U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

DOUGLAS DENNENY,

COMPLAINANT,

v.

MBDA, INC., et al.,

RESPONDENT.

ARB CASE NO. 2018-0027

ALJ CASE NO. 2016-SOX-00032

DATE: January 8, 2021

Appearances:

For the Complainant:
Nicholas Woodfield, Esq. and R. Scott Oswald, Esq.; *The Employment Law Group, P.C.*; Washington, District of Columbia

For the Respondent:
Betty S.W. Graumlich, Esq. and Mark J. Passero, Esq.; *Reed Smith LLP*; Richmond, Virginia

For the Solicitor of Labor, Amicus Curiae:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah K. Marcus, Esq.; Megan E. Guenther, Esq.; Sarah M. Roberts, Esq.; *United States Department of Labor*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell, James A. Haynes, and Randel K. Johnson, *Administrative Appeals Judges*, presiding en banc.

DECISION AND ORDER

PER CURIAM. This case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX or Section 806), as amended, and its implementing regulations.[1] On October 29, 2015, Complainant Douglas Denneny filed a complaint against Respondent MBDA, Inc. (MBDA),[2] his former employer, alleging that MBDA terminated his employment because he engaged in conduct protected by SOX. On February 9, 2018, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) granting Respondent's motion for summary decision and dismissing Denneny's complaint. For the reasons that follow, we affirm.

BACKGROUND[3]

MBDA is a privately held missile systems corporation.[4] It is a wholly owned subsidiary of MBDA UK, Limited (MBDA UK), which is also privately held.[5] Although MBDA and MBDA UK are private companies, both contract with public companies.[6]

Denneny began working for MBDA in 2009 as its Vice President for Government Relations.[7] In 2013, Denneny's role was expanded to Vice President of Government Relations, Communications, and Business Development, and he also became a member of MBDA's Board of Directors.[8]

According to Denneny, he engaged in activity protected by SOX by complaining to MBDA board members and executives about three issues: (1) the

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1 18 U.S.C. § 1514A (2010); 29 C.F.R. Part 1980 (2020).

2 Denneny currently identifies three respondents: MBDA, Inc., its parent company MBDA UK, and MBDA Group, which he alleges is a "super-ordinate entity" that "bands together and manages five national entities," including MBDA UK. Complainant's Brief in Support of Petition for Review (Compl. Br.) at 1, 3. MBDA, Inc. counters that it alone was Denneny's employer and that no other corporate entity was named, served, or otherwise properly before the ALJ. We need not address this dispute to resolve the appeal.

3 These background facts are taken from the D. & O. and the parties' briefing before the ALJ and on appeal. We make no findings of fact and view the facts in the light most favorable to Denneny, as the non-moving party below.

4 D. & O. at 4; Compl. Br. at 3

5 D. & O. at 4.

6 *Id.* at 4; Compl. Br. at 3.

7 D. & O. at 4.

8 *Id.* at 4; Compl. Br. at 4.

development of MBDA's "SABER" munitions program; (2) the termination of MBDA's lease at the Redstone Arsenal facility; and (3) a board member's conflict of interest.

1. SABER Munitions Program

MBDA developed a "small air bomb extended range" (SABER) munitions program to market to the U.S. Army.[9] Denneny asserts that beginning in 2011, he repeatedly complained to MBDA executives that SABER had limited customer interest and was not a good investment.[10] According to Denneny, John Pranzatelli, an MBDA executive, misstated SABER's performance to board members and the Chief Executive Officer (CEO) of MBDA UK, which had been funding the program, at a board meeting in July 2012.[11]

Denneny believed MBDA had subcontracts with publicly traded companies to develop SABER and was having discussions with publicly traded companies to sell SABER.[12] However, Denneny admits that MBDA did not actually contract with a public company to sell SABER.[13] There is also no evidence that MBDA hired a publicly traded subcontractor to develop SABER.[14]

2. Redstone Arsenal Lease

In February 2015, MBDA subcontracted with the Boeing Corporation (Boeing), a publicly traded company, to sell three of MBDA's Brimstone II missiles to the U.S. Navy.[15] According to Denneny, MBDA had represented to Boeing that it would produce the missiles at a facility it leased from the U.S. Army at the Redstone Arsenal in Huntsville, Alabama.[16] However, the Army had provided notice on September 10, 2014, that it was terminating MBDA's lease.[17] Denneny alleges that Mr. Pranzatelli and Scott Webster, who was at that time MBDA's interim CEO, kept the termination of the Redstone lease from MBDA's board.[18]

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9 D. & O. at 4; Compl. Br. at 5.

10 D. & O. at 5; Compl. Br. at 5.

11 D. & O. at 4-5.

12 *Id.* at 5.

13 *Id.* at 4-5.

14 *Id.* at 5 n.5.

15 *Id.* at 4-5.

16 *Id.* at 5.

17 *Id.* MBDA did not vacate the Redstone Arsenal facility until April 2015. *Id.*

18 *Id.* at 6.

Denneny asserts the Redstone facility was the only feasible facility MBDA had to produce the Brimstone II missiles.[19] According to Denneny, he was concerned that the lease termination could "negatively impact [MBDA]'s ability to fulfill its contract with Boeing, and therefore Boeing's ability to fulfill its contract with the US government."[20] Therefore, on or about October 2014, Denneny reported to MBDA's board and senior executives of MBDA's parent company that MBDA no longer had access to the Redstone Arsenal and could not carry out its plan to build the Brimstone II missiles.[21]

3. Conflict of Interest

In April 2014, ATK, a manufacturer of missile motors, publicly announced a merger with another company, Orbital Sciences, to become Orbital ATK.[22] On the same day of the merger announcement, Webster, MBDA's interim CEO and Chairman of the Board, disclosed to MBDA's board via email that he would also serve on Orbital ATK's Board of Directors.[23]

On April 20, 2015, the U.S. Navy issued a request for information (RFI) for a missile for the F/A-18E/F Super Hornet aircraft.[24] MBDA's Brimstone II missile broadly met the requirements of the RFI.[25] Almost immediately, Orbital ATK expressed a desire to collaborate with MBDA on the RFI.[26] Although the Brimstone II missile used a motor produced by another company, Roxell, ATK had supplied motors for the original Brimstone missile.[27] According to Denneny, Orbital ATK made a "big push" to get MBDA's business, and MBDA had strategy meetings to consider replacing the Roxell motor on the Brimstone II with an Orbital ATK motor.[28]

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19 *Id.* at 5.

20 *Id.* at 5-6.

21 *Id.* at 6.

22 *Id.* at 7.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 6.

28 *Id.* at 7-8; Compl. Br. at 8-9.

Denneny became concerned that Webster's positions on MBDA's and Orbital ATK's boards could create a conflict of interest.[29] Consequently, on April 21, 2015, Denneny sent an email to Pranzatelli, who at that point had become MBDA's CEO, and another MBDA board member, stating "I think [Webster] may have a conflict of interest if he is our Chairman and also on the Board and with Orbital ATK. Can we have him present when we discuss our RFI response/Brimstone/partnering? Maybe he is excluded from that part of the board discussions? . . ."[30] Pranzatelli responded that Denneny's concern was a "good point, thanks for the reminder … I know that [Webster] is aware of & sensitive to general topic."[31] Indeed, when Webster first announced his role on the Orbital ATK board, he acknowledged the potential for a conflict of interest, but committed to managing that risk.[32] There is also no evidence that Webster was involved in any of the alleged discussions regarding replacing the Roxell motor with an Orbital ATK motor, and Denneny also admitted that Webster had not expressed that MBDA should use an Orbital ATK motor on Brimstone II.[33] Even so, Denneny says he raised the potential conflict of interest "to eliminate[e] a problem prior to it developing."[34]

According to Denneny, he also told Pranzatelli that he planned to raise Webster's potential conflict of interest at the board meeting scheduled for May 7, 2015.[35] However, MBDA terminated Denneny's employment shortly before the start of the meeting on May 7, 2015.[36]

4. Procedural History

On October 29, 2015, Denneny filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that MBDA violated SOX by terminating his employment for engaging in protected activity. OSHA dismissed Denneny's complaint on April 7, 2016. Among other things, OSHA concluded that MBDA was not a covered employer under SOX.

On April 27, 2016, Complainant filed objections to OSHA's findings and requested a hearing with the Office of Administrative Law Judges. On August 31,

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29 D. & O. at 7-8.

30 *Id.* at 7.

31 *Id.*

32 *Id.* at 16.

33 Memorandum in Support of Respondent's Motion for Summary Decision at 14 (citing Deposition of Douglas Denneny at 116).

34 *Id.* (quoting Deposition of Douglas Denneny at 132).

35 D. & O. at 8.

36 *Id.*

2017, MBDA moved for summary decision. The ALJ granted MBDA's motion on February 9, 2018, concluding that the undisputed material facts established that MBDA was not a covered entity and that Denneny's concerns were not protected under SOX. This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under SOX.[37] The ARB reviews an ALJ's grant of summary decision de novo under the same standard the ALJ applies.[38] Summary decision is permitted where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."[39] The ARB views the record on the whole in the light most favorable to the non-moving party.[40]

DISCUSSION

SOX provides that a covered employer may not discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because the employee provides information to a supervisor "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire 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 . . . ."[41] Thus, to prevail on his SOX claim, Denneny must prove by a preponderance of the evidence that (1) he engaged in activity that SOX protects; (2) MBDA took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the adverse personnel action.[42]

Denneny must also establish that MBDA is covered by the statute. That is, Denneny must show that MBDA is either a "company with a class of securities

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37 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

38 *Neff v. Keybank Nat'l Assoc.*, ARB No. 2019-0035, ALJ No. 2018-SOX-00013, slip op. at 3 (ARB Feb. 5, 2020).

39 29 C.F.R. § 18.72(a).

40 *Micallef v. Harrah's Rincon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015-SOX-00025, slip op. at 3 (ARB July 5, 2018).

41 18 U.S.C. § 1514A(a)(1).

42 *See* 29 C.F.R. § 1980.109(a); *see also* 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 49121(b)); *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 9-10 (ARB May 25, 2011).

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. 78*o*(d))" (in common parlance, a publicly traded company), or a "contractor" or "subcontractor" of such company.[43]

1. We Need Not Resolve the Issue of the Scope of Coverage for "Contractors" under SOX

Much of the parties' attention in their briefs below and on appeal was devoted to the issue of whether MBDA is a covered employer under SOX. MBDA is not publicly traded. Denneny contends, however, that MBDA is covered by SOX because it is a "contractor" of public companies, like Boeing. MBDA counters that a private company is not subject to SOX simply because it has a contract with a public company. Instead, MBDA argues that for coverage to extend to a private contractor, the putative whistleblower's complaint must be connected to the contract and services provided by the contractor to the public company, and must relate to fraud or other relevant violation of law committed by the public company itself. Under MBDA's theory, it is not within the scope of SOX in this case because the conduct about which Denneny complained was either unrelated to a contract with a public company (the development of SABER), or did not involve fraud by a public company against its own shareholders (the termination of the Redstone Arsenal lease and the Orbital ATK conflict of interest).

The limiting principles that MBDA argues should be applied when assessing whether a private entity is covered as a contractor under SOX are derived from the Supreme Court's decision in *Lawson v. FMR, LLC*[44] and its progeny. In *Lawson*, the petitioners were employees of private contractors providing professional services to publicly traded mutual funds. The specific issue in *Lawson* was whether SOX shielded only those individuals employed by the public company itself, or whether it also shielded employees of privately held contractors who perform work for the public company.[45] The Supreme Court held that Section 806 prohibits, under certain circumstances, private contractors of public companies from retaliating against their own employees, just as it would retaliation against employees of public companies.[46] The Supreme Court ruled that the contractor's employees were covered because the conduct about which they complained implicated the shareholders of the publicly traded mutual funds, which had no employees of their own who could blow the whistle on fraudulent conduct.[47]

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43 18 U.S.C. § 1514A(a)(1).

44 571 U.S. 429 (2014).

45 *Id.* at 433.

46 *Id.*

47 *Id.* at 454.

In response to concerns expressed by the dissent that the Court's holding would allow SOX claims with only tenuous connection to public companies, the plurality in *Lawson* discussed potential limitations on the scope of coverage for "contractors" under the statute. Notably, the Court acknowledged a limiting condition proposed by the Solicitor General that SOX protects contractor employees only to the extent that their whistleblowing relates to "the contractor . . . fulfilling its role as a contractor for the public company, not the contractor in some other capacity."[48] However, the Court determined that it did not need to decide whether any potential limitations were appropriate, because the petitioners sought only a "mainstream application" of the provision's protections in that case.[49]

In the wake of *Lawson*, several courts have wrestled with the scope of coverage for contractors under the statute. In *Gibney v. Evolution Marketing Research, LLC*,[50] the District Court for the Eastern District of Pennsylvania distinguished between instances in which a private contractor of a public company complained about fraud committed by the public company itself, which was covered by SOX, and instances in which a private contractor complained about fraud committed by the contractor against the public company ("pass-through" harm), which was not.[51] In *Anthony v. Nw. Mut. Life Ins. Co.*,[52] the Northern District of New York imposed similar limitations. "First, the whistleblowing must relate to the contractor's provision of services to the public company." Second, the whistleblowing must "concern[ ] public company fraud, whether committed by the public company itself or through its contractors."[53] Other district courts have also grappled with the coverage issue, with varying outcomes.[54]

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48 *Id.* at 453.

49 *Id.* at 454. In a concurrence, Justices Scalia and Thomas rejected the proposed limiting conditions. *Id.* at 459-61.

50 25 F. Supp. 3d 741 (E.D. Pa. 2014).

51 *Id.* at 747-48.

52 130 F. Supp. 3d 644 (N.D.N.Y. 2015).

53 *Id.* at 652.

54 *Compare Reyher v. Grant Thornton, LLP*, 262 F. Supp. 3d 209, 217 (E.D. Pa. 2017) ("A purported whistleblower employed by a private company cannot invoke the protections of [Section 806] simply because her employer happens to contract with public companies on matters unrelated to the alleged whistleblowing."); *Baskett v. Autonomous Research LLP*, No. 17-CV-9237, 2018 WL 4757962, at *8 (S.D.N.Y. Sept. 28, 2018) (unpublished) (citing *Anthony* and dismissing claim where complaints only concerned issues internal to the private contractor "rather than fraud committed by a public company or on its shareholders"); *Brown v. Colonial Savings F.A.*, No. 4:16-CV-884-A, 2017 WL 1080937, at *3-4 (N.D. Tex. Mar. 21, 2017) (unpublished) (citing *Gibney* favorably and dismissing allegations of fraud that "are too far removed from potentially harming the shareholders of

In line with *Gibney* and *Anthony*, the ALJ concluded that "SOX only covers fraud that arises within the context of [the contractor] performing contractual obligations" for the public company.[55] Thus, the ALJ ruled that Denneny's concerns regarding the SABER program were not covered, because it was undisputed that MBDA did not contract with a public company with respect to that program. The ALJ also held that an employee of a private contractor is only protected by SOX if he complains about fraud or violations of law committed by the public company. In contrast, the putative whistleblower is not protected if he complains only about fraud committed against the public company by the private contractor.[56] Therefore, the ALJ concluded that Denneny's complaints about Webster's potential conflict of interest, which was an issue internal to MBDA that would only create attenuated pass-through harm on Boeing's shareholders, was not covered by SOX.[57] Denneny contends that the limiting principles imposed by *Gibney*, *Anthony*, and the ALJ are contrary to the plain language and purposes of SOX and are inconsistent with the holding in *Lawson*.

We need not resolve the parties' disputes on coverage in this case or decide whether any limitations, beyond those previously expressed by the Board,[58] apply to the scope of coverage for "contractors" under SOX. In addition to ruling that MBDA was not covered by SOX, the ALJ also concluded alternatively that the conduct about which Denneny complained was not protected by the statute.[59] Because we affirm the ALJ's grant of summary decision on the grounds that Denneny did not create a genuine issue of material fact that he engaged in protected activity, even

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a public company"); *Tellez v. OTG Interactive, LLC*, No. 15-CV-8984, 2016 WL 5376214, at *3 (S.D.N.Y. Sept. 26, 2016) (unpublished) (finding plaintiff stated a claim where the "fraudulent activity was done in the course of [private defendant's] fulfillment of its contractual duty to provide services to the publicly traded [company's] customers (i.e., within the scope of [defendant's] role as contractor to the public companies)"); *with Gryga v. Henkels & McCoy Grp., Inc.*, No. 19-C-1276, 2019 WL 3573565, at *4 (N.D. Ill. Aug. 6, 2019) (unpublished) (rejecting *Gibney*, and holding that "a company's shareholders can be equally harmed whether it is the contractor, or the company itself, that causes losses due to fraud."); *Limbu v. UST Global, Inc.*, No. CV 16-8499, 2017 WL 8186674, at *4 (C.D. Cal. Apr. 20, 2017) (unpublished) (declining "to craft a rule that excludes employees from SOX coverage solely on the basis of their job responsibilities or the nature of the publicly traded entity's industry").

[55] D. & O. at 14 (citing *Reyher*, 262 F. Supp. 3d at 217).

[56] *Id.* at 16 (citing *Gibney*, 25 F. Supp. 3d at 747-48).

[57] The ALJ did not make any determination regarding coverage with respect to the Redstone Arsenal lease. *See* D. & O. at 15.

[58] *E.g., Griffo v. Book Dog Books, LLC*, ARB No. 2018-0029, ALJ No. 2016-SOX-00041, slip op. at 6-7 (ARB May 2, 2019).

[59] D. & O. at 14-17.

assuming that MBDA was covered by SOX, we decline at this time to rule on the ALJ's conclusions concerning appropriate SOX coverage for private contracting companies.

2. Denneny Did Not Create a Genuine Issue That He Engaged in Protected Activity

To demonstrate that he engaged in SOX-protected activity, a complainant must prove that (1) he subjectively believed that the conduct complained of constituted a violation of one of the laws listed in Section 806, and (2) a reasonable person of similar experience, training, and factual knowledge would objectively believe that a violation had occurred.[60] A complainant need not cite a specific code provision he believes was violated to engage in protected activity, but nonetheless has to complain or provide information about conduct that he reasonably believes concerns one of the six specifically enumerated categories in the statute: mail fraud, bank fraud, wire fraud, securities fraud, any provision of Federal law relating to fraud against shareholders, or any rule or regulation of the SEC.[61] General assertions of wrongdoing untethered from these enumerated categories are not protected, nor are general inquiries.[62] Moreover, although a complainant need not prove an actual violation of law, he must do more than speculate, argue theoretical scenarios, or share mere beliefs that some corporate activity is wrong and may theoretically affect the corporation's financial statements and its shareholders.[63]

Based on these principles, and upon a review of the evidence and arguments submitted by the parties, we agree with the ALJ that MBDA is entitled to judgment because Denneny has not created a genuine dispute that he engaged in protected activity under SOX.

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60 *Sylvester*, ARB No. 2007-0123, slip op. at 14-15.

61 *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 n.6 (2d Cir. 2014) ("We note that the statute does require plausible allegations that the whistleblower reported information based on a reasonable belief that the employer violated *one of the enumerated provisions* set out in the statute" (emphasis original)); *Welch v. Chao*, 536 F.3d 269, 276-77, 279 (4th Cir. 2008) ("[Welch] utterly failed to explain how Cardinal's alleged conduct could reasonably be regarded as violating any of the laws listed in" SOX); *Thibodeau v. Wal-Mart Stores, Inc.*, ARB No. 2017-0078, ALJ No. 2015-SOX-00036, slip op. at 15 (ARB Dec. 17, 2020) ("A complainant is protected only if the complainant supplies information concerning conduct that the complainant reasonably believes constitutes a violation of one of the specifically enumerated categories.").

62 *See Welch*, 536 F.3d at 277; *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009); *Reilly v. Glaxosmithkline, LLC*, No. 19-2897, 2020 WL 4013118, at *3-4 (3d Cir. July 16, 2020) (unpublished).

63 *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 355 (4th Cir. 2008); *Lamb v. Rockwell Automation, Inc.*, 249 F. Supp. 3d 904, 913 (E.D. Wis. 2017).

A. SABER Munitions Program

Denneny asserts that he first engaged in protected activity by "repeatedly advis[ing]" MBDA's executives that SABER had limited customer interest and was not a good investment. He also asserts that he attended a board meeting at which executives misstated SABER's performance and customer interest.[64] The ALJ observed that Denneny did not articulate any particular harm that reached public shareholders.[65]

We agree with the ALJ that SOX does not protect Denneny's concerns regarding the SABER program. Even if public companies were involved in the sale or development of SABER, Denneny's concerns about SABER's viability, customer interest, and investment returns are not sufficiently connected to one of the six enumerated categories in Section 806.[66] Denneny vaguely asserts on appeal that he believed he was reporting "fraud that could impact a publicly traded company."[67] However, he has not explained why he believed his complaints about the product's viability or the company's wasteful spending could have amounted to fraud on another company's shareholders, nor has he explained why such a belief would have been objectively reasonable.[68] Therefore, we agree with the ALJ that Denneny failed to create a genuine issue of material fact that he objectively believed MBDA violated one of SOX's enumerated laws.

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[64] Compl. Br. at 5-6, 21-22.

[65] D. & O. at 14.

[66] *See Welch*, 536 F.3d at 279.

[67] Compl. Br. at 22.

[68] Notably, Denneny presented no argument on appeal regarding the objective reasonableness of his concerns about the SABER program or the termination of the Redstone lease; his argument focused exclusively on Webster's potential conflict of interest. *See* Compl. Br. 23-25. Similarly, his proffer regarding the objective reasonableness of his concerns regarding the SABER program and the termination of the Redstone lease in his brief opposing summary decision below was conclusory:

> Denneny's complaints to MBDA's board of directors about SABER and Redstone Arsenal are objectively reasonable. A reasonable employee in the exact same factual situation with the same education, training, and experience as Denneny would have reasonably believed that Pranzatelli's misstatements to MBDA's board of directors, MBDA UK, and MBDA Group about SABER and Redstone Arsenal constituted a violation of law covered by SOX given Respondents' contracts with publicly traded entities.

Complainant's Opposition to Respondents' Motion for Summary Decision at 38.

B. Redstone Arsenal Lease

Denneny next argues that he engaged in protected activity by revealing at an October 2014 board meeting that MBDA's lease at the Redstone Arsenal had been terminated. According to Denneny, the termination of the lease, which had previously been withheld from MBDA's board members, "could negatively impact MBDA's responsibility to fulfill its contract with Boeing."[69]

As with Denneny's concerns surrounding the SABER program, the ALJ determined that Denneny did not allege that he reasonably believed one of the laws enumerated in SOX had been violated.[70] We agree. Denneny alleged only that he believed the termination of the Redstone Arsenal lease could cause MBDA to breach its contract with Boeing, thereby potentially affecting Boeing's ability to fulfill its contract with the Navy. Denneny has not shown on appeal that he objectively believed that the alleged withholding of information regarding the Redstone lease from MBDA's board or the impact the loss of the lease had on MBDA's ability to fulfill its contract with Boeing constituted mail, wire, bank, securities, or shareholder fraud, or violated any rule or regulation of the SEC. As we have recently reiterated, SOX is not a general anti-retaliation statute.[71] Thus, we agree with the ALJ that Denneny failed to create a genuine issue that his concerns about the Redstone lease were protected by SOX.

C. Conflict of Interest

Finally, Denneny alleges that he engaged in protected activity when he sent the April 21, 2015 email questioning Webster's conflict of interest. Denneny submits that he feared Webster's dual membership on the MBDA and Orbital ATK boards might cause Webster to steer MBDA to partner with Orbital ATK, even though its motors might have proven to be inferior to alternatives. Denneny asserts the conflict could then result in fraud on Boeing's shareholders, to the extent Boeing eventually contracted with MBDA under the erroneous belief that MBDA had selected the most suitable motor for the Brimstone II missiles.[72]

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69 Compl. Br. at 22.

70 D. & O. at 15.

71 *Thibodeau*, ARB No. 2017-0078, slip op. at 14-15; *see also Erhart v. Bofi Holding, Inc.*, No. 15-cv-02287, 2020 WL 1550207, at *21 (S.D. Cal. Mar. 31, 2020) ("The Court underscores that [Section 806] is not a general compliance statute. It does not police all employee grievances and suspicions of wrongdoing.").

72 Compl. Br. at 22-23.

We agree with the ALJ that SOX does not protect Denneny's concerns about Webster's potential conflict of interest. Although Denneny asserts that he feared Webster's conflict could ultimately result in fraud against Boeing's shareholders,[73] Denneny failed to create a genuine dispute that his fear was objectively reasonable.

Denneny admits that by sending the April 21, 2015 email, he was merely attempting to get ahead of a potential problem regarding Webster's dual membership before any developed.[74] Denneny does not suggest there was any evidence that Webster, who had previously self-disclosed his role with Orbital ATK and committed to managing any conflict, had taken any efforts to steer MBDA into partnering with Orbital ATK on Brimstone II missiles. Assuming those efforts might have occurred, Denneny also failed to allege that there was any connection between such efforts and harm or fraud on Boeing's shareholders. Viewing the facts in the light most favorable to Denneny, Denneny was merely concerned that Webster's dual membership might cause him to improperly influence MBDA's actions and might allow him to steer MBDA to choose an inferior motor, which might negatively affect Boeing. The possibility that a challenged practice could take place, and that it could potentially adversely affect the financial condition of a publicly traded company, is not sufficient to establish an objectively reasonable belief that shareholder fraud was occurring or was likely to occur.[75] The potential harm to Boeing's shareholders is based on several speculative contingencies and too remote to give rise to a reasonable belief of shareholder fraud.[76]

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[73] Denneny also asserts on appeal that he was concerned that Webster's potential conflict could have been a "violation of SEC rules and regulations surrounding conflicts of interest." Compl. Br. at 22. Denneny does not elaborate on this statement, point to any specific rule or regulation he believed was violated, or explain why it was objectively reasonable for him to think Webster's dual Board membership would violate such a rule.

[74] Respondent's Brief in Opposition to Complainant's Petition for Review at 6.

[75] *Lamb*, 249 F. Supp. at 913 (holding that a whistleblower claim must be based on an "extant or likely, not theoretical or hypothetical, violation of the law"); *see also Sylvester*, ARB No. 2007-0123, slip op. at 38 (J., Brown concurring in part and dissenting in part) ("[A]s long as the complainant's belief relates to activity that reasonable person could conclude is *or is about to become* a violation, . . . as opposed to unsupported conjecture about hypothetical future events, it is protected." (emphasis original) (internal citations and quotations omitted).

[76] *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 355 (4th Cir. 2008) ("The chain of speculation, in light of a record totally devoid of any Wyeth wrongdoing at the Sanford site, is simply too weak on which to hang even a postulated violation of the securities laws. Livingston, therefore, could not have reasonably believed that Wyeth had violated or was violating the securities laws.").

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's order granting MBDA's motion for summary decision.[77]

SO ORDERED.

[77] Because we agree with the ALJ that Denneny did not engage in protected activity under SOX, we need not address other arguments and issues raised by the parties, including the impact of MBDA UK's relationships with public companies on the issue of coverage, whether Denneny's alleged protected activity contributed to the termination of his employment, or MBDA's assertion that it would have still terminated Denneny's employment in the absence of his alleged protected activity.