. 873, 877-878; CX 31. On July 23, 2002, Jacob and Callaghan met with Halloum and accused him of taping conversations with Intel employees. Halloum did not refute the allegation. Tr. 876. When one of the investigators interviewed him on August 1, 2002, Halloum did not describe any acts constituting delayed payments on invoices. Tr. 1172-82.

Callaghan and Jacob presented a modified CAP to Halloum on August 19, 2002. This CAP contained the four goals presented in his previous CAP and added two new goals, requiring Halloum to eliminate \$13 to \$15 million in spending and eliminate the loss of spare part warranties. RX 46. Intel also stripped Halloum of his supervisory duties. CX 35.

Callaghan met with Halloum on August 27, 2002, and informed Halloum of his dissatisfaction with Halloum's progress under the modified CAP. That same day Halloum submitted a request to participate in Intel's Voluntary Separation Program,

which entitled him to receive several months of severance pay. Halloum's employment at Intel ended on September 3, 2002. CX 44.

Halloum filed his SOX complaint with the Department of Labor Occupational Safety and Health Administration (OSHA) on October 16, 2002, alleging that Intel retaliated against him for complaining to the SEC and Barrett. The complaint states that "Intel management gave [him] instruction to 'push out payments on invoices until subsequent quarters in order to meet Wall Street expectations.'" CX 46. OSHA denied the complaint on February 20, 2003, whereupon Halloum submitted a timely appeal to the Office of Administrative Law Judges.

The ALJ conducted a hearing on Halloum's complaint on May 6-7 and 15-16, 2003. The ALJ concluded that Halloum engaged in protected activity when he complained to Barrett and the SEC that he was instructed to delay payments on invoices. R. D. & O. at 15. The ALJ also concluded that the modified CAP constituted an unfavorable employment action and that Intel's decision to modify the CAP was based in part upon Halloum's disclosures to Intel's CEO and the SEC. *Id.* at 17-18. However, the ALJ concluded that Intel presented clear and convincing evidence proving it would have modified Halloum's CAP in the absence of his protected activity. *Id.* at 20.

#### ISSUE

We consider whether Intel proved that it would have taken the same unfavorable personnel action against Halloum even if he had not engaged in a whistleblower complaint under the SOX.

#### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. *See* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); *see also* 29 C.F.R. § 1980.110.

Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard. *See* 29 C.F.R. § 1980.110(b). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). However, the Board reviews an ALJ's conclusions of law de novo. *Cf. Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) (analogous provision of Surface Transportation Assistance Act); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991) (same).

## DISCUSSION

### A. Governing Law

The employee protection provision of the SOX prohibits employers from retaliating against employees for providing information or assisting in investigations related to 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. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(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.

Actions brought pursuant to the SOX are governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code (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; (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) (investigation). *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). The respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Getman*, slip op. at 8. *Cf.* § 1980.104(c). *See* § 42121(a)-(b)(2)(B)(iv). *See also* *Peck*, slip op. at 10.

## **B. Protected Activity**

At the outset, we address the ALJ's conclusion that Halloum engaged in protected activity under the SOX when he complained to the SEC and to Barrett that Callahan had told him to delay payment of invoices. R. D. & O. at 15. The SEC and Intel took Halloum's allegations seriously enough to investigate them, but his contentions were demonstrated to be unfounded, and the SEC took no regulatory action against Intel. *Id.* at 8.

The SOX prohibits retaliation against an employee who provides information to "a Federal regulatory . . . agency" or "a person with supervisory authority over the employee" "which the employee *reasonably* believes constitutes a violation of . . . any provision of Federal law relating to fraud against shareholders . . ." 18 U.S.C.A. § 1514A(a)(1)(A)-(C) (emphasis added). Halloum was apparently mistaken in two ways. First, he confused the manufacturing division's requests for goods and services, and acknowledging their receipt (functions with which he was involved) with the actual payment of invoices for them (which took place in another division). *See* R. D. & O. at 2-3, 8. Second, under Intel's accounting system, the company had to reflect the obligation to pay for an ordered item as soon as it received the supplier's bill. *Id.* at 3. So even if Halloum actually had the capability to delay payment of invoices, that would not have improved Intel's balance sheet, thereby misleading investors. *Id.* Nevertheless, there is sufficient record support for the ALJ's finding that Halloum reasonably believed there was a securities violation. *Id.* at 8. Accordingly, we accept the ALJ's conclusion that Halloum's activities were protected under the SOX.

### **C. Unfavorable Personnel Action**

Next, Halloum must prove that Intel subjected him to an unfavorable personnel action. Under the SOX, the company could not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment” because of Halloum’s complaints to the SEC or to Barrett. § 1514A(a). We review the personnel actions Halloum claims were unfavorable.

Halloum contends that the original CAP constituted harassment. Intel initiated the original CAP on January 2, 2002, but Halloum’s March 14, 2002 letter to the SEC was his first SOX-protected complaint. Because the CAP predated the SEC complaint, we agree with the ALJ’s conclusion that the original CAP could not have been initiated in retaliation for Halloum’s SOX-protected activity. *See* R. D. & O. at 16.

Halloum asserts that Intel subjected him to unfavorable employment actions by presenting him with the “Ground Rules” and “Hopes and Fears” documents. Complainant’s Initial Brief at 6. We disagree. The record supports the ALJ’s finding that the “Ground Rules” document was meant to serve as an agenda for a meeting and is not discriminatory on its face. R. D. & O. at 9, 17; CX 9; Tr. 862-63. The record also supports the ALJ’s finding that the “Hopes and Fears” document was the result of a standard exercise Intel utilized to inform its employees that they would be protected from reprisal or intimidation after changes in management. R. D. & O. at 8-9, 17; CX 9; Tr. 717-18. We therefore conclude that neither of these documents constitutes an unfavorable personnel action.

Halloum also argues that the modified CAP constitutes an unfavorable employment action. Complainant’s Initial Brief at 15. The record supports the ALJ’s finding that the assignments in the modified CAP were unreasonable and could not be completed within the allotted time. R. D. & O. at 17-18; RX 46. We therefore concur with the ALJ’s conclusion that the modified CAP constitutes an unfavorable personnel action pursuant to the SOX.

### **D. Causation**

We must now determine whether Halloum’s protected activity contributed to Intel’s decision to modify the CAP. The ALJ found that Callaghan had knowledge of Halloum’s protected activity when he modified the CAP, and that Callaghan “could not have segregated this knowledge from other reasons for the modifications.” R. D. & O. at 17-18. The ALJ also found that the timing of the modified CAP led him to infer that its imposition was retaliatory. *Id.*

We defer to the ALJ’s conclusion that Callaghan’s decision to modify the CAP was motivated in part by Halloum’s protected activity. *See, e.g., Griffin v. Secretary of Labor*, ARB Nos. 00-032 and 00-033, ALJ No. 1991-DBA-94 (ARB May 30, 2003) (Board will defer to the factual findings of an ALJ, especially in cases in which those

findings are predicated upon the ALJ's weighing and determining credibility of conflicting witness testimony). Halloum need not establish that his protected activity was the primary motivating factor in order to establish causation. *Getman*, slip op. at 8. We therefore concur with the ALJ's conclusion that Halloum's protected activity was a contributing factor in Intel's decision to modify his CAP.

#### **E. Clear and Convincing Evidence**

Halloum established that he engaged in protected activity, that Intel subjected him to an unfavorable employment action, and that his protected activity was a contributing factor in the unfavorable employment action, Intel's decision to modify his CAP. We must finally review whether Intel proved, by clear and convincing evidence, that it would have taken the same unfavorable personnel action against Halloum in the absence of his protected activity.

Intel demonstrated that Halloum did not integrate himself into Intel's workforce and that he failed to perform up to expectations. *See, e.g.*, Tr. 659, 686, 1083-87 (missed meetings); RX 51; Tr. 1005 (absences from work); 1002-03, 1075-88 (failure to perform duties expected of a group leader); RX 8 (failure to understand Intel's business operations); RX 9 (not meeting job expectations for his grade); Tr. 1334-35 (failure to comprehend Intel's accounting system); Tr. 697-98 (Halloum's work shifted to other group leaders). These were sufficient, non-discriminatory reasons to seek his termination as an employee.

The record also indicates that Intel could have fired Halloum immediately after learning that he had surreptitiously recorded conversations with employees. RX 59. But instead of firing Halloum, Intel chose to give Halloum what the ALJ found were unattainable performance goals. We need not decide whether Intel's actions legally amounted to a constructive discharge, as Halloum argued, because the ALJ found and we agree that Intel adduced clear and convincing evidence that it would have modified Halloum's CAP in the absence of his SOX-protected activities. R. D. & O at 19-20. Consequently, the ALJ correctly ruled that Intel avoided liability under the SOX.<sup>1</sup>

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<sup>1</sup> In conjunction with his Rebuttal Brief, Halloum submitted an affidavit containing a description of conversations he recorded during his employment at Intel. The affidavit was not in the record before the ALJ. We note that the Board's review of a case must be based on the record before the ALJ and on the ALJ's R. D. & O. 29 C.F.R. § 1978.109(c)(1). The Board may order an ALJ to reopen the record to receive evidence and reconsider his or her findings based on that evidence where the proffered evidence is relevant and material and was not available prior to the closing of the record. *Madonia v. Dominick's Finer Food, Inc.*, ARB No. 99-001, ALJ No. 98-STA-2, slip op. at 4 (ARB Jan. 29, 1999). Halloum has not established that the affidavit meets either requirement. Thus, we decline to order the ALJ to reopen the record.



## **CONCLUSION**

In sum, Halloum established that his protected activity contributed to an unfavorable personnel action imposed by Intel. However, Intel demonstrated that it would have taken the same action in the absence of Halloum's protected activity. Intel thus proved that it is not liable for violation of the SOX. We therefore **DISMISS** his complaint.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**