



In the Matter of:

PATRICK J. GODFREY,

ARB CASE NO. 08-088

COMPLAINANT,

ALJ CASE NO. 2008-SOX-00005

v.

DATE: July 30, 2009

UNION PACIFIC RAILROAD COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Patrick J. Godfrey, pro se, Grain Valley, Missouri

For the Respondent:

**Robert C. Petrusis, Esq., Kristin Ulrich Somich, Esq., Ogletree Deakins Nash
Smoak & Stewart, P.C., Cleveland, Ohio**

FINAL DECISION AND ORDER

Patrick J. Godfrey filed a complaint with the United States Department of Labor in which he contends that when Union Pacific Railroad Company (Union Pacific) terminated his employment, it violated the whistleblower protection provision of the Sarbanes-Oxley Act of 2002 (SOX).¹ In an April 30, 2008 [Recommended] Decision and Order (D. & O.), a Labor Department Administrative Law Judge (ALJ) granted summary decision to Union Pacific and dismissed Godfrey's complaint. We affirm.

¹ 18 U.S.C.A. § 1514A (West 2006).

BACKGROUND

Godfrey began work with Union Pacific in 1995, and in 1998 he became Manager of Locomotive Maintenance in the company's Kansas City, Missouri locomotive facility. He was responsible for managing the repair and maintenance of locomotives and locomotive components. His supervisor was Charles J. Bussard.²

In carrying out his duties, Godfrey was permitted to use one of Union Pacific's Visa procurement cards, which he used to make work-related purchases of goods and services. Company policy imposed specific restrictions on using the procurement cards. Employees were expected to complete a written contract for any purchases that exceeded an annual amount of more than \$5,000 with a particular vendor. Union Pacific also prohibited employees from "parceling" transactions, i.e., dividing a single transaction into two or more separate transactions to avoid the contract restrictions.³

In January 2007, Union Pacific began to investigate the misuse of procurement cards by maintenance employees in Kansas City. The company discovered that some Union Pacific employees, including Godfrey, had parceled purchases.⁴ The company also discovered that Godfrey had misused an identification badge in violation of Federal Railroad Administration regulations.⁵ As a result of the investigation, Union Pacific discharged Bussard on May 22, 2007. On that same day, the company suspended Godfrey without pay. Union Pacific terminated Godfrey on June 15, 2007, "for dishonest and unethical behavior relating to misuse of your company VISA purchasing card . . . as well as misuse of temporary EDCS badges."⁶

On July 13, 2007, Godfrey filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that his discharge violated the SOX. OSHA dismissed the complaint. Godfrey appealed the dismissal and his complaint was referred to the Labor Department's Office of Administrative Law Judges for a hearing. Union Pacific filed a Motion for Summary Decision (Motion) and attached numerous exhibits. The company argued that it was entitled to summary decision because, prior to his firing, Godfrey had not engaged in activity that the SOX

² Respondent Union Pacific Railroad Company's Motion for Summary Decision (Motion) at 4-6, citing Deposition of Patrick Godfrey (Godfrey Dep.) at 19-66.

³ Motion, Exhibit (Ex.) D; Godfrey Dep. at 235-36.

⁴ Motion, Ex. D; Godfrey Dep. at 123-24, 189.

⁵ Godfrey Dep. at 82-83, 212.

⁶ D. & O. at 3; Godfrey Dep., Ex. 3, 8, 19.

protects.⁷ Godfrey responded with a Memorandum, with exhibits, opposing Union Pacific's motion.

As earlier noted, the ALJ granted the motion. He concluded that Union Pacific was entitled to summary decision because Godfrey failed to establish a genuine issue of fact that he engaged in SOX-protected activity prior to his discharge.⁸ Godfrey 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.⁹ We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies also governs our review.¹⁰ The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.¹¹ 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.¹² 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."¹³

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.¹⁴ "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

⁷ Motion at 13-19. Union Pacific also argued that several jurisdictional and procedural defects were fatal to Godfrey's SOX claim and that Godfrey failed to respond to the company's discovery requests regarding mitigation of his alleged damages. *Id.* at 19, 22.

⁸ D. & O. at 10.

⁹ Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

¹⁰ 29 C.F.R. § 18.40 (2006).

¹¹ Fed. R. Civ. P. 56.

¹² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹³ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson*, 477 U.S. at 248.

¹⁴ *Anderson*, 477 U.S. at 255.

party will bear the burden of proof at trial.”¹⁵ Accordingly, a moving party may prevail by pointing to the “absence of evidence proffered by the nonmoving party.”¹⁶ 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.”¹⁷

DISCUSSION

The Legal Standard

To prevail on his SOX complaint, Godfrey must prove by a preponderance of the evidence that: (1) he engaged in activity that the SOX protects; (2) Union Pacific 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. Godfrey is not entitled to relief if Union Pacific proves by clear and convincing evidence that it would have taken the same action in the absence of the protected activity.¹⁸ Thus, protected activity is an essential, that is, material element of Godfrey’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,¹⁹ 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.²⁰

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 protected complaint must “definitively and specifically” relate to

¹⁵ *Celotex*, 477 U.S. at 322.

¹⁶ *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.

¹⁷ 29 C.F.R. § 18.40(c).

¹⁸ 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).

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

²⁰ See 18 U.S.C.A. § 1514A(a).

the SOX subject matter, be specific enough to permit compliance, and support a complainant's reasonable belief.²¹

Godfrey's Evidence of Protected Activity

To defeat Union Pacific's motion for summary judgment, Godfrey must adduce at least some evidence that he engaged in SOX protected activity. The ALJ observed that Godfrey's filings "have not been entirely consistent or clear" about protected activity.²² We have examined all of the evidence that Godfrey submitted in opposing Union Pacific's motion. Godfrey appears to point to three instances of protected activity.

1. Calls to the Hotlines and the June 28, 2007 Duffy Letter.

In this letter appealing OSHA's decision to dismiss his claim and requesting a hearing, Godfrey appears to allege that Union Pacific terminated him, in part, because his wife, Robin Godfrey, called two company hotlines on his behalf on February 14, 2006, and complained about "financial misdeeds, FRA [Federal Railroad Administration] violations, and same sex harassment."²³ The record also contains a June 28, 2007 letter to Dennis Duffy, Union Pacific's Executive Vice-President, in which Godfrey complained that supervisor Bussard and Steven Sparr, Union Pacific's Senior Direct of Locomotive Facilities, were responsible for "intentional or negligent infliction of emotional distress, discrimination, harassment, invasion of privacy, defamation, creating a hostile work environment, and interference with employment."²⁴

The ALJ noted Union Pacific's argument that the calls to the hotlines and the letter to Duffy cannot constitute SOX protected activity because Godfrey essentially admitted in deposition that the calls and letter pertained to perceived discrimination and sexual harassment, activity that does not definitively and specifically relate to the Federal fraud statutes, SEC rules or regulations, or shareholder fraud. Moreover, Godfrey's Memorandum opposing Union Pacific's motion terms the calls and Duffy letter "background information" and states that he does not claim that he was terminated for these "prior reports."²⁵ Therefore, the record supports the ALJ's finding that these "prior

²¹ *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 2005-SOX-088-092, slip op. at 9 (ARB Apr. 29, 2008); see *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).

²² D. & O. at 5.

²³ Memorandum, Exhibit O.

²⁴ Godfrey Dep. Ex. 35.

²⁵ D. & O. at 5-6; Memorandum at 22.

reports” do not, as Godfrey at first seemed to allege, constitute evidence of SOX protected activity.²⁶

2. *Bussard’s Improper Parceling*

The record indicates that Bussard was terminated, in part, because he violated Union Pacific’s rule about parceling.²⁷ As the ALJ extensively noted, Godfrey’s Memorandum alleges that Bussard’s parceling constituted fraud against Union Pacific and its shareholders. According to Godfrey, the parceling “was fraud perpetrated on the company when [improperly purchased vehicles] were excluded from being reported as assets on the financial statements.” Furthermore, Godfrey claimed that Union Pacific violated SOX because its “internal controls” were inadequate or non-existent and thus permitted Bussard to violate the parceling rule, which resulted in other assets being “concealed and not reported appropriately on the financial statements.”²⁸ Godfrey contends that he told a company official, Stephen Slattery, about Bussard’s parceling activities.

But like the ALJ, we find no evidence in this record that Godfrey’s reports to Slattery contain the allegations that he now advances, i.e. that Bussard’s parceling and the company’s lax policies defrauded shareholders. At best, Godfrey’s complaints to Slattery evidence only vague complaints about parceling. The record contains no evidence that those complaints definitively and specifically related to the fraud statutes, SEC rules, or shareholder fraud. And speculation or a mere possibility that shareholders would be defrauded because Union Pacific employees parceled purchases does not satisfy the reasonable belief requirement.²⁹ Therefore, Godfrey has not met his burden to provide sufficient evidence to create an issue of fact that he reasonably believed that Bussard or Union Pacific itself were violating the fraud statutes, SEC rules or regulations, or shareholder fraud law.

²⁶ See, e.g., *Harvey*, slip op. at 14 (“Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX.”).

²⁷ Godfrey Dep. Ex. 3.

²⁸ D. & O. at 6-7, citing Memorandum at 3, 5, 21-22, 24.

²⁹ See *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-23, slip op. at 8 (ARB September 29, 2006), citing *Harvey*, slip op. at 14 (“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.”).

3. The “Kickback” Scheme

Finally, in his Petition for Review, Godfrey claims that he told Slattery that he believed Bussard was receiving “financial kickbacks.”³⁰ And in his brief to us, Godfrey states that he “report[ed] to and provid[ed] copies of receipts to . . . Slattery which he believed was evidence of fraudulent kickbacks being received by . . . Slattery.” According to Godfrey, three Union Pacific employees purchased a vehicle using their Visa procurement cards. They overpaid the seller \$10,016. The seller, in turn, paid Bussard the \$10,016. Godfrey calls this a “kickback.”³¹ But the record contains no evidence that Godfrey used the term “kickback” or described any action that could be characterized as a “kickback” when reporting to Slattery. Furthermore, Godfrey did not make the “kickback” argument to the ALJ. Thus he waives it on appeal.³²

CONCLUSION

We conclude that Godfrey did not present sufficient evidence to create a genuine issue of fact that he engaged in SOX-protected activity, an essential element of his claim. Accordingly, we **GRANT** Union Pacific’s Motion for Summary Decision and **DENY** Godfrey’s complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

³⁰ Petition for Review at 4.

³¹ Complainant’s Initial Brief at 4-5.

³² See *Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 4 n.11 (ARB Apr. 3, 2007 (corrected)).