



In the Matter of:

JEREMY SMITH,

ARB CASE NO. 06-064

COMPLAINANT,

ALJ CASE NO. 05-SOX-88

v.

05-SOX-89

05-SOX-90

05-SOX-91

05-SOX-92

**HEWLETT PACKARD,
NORA FUENTES-WEGNER,
FRANK BARSOTTI,
ROBERT MULKEY, and
DEBRA HERCHEK,**

DATE: April 29, 2008

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jeremy Smith, *pro se*, Aurora, Colorado

For the Respondents:

**Darren E. Nadel, Esq., Joshua B. Kirkpatrick, Esq., *Little Mendelson, P.C.*,
Denver, Colorado**

For Amicus Curiae Equal Opportunity Advisory Council:

**Ann Elizabeth Reesman, Esq., *McGuinness Norris & Williams, LLP*,
Washington, D.C.**

FINAL DECISION AND ORDER

This case arises from a complaint Jeremy Smith filed alleging that his employer, Hewlett Packard, violated the whistleblower protection provisions of Section 806 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 (2006), when it terminated his employment. A Department of Labor Administrative Law Judge (ALJ) issued a [Recommended] Decision and Order (R. D. & O.) dismissing the complaint based on Smith's failure to prove that he engaged in activity that the SOX protects. Smith appealed to the Administrative Review Board (ARB). Substantial evidence supports the ALJ's factual findings and his conclusion that Smith did not prove that he engaged in SOX-protected activity complies with the applicable law. Since Smith failed to establish protected activity, an element of his whistleblower retaliation case, the ALJ properly dismissed the complaint.

BACKGROUND

The ALJ made detailed factual findings regarding Smith's employment relationship. R. D. & O. at 2-7. We summarize them briefly to provide a context within which to address the issue we must decide: whether Smith engaged in activity that the SOX protects.

Hewlett Packard hired Smith in July 1999. At all times relevant to this case, Smith was an Employee Relations Consultant in Fort Collins, Colorado, and Nora Fuentes-Wegner was his supervisor.

In early 2005, Smith conducted a group sensing study of the Rockrimmon site, Colorado Springs, Colorado. A group sensing study requires an Employee Relations Consultant to interview employees on a voluntary basis and record the general mood or morale at the site. Smith produced a group sensing report dated February 8, 2005. Complainant's Exhibit 4. Smith took notes detailing the names of the employees he interviewed but did not include these names in his sensing report because, he testified, the communications were to remain confidential, except when an employee made a specific allegation of misconduct that would have to be investigated. Hearing Transcript (T.) at 473, 476, 477; *see* Complainant's Exhibit 4. Smith's sensing report states, *inter alia*, that the "vast majority" of minority employees at the Rockrimmon site felt that they were often passed over for promotions, lucrative assignments, and incentive awards, and were forced to endure managers' racially insensitive remarks. *Id.* Fuentes-Wegner testified that this statement and others contained in the report concerning management's alleged treatment of employees based on their race presented the type of information that required formal investigation and resolution. T. at 613-625. Fuentes-Wegner repeatedly asked Smith throughout March 2005, to investigate further and to provide her with the details and facts underlying these statements, including the names of the employees asserting disparate treatment based on race, but he refused to do so. *Id.* Smith claimed that the names of the employees participating in the study were confidential. Smith also refused similar requests in March 2005, made by Frank Barsotti, Smith's second-line supervisor and the Director of Employee Relations for the Americas, and by Ross Cockburn, Vice President, Human Resources, Customer Solutions Group Americas.

Previously, in January 2005, David Underwood, Hewlett Packard's "Vice President responsible for employee ratings," *id.* at 70, had produced an adverse impact report or "AIR" showing that a disparate number of Hewlett Packard's minority employees were receiving the lowest employee performance rating. The AIR was unrelated to Smith's group sensing work at the Rockrimmon site. Hewlett Packard tasked the Diversity and Inclusion department with resolution of the employee performance rating system matter presented in the AIR. In January 2005, Hewlett Packard modified its employee performance rating system which resulted in fewer employees receiving the lowest rating. *Id.* at 214.

In February 2005, Underwood presented his AIR to Smith, Fuentes-Wegner, and others by teleconference. While Smith never saw the AIR, he understood from this meeting that it showed that management had rated a disproportionate number of African-American employees at the lowest employee performance rating. Smith characterized the AIR as showing systemic racial discrimination, and became dissatisfied with the company's response to it. Therefore, Smith developed his own plan to address the AIR, which he conveyed to Fuentes-Wegner in March 2005. *Id.* at 547, 646-647, 1002. At that same time, Smith told Fuentes-Wegner that he intended to leave Hewlett Packard and sought a mutual separation agreement.

On March 30, 2005, Smith told Fuentes-Wegner that he was withdrawing his plan and intended to pursue his concerns by going to the appropriate federal agency. Complainant's Exhibit 7; T. at 451-460. Smith also told Fuentes-Wegner that some African-American employees planned to meet with representatives of the Urban League to identify an attorney, which Fuentes-Wegner interpreted as a discussion about the filing of a potential class-action lawsuit against Hewlett Packard, alleging civil rights violations under Title VII. *Id.* at 659-662, 664-665, 892; *see* Respondent's Exhibit 36.

Smith testified that on or around March 30, 2005, he told Fuentes-Wegner, with regard to the AIR, "I don't think that we'd be in compliance if the federal government knew about this systemic discrimination." T. at 989. Smith testified that he asked Fuentes-Wegner for a copy of the AIR and for any data that Hewlett Packard provides to the federal government on a regular basis. *Id.* at 466-472, 847-857, 978-989.

On April 5, 2005, Fuentes-Wegner requested that Smith send her "an e-mail detailing each and every policy violation; each and every fact you allege supports your contention of racism and disparate treatment." Respondent's Exhibit 18. Fuentes-Wegner asked Smith to "detail your attempts to address the issues, including your recommendations" and to provide her "with as much detail as possible, including names, dates, witnesses and any other relevant facts." *Id.* Fuentes-Wegner set an April 8, 2005, deadline. *Id.* Smith responded by calling Barsotti, to whom Fuentes-Wegner reported. Smith told Barsotti that Fuentes-Wegner's "badgering is unacceptable" and that he had "done my job" and had decided to address his concerns "in another way." Respondent's Exhibit 19. Barsotti responded by demanding that Smith comply with Fuentes-Wegner's

requests. Respondent's Exhibit 20. Barsotti informed Smith that he would be placed on administrative leave if he did not comply by April 8, 2005. *Id.*

On April 7, 2005, Smith replied to Barsotti that his demands were "ridiculous." Respondent's Exhibit 21. Smith asserted that "nothing is being done, nothing will be done" about the systemic racism at Hewlett Packard. *Id.* Smith claimed that he had "given detailed information about the situation" at the Rockrimmon site, had "provided enough info in my report," and had done his job. *Id.* Smith characterized the demands of Fuentes-Wegner and Barsotti as "driven purely by your 11th hour attempts to save face and to show action when you been [sic] apathetic and asleep at the wheel all along." *Id.* Smith added, "So I guess my response to your deadlines are [sic] that I have provided enough information and done my job, and your deadlines established will simply go by." *Id.*

Hewlett Packard placed Smith on administrative leave on April 8, 2005.¹ Fuentes-Wegner called Smith at home on April 22, 2005, and informed him that the company had terminated his employment. By letter that same day, Fuentes-Wegner and Barsotti informed Smith that his employment had been terminated effective April 25, 2005. Respondent's Exhibit 28. Fuentes-Wegner and Barsotti indicated that Smith had violated Hewlett Packard's misconduct policy regarding insubordination by failing to "comply with management's request to document the concerns that have been brought to your attention as an Employee Relations Consultant, the steps you have taken to resolve these issues, and the results of those attempts." *Id.*

Smith filed a complaint with OSHA on May 9, 2005, in which he sought relief under the SOX. Smith alleged that Hewlett Packard terminated his employment in retaliation for his attempts to address systemic discrimination of African-Americans in its employee performance rating system as revealed by the AIR. Specifically, Smith claimed that Hewlett Packard fired him for telling his supervisor that Hewlett Packard's response to the AIR was inadequate and he would take his concerns to the appropriate federal agency. Complaint at 1. Smith also stated in his complaint that Hewlett Packard "fraudulently advanced the notion of a being [sic] a diverse company that values its diverse numbers, affirmed a non-discrimination policy, openly marketed itself as diversity being one of its primary assets in market segments, particularly in ethnic populations." *Id.* at 2. Smith also asserted that the 2005 AIR proved false a 2003 statement made by Emily Duncan, Vice President for Diversity and Inclusion, to Hewlett Packard employees that "the company's adverse impact reports indicated that there is no

¹ By letter postmarked April 11, 2005, the Equal Employment Opportunity Commission (EEOC) confirmed the scheduling of an April 25, 2005 interview with Smith. Complainant's Exhibit 15. Smith signed an intake form on April 18, 2005, but added information to it subsequent to the April 22, 2005 termination of his employment. Complainant's Exhibit 16. Smith filed a Discrimination Charge against Hewlett Packard on April 25, 2005. Respondent's Exhibit 3. That charge is not before the Administrative Review Board.

‘appreciable difference’ between the ratings and lay off percentages of white and African American employees.” *Id.* at 3. Smith further contended that Hewlett Packard did not disclose but covered up the results of the AIR. Smith argued, “This willful nondisclosure and cover-up of this known data, in my opinion, constitutes fraud on Hewlett Packard’s behalf to its employees, shareholders, (particularly special populations segments who use diversity numbers, pay equity and upward mobility figures as primary criteria as to whether or not they will invest in a company.) [sic] the general public, and enforcing agencies such as the [Office of Federal Contract Compliance Programs].” *Id.*

After investigating Smith’s whistleblower retaliation complaint, OSHA determined that Smith had not engaged in SOX-protected activity. Therefore, OSHA dismissed the complaint. Smith appealed. The ALJ held a hearing September 12 - 15, 2005, in Denver, Colorado.² The ALJ issued his [Recommended] Decision and Order on January 19, 2006. The ALJ noted that Smith had not alleged that before his termination, he had complained of any conduct on the part of Hewlett Packard that implicated any securities law. R. D. & O. at 9. The ALJ also noted that Smith had conceded at the hearing that he had not reviewed any securities filing by Hewlett Packard between the 2002 passage of the SOX and his 2005 termination, and neither knew of any disclosure Hewlett Packard made in its securities filings nor was aware of any false statement in any of its securities filings. *Id.*; see T. 854-857. The ALJ stated, “Instead, [Smith] links an alleged Title VII violation to fraud against shareholders.[]” R. D. & O. at 9 (footnote omitted). The ALJ determined that when Smith complained to his supervisor that Hewlett Packard was engaged in systemic racial discrimination and he intended to file a discrimination claim with the federal government, he did not complain of any conduct he “perceived” as a violation of any securities law “covered by” the SOX. *Id.* and at 9-11, 12. The ALJ concluded that Smith had not proven that he engaged in activity that SOX protects, and dismissed the complaint. *Id.* at 13. Smith filed a Petition for Review with the ARB, seeking review of the ALJ’s R. D. & O.

JURISDICTION AND STANDARD OF REVIEW

The ARB’s jurisdiction to review the ALJ’s decision is set out in Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), which delegated to the ARB the Secretary’s authority to review ALJ decisions issued under the SOX. 18 U.S.C.A. § 1514A.

The ARB reviews the ALJ’s factual determinations under the substantial evidence standard. 29 C.F.R. § 1980.110(b). In reviewing the ALJ’s conclusions of law the ARB, as the Secretary’s designee, acts with “all the powers [the Secretary] would have in making the initial decision” 5 U.S.C.A. § 557(b) (West 1996). Therefore, the

² Hewlett Packard filed a Motion for Summary Decision, which the ALJ denied by Order dated September 12, 2005. The ALJ found that summary decision was inappropriate where Hewlett Packard did not show the absence of a genuine issue of material fact regarding whether Smith engaged in protected activity.

Board reviews the ALJ's conclusions of law de novo. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 7 (ARB June 29, 2006).

DISCUSSION

Legal Standard

The employee protection provisions of the SOX generally prohibit covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to listed categories of fraud or securities violations. That provision states:

(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 [mail fraud], 1343 [wire, radio, TV 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—

(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.

The SOX's employee protection provisions thus protect employees who provide information to a covered employer 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 (fraud "in connection" with "any security" or the "purchase or sale of any security"), any rule or regulation of the Securities and Exchange Commission (SEC) (*see, e.g.*, 17 C.F.R. Part 210 (2007), Form and Content of the Requirements for Financial Statements), or any provision of Federal law relating to fraud against shareholders.

Complaints filed under 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). 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 of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *See Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at 14-16 (ARB Sept. 29, 2006); *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-020, 36, slip op. at 9-10 (ARB June 2, 2006); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (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-003, slip op. at 6-10 (ARB Jan. 20, 2004).

If the complainant establishes by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action, then the respondent can still avoid liability by providing by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Platone*, slip op. at 16; *Harvey*, slip op. at 10; *Getman*, slip op. at 8. *Cf.* 29 C.F.R. § 1980.104(c). *See* § 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv). *See also Peck*, slip op. at 10.

Coverage

Smith timely filed a complaint with OSHA invoking the employee protection provisions of the SOX. It is undisputed that at all relevant times, Hewlett Packard was a publicly traded company with a class of securities registered pursuant to Section 12 of the Securities and Exchange Act of 1934, and was required to file reports pursuant to Section

15(d) of that Act. 15 U.S.C.A. § 781. It is also undisputed that Smith was a Hewlett Packard employee who suffered an unfavorable personnel action when Hewlett Packard terminated his employment on April 22, 2005, effective April 25, 2005. The determinative issue before the ARB is whether Smith engaged in activity that the SOX protects.

Smith's Alleged Protected Activity

Smith must establish that he provided information, prior to his April 22, 2005 termination, regarding conduct that he reasonably believed constituted mail, wire, radio, TV, bank, or securities fraud, or violated any SEC rule or regulation, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C.A. § 1514A; *Harvey*, slip op. at 14. Smith complained to Fuentes-Wegner that Hewlett Packard was engaged in systemic racial discrimination through its employee performance rating system and, because Hewlett Packard's response to the alleged discrimination was inadequate in his view, he would take his concerns to the appropriate federal agency. Neither Smith's allegations that Hewlett Packard was engaged in systemic racial discrimination, nor his threat to file a discrimination claim with the federal government complain of conduct even remotely related to 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), or 1344 (bank fraud). Therefore, to bring himself within the protection of the SOX, Smith must have complained of conduct under any of the three remaining enumerated categories of protected activity, namely securities fraud, 18 U.S.C.A. § 1348, a violation of any SEC rule or regulation, or a violation of any provision of Federal law relating to fraud against shareholders.

In *Platone*, an ARB decision that issued subsequent to the ALJ's R. D. & O., the complainant's OSHA complaint alleged violations that included SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2005).³ *Platone*, slip op. at 15. We stated in *Platone* that the

³ SEC Rule 10b-5 provides as follows:

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

elements of a cause of action for securities fraud, such as a violation of SEC Rule 10b-5, are rooted in common law tort actions for deceit and misrepresentation. *Id.* at 16 (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005)). The basic elements include a material misrepresentation (or omission), scienter, a connection with the purchase or sale of a security, reliance, economic loss and loss causation – a causal connection between the material misrepresentation and the loss. *Dura Pharm.*, 544 U.S. at 341-342. A fact is material if the reasonable investor would consider it significant to his trading decision. *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1998); see *Platone*, slip op. at 16. With respect to omissions of fact, “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available. *Basic*, 485 U.S. at 231-232 (citing *TSC Indus., Inc. v. Northway Inc.*, 426 U.S. 438, 449 (1976)).

In *Harvey*, an ARB decision also issued subsequent to the ALJ’s R. D. & O., the ALJ had determined that the complainant did not timely file a SOX complaint. The ARB decided that the original OSHA complaint, even if read to claim a right to recover against the complainant’s employer for fraud or securities violations under the SOX, was untimely filed. *Harvey*, slip op at 13. The ARB thus affirmed the ALJ’s determination. *Id.* The ARB, however, also reviewed timely-filed letters to determine if in any of them the complainant alleged a cause of action or violation under the SOX. The ARB determined that the complainant’s complaints to management of racial and employment discrimination, personnel actions, executive decisions and corporate expenditures with which he disagreed, were not protected conduct under the SOX because they did not directly implicate the listed categories of fraud or securities violations. *Id.* at 14-15. The ARB stated, “A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough.” *Id.* at 15. The ARB concluded in *Harvey* that because the complainant did not allege that he raised specific concerns about corporate fraud or securities violations or that those complaints were a contributing factor in his termination, he failed to state a SOX-protected complaint. *Id.* at 16. Finding no basis to relax the limitations period, the ARB found that the ALJ had not erred in dismissing the original complaint. *Id.* at 20.

Thus, to come under the protection of the SOX, the whistleblower must ordinarily complain about a material, misstatement of fact (or omission) about a corporation’s financial condition on which an investor would reasonably rely. The protected complaint must “definitively and specifically” relate to the SOX subject matter, be specific enough to permit compliance, and support a complainant’s reasonable belief. See *Harvey*, slip op. at 14-15.

person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2005).

We apply the principles enunciated by the ARB in *Platone* and *Harvey* to Smith's alleged protected activity. Smith alleges that Hewlett Packard terminated his employment in retaliation for his having complained to Fuentes-Wegner that Hewlett Packard was engaged in systemic discrimination of African-American employees and had not adequately addressed the discrimination, so that he intended to file a discrimination claim with the federal government. The ALJ determined that the conduct of which Smith complained, systemic racial discrimination, was not related to corporate fraud or securities violations and thus concluded that it did not constitute protected activity. We agree with the ALJ's conclusion. Smith's allegation of systemic racial discrimination and threat to file a discrimination claim with the federal government do not directly implicate corporate fraud or a securities violation. Smith did not allege, as he must, that Hewlett Packard engaged in securities fraud by misrepresenting (or omitting) any material fact in connection with the purchase or sale of a security, that Hewlett Packard violated a SEC rule or regulation, or that Hewlett Packard violated any Federal law relating to fraud against shareholders. *Platone*, slip op. at 17, 21, 22; *Harvey*, slip op. at 14-15, 16. Therefore, Smith did not engage in protected activity in this instance.

Smith also alleged that he had been put on administrative leave on April 8, 2005, and eventually fired on April 22, 2005, because he had contacted the EEOC in the first week of April and made an appointment for later that month.⁴ T. at 466, 517-518; see Complaint's Exhibit 15. The SOX does cover a complaint made to an outside agency, but the statute requires the complainant to complain about conduct covered under the SOX. 18 U.S.C.A. § 1514A(a), (1), (2). In this case, Smith's discrimination charge, ultimately filed with the EEOC on April 25, 2005, was based on Smith's complaints that Hewlett Packard was engaged in systemic discrimination of African-American employees, had discriminated against Smith based on his race, and had retaliated against him in violation of Title VII of the Civil Rights Act of 1964. Complainant's Exhibit 16; Respondent's Exhibit 3. None of these complaints directly implicate securities fraud, a violation of a SEC rule or regulation, or a violation of any Federal law relating to fraud against shareholders. As we held in *Harvey*, providing information about a corporation's alleged racially discriminatory practices, or even possible violations of other federal laws, is not protected conduct under the SOX. *Harvey*, slip op at 14. Therefore, we conclude that Smith did not engage in SOX-protected activity when he contacted the EEOC prior

⁴ Smith alleged to the ARB that Hewlett Packard "abruptly terminated" his employment when he "announced" that he had contacted a federal agency to file a discrimination charge. Petition for Review at 5; Initial Brief at 6. Smith testified, however, that while he was on administrative leave, he complained to Debra Herchek, a Human Resources manager, that he had been put on administrative leave for what he said that he "was going to do, which was to go externally to a federal agency." T. at 513-515, 516, 517. The record contains no evidence showing that Smith told either Fuentes-Wegner or Barsotti, who together made the decision to terminate his employment, that he had actually contacted the EEOC.

to his termination for the purpose of filing a racial discrimination charge against his employer.⁵

Smith argued to the ARB that Hewlett Packard “purposefully hid[]” the results of the AIR and did not “report these figures as they are required to do so as a federal contractor as part of their affirmative action audit to the Office of Federal Contract Compliance Programs” (OFCCP). Petition for Review at 5. Smith testified that he told Fuentes-Wegner in late March 2005 that he did not think Hewlett Packard would be in compliance with federal contract compliance guidelines “if the federal government knew of this systemic discrimination.” T. at 989. Smith testified that he was concerned that Hewlett Packard might have misrepresented its utilization of African-American employees in “utilization reports” filed with federal contract compliance authorities, such as the OFCCP. T. at 466-472, 847-855, 865-866. Smith admitted on cross-examination, however, that his concern was mere “conjecture,” that he did not actually state to Fuentes-Wegner that Hewlett Packard had made any misrepresentation, and that he had no information that Hewlett Packard had filed any inaccurate report or statement with the federal government about any federal contract, corporate securities, or financial condition. T. at 853-856, 985, 989. Thus, Smith merely engaged in speculation. Smith’s speculation does not constitute a complaint relating to any instance of misrepresentation of Hewlett Packard’s financial condition or fraud against its shareholders. *See Harvey*, slip op. at 18. Again, as we stated in *Harvey*, providing information about possible violations of other federal laws is not SOX-protected conduct. *Id.* at 14. Moreover, Smith did not claim in his OSHA complaint, nor argue before the ALJ or the ARB, that he was fired in retaliation for engaging in this speculation with Fuentes-Wegner. Therefore, we conclude that Smith did not complain of retaliation for engaging in any SOX-protected activity in this instance.⁶

Smith alleged, for the first time in his May 9, 2005 OSHA complaint, that Hewlett Packard willfully failed to disclose its systemic discrimination of African-American employees as revealed in the AIR, and instead covered up the results of the AIR. Smith argued, “This willful nondisclosure and cover-up of this known data, in my opinion,

⁵ Smith’s Charge of Discrimination filed with the EEOC on April 25, 2005, post-dates his April 22, 2005, termination and therefore could not have motivated it.

⁶ Similarly, while Smith informed Fuentes-Wegner that some employees planned to meet with the Urban League to discuss hiring an attorney to sue Hewlett Packard for racial discrimination, Smith did not allege that he was fired in retaliation for this disclosure. In fact, Smith asserted to the ARB that when he learned of the meeting with the Urban League, “he dutifully reported it to his supervisor.” Rebuttal Brief at 5-6. Further, since no legal proceeding was then pending, Smith’s disclosure did not trigger the corporate duty to disclose “any material pending legal proceedings, other than ordinary routine litigation incidental to the business” under 29 C.F.R. § 229.103 (2008). While Smith, in his pleadings before the Board, discusses events and lawsuits filed against Hewlett Packard subsequent to his termination, these events and lawsuits are not germane to the issue before us.

constitutes fraud on Hewlett Packard's behalf to its employees, shareholders, (particularly special populations segments who use diversity numbers, pay equity and upward mobility figures as primary criteria as to whether or not they will invest in a company.) [sic] the general public, and enforcing agencies such as the [OFCCP]." Complaint at 3. Smith reiterated to the ARB his argument that Hewlett Packard concealed the results of the AIR which, he asserted, constitutes fraudulent conduct. Smith does not specify how alleged systemic racial discrimination involves securities fraud, violates any SEC rule or regulation, or violates any Federal law relating to fraud against shareholders. Smith's argument does not even approximate any of the basic elements of a SOX claim - a material, misstatement of fact (or omission) about a corporation's financial condition on which an investor would reasonably rely. Moreover, a complainant who reasonably believes that his employer is engaged in securities fraud would not file that complaint with the EEOC.

In any event, the relevant inquiry is not what Smith alleged in his OSHA complaint, but what he actually communicated to his employer prior to his April 22, 2005 termination. *Platone*, slip op. at 17. Smith did not allege to the ALJ or to the ARB that he complained prior to his termination that Hewlett Packard was engaged in securities fraud or had violated a SEC rule or regulation or any Federal law relating to fraud against shareholders, by not disclosing the results of the AIR.

Based on the foregoing discussion, we hold that substantial evidence in the record supports the ALJ's factual findings on the issue of protected activity. Therefore, we conclude that Smith's activities prior to his April 22, 2005 termination are not protected by the whistleblower protection provisions of the SOX. We hold that Smith failed to prove by a preponderance of the evidence that he engaged in protected activity, an essential element of his whistleblower retaliation case.⁷

⁷ The ALJ also found that Smith's refusal to comply with his supervisor's, and other managers', requests for follow-up information concerning his February 2005, group sensing report, was unreasonable. R. D. & O. at 11-12. This factual finding by the ALJ would only become relevant if Smith proved that protected activity was a factor in his termination. Because we do not find that Smith met his burden to establish discrimination, we do not reach Hewlett Packard's burden of demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected activity. See 18 U.S.C.A. § 1514(b)(2)(a) *adopting*, 49 U.S.C.A. § 42121(b)(2)(B)(iiii). See also, *Getman*, slip op. at 8-9 (SOX complainant must allege protected activity that was a contributing factor in the alleged discriminatory personnel action). Therefore, we need not address Smith's arguments pertaining to this finding by the ALJ. See Petition for Review at 11-13, 14; Initial Brief at 10-11, 15; Rebuttal Brief at 5.

CONCLUSION

We agree with the ALJ's conclusion that Smith did not prove that he engaged in SOX-protected activity. Therefore, we agree with the ALJ's decision to dismiss the complaint. We thus **AFFIRM** the ALJ's R. D. & O. and **DISMISS** Smith's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge