In the Matter of:

ANTHONY JOY,	**ARB CASE NO. 08-049**
COMPLAINANT,	**ALJ CASE NO. 2007-SOX-074**
v.	**DATE: October 29, 2009**
ROBBINS & MYERS, INC.,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul H. Tobias, Esq., *Tobias, Kraus & Torchia,* Cincinnati, Ohio

For the Respondent:
Robert J. Brown, Esq., Jennifer R. Fuller, Esq., *Thompson Hine LLP,* Dayton, Ohio

FINAL DECISION AND ORDER DISMISSING COMPLAINT

Anthony Joy filed a complaint with the United States Department of Labor in which he contends that when Robbins & Myers, Inc. terminated his employment, it violated the whistleblower protection provision of the Sarbanes-Oxley Act of 2002 (SOX).[1] A Labor Department Administrative Law Judge (ALJ) granted summary decision to Robbins & Myers and dismissed Joy's complaint. We affirm.

[1] 18 U.S.C.A. § 1514A (West 2006).

BACKGROUND

Robbins & Myers employed Joy as its Director of Internal Audit in Dayton, Ohio. In December 2004, Joy informed senior management that the company had not implemented an export compliance management program. According to Joy, such a program should have been in place "to ensure that federal regulations were being followed."[2] He also warned that the company had engaged in "possible violations" of U.S. export laws.[3] Joy presented similar warnings to Robbins & Myers management in 2005 and 2006.[4]

Robbins & Myers terminated Joy on July 24, 2006. According to the company, Joy repeatedly behaved inappropriately toward both its employees and those of a Robbins & Myers associate.[5]

Joy filed his SOX complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on October 26, 2006. He alleged that Robbins & Myers fired him after he "expressed serious concerns that the Company might be in violation of Sarbanes-Oxley (SOX) requirements and Federal Export Laws/Regulations because of its failure to have an export compliance management program in place."[6] OSHA dismissed the complaint.

Joy appealed to the Labor Department's Office of Administrative Law Judges and requested a hearing. Thereafter, he moved to amend his complaint to add allegations that he had also complained about "premature recognition of revenue on Company reports" and "the Company's failure to complete [its] certification of SOX Year II rules as required by SEC rules."[7]

Robbins & Myers then filed a Motion to Dismiss and Memorandum in Support (Motion to Dismiss), with exhibits. The company argued that the ALJ should dismiss Joy's complaint because it did not plead facts that Joy had engaged in activity that the

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[2] Complaint, para. 5, 8.

[3] Respondent's Motion to Dismiss and Memorandum in Support (Motion to Dismiss) at 3.

[4] *Id.* at 3-5.

[5] *Id.* at 6.

[6] Complaint, para. 5.

[7] Complainant's Motion to Amend Complaint, para. 2, 4.

SOX protects.[8] Joy responded with a Memorandum in Opposition to Motion to Dismiss (Memorandum in Opposition), with exhibits. The ALJ treated the motion to dismiss as a motion for summary decision.[9]

On January 30, 2008, the ALJ granted Joy's motion to amend but held that Robbins & Myers was entitled to summary decision because Joy failed to establish a genuine issue of fact that he had engaged in SOX-protected activity.[10] Joy appealed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under SOX.[11] We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies also governs our review.[12] The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[13] 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.[14] 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."[15]

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.[16] "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient

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8 Motion to Dismiss at 12-13.

9 D. & O. at 4-5. See 29 C.F.R. § 18.40 (2009).

10 D. & O. at 10.

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

12 29 C.F.R. § 18.40.

13 Fed. R. Civ. P. 56.

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

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

16 *Anderson*, 477 U.S. at 255.

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.'"[17] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[18] 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."[19]

DISCUSSION

The Legal Standard

To prevail on his SOX complaint, Joy must prove by a preponderance of the evidence that: (1) he engaged in activity that the SOX protects; (2) Robbins & Myers 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. Joy is not entitled to relief if Robbins & Myers proves by clear and convincing evidence that it would have taken the same action in the absence of the protected activity.[20] Thus, protected activity is an essential, and therefore, material element of Joy'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,[21] or any rule or regulation of the Securities and Exchange Commission (SEC), 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.[22]

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17 *Celotex,* 477 U.S. at 322.

18 *Nixon v. Stewart & Stevenson Servs., Inc*. ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 6 (ARB Sept. 28, 2007), citing *Celotex,* 477 U.S. at 322.

19 29 C.F.R. § 18.40(c).

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

21 18 U.S.C.A. §§ 1341, 1343, 1344, and 1348.

22 *See* 18 U.S.C.A. § 1514A(a).

To be protected, 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. The information that the employee actually communicates must "definitively and specifically" relate to the SOX subject matter, be specific enough to permit compliance, and support a complainant's reasonable belief.[23]

To defeat summary decision, Joy must show that there is a genuine issue of fact that he engaged in SOX protected activity. The record supports the ALJ's finding that Joy did not provide information that definitively and specifically related to the fraud statutes, an SEC rule or regulation, or shareholder fraud.[24]

Joy's Evidence of Protected Activity

The crux of Joy's original complaint is that since Robbins & Myers did not have an export compliance program, the company might violate U.S. export laws and unspecified "SOX requirements." In fact, Joy alleged, two subsidiaries actually had violated export laws.[25] And, as noted, Joy's amended complaint alleged that Robbins & Myers's Belgium facility had prematurely recognized revenue and, furthermore, that the company had not completed the "SOX Year II rules certification," which Joy claimed was an SEC requirement and would have a "serious negative impact on the financial condition of the Company."[26] These allegations, of course, are not enough to defeat summary decision because they do not constitute evidence that Joy engaged in SOX protected activity, that is, that he provided information to Robbins & Myers regarding violations of the fraud statutes, an SEC rule or regulation, or shareholder fraud.

Like the ALJ, we find no evidence in the record that, before he was terminated, Joy provided information to management that the revenue recognition and "SOX Year II rules certification" issues constituted violations of the fraud statutes, an SEC rule or regulation, or shareholder fraud laws. Joy did, however, produce evidence that he provided information to Robbins & Myers about his concern pertaining to U.S. export laws. In a June 22, 2006 email to Chief Financial Officer Kevin Brown, Joy wrote that the company's export program was "pathetic" and that "now we have potential violations." He concluded the email by saying that the export compliance issue "is a

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[23] *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 2005-SOX-088-092, slip op. at 9 (ARB Apr. 29, 2008); *see Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27, slip op. at 17 (ARB Sept. 29, 2006); *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, -115; ALJ Nos. 2004-SOX-020, -036, slip op. at 14-15 (ARB June 2, 2006).

[24] D. & O. at 8-10.

[25] Complaint, para. 5-9.

[26] Motion to Amend Complaint, para. 2, 4.

SERIOUS RISK to the company" and "has the ability to put R&M out of Business."[27] In a slide presentation to management, Joy had also warned of "possible violations" of export laws and that "failure to comply [with export laws] may jeopardize export 'privileges.'"[28] In the same slide presentation, he also documented examples of occasions on which he believed Robbins & Myers entities had actually violated export laws.[29] Furthermore, a February 10, 2005 email to a company official indicates that Joy was worried that someone might "make a phone call to the SEC" and that a "fraud investigation" would result. And, in a June 1, 2006 email, Joy warned that "the accuracy and integrity of [Robbins & Myers's accounting software program] is questionable."[30]

But information about actual and "possible violations" of U.S. export laws and what might happen as a result does not definitively and specifically relate to violations of the fraud statutes, SEC rules, or laws concerning fraud against shareholders. Similarly, Joy's worries about someone else complaining to the SEC about export compliance does not definitively and specifically implicate those statutes, rules, and laws or convey his own reasonable belief of a violation of those laws or regulations.

CONCLUSION

We conclude that Joy did not present sufficient evidence to create a genuine issue of material fact that he engaged in SOX-protected activity, an essential element of his claim. Accordingly, we **AFFIRM** the ALJ's recommendation that Robbins & Myers is entitled to summary decision and that Joy's complaint be **DENIED.**

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

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27 Exhibit A, Complainant's Memorandum in Opposition to Motion to Dismiss.

28 Exhibit C, Complainant's Memorandum in Opposition to Motion to Dismiss.

29 *Id.*

30 *Id.*