

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 12 May 2006**

CASE NO: 2006-SOX-12

In the Matter of:

ALFRED LEAK, Jr.  
Complainant

v.

DOMINION RESOURCES  
SERVICES, INC.  
Respondent

**ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION  
FOR SUMMARY DECISION, AND DENYING COMPLAINANT'S MOTION FOR  
SUMMARY DECISION**

This case arises out of a complaint filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (hereinafter SOX), and Section 6 of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129 (hereinafter PSIA).

**Background and Procedural History**

Dominion Resources Services, Inc., (hereinafter Respondent) is a large producer, distributor, and marketer of energy, based in Richmond, Virginia. Respondent operates regulated electric and natural gas utilities in Virginia, North Carolina, Ohio, Pennsylvania, and West Virginia. (Resp't Mem. in Supp. at 2). Alfred Leak, Jr. (hereinafter Complainant) was hired by Respondent in 1993. (Leak Tr. at 8). In July, 2003 Complainant worked as a Technical Specialist in Respondent's Gas Planning Group and reported to Timothy McNutt, Manager of the Gas Planning Group. (Leak Tr. at 24, 28-29). The Public Utilities Commission of Ohio (hereinafter PUCO) is the agency that regulates Respondent's natural gas operations in Ohio. (Resp't Mem. in Supp. at 2). PUCO conducted a safety audit on a portion of Respondent's system, and identified six issues in a Notice of Probable Non-Compliance dated April 18, 2003. (Resp't Opp. to Complainant's Supplemental Mot. to Compel, Ex. B). Among the issues raised by PUCO was that Respondent did not have proper documentation to justify how the maximum allowable operating pressure (hereinafter MAOP) of its Northeast Shop was established.

In June, 2004, Respondent assigned Complainant to work on the MAOP issue. Complainant's duties included developing system files and reviewing historical records and data to determine the MAOP of the relevant pipeline systems. (Leak Tr. at 40-41). In performing

duties related to this assignment, Complainant believed he discovered information that Respondent had over-pressurized its systems for years, and that at the time of this discovery, over 90 percent of Respondent's Northeast Medium Pressure Shop was non-compliant with PSIA. (Complainant's Mot./Resp. at 9-10).

On May 6, 2005, Complainant filed a timely complaint with the Occupational Safety and Health Administration (hereinafter OSHA), alleging that on March 23, 2005, Respondent violated SOX and PSIA when it terminated him for voicing concerns that Respondent was failing to maintain gas distribution systems at the pressure levels required by state and federal laws, and for his refusal to falsify justification records. (Compl. at 2). On September 29, 2005, OSHA dismissed the complaint on the grounds that the evidence showed that Respondent would have taken adverse action against Complainant regardless of the alleged protected activity. On October 19, 2005, Complainant filed timely objections to OSHA's determination and requested a hearing before an administrative law judge (hereinafter ALJ).

On April 17, 2006, Respondent filed a Motion for Summary Decision and a Memorandum of Law in Support of its Motion for Summary Decision (hereinafter Respondent's Memorandum in Support). Respondent contends that Complainant did not engage in protected activity under SOX, that he is unable to demonstrate the causation element of his *prima facie* case under SOX or PSIA, and that he is unable to show that the reason offered for his termination, insubordination, is pretextual. It argues that clear and convincing evidence establishes that Complainant would have been terminated even in the absence of protected activity. Therefore, no genuine issue of material fact exists and Respondent is entitled to judgment as a matter of law.

On April 27, 2006, Complainant filed a Response to Respondent's Motion for Summary Decision and Complainant's Motion for Summary Decision (hereinafter Complainant's Motion/Response). Complainant argues that he has established a *prima facie* case under SOX and PSIA, that he has proffered evidence as to each element, and that his termination was pretextual. Therefore, there is no genuine issue of material fact in dispute and Complainant is entitled to judgment as a matter of law.

On May 8, 2006, Respondent filed a Brief in Reply to Complainant's Response to Respondent's Motion for Summary Decision and in Response to Complainant's Motion for Summary Decision (hereinafter Respondent's Brief in Reply/Response). In it, Respondent asserts that Complainant's contentions regarding his discharge are baseless and lacking evidentiary support. Further, contrary to the position it articulated in its Motion, Respondent argues that the evidence shows that Complainant did not engage in protected activity under PSIA, and that there is no evidence that the alleged protected activity contributed to the decision to terminate Complainant.

#### Standard of Review

In *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ 2004-SOX-35 (Sept. 30, 2005), the Administrative Review Board (hereinafter ARB or Board) stated that the standard for granting summary decision under 29 C.F.R. § 18.40 is essentially the same as the standard in Fed. R. Civ.

P. 56. Pursuant to § 18.40(d), the ALJ may issue summary decision if the “pleadings, affidavits, [and] material obtained by discovery or otherwise... show that there is no genuine issue as to any material fact.” Slip op. at 4. The ARB stated that a material fact is “one whose existence affects the outcome of the case,” and that a genuine issue exists when “the nonmoving party produces sufficient evidence of a material fact so that the factfinder is required to resolve the parties’ differing versions at trial.” *Id.*

Moreover, the ALJ “does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial’ by viewing ‘all the evidence and factual inferences in the light most favorable to the non-moving party.’” *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-8 (ALJ June 15, 2004), slip op. at 2, *quoting Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21 slip op. at 6 (ARB Nov. 30, 1999) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)).

Once the moving party demonstrates an absence of evidence “supporting the non-moving party’s position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.” *Reddy*, slip op. at 4-5. The non-moving party must not rest upon “mere allegations, speculation, or denials in his pleadings, but must set forth specific facts on each issue” upon which he bears the ultimate burden of proof. *Id.* at 5. Accordingly, the undersigned will grant summary decision if, upon review of the evidence in the light most favorable to the non-moving party, and without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact.

In *Reddy, supra*, the ARB articulated four elements that Complainant must prove to satisfy the burden under 29 C.F.R. § 1980.109: (1) he engaged in protected activity; (2) Respondent knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. Slip op. at 7.<sup>1</sup>

Therefore, to avoid summary decision relative to both parties’ motions, whether Complainant engaged in protected activity under SOX is an essential, material fact that must be shown to be in dispute. It must also be shown that there is a genuine issue of material fact regarding whether Complainant’s alleged protected activity under SOX and PSIA was a contributing factor in his termination.

#### Information Provided By Complainant

On November 19, 2004, Complainant advised Respondent that “more than 90% of the Northeast system is a 20 psig system.” (Complainant’s Mot./Resp. Ex. 11). On January 12, 2005, Complainant prepared a spreadsheet identifying Respondent’s Northeast Shop’s pre-1970 Medium Pressure Systems and their historically documented MAOPs, to which Complainant alleges his supervisor made changes, and instructed him to amend the spreadsheet accordingly. (*Id.*, Exs. 15-17).

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<sup>1</sup> The implementing regulations for SOX and PSIA, set forth at 29 C.F.R. Part 1980 and Part 1981 respectively, which establish the procedures under which to handle discrimination complaints, contain identical language. Therefore, it is logical that the same four elements must also be satisfied under § 1981.109.

On February 11, 2005, Complainant filed a Problem Resolution Report stating that the problem requiring resolution was that “a compliance mandate by the Public Utility Commission of Ohio may result in the reduction of the current maximum allowable operating pressure for a range of 90% of the medium pressure system for the Northeast Shop, alone. Key documentation may be systematically reviewed, negated or purged from the project.” It stated that the resolution sought was “to ensure the inclusion of key documentation including uprate files with respect to the compliance mandate by PUCO.” (Complainant’s Mot./Resp. Ex. 3).<sup>2</sup> Also on February 11, 2005, Complainant placed an anonymous call to the Dominion Compliance Line. (Complainant’s Mot./Resp. Ex. 22). Complainant stated that he believed that the company was out of compliance in its operating distribution system, and that management would delete related information.

On or about March 14, 2005, Complainant contacted Lane Miller, a Department of Transportation instructor at the Transportation Institute in Oklahoma. (Leak Tr. at 404-409). Complainant relayed to Mr. McNutt that he had spoken to Mr. Miller on March 17, 2005. (McNutt Tr. at 130).

Complainant’s May 6, 2005 complaint alleged that he was terminated in “retaliation for continuing to voice my concerns that Dominion was in serious violation of the Natural Gas Pipeline Safety Act... by failing to maintain gas distribution systems at the pressure levels required by the Federal Code of Regulations.” (Compl. at 1). He provided information advocating the downrating of ninety percent of Respondent’s systems to a MAOP of 25 psig so as to bring Respondent into compliance with pipeline safety regulation 49 C.F.R. § 192.619. Additionally, he stated that he was terminated because he refused to submit to pressure exerted by his supervisor, Mr. McNutt, to report false and inaccurate information, which would violate state and federal regulations and have health and safety ramifications. He alleged that Respondent did not want his concerns brought to the attention of the PUCO “for fear of a large fine and orders to make very costly repairs and/or changes to the distribution systems.” (Compl. at 2). Thus, Complainant concluded that he was wrongfully terminated in retaliation for voicing his concerns “in violation of SOX and PSIA.” *Id.*

In OSHA’s September 29, 2005 Findings dismissing the complaint, OSHA stated that the Complainant alleged that Respondent did not want the costly repairs and/or changes to gas pipeline distribution systems reported “for fear this information would affect investment by shareholders.” (Secretary’s Findings at 2). Complainant made no such express statement in his complaint. However, in Complainant’s May 11, 2005 sworn statement provided to OSHA during its initial investigation, Complainant stated that departmental goals for pipeline safety included a goal not to receive two letters of non-compliance associated with fines for a one year period. He stated that the more letters of non-compliance, “the more marks there are against the department in terms of incentives. These incentives include... annual salary increases... promotions for management... as well as stock options for managers and above.” (Decl. of James P. Smith, Ex. 1 at 6). He also stated that bringing Respondent into compliance per his recommendations would be extremely costly, and that Respondent’s continued non-compliance would lead to fines, which would have a negative monetary impact on employees. (*Id.* at 4-6).

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<sup>2</sup> On March 18, 2005, he filed this report a second time. (Complainant’s Mot./Resp. Ex. 20).

In Complainant's Response/Motion, he stated that Mr. McNutt pressured him to submit fraudulent information to PUCO, and that he sought to have Mr. McNutt sign records to ensure Mr. McNutt would not be able to submit "fraudulent and arbitrarily contrived" information to PUCO. (Compl. Resp./Mot. at 3, 6, 14). He stated that Respondent not only "put the general public of Northeast Ohio at great risk by intentionally and consistently over-pressurizing its pipeline systems in violation of [the PSIA], but "indirectly" defrauded its shareholders as a result. (*Id.* at 16-17, 20). He argued that Respondent's conduct defrauds the shareholders because it left Respondent open to "potentially huge litigation should anything happen to the general public as a result of its intentional, consistent over-pressurizing of its pipeline systems." (*Id.* at 18).

### The SOX Complaint

Section 1514A of SOX provides that:

No company with a class of securities 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. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) 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

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(emphasis added). *See also* 29 C.F.R. § 1980.102(a), (b)(1).

SOX provides whistleblower protection for employees of publicly traded companies who provide information or participate in an investigation relating to violations of certain criminal code provisions relating to fraud (including fraud and swindles; fraud by wire, radio, or television; bank fraud; and securities fraud), rules or regulations of the Securities and Exchange Commission, or any provisions of Federal law relating to fraud against shareholders. *Hopkins v. ATK Systems*, 2004-SOX-19, slip op. at 5 (ALJ May 27, 2004).<sup>3</sup> The SOX whistleblower provision is designed to protect “employees involved ‘in detecting and stopping actions which they reasonably believe are fraudulent.’” *Tuttle v. Johnson Controls, Battery Division*, 2004-SOX-76, slip op. at 3 (ALJ Jan. 3, 2005), citing S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002). In *Tuttle*, the ALJ noted that in the securities area, “fraud may include ‘any means of disseminating false information into the market on which a reasonable investor would rely,’” but stated that while fraud under SOX is broader, “an element of intentional deceit... is implicit.” Slip op. at 3, quoting *Ames Department Stores, Inc., Stock Litigation*, 991 F.2d 953, 967 (2d Cir. 1993); *Hopkins*, slip op. at 5.

Complainant does not submit that the information that he communicated related to conduct that he believed constituted a violation of the enumerated fraud sections or an SEC rule or regulation. He claims, however, that he engaged in protected activity in response to conduct that he reasonably believed related to fraud on the shareholders.

A whistleblower must state “particular concerns... which reasonably identify a respondent’s conduct that the complainant believes to be illegal.” *Lerbs, supra*, slip op. at 12; see generally *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). While Complainant is not required to show that the reported conduct actually caused a violation of the law, he must show that he reasonably believed the employer violated one of the laws or regulations enumerated in SOX. *Melendez v. Exxon Chemical Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6 (July 14, 2000).

Thus, protected activity under SOX may be said to comprise three elements: (1) the report or action must involve a purported violation of a Federal law or SEC rule or regulation relating to fraud against the shareholders; (2) the complainant’s belief about the purported violation must be objectively reasonable; and (3) the complainant must communicate his concern to the employer, Federal government, or member of Congress. 1514A(a)(1); *Hughart v. Raymond James & Assoc., Inc.*, 2004-SOX-9 (ALJ Dec. 17, 2004), slip op. at 47.

I must determine whether the concerns Complainant expressed to Respondent provided information about conduct that he reasonably believed constituted violations of a Federal law or SEC rule or regulation relating to fraud against the shareholders. To do so, I will examine the nature and characteristics of the information Complainant communicated to Respondent, the allegations contained in his complaint and other pleadings, and the evidence he proffered in support thereof, in the context of the relevant case law.

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<sup>3</sup> The legislative history of SOX also makes it clear that fraud is an integral element of a cause of action under the whistleblower provision. See S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002), stating that the pertinent section “would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company.”

### Relatedness to Fraud

In *Getman v. Southwest Securities, Inc.* ARB No. 04-059, ALJ No. 2003-SOX-8 (July 29, 2005), the Board considered whether a complainant's refusal to change stock ratings "provided information"<sup>4</sup> that she reasonably believed her employer was about to commit fraud on the shareholders. Under the set of facts presented by this case, the ARB concluded that the complainant's refusal was insufficient to provide information to the respondent, stating that the employee must communicate a concern "that the employer's conduct constitutes a violation in order to have whistleblower protection." *Id.* at 10.

In *Hopkins, supra*, the ALJ found that the complainant's reporting of the release of sludge water into a ground water system due to poor maintenance and overdue inspections did not address any kind of fraud and did not involve transactions relating to securities. Moreover, as there was no allegation that the activities complained of involved intentional deceit or resulted in a fraud against shareholders or investors, the matters complained of within the complaint fell outside of the purview of the employee protection provision of SOX. Slip op. at 2, 5-6.

Similarly, in *Minkina v. Affiliated Physician's Group*, 2005-SOX-19 (ALJ Feb. 22, 2005), the complainant alleged that she was discriminated against for reports she made to OSHA and her employer regarding the air quality of her workplace. Slip op. at 2. She stated that poor air quality not only threatened the health of employees and the public, but also shareholder investments, in that it would reflect badly on the company's reputation and affect its financial health and its ability to contract. *Id.* at 3. The ALJ found that the complainant's reports were about air quality and were unrelated to fraud or the protection of investors. *Id.* at 6. The ALJ concluded that even if there was a possibility that poor air quality might result in financial loss, SOX was enacted to address the problem of "fraud in the realm of publicly traded companies and not in the resolution of air quality issues." *Id.* at 7.

In *Harvey v. The Home Depot, Inc.*, 2004-SOX-20 (ALJ May 28, 2004), the ALJ stated that in determining whether alleged violations of race and employment discrimination involve a federal law related to fraud against shareholders, "an implicit argument may be made that a company which permits discriminatory practices despite its public policy of equal opportunity is acting contrary to the best interests of its share holders." Slip op. at 12. The ALJ noted the appeal of this argument, but stated that protected activity under SOX must involve an "alleged violation of a federal law directly related to fraud against share holders." *Id.* In this case, the ALJ noted that the federal law prohibiting individual employment discriminatory practices, Title VII, is based on individual rights and establishes procedures to address illegal employment discrimination; it was not enacted to preclude fraud against shareholders.

The ALJ continued by stating that the federal law "directly linked to the prevention of fraud against shareholders is SOX statute itself." *Id.* at 12. He considered the argument that "although the racial discrimination is prohibited by a different federal law, its existence may also adversely affect the accuracy of corporate disclosures mandated by SOX, which is a federal law concerning fraud against shareholders." *Id.* However, he concluded that despite some logical appeal, the connection became tenuous upon close examination of SOX. Specifically, upon

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<sup>4</sup> Section 1514A(a)(1).

examination of Section 302's requirement "for the accuracy of material facts relating to finances," the ALJ noted that this section demonstrates Congress' intention to protect shareholders by requiring accurate accounting of a corporation's financial condition. *Id.* at 13. He determined that alleged individual violations of Title VII do not fall into the category of SOX mandated disclosures. *Id.*

While the ALJ theorized that a failure to disclose "a class action lawsuit based on systemic racial discrimination with the potential to sufficiently affect the financial condition of a corporation might become the subject of a SOX protected activity if an individual complained about the failure to disclose that situation," he concluded that individual discrimination did not involve violations of federal laws addressing fraud against shareholders. *Id.*

### Reasonable Belief

The Secretary "has broadly defined protected activity as a report of an act, which the complainant reasonably believes is a violation of the subject statute." *Hughart*, slip op. at 46. Although the allegation need not be ultimately substantiated, an employee's complaints "must be grounded in conditions constituting reasonably perceived violations," of the applicable act. *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995) slip op. at 5. A complainant must have held the belief that there were "pertinent statutory violations at the time he... engaged in the activity subject to whistleblower protection." *Melendez*, slip op. at 20, *citing Oliver v. Hydro-Vac Services, Inc.*, 91-SWD-1 (Sec'y Nov. 1, 1995). Further, a complainant's belief "must be scrutinized under both subjective and objective standards, *i.e.*, he must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable." *Lerbs*, slip op. at 11, *quoting Melendez*, slip op. at 20 (emphasis added). The reasonableness of Complainant's belief is to be determined on the basis of "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." *Id.*

The alleged act by Respondent "must also at least 'touch on' the subject matter of the related statute." *Hughart*, slip op. at 46, *quoting Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and *Dodd v. Polsar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994).

In *Johnson v. Oak Ridge Operations Office*, ARB No. 97-057, ALJ Nos. 1995-CAA-20, 21, 22 (ARB Sept. 30, 1999), the ARB stated that in order to state a valid claim under the environmental whistleblower provisions at issue, the complainants were required to demonstrate that the concerns they expressed regarding alleged violations of the Atomic Energy Act, specifically protected by the ERA, were "grounded in conditions" that could reasonably relate to the CAA, SDWA, SWDA, or CERCLA. Slip op. at 9. Complainants argued that since federal security clearance requirements were improperly implemented and enforced, employees, for that reason, are more likely to engage in behavior that will endanger the environment. *Id.* The ARB found that nothing in the CAA, SDWA, SWDA, or CERCLA related to security clearance operations at places of employment. Since the concerns were unrelated to potential violations of the CAA, SDWA, SWDA, or CERCLA, they could not be grounded in reasonably perceived violations of those statutes. *Id.*



In *Reddy, supra*, the complainant alleged that the respondent violated SOX when it terminated her contract after she informed her supervisors of the deletion of line counts. The ARB reviewed the emails through which the complainant purported to provide this information. The ARB noted that the relevant portions of her emails complained that line counts were “being ‘zapped’ and that the ‘zapping’ is an ‘Enron-type’ accounting practice.” Slip op. at 8. The Board went on to note that the complainant’s pleadings did not explain or demonstrate how the emails constituted protected activity. The complaint “merely alleged that when she complained about the line counts, her contract was terminated.” *Id.* The complainant’s opposition brief contended that respondent’s re-routing of sums owed to transcriptionists to its profits by deleting line counts, constituted filing fraudulent income with the SEC and thus deceived investors. The ARB noted that since the complainant failed to submit evidence supporting these allegations, they were “mere speculation.” *Id.*

### Conclusions

In light of the foregoing case law, the evidence does not support that Complainant’s reporting or action involved a purported violation by Respondent of a Federal law or SEC rule or regulation relating to fraud against the shareholders, or that his belief about the purported violation was objectively reasonable.

The content of Complainant’s various communications demonstrate that his concerns were not grounded in SOX or any other federal law relating to fraud. Indeed, Complainant expressed concern regarding Respondent’s alleged non-compliance with, and alleged falsification of, documents related to pipeline safety, that have nothing to do with the protection of investors. Furthermore, while those concerns fit squarely under that which PSIA is designed to protect, PSIA is not a statute that relates to fraud. Similarly, Complainant’s concerns expressed thereunder, regarding the potential destruction and falsification of key pipeline regulatory documents, do not rise to fraud against shareholders. Falsification of documents that may or may not evidence a violation of PSIA is not fraud on the shareholders in the sense of what SOX was promulgated to protect – fraud pertaining to corporate accounting and financial practice. Additionally, the relevant disclosures under PSIA are not mandated by SOX.

Next, Complainant subjectively believes that his protected activity was taken in response to actions by Respondent that he perceived to constitute shareholder fraud. However, the fact that he never expressed anything remotely close to fraud against the shareholders to his employer or in his initial pleadings, militates against him having the belief at the time he engaged in protected activity, and suggests instead that he acquired that belief thereafter. Additionally, because Respondent’s alleged acts do not touch on the subject matter of SOX, or any other provision related to fraud against shareholders, and none of Complainant’s concerns were grounded in SOX, or another provision related to fraud against shareholders, even if Complainant subjectively believed this to be so, such a belief is not objectively reasonable. Furthermore, the tenuous and speculative nature of the explanation Complainant provides in his Motion/Response for how the alleged pipeline safety violations rise to shareholder fraud also serves to undermine the objective reasonableness of his belief.

Further, Complainant focused on the potential implication of Respondent's conduct rather than demonstrating how he engaged in protected activity. Complainant failed to show how his communications provided information about conduct he reasonably believed constituted a violation of SOX. Thus, Complainant's belief is objectively unreasonable in light of the facts construed in a light most favorable to him, and upon review of the content and nature of the concerns he expressed to Respondent, the content of the pleadings and supporting evidence presented by Complainant, and the plain meaning and legislative history of the relevant statutes.

Thus, because Complainant's concerns were not grounded in SOX or any other federal statute relating to fraud against the shareholders, and Complainant's belief that Respondent's conduct was a purported violation thereof was not objectively reasonable, no genuine issue exists as to whether Complainant engaged in protected activity, a material fact. Accordingly, Respondent's Motion for Summary Decision is granted as it pertains to the SOX complaint, and Complainant's Motion regarding the same is denied. Complainant's complaint under SOX is dismissed.

### The PSIA Complaint

Section 60129 of the Pipeline Safety Improvement Act provides, in part, that:

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee--

(A) provided, caused to be provided, or is about to provide or cause to be provided, to the employer or the Federal Government information relating to any violation or alleged violation of any order, regulation, or standard under this chapter or any other Federal law relating to pipeline safety;

(B) refused to engage in any practice made unlawful by this chapter or any other Federal law relating to pipeline safety, if the employee has identified the alleged illegality to the employer;

(C) provided, caused to be provided, or is about to provide or cause to be provided, testimony before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or any other Federal law relating to pipeline safety;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or any other Federal law relating to pipeline safety, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or any other Federal law relating to pipeline safety;

(E) provided, caused to be provided, or is about to provide or cause to be provided, testimony in any proceeding described in subparagraph (D); or F) assisted or participated

or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or any other Federal law relating to pipeline safety.

*See also* 29 C.F.R. § 1981.102(a), (b)(1).

The purpose of PSIA is to improve the safety regulatory program at the Department of Transportation, increase levels of safety throughout our national pipeline system and in the communities through which pipelines run. (Legislative History of Section 6, PSIA, Congressional Record: Nov. 14, 2002 (Senate), Page S11067 – S11069).

As previously stated herein, the four elements that Complainant must prove to satisfy his burden under § 1981.109 are: (1) that Complainant engaged in protected activity; (2) that Respondent knew that he engaged in protected activity; (3) that Complainant suffered an unfavorable personnel action; and (4) that the protected activity was a contributing factor in the unfavorable action. Therefore, to avoid summary decision, it must be shown that there is a genuine issue of material fact regarding whether Complainant's alleged protected activity under PSIA was a contributing factor in his termination.

Respondent denies that Complainant engaged in protected activity under PSIA, but "assumes that he did" for the purposes of this motion only. (Resp't Mem. in Supp. at 1). Respondent's awareness of the alleged protected activity and the existence of an unfavorable personnel action are evident from the record and not disputed. However, Respondent states that Complainant's insubordinate conduct alone motivated his dismissal, and argues that there is no evidence linking his alleged protected activity with Respondent's decision to terminate him for insubordination. (*Id.* at 14-15). Respondent states that Complainant's insubordination warranted immediate discharge. *Id.* at 15.

Respondent further argues that Complainant's insubordinate conduct severs any casual connection between his alleged protected activity and his discharge. (*Id.* at 16). While Respondent concedes temporal proximity as between Complainant's alleged protected activity and his discharge, it argues that his insubordinate conduct negates any nexus between the two events. (*Id.*). Thus, it submits that regardless of any alleged protected activity, his decision to walk out of a meeting after being warned of the consequences warranted immediate discharge. (*Id.* at 17). Finally, Respondent argues that Complainant has not adduced evidence demonstrating that Respondent's reasons for discharging him were pretextual, or motivated by anything other than Complainant's insubordination. (*Id.*).

Complainant argues that his refusal to submit to his supervisor a 60 psig system that he perceived was illegal, and for refusing to ignore or destroy historical documentation was the basis for his termination. (Compl. at 1-2; Complainant's Mot./Resp. at 26-27). He also disputes that walking out of the meeting, the act of insubordination for which Respondent asserts that it terminated him, was insubordinate because of a lack of formal corporate policy against tape-recording meetings. (*Id.* at 27, 32).

Complainant also asserts that the evidence suggests that Mr. McNutt and Kathy Johnson, of Human Resources, conspired to fire him as early as February 7, 2005. (Complainant's Ex. 1-3). Respondent asserts that the evidence upon which Complainant relies in support of that proposition supports instead that Respondent was concerned about Complainant's aptitude and ability to perform the tasks assigned him. (Resp't Br. in Reply/Resp. at 3).

In light of the foregoing, it is clear that genuine issues of material fact exist regarding whether Complainant's alleged protected activity was a factor in his termination. Therefore, the above-captioned matter cannot be resolved in favor of either party on summary decision, and the parties' respective Motions for Summary Decision as they pertain to Complainant's PSIA complaint are denied.

### **ORDER**

1. It is ORDERED that Respondent's Motion for Summary Decision is GRANTED as it pertains to Complainant's complaint filed pursuant to Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A and that Complainant's complaint is DISMISSED.

2. It is further ORDERED that Respondent's Motion for Summary Decision and Complainant's Motion for Summary Decision are DENIED as they pertain to Complainant's complaint filed pursuant to Section 6 of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129.

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DANIEL L. LELAND  
Administrative Law Judge