In the Matter of:

ALVIN REED, **ARB CASE NO. 06-126**

COMPLAINANT, **ALJ CASE NO. 2006-SOX-071**

v. **DATE: April 30, 2008**

MCI, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Alvin Reed, *pro se,* Sanford, North Carolina

For the Respondent:
David B. Hawley, Esq., *Ogletree, Deakins, Nash, Smoak & Stewart,* Raleigh, North Carolina

FINAL DECISION AND ORDER

Alvin Reed filed a complaint alleging that his former employer, MCI, Inc., fired him because he "refused to commit felonies." This, he contended, violated the employee protection section of the Sarbanes-Oxley Act of 2002 (SOX).[1] After the case was assigned to a United States Department of Labor Administrative Law Judge (ALJ), MCI filed a Motion for Summary Decision.[2] The company argued that Reed did not timely file his complaint and that he did not engage in activity that the SOX protects. Reed filed

[1] 18 U.S.C.A. § 1514A (West Supp. 2005).

[2] *See* 29 C.F.R. § 18.40 (2007).

a response to the motion. The ALJ found that material facts existed as to whether Reed timely filed the complaint. But he also found that no issue of fact existed as to whether Reed engaged in activity that the SOX protects, a material fact in a SOX case. Therefore, he recommended that MCI's motion be granted. Reed appealed. We affirm the ALJ's recommended decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the SOX.[3] We review a recommended decision granting summary decision de novo. That is, the standard that the ALJ applies also governs our review.[4] The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[5] Accordingly, summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.[6] A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[7]

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[8] "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'"[9] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[10]

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[3] Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a) (2007).

[4] 29 C.F.R. § 18.40.

[5] Fed. R. Civ. P. 56.

[6] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[7] *Bobreski v. United States EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

[8] *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

[9] *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

[10] *Bobreski*, 284 F. Supp. 2d at 73.

Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing."[11]

DISCUSSION

Timeliness

The ALJ correctly determined that MCI was not entitled to summary decision on the issue of whether Reed timely filed his complaint. The SOX requires that complaints be filed within 90 days of the day the alleged violation occurred.[12] The limitations period for filing whistleblower complaints commences on the date that the employee receives a final, definitive, and unequivocal notice of the adverse employment decision. "Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities.[13]

The record demonstrates that MCI informed Reed by letter of August 1, 2005, that "an employee who has exhausted all available leave time [as Reed had] *generally will be terminated* after the employee has not been actively at work for 26 cumulative weeks [as was the case with Reed].[14] MCI argues that this letter made Reed aware that it could have terminated him in August 2005 and thus triggered the limitations period. But like the ALJ, we reject this argument because it was not until October 28, 2005, that MCI, by letter, unequivocally informed Reed that it was terminating him.[15] MCI does not dispute that Reed filed his SOX complaint on January 16, 2006. Therefore, he filed within 90 days of October 28, 2005, making his complaint timely.

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[11] 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co*., No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 17, 1995).

[12] 18 U.S.C.A. § 1514A(b)(2)(D).

[13] *See Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 2-3 (ARB Apr. 3, 2007 (corrected)).

[14] Motion for Summary Decision, Attachment 8 (emphasis added).

[15] Motion for Summary Decision, Attachment 9 ("The Company has until now accommodated you with additional leave, but unfortunately, we cannot continue to carry you in a leave of absence status. For this reason, your employment will terminate effective 10/21/05.").

Protected Activity

To prevail on his SOX complaint, Reed must prove by a preponderance of the evidence that: (1) he engaged in activity that the SOX protects; (2) MCI 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.[16] Thus, protected activity is an essential, i.e., material element of Reed's case.

An employee engages in SOX-protected activity when he or she provides information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of the Federal statutes that address mail fraud, wire-radio-TV fraud, bank fraud, or securities fraud,[17] or any rule or regulation of the Securities and Exchange Commission (*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. 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 a covered company relating to any such alleged violation.[18]

As noted, Reed's complaint alleged that MCI fired him "because he refused to commit felonies." In his response to the summary decision motion, Reed clarified this allegation. He states that he was employed as a software engineer, and MCI required him to use stolen ("pirated") software. Reed's response did not allege any violation of the fraud statutes or rule or regulation of the SEC. Rather, Reed argued that MCI's profit reports to its shareholders were based partly on its use of stolen software, and thus it defrauded shareholders. Furthermore, according to Reed, using stolen software could subject MCI to potentially huge fines and loss of good will, both of which might cause significant damage to the value of the company and thereby affect shareholders.[19]

In his brief to us, Reed also argues that MCI defrauded shareholders by claiming to be ethical, but, as its retaliation against him proves, the company is not ethical. Furthermore, its "continual denial of the use of rampant pirated software" shows "fraudulent conduct against the well being of the company and thus defrauds the stock

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[16] *See Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008 (ARB July 29, 2005).

[17] 18 U.S.C.A. §§ 1341, 1343, 1344, and 1348.

[18] *See* 18 U.S.C.A. § 1514A(a).

[19] Complainant's Response to Motion for Summary Decision at 6.

holders"[20] And Reed now argues in his brief that MCI violated the mail fraud and wire-radio-TV statutes because, by mailing and e-mailing its code of ethics to him (and others), MCI convinced him that he could object to the stolen software without fear of retaliation, yet the company did retaliate for these objections.[21] In addition, Reed contends that the company defrauded shareholders who bought stock "under the impression that [MCI] would not retaliate against [Reed] for objecting to pirated software."[22] All this, Reed concludes, constitutes stockholder fraud because it subjected the stockholders to "significant potential losses."[23]

But even if MCI did force Reed to use stolen software, an allegation that Reed has not supported with any evidence and that the company strongly denies, Reed only speculates that MCI's profits were at least partly based on using such software and that fines and loss of good will would result, thus affecting shareholders. To defeat summary decision, Reed must produce evidence that he engaged in SOX-protected activity because he reasonably believed that using the stolen software defrauded shareholders. Speculation or a mere possibility that shareholders would be defrauded because he used the software, however, does not satisfy the reasonable belief requirement.[24]

Reed presents arguments in his brief that he did not make before the ALJ. Therefore, we will not consider them.[25] They would fail anyway. Even if Reed were to prove that MCI retaliated against him, and even if MCI continues to deny that it uses stolen software, again, Reed only speculates that these facts would defraud stockholders. Moreover, without additional evidence, we would conclude that MCI's use of the mail and Internet to disseminate its ethics policy does not constitute mail or wire-radio-TV fraud.

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[20] Complainant's Brief at 17, 20.

[21] *Id*. at 24-25.

[22] *Id.* at 26.

[23] *Id.* at 30.

[24] *See Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 115; ALJ Nos. 2004-SOX-020, 036, slip op. at 14 (ARB June 2, 2006) ("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. Accordingly, Harvey's August 31, 2002 letter does not express his reasonable belief that Home Depot was defrauding shareholders or violating security regulations.").

[25] *See Rollins*, slip op. at 4 n.11.

CONCLUSION

MCI is not entitled to summary decision on the grounds that Reed filed an untimely complaint because the record demonstrates that Reed filed the complaint within 90 days of the day MCI finally, definitively, and unequivocally notified Reed that he was terminated. But like the ALJ, we grant MCI's motion for summary decision because Reed has not sufficiently proven that he reasonably believed that MCI violated the Federal fraud statutes, an SEC rule or regulation, or any Federal law pertaining to shareholder fraud. Accordingly, we **DENY** Reed's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge