



In the Matter of:

BEVERLY E. ROBINSON,

ARB CASE NO. 07-070

COMPLAINANT,

ALJ CASE NO. 2005-SOX-044

v.

DATE: January 10, 2010

**MORGAN STANLEY,
DISCOVER FINANCIAL SERVICES,
KELLY MCNAMARA-CORLEY,
AND DAVID SUTTER,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Beverly E. Robinson, *pro se*, Grayslake, Illinois

For the Respondents:

**Andrew J. Schaffran, Esq., Sari M. Alamuddin, Esq., Ross H. Friedman,
Esq., *Morgan, Lewis & Bockius LLP*, Chicago, Illinois**

FINAL DECISION AND ORDER

Beverly E. Robinson complains that Morgan Stanley, Discover Financial Services (Discover), Kelly McNamara-Corley, and David Sutter (Respondents) violated the whistleblower protection provision of the Sarbanes-Oxley Act of 2002 (the SOX)¹ by

¹ 18 U.S.C.A. § 1514A (West Supp. 2008). Implementing regulations appear at 29 C.F.R. Part 1980 (2009).

discharging her from employment after she engaged in protected activity. On March 26, 2007, a United States Department of Labor (DOL) Administrative Law Judge (ALJ) issued an Initial Decision and Order (I. D. & O.) concluding that Robinson failed to prove that her protected activity was a contributing factor in the decision to discharge her. We affirm.

BACKGROUND

The ALJ issued a 127-page decision that contains a thorough analysis of the testimony and evidence presented at the hearing. The ALJ's findings of fact are set forth at pages 95-113 of the I. D. & O and are supported by substantial evidence. We summarize.

Morgan Stanley is a publicly traded company with several wholly owned subsidiaries, including Discover.² In September 2000, Robinson began work as a Senior Auditor in the Internal Audit Division (IAD) of Discover in Riverwoods, Illinois. IAD conducted audits of Morgan Stanley's business units every one to five years. Every person in IAD reported to a manager or director who conducted year-end evaluations and set professional development goals.³ David Sutter served as the Vice President of IAD.

Robinson's direct supervisors between September 2000 and November 2001 were Dolores Wheeler and Marie France-Weiler. During that period, Michael Takada also supervised Robinson during a general ledger audit. Weiler and Takada acknowledged Robinson's analytical strengths as an auditor, but they rated her performance as "needs improvement" in the areas of communication, professionalism, and leadership abilities.⁴ They also criticized her teamwork skills and inability to accept feedback. Robinson disagreed with these evaluations of her performance.⁵

During a collections audit in 2001, Robinson concluded that, due to a systems error, Discover was not charging off customer bankruptcies within 60 days of the date of receipt of notice from the bankruptcy court.⁶ Instead of relying on the date of notice, the company was using the date the bankruptcy was entered into system. According to Robinson, this caused a delay in charging off bankruptcies. She believed the delay would cause certain accounts to be improperly designated as receivables, thereby inflating both

² Respondent's Post-Hearing Brief at 7.

³ Hearing Transcript (Tr.) at 1751.

⁴ Respondent's Exhibit (RX) 4, 6.

⁵ Tr. at 495-97.

⁶ Complainant's Exhibit (CX) 1 at 5; Tr. at 80-81; I. D. & O. at 96.

Discover's and Morgan Stanley's financial statements by making "it look like they had more assets than they did."⁷ After discussing her concerns with one of Discover's attorneys, she concluded that federal banking regulations required the bankruptcies to be written off in the proper period. She informed Takada, Weiler, and Sutter about her concerns, and she documented those concerns in Audit Observation Sheets she submitted in June 2001.⁸

Jerry Graczkowski became Robinson's supervisor in early 2002. In February 2002, he gave her a performance rating of "needs improvement" because of her "adversarial stance, toward both her colleagues and her clients," and because she "failed on numerous occasions to deliver quality work products on time."⁹ As a result, Graczkowski placed Robinson on a performance action plan on February 20, 2002. The purpose of the plan was to assist Robinson in meeting the goals for improvement described in her performance rating. The plan also provided that, if she failed to meet acceptable levels of performance, she could be discharged.¹⁰ The plan remained in effect until May 31, 2002.

Upon completion of the plan, Graczkowski informed the Discover Human Resources Department (HR) that, with one exception not indicative of her performance, Robinson had successfully completed the plan. On December 12, 2002, Graczkowski gave Robinson ratings of meets, exceeds, and consistently exceeds in her annual appraisal. He acknowledged the turn around in her performance, but he also suggested that she "take a more balanced, reserved approach" when dealing with auditees.¹¹

Early in 2003, Robinson met with Sutter, Graczkowski, and a representative from HR to discuss what they perceived as a drop in Robinson's performance since her 2002 year-end appraisal. They noted deficiencies in her communication style. According to Sutter, Robinson exhibited aggressive and disrespectful behavior toward other employees.¹² Robinson testified that she could not recall receiving such criticism during the meeting.¹³

⁷ Tr. at 80-81.

⁸ Tr. at 84, 88; CX 1, Attachment E, F.

⁹ RX 9.

¹⁰ RX 10.

¹¹ RX 12 at 3.

¹² Tr. at 1651-54.

¹³ Tr. at 655-56.

In March 2003, Sutter criticized Robinson's performance during an audit. Robinson questioned Sutter's independence, and she told Sutter that she planned to take her concerns to Tom Burr, Morgan Stanley's Audit Director and Sutter's supervisor.¹⁴ She also criticized Sutter for promoting Vesela Zlateva and another employee to management. That same month, Graczowski left IAD. As a result, Sutter asked Zlateva to help him supervise Robinson.

In April 2003, Sutter assumed direct supervision of Robinson.¹⁵ In the spring of 2003, Anthony DeLuca, the Global Head of Internal Audit for Morgan Stanley, asked Sutter to identify his top and bottom performers. Sutter listed Robinson as one of his bottom performers.¹⁶

DeLuca conducted a breakfast meeting in August 2003 that included Robinson and other employees. During this meeting, Robinson asked DeLuca if he "understood the level of incompetence that existed within [the] management ranks."¹⁷ An attendee at the meeting complained to Sutter that Robinson's behavior at the meeting had been unprofessional.¹⁸ Shortly thereafter, Sutter considered placing Robinson on another performance action plan. He presented a chronology of Robinson's performance difficulties to HR in September 2003 that described "examples of her aggressive and confrontational style, unprofessional communications, poor audit judgment, and uncooperative attitude with Ms. Zlateva."¹⁹

In October 2003, DeLuca decided to deny Robinson a raise in her compensation for the following year, and Sutter placed her on a second performance action plan. The purpose of this plan was to assist her "in correcting and improving several areas of [her] performance and conduct that [did] not meet the required standards for [her] job."²⁰ The plan also indicated that Robinson could be discharged if she failed to "make immediate and sustained changes in [her] performance."²¹

¹⁴ Tr. at 661.

¹⁵ RX 13.

¹⁶ Tr. at 746-47.

¹⁷ Tr. at 748.

¹⁸ Tr. at 1783.

¹⁹ I. D. & O. at 120.

²⁰ RX 14.

²¹ *Id.*

Sutter completed Robinson's 2003 appraisal in December of that year. He indicated that she met expectations in several categories, and he noted that she exceeded expectations in the category of technology knowledge. Sutter rated Robinson as needing improvement in leadership, organization, judgment, and commitment. And he gave her an unsatisfactory rating in teamwork because of her adversarial approach toward colleagues and management.²² The appraisal cited Robinson's failure to finish assignments in a timely manner and indicated that she "requires more supervision than should be needed at her level."²³

Sutter presented Robinson's annual appraisal to her on December 11, 2003. Sutter also gave Robinson a memorandum, dated January 30, 2004, indicating that he would extend the expiration date of the second performance action plan from December 23, 2003, to February 23, 2004, "to continue to evaluate [her] progress."²⁴ Sutter also informed HR that he wished to conduct a "360 Review" of Robinson's performance. The 360 Review was a process through which certain individuals within the company submitted written feedback about an employee's performance. Beginning in January 2004, sixteen individuals provided such comments, including Robinson's past and present supervisors, co-workers, and auditees.²⁵

On February 5, 2004, Robinson submitted a 23-page memorandum to Martin Slusarz, Discover's Chief Financial Officer. The memorandum was addressed to Slusarz and David Nelms, Discover's President. The memorandum described thirteen matters which, according to Robinson, constituted "financial, operational, regulatory, and legal risks that could result in financial loss to the company and seriously damage the reputation of Discover Financial Services and Morgan Stanley."²⁶

Robinson's memorandum discussed employees' personal use of company cell phones, failures to issue audit reports and apprise management of audit findings, and computer security. She questioned the professionalism and qualifications of several IAD employees, including Sutter. Robinson complained about computer technology expenditures and the company's use of contractors. And she indicated that Sutter retaliated against her because she refused to compromise her auditor responsibilities.²⁷

²² RX 17.

²³ *Id.* at 5.

²⁴ RX 15.

²⁵ RX 18, 21.

²⁶ CX 1 at 1 (cover sheet).

²⁷ *Id.* at 3-23.

The memorandum also included a description of the bankruptcy charge-off issue Robinson had discovered in 2001:

As required by banking regulations and reported in the DFS FDICIA matrix, bankruptcies are to be charged off within 60 days (month end) from the date of receipt of notice from the bankruptcy court. During a 2001 Collections audit, I performed audit work in the Bankruptcy area and determined that, due to the lack of a “receipt” date in the system, bankruptcies were not being written off as required ... I consulted with Sara Horwitz in the Legal Department, who, after reviewing the relevant laws and regulations, concluded there was no room for interpretation and that the practice needed to be changed.^[28]

The next day, Slusarz called Robinson to his office to discuss the memorandum with him and Kelly McNamara-Corley, General Counsel for Discover. After reading the memorandum, Slusarz concluded that the bankruptcy charge-off discrepancies could have a potential impact of up to \$8 million.²⁹ In response to the memorandum, McNamara-Corley assembled a team of attorneys to investigate Robinson’s claims. Morgan Stanley also hired KPMG, an outside audit and advisory firm, to investigate the allegations.³⁰ HR temporarily suspended Robinson’s 360 Review, and Sutter stopped directly supervising her. Sutter did not complete a close-out meeting regarding Robinson’s performance action plan.³¹

Sometime in early March 2004, Robinson noticed that Zlateva began wearing perfume to which Robinson was allergic. She characterized Zlateva’s use of the perfume as a form of retaliation.³² Robinson had informed Morgan Stanley of her sensitivity to perfume on August 22, 2003.³³

Laura Birk, an HR representative, informed Robinson of the results of the 360 Review on March 15, 2004. In a memorandum addressed to Robinson, Birk summarized the input provided by the employees who participated in the 360 Review, which included

²⁸ *Id.* at 5.

²⁹ Tr. at 2008.

³⁰ Tr. at 1024, 1027, 2256-58.

³¹ Tr. at 232.

³² Tr. at 855-56, 1236.

³³ CX 7A.

the same complaints about Robinson's communication style, failure to meet deadlines, and inability to accept feedback. The memorandum concluded by stating that "[Zlateva] and [Birk] will set up a meeting to assist you in incorporating the feedback into action items for your development plan."³⁴

On May 7, the investigation team informed Robinson of the results of the investigation into the allegations presented in her February 5 memorandum. The investigation revealed that some of her allegations had merit while others did not. The team also informed Robinson that the investigation revealed that she bore partial responsibility for some of the problems she had identified.³⁵ The investigators found no evidence of intentional misconduct or fraud. DeLuca concluded the only action warranted pursuant to the investigation was a review of IAD policies to ensure "that they were in keeping with the capabilities of the organization."³⁶

In late May 2004, Zlateva concluded that Robinson had shown a lack of improvement, and on June 1, she placed Robinson on a third performance action plan.³⁷ The plan indicated that "failure to make the immediate and sustained changes in your performance and conduct, or your failure to maintain acceptable levels of performance in all other areas of your job, may result in immediate additional disciplinary action up to and including termination."³⁸

To assist Robinson in meeting her goals, Discover hired Tom Rosenak, an executive coach, to work with Robinson beginning in June 2004. But according to Zlateva, Robinson's performance between June and July was still deficient because she missed deadlines for completing tasks and was still reluctant to listen to feedback. According to Robinson, Zlateva's supervision of her was not an attempt to improve her performance but was instead an effort to get her fired.³⁹

In late July, Zlateva informed Kerry Piercy, Vice President of HR, that she had not seen any improvement in Robinson's performance during the action plan. Piercy, DeLuca, and McNamara-Corley conducted a conference call based upon Zlateva's observations and concluded that Robinson should be given a Job in Jeopardy letter (JIJ).⁴⁰

³⁴ RX 21.

³⁵ Tr. at 222-25.

³⁶ Tr. at 789.

³⁷ Tr. at 1434-36; RX 31.

³⁸ RX 31 at 4.

³⁹ Tr. at 315-16.

⁴⁰ Tr. at 762-63, 1447-49; I. D. & O. at 110-11.

The purpose of the letter was to inform Robinson that, having failed to comply with the action plan, she needed to take immediate steps to meet performance and behavioral requirements.⁴¹ Zlateva gave Robinson the JIJ letter on August 6, 2004. Robinson disagreed with the performance assessment described in the letter. She also contended that the company had made it impossible for her to meet deadlines by giving her additional work and removing files from her desk during the investigation initiated by her February 5 memorandum.⁴²

On August 21, 2004, Zlateva decided to discharge Robinson because she had not shown any improvement following the JIJ letter.⁴³ DeLuca concurred with Zlateva's decision, and McNamara-Corley advised DeLuca of the legal issues associated with the discharge. Sutter did not participate in the decision to issue the JIJ letter or to terminate Robinson's employment.

Zlateva and Piercy met with Robinson on August 23, 2004. Zlateva read from an Interoffice Memorandum she had drafted describing Robinson's performance at the mid-point of her JIJ period. Zlateva indicated that Robinson had failed to improve her performance with respect to meeting deadlines, communicating in a professional manner, accepting feedback, and demonstrating initiative and active involvement in her assignments. Noting that she had not taken the steps described in the JIJ letter, Zlateva terminated Robinson's employment.⁴⁴

Robinson filed a complaint with the Labor Department's Occupational Safety and Health Administration (OSHA) on November 19, 2004. She alleged that the Respondents violated the SOX by terminating her employment. OSHA investigated her complaint and found that the Respondents did not violate the SOX since Robinson "was terminated because she consistently and repeatedly failed in her work performance."⁴⁵

Robinson filed timely objections to OSHA's findings and requested a hearing before an ALJ. The ALJ held a formal hearing on ten days between August 9 and September 15, 2005, in Chicago, Illinois. All parties appeared and were represented by counsel.

⁴¹ CX 116.

⁴² Tr. at 1081.

⁴³ Tr. at 1446-48.

⁴⁴ RX 45.

⁴⁵ OSHA Determination at 2.

On March 26, 2007, the ALJ issued an I. D. & O. dismissing Robinson's complaint. The ALJ held that Robinson had engaged in SOX-protected activity prior to her discharge, but the activity did not contribute to the termination of her employment.⁴⁶

Robinson filed a Petition for Review with the Administrative Review Board (ARB or Board) on April 16, 2007, seeking reversal of the ALJ's ruling on her complaint. We issued a Notice of Review and Briefing Schedule, and the parties filed briefs.⁴⁷

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the ARB.⁴⁸ Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.⁴⁹ 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."⁵⁰ We must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice had the matter been before us de novo."⁵¹

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee acts with "all the powers [the Secretary] would have in making the initial decision"⁵² Therefore, the Board reviews an ALJ's conclusions of law de novo.⁵³

⁴⁶ I. D. & O. at 126.

⁴⁷ Although Robinson was represented by counsel at the hearing, she appears before us pro se.

⁴⁸ See Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002). See also 29 C.F.R. § 1980.110.

⁴⁹ See 29 C.F.R. § 1980.110(b).

⁵⁰ *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). See also *Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

⁵¹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). See also *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051 (ARB June 29, 2006).

⁵² 5 U.S.C.A. § 557(b) (West 1996).

⁵³ See *Getman*, slip op. at 7.

DISCUSSION

1. The Legal Standard

Section 806, the employee protection provision of the SOX, generally prohibits 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.^[54]

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 (2009), Form and Content of the Requirements for Financial Statements), or any provision of Federal law relating to fraud against shareholders.

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).⁵⁵ Accordingly, to prevail on a SOX claim, Robinson would have to prove by a preponderance of the evidence that: (1) she engaged in activity or conduct that the SOX protects; (2) the Respondents knew of the protected activity; (3) the Respondents took unfavorable personnel action against her; and (4) the protected activity was a contributing factor in the adverse personnel action.⁵⁶ If Robinson establishes by a preponderance of the evidence that her protected activity was a contributing factor in the adverse action, the Respondents could still avoid liability by proving by clear and convincing evidence that they would have taken the same unfavorable personnel action in the absence of the protected activity.⁵⁷

2. Protected activity

To prevail on her complaint, Robinson must establish that she provided information, prior to her discharge, regarding conduct that she reasonably believed constituted mail fraud, wire fraud, radio fraud, TV fraud, bank fraud, securities fraud, a violation of an SEC rule or regulation, or a violation of any provision of Federal law relating to fraud against shareholders. The ALJ concluded that Robinson's only SOX-protected activity was the portion of her February 5, 2004 memorandum that discussed the bankruptcy charge-off issue. We agree that the February memorandum constituted

⁵⁴ 18 U.S.C.A. § 1514A.

⁵⁵ 49 U.S.C.A. § 42121 (West Supp. 2005). 18 U.S.C.A. § 1514A(b)(2)(C).

⁵⁶ *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*, slip op. at 7.

⁵⁷ *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).

protected activity, but we also conclude that Robinson engaged in SOX-protected activity when she complained about that same issue in 2001.

In the February 2004 memorandum, Robinson complained about employee cell phone usage, the untimely reporting of audit results, computer security, the qualifications of IAD employees, the use of contractors, technology expenditures, and the bankruptcy charge-off issue she had complained about in 2001.⁵⁸ None of these complaints are even remotely related to mail, wire, radio, or TV fraud. Therefore, to bring herself within the protection of the SOX, Robinson must have complained of conduct under any of the four remaining enumerated categories of protected activity, namely bank fraud, securities fraud, a violation of any SEC rule or regulation, or a violation of any provision of Federal law relating to fraud against shareholders.

With the exception of her discussion of the bankruptcy charge-off issue, none of the information Robinson provided in her February 2004 memorandum is entitled to protection pursuant to the SOX. Complaints to management about executive decisions and corporate expenditures with which a complainant disagrees are not protected activity under the SOX unless they directly implicate the categories of fraud listed in the statute or securities violations.⁵⁹ “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.”⁶⁰

In contrast, the portion of Robinson’s February 2004 memorandum describing the bankruptcy charge-off problem is protected by the SOX. To come under the SOX’s protection, a 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.⁶¹ 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 that there is a violation.⁶² Thus, for example, an employee’s disclosure that the company is materially misstating its financial condition to investors is entitled to protection.⁶³

⁵⁸ CX 1 at 3-23.

⁵⁹ *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 2005-SOX-088, -092, slip op. at 9 (ARB Apr. 29, 2008), citing *Harvey*, slip op. at 14-15.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Platone*, slip op. at 17.

In the memorandum, Robinson described her determination that Discover was taking longer than 60 days to charge-off customer bankruptcies. Slusarz opined that this oversight had a potential impact of \$8 million, and he was sufficiently concerned about Robinson's determination that he initiated an investigation. Because Robinson had a reasonable belief that Discover was violating federal banking regulations, and that those violations had the potential to misstate the financial condition of Morgan Stanley and Discover, her complaint about the matter is protected by the SOX.⁶⁴

We disagree with the ALJ's conclusion that Robinson did not engage in SOX-protected activity when she complained about the bankruptcy charge-off issue prior to her February 2004 memorandum. The ALJ found that Robinson lodged her complaint "during the discharge of her auditor duties" and concluded that, to engage in SOX-protected activity, an employee's "report or complaint must involve actions outside the complainant's assigned duties."⁶⁵ In support of this statement, the ALJ cited the Fourth Circuit's ruling in *Sasse v. U.S. Dep't of Labor*.⁶⁶ In that case, which arose under three environmental whistleblower laws,⁶⁷ the court noted that Sasse, an Assistant United States Attorney, was not entitled to whistleblower protection because he had not risked his job as a prosecutor by participating in the investigation and prosecution of environmental crimes.⁶⁸

The ALJ's conclusion is incorrect because the SOX's employee protection provision states that an employee cannot be subjected to discrimination because he "provide[d] information . . . to . . . 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)."⁶⁹ It does not indicate that an employee's report or

⁶⁴ See, e.g., *Halloum v. Intel Corp.*, ARB No. 04-068, 2003-SOX-007, slip op. at 6 (ARB Jan. 31, 2006) (The Complainant's belief that employer engaged in shareholder fraud by instructing him to delay payment on invoices to increase cash on the Respondent's balance sheet was reasonable, and he engaged in SOX-protected activity even though he was mistaken about his allegations.).

⁶⁵ *Id.* at 116.

⁶⁶ 409 F.3d 773 (6th Cir. 2005).

⁶⁷ The case arose under the Federal Water Pollution Prevention Control Act, 33 U.S.C.A. § 1367 (West 2001); the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995); and the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995). See *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-007 (ARB Jan. 30, 2004).

⁶⁸ 409 F.3d at 780.

⁶⁹ 18 U.S.C.A. § 1514A(a)(1).

complaint about a potential violation must involve actions outside the complainant's assigned duties. We therefore conclude that Robinson's 2001 complaint about the bankruptcy charge-off problem constituted SOX-protected activity.

On appeal, Robinson argues that the ALJ erred in concluding that only a portion of her February 2004 memorandum constituted SOX-protected activity. She states that, prior to her discharge, she raised "questions to Mr. DeLuca pertaining to professional audit standards, procedures, and audit experience," and "concerns related to the continued access of information and other assets by terminated employees which could result in identity theft and the loss of other assets."⁷⁰ She also contends that she complained about "lack of a disaster recovery plan for the servers housing the cardmember information."⁷¹ And she alleges that she notified Sutter that she intended to "report concerns of management fraud to Mr. DeLuca."⁷² But these statements do not describe instances of SOX-protected activity.

As we note above, Robinson's complaints to management about decisions with which she disagreed are not protected under the SOX unless they directly implicate the categories of fraud or securities violations listed in the statute. Robinson's brief does not cite to any record evidence or contain any description of SOX-protected activity other than the bankruptcy charge-off issue. She does not indicate how questions about audit standards, information access, and a disaster recovery plan implicate the categories of fraud listed in the SOX or securities laws. And she defines "management fraud" as violations involving the use of cell phones and calling cards.⁷³ Those acts, as described by Robinson, did not constitute conduct that an investor would rely upon regarding Morgan Stanley's or Discover's financial condition.

We therefore conclude that substantial evidence supports the ALJ's conclusion that Robinson engaged in SOX-protected activity by informing Discover on February 5, 2004, about the company's potential bankruptcy charge-off violations.

3. Causation

Employees alleging employer retaliation in violation of the SOX must file their complaints with OSHA within 90 days after the alleged unfavorable personnel action has

⁷⁰ Pro Se Complainant's Opening Brief in Support of Complainant's Petition for Review at 15.

⁷¹ *Id.*

⁷² *Id.*

⁷³ CX 1 at 7-8.

occurred.⁷⁴ Robinson filed her complaint on November 19, 2004. The only allegedly retaliatory act she alleges occurred within the 90-day filing period is her discharge.⁷⁵ As indicated above, an employer may not discharge an employee for engaging in activity protected by the SOX.

Although Robinson proved that she engaged in protected activity and was discharged, she failed to prove that her protected activity was a contributing factor in her discharge. Robinson first complained about potential bankruptcy charge-off violations in 2001. The record does not indicate that anyone at Morgan Stanley or Discover reacted to this initial complaint by retaliating against her. Instead, the record supports the ALJ's finding that Robinson was discharged because she did not respond to performance feedback and failed to meet her performance standards.⁷⁶

Not long after her arrival at Discover, Robinson found it difficult to accept performance feedback and to work with other employees. In 2001, her supervisors identified her strengths and weaknesses and told her that she was not meeting performance expectations. This resulted in her first performance action plan. By the end of 2002, Robinson demonstrated that she was capable of meeting those expectations and performing at the level of senior auditor.

But in 2003, she exhibited a drop in her performance. Sutter and Graczkowski concluded that she was not meeting expectations with respect to her communication style, teamwork, and ability to accept feedback. By the end of 2003, Robinson was subjected to a 360 Review and second performance action plan. At this time she began working on the memorandum she submitted to Slusarz on February 5, 2004, informing Morgan Stanley about what she considered to be the company's operational problems dating back to 2001.⁷⁷

After Robinson submitted the memorandum, Morgan Stanley not only investigated her concerns, but also engaged in efforts to aid her professional development by retaining an executive coach. The company also presented, in writing, what Robinson needed to accomplish in 2004 to retain her job.

Robinson's performance did not improve following the submission of her memorandum. She refused to accept performance feedback and continued to miss

⁷⁴ 29 C.F.R. § 1980.103(d).

⁷⁵ Complaint at 10. Although she characterized it as a retaliatory act, Robinson does not contend that Zlateva wore perfume within 90 days of her SOX complaint.

⁷⁶ I. D. & O. at 125-26.

⁷⁷ Tr. at 1096 (Robinson)(indicating that by the time she submitted the February 2004 memorandum, she had been "working on it for months").

deadlines and to engage in confrontational exchanges. These performance problems were identified not only by her supervisors, but also by the employees who participated in the 360 Review process.

When Robinson failed to meet her performance standards and rejected performance feedback from her supervisors and co-workers, Zlateva, her direct supervisor, decided to terminate her employment. We conclude that no one at Morgan Stanley or Discover decided to discharge Robinson because she complained about potential bankruptcy charge-off violations. Robinson has failed to prove by a preponderance of the evidence that her protected activity contributed to her discharge, and therefore we must dismiss her complaint.⁷⁸

CONCLUSION

We agree with the ALJ's conclusion that Robinson did not prove that her SOX-protected activity contributed to her discharge. Therefore, we agree with the ALJ's decision to dismiss the complaint. We thus **AFFIRM** the ALJ's I. D. & O. and **DISMISS** Robinson's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

⁷⁸ Because we dismiss Robinson's complaint because she failed to prove that her protected activity contributed to her discharge, and since they did not file any cross-appeals, we need not address whether Respondents Discover, McNamara-Corley, and Sutter should be dismissed as improperly named respondents.