

**U.S. Department of Labor**

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**Issue Date: 15 March 2011**

CASE No: 2011-SOX-1

In the Matter of:

MICHAEL MURPHY,  
Complainant

v.

SYMANTEC CORPORATION,  
Respondent

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

This case arises from a complaint filed by Michael Murphy (“Murphy” or “Complainant”) against Symantec Corporation (“Symantec” or “Respondent”) under 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 (“SOX,” “Sarbanes-Oxley,” or the “Act”) and the procedural regulations found in 29 C.F.R. Part 1980. This order pertains to a Motion for Summary Decision filed by Respondent on November 19, 2010.

***I. PROCEDURAL HISTORY***

On March 29, 2010, Murphy filed a Complaint with Department of Labor alleging that Respondent discriminated against him in violation of SOX. By letter dated September 8, 2010, the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) dismissed Murphy’s Complaint, finding that the preponderance of the evidence does not support that Complainant engaged in protected activity. On October 7, 2010, Complainant filed his objections to OSHA’s findings and requested a hearing before the Office of Administrative Law Judges (“OALJ”).

On November 19, 2010, Respondent filed a Motion for Summary Decision and Memorandum of Law. Additionally, Respondent filed a number of exhibits, including: (1) a copy of Symantec’s online policy statement regarding discrimination and retaliation; (2) a declaration by Theresa Phillips, Senior Human Resources Consultant for Symantec Corporation (“*Phillips Decl.*”); (3) a copy of Symantec’s Code of Conduct; (4) an AlertLine Confidential Memorandum dated April 20, 2008; (5) an Ethics and Compliance Investigation Report dated December 15, 2009; and (6) a copy of Symantec’s Global Travel and Expense Reimbursement

Policy. Complainant filed his Response to Respondent's Motion for Summary Decision and Memorandum of Law on January 12, 2011, along with (1) a declaration by Michael Murphy ("*Murphy Decl.*"); (2) a screenshot of a Microsoft Outlook calendar for the days of November 5, 2009 and November 12, 2009; (3) three emails between Murphy and Andy London dated November 11 and 12, 2009; and (4) Murphy's expense report statements from October 2008 through October 2009, as well as an audit trail of the expenses included in these reports. On February 1, 2011, Respondents filed a Reply to Complainant's Response to Its Motion for Summary Decision.

## II. STANDARD FOR SUMMARY DECISION

Summary decision may be granted for any party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d); Fed. R. Civ. P. 56(c). A judge's role in deciding a motion for summary decision is not to weigh conflicting evidence or make credibility determinations, but only to assess whether there is a genuine issue for trial by viewing the record "in the light most favorable to the non-moving party. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, Dec. & Ord. of Remand, slip. op. at 6 (ARB Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)).

The mere existence of some disputed facts is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A motion for summary judgment will only be denied when there is a genuine issue of material fact. A fact is material if proof of that fact would establish or refute one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co. Ltd. v. Zenith*, 475 U.S. 574, 585-88 (1986). The fact must necessarily affect application of appropriate principles of law to the rights and obligations of the parties. *Id.* If reasonable doubt remains as to the facts, the motion must be denied. *Anderson*, 477 U.S. at 247-52.

Initially, the party moving for summary decision has the burden of showing that there are no genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This burden may be discharged by demonstrating that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Id.* at 325. Thereafter, the burden shifts to the non-movant who must "set forth specific facts showing that there is a genuine issue of fact for the hearing." *See* 29 C.F.R. § 18.40(c). In determining whether there is a genuine issue of fact for the hearing, the judge shall view "all the evidence and factual inferences in the light most favorable" to the non-movant. *See Stauffer, supra* at 6 (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-9 (1969)). If there are no genuine issues of material fact, then the moving party is entitled to judgment as a matter of law. *See Dawkins v. Shell Chemical, LP*, 2005-SOX-41, slip op at 2 (ALJ May 16, 2005).

### III. FINDINGS OF FACTS

#### a. *Complainant's Employment with Vontu, Inc., & Symantec Corporation*

Complainant was a Sales Engineer with Vontu, Inc., a software manufacturer, from June 25, 2007, until it was acquired on December 1, 2007, by Symantec Corporation.<sup>1</sup> (*Murphy Decl.* at ¶ 3). As part of the acquisition, Symantec retained approximately 160 Vontu employees, including Complainant and the majority of his sales team. (*Phillips Decl.* at ¶ 2). Complainant worked out of his home in Barrington, Illinois, as a Senior Systems Engineer in the American Sales organization, which is comprised of sales representatives, account managers, system engineers, and specialists, who collaborate to sell Symantec software products to large enterprise customers in the United States. (*Id.*).

As a Senior Systems Engineer, Murphy's primary responsibility was to assist sales managers in his territory with the handling of technical pre-sales questions that arise when selling complex software products to Symantec's customers. (*Id.* at ¶ 4). Murphy reported to three different managers during the course of his employment with Symantec. For almost a year, between December 2007 and October 2008, he reported to David Smoler, Manager, Systems Engineering; to Mark Elkin, Director, Systems Engineering until June 2009; and finally, to Andrew London, Manager, Systems Engineer, until termination of his employment in December 2009. (*Id.* at ¶ 6). Murphy provided assistance and support to Symantec's sales and customers via email, online meetings, and conference calls. Murphy also accompanied sales representatives on visits to customer sites. Business travel was a frequent requirement of Murphy's work as a Senior Systems Engineer. (*Id.*).

#### b. *Complaints to Symantec Supervisors & Via AlertLine*

In December 2007, just after Symantec had acquired Vontu, Complainant approached his new supervisor, David Smoler, as well as his second line manager, Mark Elkin, and expressed discomfort with traveling on business with two members of his sales team who were also retained by Symantec in its acquisition of Vontu. Specifically, Murphy reported that these co-workers repeatedly visited strip clubs while on business trips and that on one particular business trip to Topeka, Kansas, on September 18, 2007, he suspected that they solicited the services of prostitutes and purchased cocaine. Murphy told David Smoler that he was "uncomfortable" with his travel with these two co-workers. (*Murphy Decl.* at ¶ 11). Similarly, Murphy complained to his second line manager Mark Elkin that these co-workers were always "pressuring" him to go to strip clubs, and that he did not wish to do so because his "family was important to [him]." (*Id.* at ¶ ¶ 12-13).

On April 20, 2008, Complainant called AlertLine, a 24-hour ethics hotline which Symantec utilizes to allow to its employees to report Code of Conduct concerns, or suspected human rights or ethics violations. Complainant reported his concerns relating to the September

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<sup>1</sup> Founded in 1982 and headquartered in Mountain View, California, Symantec is one of the world's largest software companies with over 17,500 employees in more than 40 countries. (*Respondent's Memorandum* at 2). Symantec provides a broad range of security, storage and systems management solutions to individuals, enterprises, and service providers. (*Id.* at 3).

18, 2007 business trip to Topeka, Kansas. Specifically, Murphy reported that during the business trip, two members of his sales team exhibited “unprofessional behavior” by patronizing prostitutes, as well as purchasing and using cocaine. (*AlertLine Memorandum* at 2). Complainant further stated that he reported the incident to Mark Elkin and David Smoler, but that no action was taken. (*Id.*). Additionally, Complainant expressed concerns that he was being retaliated against by Mark Elkin.

Symantec forwarded Murphy’s AlertLine complaints to its Human Resources department (“HR”) for follow up by HR consultants Karen Brownell, Theresa Phillips, and Elizabeth McLean. (*Phillips Decl.* at ¶ 11; *Murphy Decl.* at ¶ 14). Symantec conducted an investigation of the matter, including interviewing Murphy and the two co-workers who were the subject of Murphy’s report. (*Phillips Decl.* at ¶ 12). The co-workers denied Murphy’s allegations and provided alternative accounts of the incident, which were found to be credible. (*Id.* at ¶ 13). Murphy suggested that Symantec audit his co-workers’ expenses and analyze their bank records and telephone records in order to corroborate what he had reported. (*Murphy Decl.* at ¶ 14). HR concluded that Murphy’s allegations could not be substantiated and closed its investigation, informing Murphy of the same. (*Id.*).

*c. Investigation for Expense Fraud & Termination*

On November 3, 2009, Mark Elkin and Andrew London contacted Theresa Phillips in HR, seeking guidance in managing Murphy’s performance after receiving customer complaints about Murphy’s attitude and demeanor, as well as complaints from sales representatives about his lack of preparation for product demonstrations and presentations. (*Phillips Decl.* at ¶ 14). During this same conversation, London expressed concerns about several items he had seen on Murphy’s expense reports which appeared to be personal in nature, including submission of reimbursement requests for a large number of meals near his home, despite the fact that he had no clients located in the area, as well as “an unusually high number” of reimbursement claims for under \$25 paid with cash or non-corporate credit card, many from days and times when Murphy was unlikely to be traveling for business. (*Id.* at ¶ 15). Additionally, London expressed concern about several incidents in which other Symantec employees would pay for a business lunch and submit the expense for reimbursement with Murphy listed on the receipt as an attendee at the meal, and then Murphy would also request reimbursement for the same meal. (*Id.*). In response to these concerns, Symantec began an investigation into this matter. (*Id.* at ¶ 16).

Symantec’s analysis of Murphy’s two most recent expense reports revealed 15 receipts from restaurants located within a few miles of Murphy’s home in Barrington, Illinois. (*Phillips Decl.* at ¶ 17). Many of the restaurant receipts showed charges for 3 to 4 entrees, sides, appetizers, and drinks, totaling from \$40 to \$60. Additionally, the receipts lacked a list of meal participants, as required by Symantec’s business expense reimbursement policy, and some receipts were for carry-out orders. (*Id.*). These findings raised a concern that Murphy was ordering food for more than just himself. Andy London held a meeting with Murphy to discuss these concerns on November 12, 2009. During this meeting, London asked Murphy about the large number of meals near his home and asked if he was buying dinners for other people, such as family. Murphy declined to answer the question. As a result of these findings, Symantec concluded that a review of all of Murphy’s expense reports was warranted.

On December 14, 2009, Symantec interviewed Murphy regarding the irregularities found in his expense reports. During the interview, Murphy admitted that he regularly expensed local restaurant meals that he purchased for his wife and daughter while he was home and that he had been doing so ever since being hired at Vontu. (Exhibit C3, *Ethics and Compliance Investigation Report* at page 3; *Phillips Decl.* at ¶ 19). When asked about the large number of cash transactions below \$25 on his expense reports, which were often paid for with a non-Symantec credit card contrary to the Travel and Expense Reimbursement Policy, Murphy stated that his practice was to save all receipts each month for purposes of creating his monthly expense report, then after the report was approved, he would shred all of his receipts. Murphy claimed that he did not receive expense report training at the time he became an employee of Symantec during the Vontu acquisition. (Exhibit C3, *Ethics and Compliance Investigation Report* at page 3). He also claimed to have not read Symantec's Global Travel and Expense Reimbursement Policy until November of 2009. (*Id.*). Symantec alleges that during the December 14, 2009 meeting, Murphy conceded that in retrospect, his behavior crossed an ethical boundary and was inappropriate. Nevertheless, Murphy maintains that he never admitted any fraudulent or deceptive conduct concerning his employment at Symantec or Vontu and that he fully complied with all expense reporting requirements. (*Id.* at ¶ 21; *Murphy Decl.* at ¶ 23). Murphy maintains that his expensed meals in Illinois were for meals taken while traveling to and from O'Hare Airport and understood by him to be part of a business trip and therefore properly expensed as a business meal. (*Murphy Decl.* at ¶ 21).

Symantec concluded that Complainant's practice of billing the company for meals for his family while he was home was a clear violation of Symantec's Global Travel and Expense Reimbursement Policy. (*Id.* at ¶ 20). After completing an analysis of Murphy's expense reports between December 2007 and November 2009, Symantec found that in direct violation of its Travel and Expense Reimbursement Policy, Murphy had fraudulently billed the company for expenses associated with at least 126 non-business related meals, totaling \$5,644.74.

Symantec was unable to verify the legitimacy of Murphy's numerous requests for reimbursement for expenses of less than \$25 paid with either cash or Murphy's personal credit card because expenses that are less than \$25 do not require receipts per Symantec's Travel Expense Reimbursement Policy. Murphy maintains that he never claimed reimbursement for 126 non-business related meals or any other meals for days that he was not traveling. (*Murphy Decl.* at ¶¶ 21-23). Murphy maintains that he never submitted duplicate expenses for meals, or either concealed or failed to produce any receipts requested. (*Id.* at ¶¶ 22-23).

Symantec's Travel Expense Reimbursement Policy provides that:

Consequences for non-compliance with this policy will result in notifications to the employee and management. Further consequences may range from delay or non-reimbursement of charges, loss of travel privileges, adverse impact to an employee's personal credit rating, disciplinary action (up to and including, termination of employment), and/or legal proceedings to recovery [*sic*] any loss or damage to the Company.

(Exhibit C4, *Symantec Global Travel and Expense Reimbursement Policy*, section 5.0, at page 18).

Symantec terminated Murphy's employment on December 29, 2010. (*Phillips Decl.* at ¶ 23). Murphy states that he was discharged by a "peremptory telephone call" at 5 p.m., with no adequate opportunity to respond. (*Murphy Decl.* at ¶ 24).

#### **IV. SUMMARY OF THE ARGUMENTS & OBJECTIONS**

First, Respondent asserts that it is entitled to summary decision on the grounds that Murphy did not engage in protected activity. Second, Respondent asserts that summary decision should be granted because Murphy cannot show that the complaints he made to his supervisors contributed to Symantec's decision to discharge him. Finally, Respondent asserts that it is entitled to summary decision because the evidence proves that Symantec would have terminated Murphy's employment, even in the absence of his complaints, because of Murphy's violation of company policy in fraudulently submitting over \$5,000 in business expenses.

Complainant objects to the evidence relied on by Respondent, specifically the declaration by Theresa Phillips. Complainant contends that Theresa Phillips' testimony is "deficient" because she is not an officer or employee of Symantec and claims no personal knowledge of the records and factual allegations recited in Respondent's Motion. (*Id.* at 1-2, n. 1).

Complainant also objects to Respondent's characterization of his complaints to Symantec. Specifically, Complainant objects to Respondent's assertion that "Murphy's so-called protected activity consists of a single call made in April 2008 to the Ethics AlertLine. . ." (*Respondent's Memorandum* at 10). Complainant also objects to Respondent's contention that his complaint to OSHA was the first time that that he suggested that his co-workers not only purchased illegal drugs and procured the services of prostitutes, but that they did so using corporate funds. Complainant contends that the AlertLine memorandum offered by Respondent does not "fully or accurately reflect the number of conversations, the persons involved, or the complete scope and substance of Complainant's report of misconduct." (*Id.* at 5). Complainant alleges that he reported to his supervisors on "multiple occasions" that his co-workers were "using corporate funds to engage in illegal activities," including prostitution and drugs, while on business trips. (*Id.* at 4). He also alleges that he suggested to the Symantec HR consultants who were investigating his AlertLine complaint that the bank records, telephone records, and expense reports of his co-workers be analyzed to corroborate his allegations.

Complainant contends that summary decision should be denied because the evidence establishes that he engaged in protected activity by reporting to his Symantec supervisors what he believed to be "illegal or unethical conduct" that, if reported to the Securities and Exchange Commission, could have a material adverse effect on the value of Symantec's stock, as well as constitute bank fraud, accounting fraud, and possibly, wire fraud. (*Id.* at 3, 6-7). Complainant also asserts that summary judgment must be denied because the evidence shows that Respondent's asserted reason for Complainant's termination is pretextual. (*Id.* at 8-11).

## V. DISCUSSION

### a. *Governing Law*

Section 1514A(a) of the Sarbanes-Oxley Act provides whistleblower protection for employees of publicly-traded companies by prohibiting employers from retaliating against them for “any lawful act done by the employee . . . to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes” mail fraud, bank fraud, securities fraud, or violation of any rule or regulation of the SEC, or any federal law relating to fraud against shareholders, when the information or assistance is provided to a person with investigatory authority. 18 U.S.C. § 1514A(a). SOX claims are governed by the legal burdens of proof applicable to whistleblower claims brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b) (2000), as set forth in 29 C.F.R. § 1980.104(b)(1) (2007) and numerous court opinions as follows:

To prevail under this provision, an employee must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. . . . If the employee established these four elements, the employer may avoid liability if it can prove “by clear and convincing evidence” that it “would have taken the same unfavorable personnel action in the absence of that [protected] behavior.”

*Allen v. Administrative Review Board*, 514 F.3d 468, 475-76 (5th Cir. 2008); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 (4th Cir. 2008); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008); 18 U.S.C. § 1514A(b)(2)(C); 49 U.S.C. § 42121.

### b. *Complainant’s Objections*

At the outset, it is determined that the declaration of Theresa Phillips is not “deficient,” as alleged by Complainant. Complainant suggests that summary decision is inappropriate because Symantec has not laid a “sufficient foundation for its many factual assertions, relying instead on [the] Declaration of Theresa Phillips, who is not a Symantec officer or even a Symantec employee, but merely a “consultant” with an outside contractor, who could have no, and claims no personal knowledge of the many factual assertions advanced by Symantec. . . .” (*Complainant’s Reply* at 1). Respondent’s reply to Complainant’s response makes it clear that Theresa Phillips is employed as the Senior HR Consultant for Symantec Corporation and is not merely an outside consultant. (*Respondent’s Response* at 2).

Second, regarding Complainant's objection to Respondent's characterization of Murphy's complaints, Respondent asserts that, "even accepting as true Complainant's ever evolving version of the facts, it still does not constitute protected activity for purposes of SOX." Thus, for the purpose of deciding Respondent's motion for summary decision, Complainant's allegation that he reported to his Symantec supervisors that his co-workers used corporate funds to procure prostitutes and purchase illegal drugs is accepted as true.

c. *Protected Activity*

Complainant asserts that his complaints to his Symantec supervisors and via AlertLine constitute protected activity under SOX because he reasonably believed that the misconduct he reported could have a material adverse effect on the value of Symantec's stock and would constitute shareholder fraud, as well as bank fraud, accounting fraud, and possibly, wire fraud. (*Complainant's Reply* at 3, 6-7).

Not all employee complaints to management are covered by SOX. "Protected activity" under the statute includes providing information to federal regulatory or law enforcement authorities, Congress, or a person with supervisory authority over the employee, which the employee reasonably believes to constitute a violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1); 29 C.F.R. § 1980.102(b)(1).

SOX does not require that an employee provide information about an actual violation of one of the statutes or regulations enumerated in § 1514A to be protected. Rather, the employee only has to show that he reasonably believed that the company conduct he complained of constitutes a violation of one of the statutes or regulations and that he conveyed that belief to his employer. To determine if an employee's belief is reasonable, the belief must be scrutinized under both subjective and objective standards. In other words, to trigger the employee protections of SOX, the employee must establish that: (1) he had a subjective belief that the conduct he reported violates a listed law under SOX, and (2) this belief is objectively reasonable. *See Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Day v. Staples*, 555 F.3d 42, 54 (1st Cir. 2009).

To have a subjectively reasonable belief that there has been shareholder fraud, the employee must show that his complaints were undertaken in good faith. In this case, there is no evidence that Murphy's complaints were made in bad faith and Respondent does not suggest otherwise.

"To have an objectively reasonable belief there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud." *Day*, 555 F.3d at 55. "The complaining employee need not reference a specific statute, or prove actual harm, but he must have an objectively reasonable belief that the company intentionally misrepresented or omitted certain facts to investors, which were material and which risked loss." *Day*, 555 F.3d at 56. Although a SOX complainant is not required to use the words "fraud" or "fraud in shareholders" in his communications with his employer, the

communications must nevertheless “definitively and specifically” relate to one of these six categories of fraud or securities violations in order to constitute protected activity. Complaints to management of racial and employment discrimination, personnel actions, executive decisions and corporate expenditures with which the complainant disagrees, or even possible violations of other federal laws, are not protected activity under the SOX because they do not directly implicate the categories of fraud listed in the statute or securities violations. *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, 36, slip op. at 14-15 (ARB June 2, 2006). “A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial could in turn be intentionally withheld from investors, is not enough.” *Ryerson v. American Express Financial Services, Inc.*, ARB No. 08-064, ALJ No. 2006-SOX-74 (ARB July 30, 2010), citing *Harvey*, slip op. at 15.

Here, Murphy’s complaints regarding the behavior of his co-workers during the business trip to Topeka, Kansas, do not constitute protected activity under the employee protection provisions of SOX relating to reports of shareholder fraud or securities fraud. The evidence advanced by Murphy fails to establish that Symantec intentionally misrepresented or omitted facts to its investors which were material and which risked loss. Murphy does not suggest that Symantec or its employees had or even intended to mislead shareholders. Although misconduct reported by Murphy may constitute a violation of criminal statutes pertaining to prostitution and illegal drugs, such misconduct does not constitute shareholder fraud. The mere possibility that the alleged inappropriate use of corporate funds by Murphy’s co-workers could affect the value of Symantec stock is too attenuated to state a claim for relief under the SOX whistleblower protection provision.

Complainant also argues that summary judgment is not warranted because facts exist which constitute bank fraud,<sup>2</sup> accounting fraud or wire fraud.<sup>3</sup>

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<sup>2</sup> The bank fraud statute, 18 U.S.C. § 1344, provides:

Whoever knowingly executes, or attempts to execute, a scheme or artifice—  
(1) to defraud a financial institution; or  
(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;  
shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

<sup>3</sup> The wire fraud statute, 18 U.S.C. § 1343, provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

Murphy alleges that the illegal drugs that were purchased by his sales team members in Topeka, Kansas, were bought with money that one of his co-workers withdrew from an ATM during the business trip, and that this same individual reported his expenses to be \$10,000 for the time they were in Topeka, Kansas, whereas Murphy only reported expenses of \$4,000. (*Murphy Decl.* at ¶¶ 7, 9). Murphy alleges that he alerted Symantec’s HR consultants to check the bank records, telephone records, and expense reports of his sales team members to verify his reports of their misconduct in Topeka, Kansas. (*Id.* at ¶ 14).

Murphy asserts that, “[u]sing corporate credit cards to withdraw funds for drug purchases and prostitute fees presumably would implicate the bank fraud statute...” (*Complainant’s Reply* at 6). Additionally, he contends that, “[d]isguising these expenditures as legitimate business expenses would implicate accounting fraud . . . [and] [d]epending on how the expense reports disguising these expenditures were transmitted to the accounting department of Symantec, wire fraud may well also have been committed.” (*Id.* at 6-7).

Respondent asserts that Symantec’s employees do not have corporate credit cards that allow them to withdraw cash. (*Respondent’s Reply* at 6 n.2). Additionally, Respondent contends that Murphy’s allegations that his co-workers disguised their expenditures for drugs and prostitutes as legitimate business expense is nothing more than mere speculation. (*Id.* at 6).

Moreover, Respondent asserts that, as a matter of law, Complainant’s allegations do not implicate the employee protection provisions of SOX because reports of behavior that constitutes mail fraud, wire fraud, and bank fraud are protected under SOX only if they relate to fraud against shareholders. A conflict exists among the various courts which have addressed the issue of whether all reports of mail fraud, wire fraud, and bank fraud are protected under SOX or only those relating to fraud against shareholders. Whereas some courts have held that the phrase “relating to fraud against shareholders” must be read as applying to all violations enumerated under section 806, others have held that a plain reading of the statutory provision makes clear that an employee’s reporting of mail, bank, and/or wire fraud is protected regardless of whether that fraud relates to fraud against shareholders. *Compare Livingston v. Wyeth, Inc.*, 2006 WL 2129794, \*10 (M.D.N.C. July 28, 2006) (“To be protected under Sarbanes- Oxley, an employee’s disclosures must be related to illegal activity that, at its core, involves shareholder fraud.”); *Bishop v. PCS Admin. (USA), Inc.*, 2006 WL 1460032, \*9 (N.D.Ill. May 23, 2006) (finding that the phrase “relating to fraud against shareholder” must be read as applying to all violations enumerated under section 806); *Marshall v. Northrup*, 2005-SOX-0008, 2005 WL 4889013, \*2 (ALJ June 22, 2005) (“Protected activity is defined under SOX as reporting an employer’s conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders.”); *Wengender v. Robert Half Int’l Inc.*, 2005-SOX-59, 2006 WL 3246887, \*11 (ALJ March 30, 2006) (“SOX does not apply to ... general allegations of fraud. ... Rather, applicability of SOX is limited to specifically enumerated laws or regulations related to fraud against shareholders.”); *with O’Mahoney v. Accenture Ltd.*, 537 F.Supp. 2d 506, 516 (S.D.N.Y. 2008) (holding that “general principles of statutory construction weigh against reading § 1514A as providing whistleblower protection only to employees who provide information concerning fraud against shareholders”); *Reyna v. ConAgra Foods, Inc.*, 506 F.Supp.2d 1363, 1381 (M.D.Ga.2007) (finding that § 1514A “clearly protects an employee

against retaliation based upon that employee's reporting of mail fraud or wire fraud regardless of whether that fraud involves a shareholder of the company"); *Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1365, 1376 (N.D.Ga.2004) ("The threshold is intended to include all good faith and reasonable reporting of fraud."); *Walton v. Nova Inf. Sys.*, 2005-SOX-1076; 2006-SOX-18 (ALJ March 29, 2006) (rejecting argument that report of violation or rule or regulation of the SEC must relate to fraud against shareholders).

As the Seventh Circuit has not yet addressed the issue, the interpretation of the Administrative Review Board ("ARB") is controlling. In *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27, slip op. at 15 (ARB Sept. 29, 2006), the ARB held that, "when allegations of mail or wire fraud arise under the employee protection provision of the Sarbanes-Oxley Act, the alleged fraudulent conduct must at least be of a type that would be adverse to investors' interests." Citing to the preamble to the Act, the ARB noted that the purpose of SOX is, to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities law, and for other purposes."<sup>4</sup> However, in the more recent case of *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-49, slip op. at 9 (ARB Feb. 28, 2011), the ARB held that Section 806(a)(1) does not require that mail fraud or wire fraud pertain to a fraud against the shareholders.

Thus, Respondent's argument that, as a matter of law, Murphy's complaints do not implicate the employee protection provisions of SOX relating to bank fraud and wire fraud, is rejected.

#### d. Causation

Complainant has the burden of establishing by a preponderance of the evidence that his report of the alleged misconduct was a contributing factor in his termination. *Harp v. Charter Communications, Inc.*, 558 F.3d. 722, 726-27 (7th Cir. Mar. 16, 2009). A contributing factor under Sarbanes-Oxley is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62, slip op. at 17 (ARB July 27, 2006) at 17. The contributing factor standard is a broad one that was "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *Id.* (internal quotation marks in original), citing *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)(1) (West 1996)).

As the moving party, Respondent bears the burden of establishing that there are no genuine issues of material fact. See *Celotex, supra* at 322. Complainant alleges that the circumstances of his termination are sufficient to raise the inference that his reports of misconduct by his co-workers were a contributing factor in his termination. Specifically,

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<sup>4</sup> The ARB's decision in *Platone* was appealed to the United States Court of Appeals for the Fourth Circuit. Deciding the case on other grounds, the Fourth Circuit explicitly stated that it did not reach the issue of whether a SOX complainant alleging mail or wire fraud under § 1514A must demonstrate that the fraud would be adverse to the interest of investors. *Platone v. United States Department of Labor*, 548 F.3d 322, 326 n.3 (4th Cir. 2008).

Complainant cited to the fact that Theresa Phillips, the Symantec HR consultant who both investigated Murphy's complaints via AlertLine, participated in his termination, in support of his contention that his complaints and his termination are causally related. As there are genuine issues of material fact regarding Symantec's decision to terminate Complainant's employment, summary decision is denied.

## **VI. CONCLUSION**

To the extent that Complainant asserts that his reports to his Symantec supervisors constitute protected activity under the SOX provisions relating to shareholder fraud or securities fraud, summary decision is granted in Respondent's favor.

To the extent that Complainant argues that his reports to his Symantec supervisors constitute protected activity under the SOX provisions relating to bank fraud or wire fraud, and that such activity contributed to his termination by Symantec, summary decision is denied.

## **ORDER**

Based on the foregoing, Respondent's Motion for Summary Decision is GRANTED IN PART AND DENIED IN PART.

**A**  
THOMAS M. BURKE  
Administrative Law Judge