In the Matter of:

ANDRÉ RYERSON,

COMPLAINANT,

v.

AMERICAN EXPRESS FINANCIAL SERVICES, INCORPORATED,

RESPONDENT.

ARB CASE NO. 08-064

ALJ CASE NO. 2006-SOX-074

DATE: July 30, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
André Ryerson, *pro se*, Amherst, Massachusetts

For Respondent:
Julia Fleming-Wolfe, Esq., St. Paul, Minnesota

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

André Ryerson 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] Ryerson alleged that

[1] 18 U.S.C.A. § 1514(A) (West Supp. 2010). Implementing regulations are found at 29 C.F.R. Part 1980 (2009).

his employer, American Express Financial Services, Incorporated (AMEX) terminated his employment in violation of the SOX's employee protection provisions after he complained about fraudulent and illegal company practices and policies. A Department of Labor (DOL) Administrative Law Judge (ALJ) found that while Ryerson did engage in SOX-protected activity, he failed to prove that his protected activity played any role in the termination of his employment. Thus, the ALJ determined that Ryerson was not entitled to reinstatement, lost pay, or other economic damages. We affirm the ALJ's findings as supported by substantial evidence.

BACKGROUND

Beginning in February 2001, AMEX employed Ryerson as a Platform One (P1) financial advisor in its Holyoke, Massachusetts office.[2] As a P1 financial advisor, Ryerson provided financial planning services to clients and sold them investment products such as mutual funds and insurance plans. The investment products that financial advisors recommend include house brand AMEX proprietary products and non-proprietary products, including the Strategic Portfolio Service (SPS).[3] Stephen Micelotta, an AMEX Field Vice President, was Ryerson's supervisor at the Holyoke office.[4]

Patrick O'Connell, an AMEX Group Vice President and Micelotta's supervisor, testified that AMEX measures a financial advisor's productivity based on the advisor's Gross Dealer Concession (GDC) product sales figure and the number of financial plans the advisor writes for clients.[5] O'Connell testified that AMEX tracks a P1 advisor's sales productivity on a bi-weekly basis, looking at the advisor's sales or GDC amount over the most recent, preceding 12-month period, which is designated as an advisor's "GDC PACE."[6] AMEX set forth minimum requirements for a P1 advisor's GDC PACE and, beginning in 2002, established a policy requiring a P1 advisor to have at least 60 percent of the required GDC PACE.[7] Otherwise the advisor was subject to an initial and, ultimately, final written warning, giving the advisor a period of opportunity to meet the 60 percent GDC PACE requirement or else be subject to termination.[8]

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2 Hearing Transcript (HT) at 90, 440-441, 1008.

3 HT at 279-280.

4 HT at 706-708.

5 HT at 274.

6 HT at 454-459.

7 HT at 415-416.

8 *Id*.

If a P1 financial advisor meets certain requirements for GDC and financial plans, AMEX allows the advisor to make the transition to the Platform 2 (P2) financial advisor position.[9] A P2 advisor operates as an independent franchisee of AMEX, covering his or her own operating expenses and receiving no benefits from AMEX.[10] AMEX increased the level of GDC and financial plan requirements for transitioning to the P2 financial advisor position in October 2001, after Ryerson began working as a P1 financial advisor for AMEX.[11]

On June 19, 2002, Ryerson was given a written warning for, as he admitted, failing to comply on one occasion with the AMEX requirement to notify an AMEX manager that he was holding a client meeting.[12] Later, on Ryerson's December 2002 annual review, Micelotta noted that his review of some of Ryerson's client files for regulatory compliance revealed a number of compliance "gaps," so he placed Ryerson on heightened supervision.[13]

In late 2003, Ryerson grew concerned about an AMEX Mutual Fund Disclosure Form, F-118, which advisors were required to provide to clients who invested in mutual funds.[14] On December 18, 2003, Ryerson sent a memorandum to Micelotta expressing his concern that the F-118 form gave a false and misleading impression to clients that, for investments under $50,000, investing in "A" shares having initial front end load charges were less costly for the clients to invest in than "B" shares having no front end load charges.[15]

In response to Ryerson's concern, Micelotta met with Ryerson on December 19, 2003. According to Ryerson's testimony regarding the meeting, Micelotta threatened him with retaliation if he intended to pursue his concern with AMEX upper management. Specifically, Micelotta stated he would make Ryerson rewrite his financial plans, require a manager to attend all of his client appointments and pre-approve all his potential sales, and require him to attend training.[16] The ALJ credited Ryerson's account of the meeting.[17] Subsequently, in January

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9 HT at 440; Respondent's Exhibit (RX) 28.

10 HT at 90.

11 RX 28.

12 Complainant's Exhibit (CX) 18.

13 HT at 195, 611-612, 742-746; RX 3-5.

14 RX 1.

15 CX 40-A.

16 HT at 1036-1038.

17 Decision and Order (D. & O.) at 13, n.13.

2004, Micelotta did require Ryerson to rewrite seven of his financial plans that Micelotta had previously approved.[18]

Later in the spring of 2004, Ryerson's office mate asked Micelotta to allow him to have more access to the office computer he shared with Ryerson when making his client calls, as he logged his client calls on the computer, but Ryerson did not.[19] Micelotta granted Ryerson's office mate exclusive use of their shared office computer during the late afternoon and early evening hours of the work day to log his client calls.[20] After Ryerson complained to Micelotta that this arrangement impeded his ability to rewrite his financial plans, Micelotta allowed him access to a computer in another office for that purpose, away from his office phone and computer.[21]

Early in March 2004, Micelotta had a discussion with Ryerson about his failing to timely forward a client's check in accordance with AMEX policy, which Ryerson acknowledged doing.[22] Micelotta also reproached Ryerson for using what he deemed was an inappropriate "Ibbotson" chart to justify recommending the non-proprietary SPS investment product to a client and because the SPS transaction did not comply with AMEX policies.[23] Thus, Micelotta instructed Ryerson to seek his review before making any such transactions in the future. In reply, Ryerson denied that he had used an "Ibbotson" chart and, as the ALJ found, evidence in the record indicates that Micelotta's accusation was inaccurate.[24]

Ryerson sent an e-mail on March 16, 2004, to Micelotta and other AMEX management officials again expressing his concern that the F-118 form was misleading.[25] Additionally, he complained about abusive treatment he was receiving from Micelotta, which he alleged lowered his morale and, consequently, his job performance. Specifically, he alleged that Micelotta prevented him from recommending non-proprietary and SPS investment products to clients. He alleged that another investment company had been penalized for giving its advisors financial incentives to promote the company's own investment products over non-proprietary products. Thus, he charged that Micelotta's policy put AMEX in "legal jeopardy." He further complained

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18 HT at 1048, 1050-1051, 1116-1130; CX 65-71.

19 HT at 839-840, 842-846, 1077-1078.

20 *Id*.

21 *Id*.

22 RX 29 at 137-138.

23 *Id*.

24 D. & O. at 16, n. 20; *see* HT at 1056; CX 23.

25 RX 15.

about Micelotta's order that he rewrite his financial plans and get additional training, while also reducing access to his office computer. Finally, Ryerson complained that the policy for promotion to the P2 advisor level had been made more difficult after he began working for AMEX.

In response to Ryerson's concern regarding the F-118 form, Micelotta and other AMEX management officials held a conference call with Ryerson on March 18, 2004, during which they assured him that his concern would be addressed.[26] Ultimately, AMEX revised the F-118 form in April 2004 to reflect Ryerson's views regarding investments in front load "A" shares or "B" shares.[27]

Laura McHugh, an AMEX manager of market group operations, also met with Ryerson and Micelotta on March 30, 2004, to investigate Ryerson's other complaints.[28] After concluding her investigation, McHugh e-mailed Ryerson on April 30 informing him that it was Micelotta's responsibility to oversee compliance and to review his financial plans.[29] McHugh also indicated that Ryerson had agreed at their meeting that the plans Micelotta asked him to rewrite could be improved. She further stated that any concerns about the use of SPS products could be addressed to Micelotta or another AMEX management official. Finally, McHugh added that the training Ryerson was asked to attend was intended to assist him in meeting his GDC PACE and that the P2 promotion policy is always subject to change.

On May 20, 2004, Micelotta gave Ryerson a written warning for failing to consult with him before conducting a SPS transaction with a client in April and for failing to follow AMEX written policy for determining a client's suitability and risk tolerance for such a transaction.[30] Additionally, Micelotta indicated that the warning was the result of Ryerson's prior failings in March to timely forward a client's check in accordance with AMEX policy, using an inappropriate "Ibbotson" chart to justify recommending the non-proprietary SPS investment product to a client, and for his past compliance violations found in his 2002 review. As a consequence, Micelotta's warning required Ryerson to submit to him any such future recommendations he made to clients for his approval.

When Ryerson failed to meet his GDC PACE requirement in May, he received a written warning on May 25, 2004.[31] The warning noted that Ryerson's GDC PACE was 55 percent and

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26 HT at 1060-1065.

27 RX 21-22.

28 RX 26.

29 *Id*.

30 RX 29 at 138-140.

31 RX 35.

gave him a two-week period to reach the required 60 percent or he would be subject to a final warning.

Ryerson also received an unrelated warning from McHugh in an e-mail on May 27, 2004, due to inappropriate contact Ryerson had with a client to inquire why the client chose another advisor for his investment account.[32] McHugh warned Ryerson that any future inappropriate behavior could result in further discipline or termination.

Ultimately, Ryerson received a final written warning from Micelotta on June 11, 2004, for failing to meet his GDC PACE requirement.[33] Ryerson's GDC PACE was still at 55 percent and he was given a final four-week period to reach the required 60 percent or he would be terminated. On June 29, 2004, Ryerson submitted his resignation after recognizing that he would not meet the required GDC PACE level to avoid termination by the end of the final four-week period.[34]

Prior to receiving his final written warning, Ryerson filed a SOX complaint on June 6, 2004, with the Department of Labor's Occupational Safety and Health Administration (OSHA). After investigating, OSHA dismissed Ryerson's complaint.[35] Ryerson requested a hearing before an ALJ.[36]

After holding a hearing, the ALJ issued his D. & O. on February 29, 2008. The ALJ found that Ryerson did engage in SOX-protected activity when he complained in his December 18, 2003 memorandum to Micelotta that the F-118 AMEX form was false and misleading. Furthermore, the ALJ determined that the evidence established that Ryerson was directed to rewrite financial plans because of his protected activity. But the ALJ concluded that Ryerson failed to prove that his protected activity played any role in the termination of his employment with AMEX. Thus, the ALJ determined that Ryerson was not entitled to reinstatement, lost pay, or other economic damages. The ALJ did, however, order AMEX to expunge from its records any reference to Micelotta's directive that Ryerson rewrite the financial plans that Micelotta had previously approved, and the ALJ allowed Ryerson to submit an itemized application of his

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[32] RX 29.

[33] RX 40.

[34] RX 41-42.

[35] Administrative Law Judge Exhibit (ALJX) 1.

[36] Ryerson did not file a request for a hearing until April 20, 2006, explaining that he had not received OSHA's August 24, 2004 dismissal letter until March 25, 2006. ALJX 2. The timeliness of Ryerson's request for a hearing has not been challenged on appeal.

litigation costs and expenses.[37] Ryerson petitioned the ARB for review of the ALJ's D. & O. and the matter is now before us.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the ARB.[38] Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.[39] 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."[40] 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."[41]

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 …."[42] Therefore, the Board reviews an ALJ's conclusions of law de novo.[43]

DISCUSSION

The Legal Standards

A. SOX Section 806 Whistleblower Provision

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37 Any award to Ryerson of his litigation costs and expenses before the ALJ is not before the Board in this appeal.

38 *See* Secretary's Order 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). *See also* 29 C.F.R. § 1980.110.

39 *See* 29 C.F.R. § 1980.110(b).

40 *Clean Harbors Envtl. 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).

41 *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).

42 5 U.S.C.A. § 557(b) (West 1996).

43 *See Getman*, ARB No. 04-059, slip op. at 7.

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.[44]

B. The Elements of a SOX Complaint

To prevail on his SOX complaint, Ryerson must prove by a preponderance of the evidence that: (1) he engaged in SOX protected activity or conduct; (2) AMEX 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.[45] AMEX 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.[46]

The SOX does not cover every employee complaint to management. 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.[47] "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."[48]

Thus, to come within the SOX's protection, 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.[49] The protected complaint must "definitively and

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[44] 18 U.S.C.A. § 1514A(a).

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

[46] *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).

[47] *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, -036, slip op. at 14-15 (ARB June 2, 2006).

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

[49] *Smith*, ARB No. 06-064, slip op. at 9.

specifically" relate to the SOX subject matter, be specific enough to permit compliance, and support a complainant's reasonable belief.[50]

Protected Activity

Initially, the ALJ considered whether Ryerson's December 18, 2003, memorandum to Micelotta addressing his concern that the F-118 form was "false" and "misleading" in its characterization regarding investments in front load "A" shares or "B" shares constituted SOX-protected activity. Ryerson must establish that he complained about conduct that he "reasonably believed" constituted securities fraud, a violation of an SEC rule or regulation, or a violation of any provision of Federal law relating to fraud against shareholders.[51]

The ALJ noted that AMEX based the language of its F-118 form on identical language contained in an Investor Alert that the National Association of Securities Dealers (NASD) issued. The NASD issued the alert in response to its concern that financial advisors were recommending investments in "B" shares, even when not suitable for clients, because the advisors received a greater commission for such sales.[52] While the language from the NASD alert indicated that Ryerson's concern regarding the F-118 form may have been mistaken, the ALJ properly held that "an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories" under SOX Section 806 is protected.[53]

The ALJ found the fact that AMEX revised the F-118 form in response to Ryerson's concern supported the conclusion that Ryerson reasonably believed, even if mistakenly, that the language of the F-118 form violated securities laws dealing with fraud against shareholders. Consequently, the ALJ found that Ryerson's concern about the F-118 form expressed in his December 18, 2003 memorandum to Micelotta constituted protected activity under Section 806 of the SOX.[54] Moreover, as Ryerson expressed his concern to Micelotta and other AMEX management officials, the ALJ concluded that AMEX had knowledge of Ryerson's protected activity. We affirm the ALJ's findings as they are supported by substantial evidence and not challenged on appeal.

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

51 *Id*.

52 RX 6; HT at 158-159.

53 *Halloum v. Intel Corp*., ARB No. 04-068, ALJ No. 2003-SOX-007, slip op. at 6 (ARB Jan. 31, 2006).

54 D. & O. at 26-27.

Next, the ALJ considered whether Ryerson's complaint in his March 16, 2004 e-mail to Micelotta and AMEX management officials that Micelotta prevented him from recommending non-proprietary and SPS investment products to clients over AMEX proprietary products also constituted SOX-protected activity. Ryerson alleged that such a policy put AMEX in "legal jeopardy."[55]

The ALJ found that the evidence established that new P1 financial advisors in Ryerson's AMEX office were instructed to recommend AMEX proprietary investment products "where the proprietary product was comparable to a non-proprietary alternative."[56] In addition, the ALJ found that it was Micelotta's policy that Ryerson "consult" with him before offering a non-proprietary product to a client.[57] Ultimately, the ALJ concluded that Ryerson did "not elucidate any basis" for his allegation or provide AMEX with any information as to how Micelotta's policy "definitively and specifically" involved conduct which he reasonably believed to violate one of the six categories of securities law specified in SOX Section 806. Thus, the ALJ determined that Ryerson did not engage in protected activity when he complained about being prevented from selling non-proprietary products.[58]

Ryerson contends that Micelotta had a financial incentive to have financial advisors sell AMEX proprietary investment products and that his policy that Ryerson "consult" with him before selling non-proprietary products constituted, in essence, illegal pressure to sell such products. Also, Ryerson argues that the ALJ's determination does not accord with the standard for determining whether he "reasonably believed" Micelotta's conduct violated SOX Section 806.

The relevant evidence indicates that new P1 financial advisors were instructed, as Ryerson acknowledges, to sell AMEX investment products for training purposes.[59] Ryerson also acknowledged at the hearing a "beginning advisor's obligation to consult with" Micelotta about sales of investment products to clients.[60] Furthermore, as the ALJ found, AMEX financial advisors could recommend AMEX investment products over non-proprietary products if they were comparable.[61] The evidence establishes that Ryerson was only asked to consult with

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55 RX 15.

56 D. & O. at 5.

57 *Id*. at 7.

58 D. & O. at 27.

59 HT at 1009; *see also* HT at 870-871; D. & O. at 4-5.

60 HT at 1022; see also HT at 870-871.

61 HT at 68. In response when asked whether it was AMEX policy that Micelotta review non-proprietary investment product recommendations so he could determine whether a proprietary product was better, Ryerson replied "Something close to that was the policy." HT at 1325.

Micelotta before recommending a non-proprietary or SPS product to a client and received a warning when he failed to do so. Ryerson testified that such a policy "by itself" was not illegal.[62]

Moreover, there is only one instance in the record where Ryerson specifically alleges he was prevented from recommending a non-proprietary investment product. He noted in his complaint Micelotta's "near-total" refusal to let financial advisors use non-proprietary products and that Micelotta "specifically turned down" his request on "September 15, 2003" to use the SPS product for a client because it was not already listed in the client's financial plan. Ryerson stated that "I believe" the real reason was because the SPS product allowed a client's funds to be invested in non-proprietary funds.[63] But Ryerson testified that when he wanted to recommend the SPS product for the client in September 2003, Micelotta replied that, because it was not already contained in the client's financial plan, he could do so only if he rewrote the client's financial plan.[64] Ryerson also testified that one time in 2002 and maybe three or four times in the four years he was employed at AMEX did Micelotta try to stop him from using non-proprietary funds, but admitted that it was because he had not complied with the policy to consult with Micelotta first.[65]

Thus, as the ALJ found, the relevant evidence does not establish or support that Ryerson had a reasonable belief that Micelotta prevented him from using non-proprietary or SPS investment products, but only that Micelotta required Ryerson to consult with him before recommending such products. Consequently, we affirm, as supported by substantial evidence, the ALJ's conclusion that Ryerson did not engage in protected activity when he complained that he was prevented from selling non-proprietary investment products.

Whether Ryerson Was Subjected to Adverse Employment Actions or a Hostile Work Environment

Although Ryerson resigned after recognizing he would be terminated for not meeting the required GDC PACE level, the ALJ found that he suffered an adverse employment action when his employment was scheduled for termination.[66] We affirm the ALJ's finding as it is supported by substantial evidence and not challenged on appeal.

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62 HT at 1326.

63 RX 1.

64 HT at 1023-1025.

65 HT at 1323-1324.

66 D. & O. at 28.

The ALJ also found that Ryerson was subjected to an adverse employment action when Micelotta required him to rewrite financial plans that Micelotta had previously approved.[67] Similarly, the ALJ found that the written warnings Ryerson received, including the inaccurate warning for using an inappropriate "Ibbotson" chart, constituted adverse employment actions as they were preliminary steps to further disciplinary action including termination.[68]

But the ALJ further found that although Ryerson alleged he was also subjected to adverse employment actions when he was given heightened supervision and required to attend additional training, these actions did not have any tangible or detrimental effect on his conditions of employment and were no different than the requirements imposed on similar employees.[69] As for Ryerson's allegation that Micelotta impeded his ability to rewrite his financial plans by limiting his access to his shared office computer, the ALJ concluded that there is no evidence that this materially impacted Ryerson's ability to perform his duties or otherwise altered his employment status. Specifically, the ALJ found that the evidence shows that Micelotta's decision was to accommodate Ryerson's office mate, who used their shared office computer more often than Ryerson did, and Micelotta also accommodated Ryerson when he made a second office computer available to Ryerson on which to rewrite his financial plans.[70]

Finally, Ryerson also alleged that he was subjected to a hostile work environment after reporting his concern about the F-118 form when Micelotta threatened to retaliate against hiim, made him rewrite his financial plans, limited his access to his office computer, and issued him written warnings. The ALJ determined that the evidence does not establish that any of Micelotta's allegedly discriminatory or harassing conduct was sufficiently severe or pervasive that it altered Ryerson's conditions of employment and established a hostile work environment.[71]

Ryerson contends before us that Micelotta's retaliatory actions after he reported his concern about the F-118 form lowered his morale, leading to his poor performance, failure to meet the required GDC PACE level, and therefore, his termination. Specifically, Ryerson argues that the reasons for the written warnings and heightened supervision he received, the limits on his access to his office computer, and the failure of AMEX to properly investigate his complaints about Micelotta were pretexts. Instead, Ryerson alleges that these actions were intended to create a hostile work environment in retaliation for reporting his concern about the F-118 form and, consequently, to force his resignation or termination.

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67 *Id*. at 29.

68 *Id*.

69 *Id*. at 30.

70 *Id*. at 29-30.

71 *Id*. at 31.

To prevail on a hostile work environment claim, Ryerson must prove by a preponderance of the evidence: 1) that he engaged in protected activity; 2) that he suffered intentional harassment related to that activity; 3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) that the harassment would have detrimentally affected a reasonable person and did detrimentally affect him.[72] To evaluate whether Ryerson demonstrated that any harassment altered the conditions of employment and created an abusive work environment, the fact-finder considers factors such as the frequency and severity of the harassment; whether the harassment was pervasive, physically threatening or humiliating, or merely offensive; and whether it unreasonably interfered with Ryerson's work performance.[73] If Ryerson succeeds in proving that a hostile work environment existed, he must also prove by a preponderance of evidence that AMEX knew, or in the exercise of reasonable care should have known, that his supervisors or co-employees were harassing him and that AMEX failed to take prompt remedial action.[74]

The ALJ's findings that the limits on Ryerson's access to his shared office computer, the heightened supervision he was given, and the training he was required to attend were no different than what was required of similar employees are supported by substantial evidence. Thus, even if substantial evidence could support a different conclusion, we affirm the ALJ's findings that these actions did not have any tangible or detrimental effect on the conditions of his employment or materially impact his ability to perform his duties.[75]

In addition, the ALJ's conclusion that the written warnings Ryerson received (other than the inaccurate warning for his use of an "Ibbotson" chart) were based on legitimate concerns AMEX had with Ryerson's behavior, his failure to comply with AMEX policies and his failure to meet the required GDC PACE sales level is also supported by substantial evidence.[76] Finally, although Micelotta did require him to rewrite financial plans that were previously approved, Ryerson testified that "[b]y and large" it was true that rewriting the plans did not affect his GDC PACE sales level.[77] Thus, even if substantial evidence could support a different conclusion, we

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[72] *Jenkins v. United States EPA*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 13 (ARB Feb. 28, 2003).

[73] *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 1997-ERA-014 et al., slip op. at 44 (ARB Nov. 13, 2002), citing *Harris v Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

[74] *Sasse v. Office of the U.S. Attorney,* ARB Nos. 02-077, 02-078, 03-044; ALJ No. 1998-CAA-007, slip op. at 35 (ARB Jan. 30, 2004).

[75] *Universal Camera Corp.*, 340 U.S. at 488; *see also Henrich*, ARB No. 05-030.

[76] As the ALJ found, Micelotta did not issue the warnings because he disagreed with Ryerson's recommendations of non-proprietary and SPS investment products, but because Ryerson had not complied with AMEX policies. D. & O. at 21, n.27.

[77] HT at 1374.

affirm the ALJ's finding, as supported by substantial evidence, that the adverse actions AMEX took were not sufficiently severe or pervasive that they altered the conditions of Ryerson's employment. Consequently, we affirm the ALJ's conclusion that Ryerson failed to establish that he was subjected to a hostile work environment.

Causation

The ALJ concluded that Ryerson did not prove that his protected activity played any role in the issuance of the written warnings or his subsequent termination due to his acknowledged failure to meet the required GDC PACE level.[78] As the ALJ noted, the GDC PACE level requirement was based on a non-discriminatory application of AMEX policy for all P1 financial advisors. Moreover, the ALJ found that Ryerson was unable to explain how any of AMEX's adverse actions materially impacted his GDC PACE level.[79]

Again, although Micelotta required him to rewrite financial plans that he had previously approved, Ryerson testified that "[b]y and large" it was true that rewriting the plans did not affect his GDC PACE sales level. [80] Ryerson also could not "recall" that using the F-118 form prior to its revision affected his GDC PACE level.[81]

The ALJ did find that Micelotta's accusation that Ryerson used an "Ibbotson" chart to justify an investment recommendation was inaccurate. Therefore, given Micelotta's previous threats in response to Ryerson's complaint about the F-118 form, the ALJ inferred that Ryerson's protected activity was a contributing factor to the warning he received for this unsubstantiated allegation.[82] But the ALJ ultimately concluded that the reasons for the other warnings Ryerson received were based on legitimate concerns that AMEX had with Ryerson's behavior, his failure to comply with AMEX policies, and ultimately his failure to meet the required GDC PACE sales level.[83]

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78 D. & O. at 32-33.

79 *Id*.

80 HT at 1374.

81 HT at 1315.

82 D. & O. at 32.

83 Ryerson also complained that AMEX changed its promotion policy after Ryerson was hired and began working for AMEX. RX 15. The ALJ did find that not considering Ryerson for promotion to a P2 financial advisor based on the AMEX policy in place when he was first hired constituted adverse employment action. D. & O. at 29. But the ALJ ultimately concluded that as AMEX changed its promotion policy before Ryerson engaged in any protected activity and the policy was applied to all P1 employees, Ryerson's protected activity did not play any role in the issuance of the new policy. D&O at 32. We affirm the ALJ's finding as it is supported by substantial evidence and is not challenged on appeal.

Thus, the ALJ's finding that Ryerson did not prove that his protected activity played any role in his subsequent termination due to his acknowledged failure to meet the required GDC PACE level is supported by substantial evidence. Consequently, even if substantial evidence could support a different conclusion, we affirm the ALJ's conclusion that that Ryerson is not entitled to reinstatement, lost pay, or other economic damages.[84]

CONCLUSION

The ALJ found that Ryerson engaged in SOX-protected activity and that AMEX had knowledge of Ryerson's protected activity. But the ALJ further found that Ryerson failed to prove that his protected activity played any role in the termination of his employment. Thus, the ALJ determined that Ryerson was not entitled to reinstatement, lost pay, or other economic damages. The ALJ's findings are supported by substantial evidence. Accordingly, the ALJ's D. & O. is **AFFIRMED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Similarly, Ryerson also complained before the ALJ that AMEX did not allow him to bring clients with him to his new job working for an independent AMEX P2 financial advisor after AMEX terminated his employment. D. & O. at 29. The ALJ also found that AMEX's policy that did not allow Ryerson to bring clients with him to his new job constituted adverse employment action. *Id*. But the ALJ concluded that Ryerson has not shown that his protected activity played any role in regard to AMEX's policy on the reassignment of his clients after he resigned. D. & O. at 33. Again, we affirm the ALJ's finding as it is supported by substantial evidence and is not challenged on appeal.

[84] D. & O. at 35. We further note, however, that because the ALJ found that the evidence established that Micelotta directed Ryerson to rewrite his financial plans because of his protected activity, D. & O. at 31, the ALJ did order AMEX to expunge from Ryerson's personnel file and AMEX records any reference to Micelotta's directive that Ryerson rewrite the previously-approved financial plans and allowed Ryerson to submit an itemized application of his litigation costs and expenses. D. & O. at 35. As AMEX has not challenged the ALJ's order on appeal, it is affirmed.