In the Matter of:

ROGER A. FREDRICKSON,

COMPLAINANT,

v.

THE HOME DEPOT U.S.A., INC.,

RESPONDENT.

ARB CASE NO. 07-100

ALJ CASE NO. 2007-SOX-013

DATE: May 27, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Mark D. Schwartz, Esq., Bryn Mawr, Pennsylvania

For Respondent:
Donald R. Livingston, Esq., Stacy E. Cooper, Esq., and Eric S. Dreiband, Esq., *Akin Gump Strauss Hauer & Feld LLP,* Washington, District of Columbia, and David M. Smith, Esq., *Maynard Cooper & Gale PC*, Birmingham, Alabama

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Wayne C. Beyer, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Roger A. Fredrickson filed a complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX).[1] Fredrickson alleged that his employer, The Home Depot U.S.A., Incorporated, terminated him in violation of the SOX's employee protection provisions after he complained about fraudulent and illegal accounting practices. A Department of Labor (DOL) Administrative Law Judge (ALJ) granted Home Depot's motion for summary decision because Fredrickson failed to show that he had engaged in SOX-protected activity, that Home Depot knew that he engaged in the protected activity, or that Home Depot would not have terminated him even absent his alleged protected activity. We affirm.

BACKGROUND

Home Depot sells home improvement goods and services and is a publicly-traded banking company with a class of securities registered under Section 12 of the Securities Exchange Act and is required to file reports under Section 15(d) of the Securities Exchange Act.[2] Home Depot hired Fredrickson on April 19, 2006, as the supervisor of the inside garden department at its Pell City, Alabama store.[3]

A review of the evidence reveals the following undisputed facts. During the first week of June 2006, Fredrickson went to the store's service department to mark down in the store's computer accounting system a package of hooks he was going to use for hanging clipboards in his own department.[4] Fredrickson informed Brandi Heifner, the supervisor of the service department, that he was going to mark down the package of hooks into the computer as being for "store use."[5] Heifner replied that such items were instead to be marked down as "damaged goods" in accordance with instructions from the store manager, Tom Burns.[6] Fredrickson informed Heifner that he refused to do so because it was "illegal" and fraudulent.[7] No one from

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1 18 U.S.C.A. § 1514(A) (Thomson/West Supp. 2009). Implementing regulations are found at 29 C.F.R. Part 1980 (2009).

2 Home Depot Exhibit (HDX) 3, Tom Burns Affidavit at 1; Occupational Safety and Health Administration (OSHA) Nov. 30, 2006 Dismissal at 1-2.

3 Fredrickson Deposition at 18-19, 21.

4 *Id*. at 34.

5 *Id*.

6 *Id*. at 34-35.

7 *Id*. at 35-36.

Home Depot, however, ever informed Fredrickson that "damaged goods" were charged to or paid for by the vendor and he did not know "firsthand" if that was done.[8]

Heifner did not have any supervisory authority over Fredrickson or authority to investigate, discover, or terminate misconduct.[9] Nor did Heifner discuss Fredrickson's refusal to mark down store used items as "damaged goods" with anyone else.[10] Amy Higgenbotham, another Home Depot employee, witnessed Fredrickson's conversation with Heifner.[11] But Higgenbotham did not have any supervisory authority and did not discuss Fredrickson's refusal to mark down store used items as "damaged goods" with anyone else.[12]

Later, Fredrickson did have a discussion with Ted Parent, another Home Depot employee, about his conversation with Heifner.[13] But Parent did not have any supervisory authority.[14] Fredrickson did not discuss the conversation he had with Heifner or his refusal to mark down store used items as "damaged goods" with anyone else, including his supervisor or the store manager, Tom Burns.[15]

On June 16, 2006, Fredrickson had a conversation in the store with a vendor's representative, Tim Quick.[16] Quick told Fredrickson about an incident the day before when a customer had struck him in the groin.[17] Fredrickson then hit Quick in what Fredrickson assumed was the groin area.[18] Quick immediately reported the incident to the store manger, Tom Burns.[19]

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8 *Id*. at 43-44, 46. Fredrickson merely stated it was his "assumption" that marking down such items as "damaged goods" would result in the manufacturer or vendor covering the cost of the items and not Home Depot. *Id*. at 41-42, 46.

9 *Id*. at 53; HDX 4, Brandi Heifner Affidavit at 1.

10 HDX 4, Brandi Heifner Affidavit at 1.

11 Fredrickson Deposition at 47, 49-50.

12 *Id*. at 48; HDX 5, Amy Higgenbotham Affidavit at 1.

13 Fredrickson Deposition at 48.

14 *Id*.

15 *Id*. at 46-48, 59, 162-163, 258-259.

16 *Id*. at 95-96, 98-101.

17 *Id*. at 101; HDX 6, Tim Quick Affidavit at 1.

18 *Id*. at 101, 103-104.

19 HDX 6, Tim Quick Affidavit at 1; HDX 3, Tom Burns Affidavit at 1.

The next day, Brian Miller, a Home Depot management employee, informed Fredrickson that he was being investigated regarding the incident with Quick.[20] On June 20, 2006, two other Home Depot managers, Jason Bane and Chris Arnold, informed Fredrickson that he was being terminated for violating the company's code of conduct in regard to the incident with Quick.[21] Fredrickson never informed Miller, Bane, Arnold, or any other Home Depot manager involved in his termination about any activity at Home Depot that he considered to be illegal.[22]

Fredrickson filed his SOX complaint on July 31, 2006, with the Department of Labor's Occupational Safety and Health Administration (OSHA). After investigating, OSHA dismissed Fredrickson's complaint.[23] Fredrickson requested a hearing before an ALJ. Home Depot filed a motion for summary decision with the ALJ. Home Depot contends that there is no genuine issue as to a material fact that: (1) Fredrickson did not engage in SOX protected activity; (2) that Fredrickson did not provide information regarding a violation of the fraud statutes delineated under the SOX, or of any SEC rules or federal law, to "a person with supervisory authority over" him or a Home Depot employee with "authority to investigate, discover, or terminate misconduct;" (3) that Fredrickson's conversation with Heifner or his refusal to mark down store used items as "damaged goods" was not a contributing factor in his termination; and (4) that Home Depot had a legitimate business reason for his termination even if he engaged in protected activity.

The ALJ granted summary judgment because he found no genuine issue as to a material fact that Fredrickson did not engage in SOX-protected activity, that he did not complain to an appropriate Home Depot official, that his alleged protected activity was not a contributing factor in his termination, and that Home Depot had a legitimate business reason for his termination absent his alleged protected activity. Since there was no genuine issue of material fact as to the material elements of Fredrickson's claim, the ALJ denied Fredrickson's complaint. Fredrickson petitioned the ARB for review of the ALJ's recommended decision and order, and the matter is now before us.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX.[24] The Board reviews an ALJ's recommended grant of summary

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[20] Fredrickson Deposition at 104-105; HDX 8, Brian Miller Affidavit at 1.

[21] Fredrickson Deposition at 115-116; HDX 10, Jason Bane Affidavit at 1.

[22] Fredrickson Deposition at 188-190.

[23] OSHA Nov. 30, 2006 Dismissal.

[24] Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

judgment de novo.[25] The standard for granting summary decision in our cases is set out at 29 C.F.R. § 18.40 (2009) and is essentially the same standard governing summary judgment in the federal courts.[26] Thus, the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."[27] 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.[28] The determination of whether facts are material is based on the substantive law upon which each claim is based.[29] 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."[30]

"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.'"[31] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[32] 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."[33]

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[25] *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006, ALJ Nos. 2006-SOX-037, -108; 2007-SOX-055, slip op. at 6 (ARB Apr. 30, 2008) (citing *Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 6 (ARB Sept. 28, 2007)).

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

[27] 29 C.F.R. § 18.40(d).

[28] *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).

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

[30] *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Anderson.,* 477 U.S. at 248.

[31] *Celotex Corp.*, 477 U.S. at 322.

[32] *Id*.

[33] 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co*., 1993-ERA-042, slip op. at 4-6 (Sec'y July 17, 1995).

DISCUSSION

The Legal Standards

A. SOX Section 806 Whistleblower Provision

SOX Section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who *provide 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*)" or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders.[34]

B. The Elements of a SOX Complaint

To prevail on his SOX complaint, Fredrickson would have to prove by a preponderance of the evidence that: (1) he engaged in SOX-protected activity or conduct (i.e., provided information to "a person with supervisory authority" or authority to investigate misconduct); (2) Home Depot 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.[35] Home Depot 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.[36]

Not all employee complaints to management are covered by the SOX. The ARB has said that complaints to management of corporate expenditures with which the complainant disagrees are not protected activity under the SOX because they do not directly implicate the categories of fraud listed in the statute or securities violations.[37] "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."[38]

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[34] 18 U.S.C.A. § 1514A(a) (emphasis added).

[35] *See* 18 U.S.C.A. § 1514(b)(2); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 8 (ARB July 29, 2005).

[36] *Getman*, ARB No. 04-059, slip op. at 8; *cf.* 29 C.F.R. § 1980.104(c); *see* 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv).

[37] *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 2005-SOX-088, -092, slip op. at 9 (ARB Apr. 29, 2008), citing *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, -115, ALJ Nos. 2004-SOX-020, -36, slip op. at 14-15 (ARB June 2, 2006).

[38] *Smith*, ARB No. 06-064, slip op. at 9, citing *Harvey*, ARB Nos. 04-114, -115, slip op. at 15.

Thus, to come under the protection of the SOX, the employee must ordinarily complain about a material misstatement of fact or omission concerning a corporation's financial condition on which an investor would reasonably rely.[39] 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.[40]

No Protected Activity

Home Depot moved for summary judgment on the ground that that Fredrickson did not engage in SOX-protected activity. The undisputed facts are that Fredrickson told Heifner that he refused to mark down store used items as "damaged goods" because he believed it was "illegal" and fraudulent.[41] But refusing to mark down a single package of hooks at one Home Depot store as "damaged goods" does not constitute SOX-protected activity because it did not directly implicate the categories of fraud listed in the statute or securities violations, but at most constitutes an expenditure with which Fredrickson disagreed.[42] Moreover, one instance of refusing to mark down a single package of hooks as "damaged goods" is not sufficient to support a finding that Fredrickson had a reasonable belief that to do otherwise would constitute a material misstatement of fact or omission concerning Home Depot's financial condition, on which an investor would reasonably rely.[43]

In addition, the undisputed facts establish that the only Home Depot employees aware of Fredrickson's conversation with Heifner and his refusal to mark down store used items as "damaged goods" did not have any "supervisory authority over" him or "the authority to investigate, discover, or terminate misconduct."[44] Although Fredrickson states in an affidavit provided in response to Home Depot's motion for summary judgment that "Home Depot both knew and has reason to know that I engaged in protected activity,"[45] Fredrickson "may not rest upon the mere allegation" that appropriate Home Depot management officials knew of his

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39 *Smith,* ARB No. 06-064, slip op. at 9.

40 *Id.*, citing *Harvey*, ARB Nos. 04-114, -115, slip op. at 14-15.

41 Fredrickson Deposition at 34-36.

42 *Smith,* ARB No. 06-064, slip op. at 9, citing *Harvey*, ARB Nos. 04-114, -115, slip op. at 14-15.

43 *Smith,* ARB No. 06-064, slip op. at 9.

44 Fredrickson Deposition at 46-48, 53, 59, 162-163, 258-259; HDX 4, Brandi Heifner Affidavit at 1; HDX 5, Amy Higgenbotham Affidavit at 1.

45 Fredrickson June 14, 2007 Affidavit at 1.

refusal.[46] Fredrickson has not disputed that no appropriate Home Depot management official was aware of his refusal with any admissible facts. Moreover, in contradicting his own admission in his deposition that he did not discuss his refusal to mark down store used items as "damaged goods" with anyone with supervisory authority over him,[47] Fredrickson's affidavit could be construed as false or fraudulent, and as such, it would be insufficient to defeat Home Depot's motion for summary decision.[48]

Thus, based on the undisputed facts, there is no genuine issue of material fact that Fredrickson did not make a protected complaint or provide information to "a person with supervisory authority over" him of his refusal or any other Home Depot employee with "the authority to investigate, discover, or terminate misconduct."[49] Consequently, there is no genuine issue of material fact that Fredrickson did not engage in protected activity under the SOX, an essential element of his complaint. Home Depot is entitled to summary judgment, therefore, as a matter of law.

No Knowledge of Alleged Protected Activity

Home Depot also moves for summary judgment on the grounds that none of the Home Depot management officials responsible for his termination were aware of Fredrickson's alleged protected activity. The undisputed facts establish that none of the Home Depot management officials involved in or responsible for Fredrickson's termination were aware of any of his alleged protected activity or any activity at Home Depot that Fredrickson considered to be illegal.[50]

In his subsequent affidavit in response to Home Depot's motion for summary judgment, Fredrickson stated that his alleged "protected activity consisting of my refusal to commit fraudulent acts" was "a contributing factor" in his termination and that the incident with the

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[46] 29 C.F.R. § 18.40(c). *See Webb*, 1993-ERA-042, slip op. at 4-6.

[47] Fredrickson Deposition at 46-48, 59, 162-163, 258-259.

[48] *Salian v. Reedhycalog UK*, ARB No. 07-080, ALJ No. 2007-SOX-020, slip op. at 6 (ARB Dec. 31, 2008); *cf. Cleveland v. Policy Mgmt. Sys. Corp*., 526 U.S. 795, 806-807 (1999) ("[A] party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement … without explaining the contradiction or attempting to resolve the disparity."); *see, e.g., Iko v. Shreve*, 535 F.3d 225, 230 (4th Cir. 2008) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

[49] 18 U.S.C.A. § 1514A(a), (b)(2); *Getman*, ARB No. 04-059, slip op. at 8.

[50] Fredrickson Deposition at 188-190.

vendor's representative was merely a "pretext" for his termination.[51] But again, mere allegations in Fredrickson's affidavit are insufficient to establish that Home Depot management officials responsible for his termination were aware of his alleged protected activity to defeat Home Depot's motion for summary decision or that his alleged protected activity was "a contributing factor" in his termination, an essential element of his complaint.[52] Fredrickson has not disputed that the Home Depot management officials responsible for his termination were not aware of his alleged protected activity with any admissible facts. Consequently, there is no genuine issue of material fact that none of the Home Depot management officials involved in or responsible for Fredrickson's termination had any knowledge of his alleged protected activity, an essential element of his complaint.

Would Have Terminated Even Without Alleged Protected Activity

Finally, Home Depot also moves for summary judgment on the grounds that it would have terminated Fredrickson even absent his alleged protected activity. The undisputed facts establish that Fredrickson struck a vendor's representative, Tim Quick, in the groin area and the following day Home Depot management officials began an investigation of the incident.[53] After the investigation, Fredrickson was immediately terminated because his encounter with Quick violated the company's code of conduct.[54] It is also undisputed that none of the Home Depot management officials responsible for his termination were aware of his alleged protected activity.[55]

Although Fredrickson states in his affidavit that the incident with the vendor's representative was merely a "pretext" for his termination, his mere allegation is insufficient to establish that Home Depot would not have terminated him absent his alleged protected activity.[56] Fredrickson has not disputed that Home Depot would have terminated him even absent his alleged protected activity with any admissible facts. Consequently, there is no genuine issue of material fact that Home Depot would have terminated Fredrickson even absent his alleged protected activity.

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51 Fredrickson June 14, 2007 Affidavit at 2.

52 29 C.F.R. § 18.40(c). *See Webb*, 1993-ERA-042, slip op. at 4-6.

53 Fredrickson Deposition at 101, 103-105; HDX 8, Brian Miller Affidavit at 1.

54 Fredrickson Deposition at 115-116; HDX 10, Jason Bane Affidavit at 1.

55 Fredrickson Deposition at 188-190.

56 29 C.F.R. § 18.40(c). *See Webb*, 1993-ERA-042, slip op. at 4-6.

Fredrickson's Additional Arguments

Fredrickson also contends that he was denied due process before the ALJ. Specifically, Fredrickson notes that the ALJ did not allow Fredrickson's counsel to submit depositions of Home Depot corporate officials before the ALJ issued his recommended decision granting Home Depot's motion for summary decision. Fredrickson asserts that the depositions provide evidence that the policy to mark down store used items as "damaged goods" at the Home Depot store where Fredrickson was employed was actually the policy at all Home Depot stores.

In addition, Fredrickson points out that the ALJ did not issue subpoenas to third parties, which Fredrickson's counsel requested, as the ALJ determined that the SOX does not provide such authority.[57] In his pre-hearing statement, Fredrickson asserts that subpoenas were needed to obtain testimony from Home Depot officials who would also establish that it was the policy at all Home Depot stores to mark down store used items as "damaged goods."

A review of the record reveals that Home Depot filed its motion for summary decision on May 21, 2007. Subsequently, the ALJ granted Fredrickson's request for an extension to file his response until June 18, 2007, and ordered that the parties' pre-hearing submissions were due on June 25, 2007.[58]

In a letter to the ALJ dated June 6, 2007, Fredrickson's counsel informed the ALJ that from May 22 to May 25, 2007, he had conducted the depositions of the Home Depot corporate officials, but would not have the transcriptions of the depositions to review prior to the deadline for filing Fredrickson's response to Home Depot's motion. But Fredrickson's counsel never filed any formal motion before the ALJ for a further extension of time to file Fredrickson's response to Home Depot's motion until he had the opportunity to review the deposition transcripts.

Instead, Fredrickson timely filed his response to Home Depot's motion on June 18, 2007, without Fredrickson's counsel apparently having reviewed the deposition transcripts. Subsequently, Fredrickson also timely filed his pre-hearing statement with the ALJ on June 25, 2007, in which Fredrickson acknowledged that by that time his counsel had received the deposition transcripts. But Fredrickson's counsel never subsequently filed any motion before the ALJ issued his recommended decision and order on July 10, 2007, in which Fredrickson requested that the ALJ allow him to amend his response to Home Depot's motion. Nor did Fredrickson's counsel file a motion after the ALJ issued his decision asking the ALJ to reconsider his decision in light of the depositions.

Thus, Fredrickson had the opportunity but failed to argue before the ALJ that he was denied due process because there was no opportunity for the ALJ to review the depositions of the

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[57] *See* ALJ's Jan. 18, 2007 Notice of Hearing and Pre-Hearing Order; ALJ's June 5, 2007 Second Order Rescheduling Hearing and Revised Pre-Hearing Order.

[58] ALJ's June 5, 2007 Second Order Rescheduling Hearing and Revised Pre-Hearing Order.

Home Depot officials prior to the ALJ issuing his recommended decision granting Home Depot's motion for summary decision. However, since Fredrickson had the opportunity to submit the depositions or argue his contention to the ALJ before the ALJ issued his decision but did not, he has waived this argument on appeal.[59] In any event, the ALJ provided Fredrickson due process when he granted Fredrickson's only request for an extension to file his response to Home Depot's motion.

Moreover, because Fredrickson had the opportunity to submit the depositions, which he asserts provide evidence that it was the policy at all Home Depot stores to mark down store used items as "damaged goods," Fredrickson's argument that he was also denied due process when the ALJ did not issue subpoenas to the third parties, which Fredrickson's counsel requested, is also unavailing. In his pre-hearing statement, Fredrickson asserts that the subpoenas were sought to again establish that it was the policy at all Home Depot stores to mark down store used items as "damaged goods." Thus, Fredrickson was not denied due process when the ALJ did not issue the subpoenas Fredrickson's counsel requested, as Fredrickson had the opportunity to submit depositions relating to the same subject matter that he wanted to establish with the subpoenas before the ALJ issued his decision, but failed to do so. Consequently, we reject Fredrickson's contention that he was denied due process before the ALJ.

CONCLUSION

After thoroughly and fairly reviewing all of the evidence of record, there is no question of material fact that Fredrickson did not engage in SOX-protected activity, that none of the Home Depot management officials responsible for Fredrickson's termination had any knowledge of his alleged protected activity, and that Home Depot would have terminated Fredrickson even absent his alleged protected activity. Thus, Home Depot is entitled to summary judgment as a matter of law. Accordingly, we **GRANT** summary judgment and **DENY** the Complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

[59] *See Reddy v. Medquist, Inc.,* ARB No. 04-123, ALJ No. 2004-SOX-025, slip op. at 9 (ARB Sept. 30, 2005); *Schlagel v. Dow Corning Corp.,* ARB No. 02-092, ALJ No. 2001-CER-001, slip op. at 9 (ARB Apr. 30, 2004).