

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

HERSHEL PEARL, )  
 )  
 Plaintiff, )  
 )  
 v. ) Case No. 06-0918-CV-W-SWH  
 )  
 DST SYSTEMS, INC., )  
 )  
 Defendant. )

ORDER

Plaintiff seeks to recover from his former employer, DST Systems, Inc., pursuant to section 806 of the Sarbanes-Oxley Act (hereinafter SOX), 18 U.S.C. § 1514A, (Count I) and for wrongful discharge (Count II). Both parties have filed motions for summary judgment. (See Doc. #59 and #61) On Tuesday, March 11, 2008, the Court held argument on the pending motions. Based upon the briefing of the parties as well as the argument, the Court finds that plaintiff did not engage in a protected activity, and thus, Defendant's Motion for Summary Judgment, doc. #61, must be granted.

I. STANDARDS FOR EVALUATING A MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, summary judgment is granted when the pleadings and evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to show the absence of evidence to support the nonmoving party's case. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The nonmoving party may not rest upon allegations or general denials, but must come forward with specific facts to prove that a genuine issue for trial exists. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). In doing so, all evidence and inferences therefrom are viewed in the light most

favorable to the nonmoving party. See Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

## II. UNDISPUTED FACTS

Defendant's motion for summary judgment sets forth 170 allegedly uncontroverted facts. Plaintiff's motion sets forth 135 allegedly uncontroverted facts. Plaintiff objects to a number of the defendant's facts on the basis that the citations to the record are erroneous or only a portion of the fact is alleged. Defendant responds that some of the "facts" for which no support is provided are undisputed.

Plaintiff's motion for summary judgment sets forth numerous facts without any record citation. Both sides object to some facts as being only partial recitations from documents which are presented in a misleading manner. Plaintiff objects to certain facts on the basis that the factual statement contain the words "ultimately" or "at another point."

However, in contesting each others' facts, both sides refer to many of the same documents, the language of which is not in dispute. Because of the parties' reliance on many of the same documents, the Court scheduled argument in the case to give the Court and the parties the opportunity to discuss what facts and documents were not in dispute. Based upon the arguments on March 11, 2008, and the motions for summary judgment as well as the accompanying exhibits, the Court makes the following findings:

1. Plaintiff was employed by defendant from February 2, 1998 until November 18, 2005, in the job title of Senior Systems Programmer. (Pearl Dep. p. 463; Pearl Dep. Ex. 39) (Defendant's Statement of Uncontroverted Facts, hereinafter DSOF #1)
2. DST is a publicly traded company as defined in section 806 of the Sarbanes-Oxley Act. (Defendant's Responses to Plaintiff's Request for Admissions – Response #24) (Plaintiff's Statement of Uncontroverted Material Facts, hereinafter PSOF #2)
3. Plaintiff's principal duties and responsibilities were to "manage vendor relationships;" "negotiate contract terms, conditions, and price with vendors...;" "work with

users to determine required terms, conditions and capacities for software licenses to meet their needs;” “maintain a network within the company...;” “develop budgets;” “monitor expenses;” “suggest corrective actions;” “develop strategies and show initiative...” (Pearl Dep. Ex. 39) (Plaintiff’s Controversion of Defendant’s Statement of Fact, hereinafter Plaintiff’s Controversion of DSOF #2)

**A. The Investigation**

4. On September 15, 2004, Roger Tisch sent Thomas McDonnell, the CEO of DST, correspondence that requested “a meeting concerning DST violations of corporate policies and Federal guidelines” and that alleged that a Vice President was costing DST millions of dollars in unnecessary payments to vendors. (Horan Dep. Ex. 2) (PSOF #3)

5. On October 1, 2004, Mr. McDonnell, in response to Mr. Tisch’s complaints, directed Ms. Horan to request further information, schedule a meeting and take any appropriate follow-up action. (Horan Dep. Ex. 3, Horan Dep. p. 369, ll. 9-16) (PSOF #4)

6. In the course of her investigation, Ms. Horan contacted Mr. Pearl, notified him that the issues she was investigating were important and requested that Mr. Pearl meet with her and provide information. (Horan Dep. Ex. 5<sup>1</sup> and Admission #12) (PSOF #6)

7. Defendant’s Vice President of Human Resources, Joan Horan, reviewed the written communications from plaintiff. (Horan Dep. pp. 15, 446-47; Horan Dec. ¶ 4) (DSOF #11, modified)

8. Plaintiff testified in his deposition that prior to his discharge, he made four complaints or reports about conduct that he believed constituted fraud against shareholders, including the following: (1) DST showed a lack of good judgment in the negotiation of certain contracts; (2) DST “gave away” 20,000 MIPS of software usage in the 2004 CA contract negotiations; (3) he told his managers that DST should write off \$97,000 on the LRS contract after they “cancelled” the contract; and (4) his manager did not have information regarding available cash and turned down his offer to help produce a cash flow report. (Pearl Dep. pp. 795-97, 819-20) (DSOF #3)

In controverting this statement, plaintiff indicated that his complaints also included the following: (1) a claim that DST understated earnings by \$12,000,000, which violated 409 of Sarbanes-Oxley; (2) complaints about what happened to the 20,000 MIPS and the associated value; (3) violations of section 406, 302 and 404 of SOX; and (4) complaints about violation of corporate policies and Federal guidelines. Plaintiff testified in his deposition that he believes that DST committed fraud and that DST violated other SEC rules.

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<sup>1</sup>Exhibit 5 indicates that Mr. Tisch identified Mr. Pearl as the individual with information about the issues Mr. Tisch raised in his memorandum to Mr. McDonnell.

(Plaintiff's Controversion of DSOF #3)

9. Plaintiff included all the assertions that he was making about violations of SEC rules and regulations, about Sarbanes-Oxley violations and about any other violations of the law in his written communications with Ms. Horan. (Pearl Dep. p. 486) (DSOF #130)

10. All of plaintiff's written communications to Ms. Horan are attached to Defendant's Exhibit 13, as Exhibits A through E. (Transcript of March 11, 2008 Hearing, hereinafter Tr. at 17-27)

11. DST understood that Mr. Pearl had voiced concerns about whether certain actions might be illegal under Sarbanes-Oxley. (Horan Dep. Ex. 13, Attachment E) (PSOF #48)

12. DST investigated contract issues and Sarbanes-Oxley allegations. (Horan Dep. p. 243, ll. 14-21) (PSOF #49)

13. Ms. Horan stated that DST had devoted, and was continuing to devote, substantial time and effort to a review of Mr. Pearl's complaints. She stated that DST had not dismissed Mr. Pearl's complaints. (Horan Depo. Ex. 28) (PSOF #51)

14. Ms. Horan estimated that she dedicated between 50 and 60 hours to the investigation. (Horan Dep. p. 243, ll. 14-21) (PSOF #52)

15. Ms. Schnieder, Ms. Horan's assistant, testified that she probably committed over 100 hours to the investigation into Mr. Pearl's allegations/complaints. (Schnieder Dep. p. 28, ll. 7-15) (PSOF #53)

16. On January 7, 2004, Ms. Horan sent plaintiff an e-mail setting forth the company's understanding of all his complaints to make sure that the company "properly understand[s] the full nature of your complaints" and asking plaintiff to identify any corrections or additional complaints in writing. (Pearl Dep. Ex. 14) (DSOF #12)

17. In Ms. Horan's January 7, 2004 e-mail, she wrote the following understanding of plaintiff's complaints: "During our discussions, you told us that you were not asserting any criminal or dishonest conduct, or any violation of accounting standards."<sup>2</sup> (Pearl Dep. Ex. 14) (DSOF #13)

18. Plaintiff responded as follows:  
Ms. Horan, currently I'm unaware of any reported violations. But if

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<sup>2</sup>Plaintiff controverted this statement on the basis that the e-mail also voices concern over possible SOX violations.

the existing violations are reported, I'm not for sure your statement would be correct, right?

(Pearl Dep. Ex. 15, p. 3) (DSOF #14)

Plaintiff controverted this portion of his response to Ms. Horan's e-mail on the basis that although this statement is made in the e-mail, his response is six pages long.

19. In his deposition, plaintiff testified about this statement stating that "I think I'm referring to both criminal and dishonest conduct and/or any violations of accounting standards," but he testified that he had "no idea" who he was talking about existing violations being reported to, and he was uncertain about whether there had been any such violations or any such conduct. (Pearl Dep. pp. 584-87) (DSOF #15)

20. Plaintiff's contention that he reported that a person with DST engaged in criminal conduct prior to his discharge is based on the statement set forth in paragraph 18 above. (Pearl Dep. pp. 339-40) (DSOF #16)

21. Ms. Horan enlisted the assistance and/or opinion of Kollete Schnieder, Lisa Fielden, Daryl Hubbard, Diane Benetz, Brian Finucane and John Marvin to assist her in the investigation of Mr. Pearl's allegations. (Admission #8) (PSOF #54)

22. In February 2005, after Ms. Horan reviewed Mr. Pearl's written submissions and found them confusing and hard to understand, she decided to have Mr. Pearl's submissions reviewed by an outside expert on Sarbanes-Oxley, attorney John M. Marvin, with Sonnenschein Nath & Rosenthal LLP. (Horan Dec. ¶ 4) (DSOF #17)

23. On February 24, 2005, after receiving the last of plaintiff's written communications that cited SOX on February 14, 2005, Ms. Horan sent to Mr. Marvin copies of the documents plaintiff had prepared and provided to DST, asking him to review plaintiff's allegations and provide the following legal assessment:

In view of the importance to DST of full compliance with Sarbanes-Oxley and all other securities laws and regulations, we are asking that you please provide us with your opinion on the following question:

Assuming Mr. Pearl's factual allegations to be true, has Mr. Pearl alleged any conduct that would violate Sarbanes-Oxley or any other securities law or regulation?

(Horan Dep. Ex. 13) (DSOF #18)

24. On March 8, 2005, Mr. Marvin responded to Ms. Horan with a letter that stated "[m]y conclusion is that none of the following facts alleged by Mr. Pearl, as described

in more detail below, would, if true, constitute a violation of the Sarbanes-Oxley Act or any other federal securities law or regulation.” At the conclusion of his letter, Mr. Marvin summarized the law and his conclusion as follows:

The legislative history of the Sarbanes-Oxley Act, and the regulations responsive to that law adopted by the SEC and the NYSE make it clear that their purpose is, among other things, to restore investor confidence by improving corporate financial reporting, make corporate management more accountable and remove conflicts of interest. They are not directed at management failures to use best judgment. Consequently, even if all of Mr. Pearl’s allegations about that are assumed to be correct, this does not establish a violation of the Sarbanes-Oxley Act, or any other federal securities laws or regulations in the circumstances described in this letter.

(Horan Dep. Ex. 14) (DSOF #19)

25. Mr. Marvin also advised DST that “paying more for an asset, or incurring greater costs in connection with the acquisition of an asset, because the negotiations for that acquisition were negligently mishandled, would not result in a change in financial conditions or operations of the company. Thus, there would be no real-time disclosure obligation under Section 409 with respect to these allegations.” (Horan Dep. Ex. 14) (DSOF #20)<sup>3</sup>

## **B. Plaintiff’s Complaints**

26. Plaintiff originally testified in his deposition that he did not believe that his communications with DST prior to his discharge provided information to DST that he believed showed that DST had violated shareholder fraud laws. (Pearl Dep. p. 388) (DSOF #4) This fact is controverted by plaintiff. The Court finds that it is undisputed plaintiff testified at his deposition to the following:

- Q. In your communications with DST prior to your discharge, is it your contention that you provided information to DST that you believed showed that DST had violated shareholder fraud laws.
- A. I thought they had—my answer’s no.
- Q. Okay.
- A. I thought they had violated SEC laws.
- Q. All right. And when you say they had violated SEC laws, what laws

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<sup>3</sup>Plaintiff controverted this fact, in part on the basis that he was not alleging that paying more for an asset or incurring greater costs in connection with the acquisition of an asset was a violation of section 409. Rather, plaintiff was alleging that “DST, because of their failure to understand how to process invoices, resulted in a section 409 violation.” (Plaintiff’s Controversion, doc. #68, at p. 13)

are you talking about?

A. I thought they were mostly related to Sarbanes-Oxley.

(Pearl Dep. pp. 388-89)

27. Prior to his discharge, plaintiff never identified any publicly filed financial statement that he thought was inaccurate. (Pearl Dep. p. 622) (DSOF #5)

28. In plaintiff's SOX 806 retaliatory discharge complaint filed with the Department of Labor/OSHA, he did not identify any publicly filed financial statement that he considered to be inaccurate. (Pearl Dep. p. 638; Pearl Depo. Ex. 38) (DSOF #6)

29. Prior to his discharge, plaintiff never used the word "dishonest" in his reports to DST and he never thought anybody with DST was dishonest. (Pearl Dep. p. 343) (DSOF #7) This fact is controverted by plaintiff by reference to Pearl Deposition Exhibits 5, 15 and 32. Exhibits 5, 15 and 32 consist of more than 20 pages. Plaintiff does not point out what passages he thinks controvert this fact. Thus, the Court finds that plaintiff Pearl testified as follows:

Q. You never reported to DST prior to your discharge any dishonest conduct by anybody did you?

A. I don't remember using the word "dishonest."

Q. All right. And you never thought that anybody with DST was dishonest prior to your discharge from employment, do you?

A. I don't think so.

(Pearl Depo. p. 343)

30. Prior to his discharge, in his written communications with DST, plaintiff never used the terms securities fraud or fraud against shareholders. (Pearl Dep. p. 819) (DSOF #8 as modified by Plaintiff's Controversion and the Court's review of Horan Dep. Ex. 13, Attachments A-E)

31. Plaintiff claims that he told the company it was committing fraud without using the word fraud. (Pearl Dep. pp. 813-16) (DSOF #9)

32. Prior to his discharge, plaintiff submitted three written communications to defendant that cited provisions of SOX. (Pearl. Dep. Exs. 5, 15, 32, 49) (DSOF #10 as modified by Plaintiff's Controversion)

33. Prior to his discharge, plaintiff did not consult with an accountant or anyone else regarding issues relating to SOX or SEC rules and regulations or federal laws against fraud against shareholders. (Pearl Dep. pp. 80, 417) (DSOF #21)

34. Plaintiff has never read any rules or standards of the accounting industry, such as the Financial Accounting Standard Board (“FASB”) rules or Accounting Principles Board (“APB”) opinions, except that he read an inventory rule on the SEC web site about “inventory tags” and how a clothing store would handle missing inventory. (Pearl Dep. pp. 313-15, 325-26) (DSOF #22)

35. Aside from the accounting rule on missing clothes inventory, plaintiff has never read any accounting rule of any kind that relates to the issues regarding DST. (Pearl Dep. p. 326) (DSOF #23)

36. During the hearing with the Court on March 11, 2008, plaintiff agreed that the protected activity for which he was making a SOX complaint included the following:

- A. Plaintiff alleged that the company had possibly understated earnings by \$12 million. (Tr. at 31-32; Horan Depo. Ex. 13, attachment B; Plaintiff’s Suggestions in Support of Motion for Summary Judgment, doc. #68, at 47-48)
- B. Plaintiff alleged that DST improperly disposed of 20,000 MIPS when a new contract reduced the capacity called for in the contract with Computer Associates from 55,000 MIPS to 35,000 MIPS. (Tr. at 33; Doc. #68 at 48; Horan Depo. Ex. 13, attachment C)
- C. Plaintiff alleged that he was not promoted because a member of management had allegedly stated he would not work with plaintiff, and the management of DST failed to take action thereby violating DST’s Business and Ethics policies because no waiver of compliance was filed. (Tr. at 34; Doc. #68 at 48; Horan Depo. Ex. 13, attachment C)
- D. Plaintiff alleged that a lack of good judgment had caused DST to spend \$109 million in connection with eight separate contracts. (Tr.at 40; Horan Depo. Ex. 13, attachment A)
- E. In March of 2005, at a meeting with Jack Dooley, Stewart Ramsey, Diane Benetz, Tam Harper and others, plaintiff alleges that he was told that “they didn’t know how much cash they had on hand, they didn’t know if they could pay—if we did a BMC contract, they didn’t know if they could pay for it or not. They had no idea, also, what bills were coming due and the amount of the bills.” (Pearl Dep. p. 599) (DSOF #87 and #88; Tr. at 45-46) Plaintiff offered to write a computer query to help produce cash flow reports and was told no. (DSOF ## 89-94)

F. Plaintiff alleges that the lack of a complete Disaster Recovery Plan for Lock\Line was a possible SOX violation. (Tr. at 47; Horan Depo. Ex. 13, attachment E)

**1. Under Reporting of Earnings**

37. On May 28, 2004, plaintiff sent an e-mail to Diane Benetz that stated, in part, "I believe DST may have violated its own Rules of Conduct in the manner as follows: (1) Possible understating earnings by approximately \$12 million dollars..." (Pearl. Dep. Ex. 5) (DSOF #97)

38. Plaintiff's e-mail further stated, in part, "Diane, in addition to the above possible violations, I believe, we may have a Sarbanes-Oxley violation. That possible violation is Section 409." Plaintiff then quoted statutory language that included publicly traded companies "shall disclose to the public on a rapid and current basis such additional information concerning material changes in financial conditions or operations ..." (Pearl Dep. Ex. 5) (DSOF #98)

39. Plaintiff's May 28, 2004 e-mail to Ms. Benetz did not explain the \$12 million figure. (Pearl Dep. p. 74; Pearl Dep. Ex. 5) (DSOF #99)

40. Plaintiff did not provide further information to defendant about the \$12 million figure other than a January 14, 2005 memorandum to Ms. Horan that stated the possible understatement of earnings were "caused by DST's lack of knowledge on how to process invoices within the recently purchased and implemented PeopleSoft's Financial System." (Pearl. Dep. Ex. 15) (DSOF #100)

41. All plaintiff knew about the potential \$12 million understatement of earnings was that an unidentified person in Benetz's department had told him there was that amount of invoices that had been paid and not recorded. (Pearl Dep. pp. 706-07) (DSOF #101)

42. Plaintiff did not know whether Benetz's procurement department was responsible for any accounting work for defendant. (Pearl Dep. p. 258) (DSOF #102)

43. Plaintiff has not learned any more factual information about the \$12 million since May 28, 2004. (Pearl Dep. pp. 706-07) (DSOF #103)

44. Plaintiff did not consult with anyone or do any research regarding SOX before sending the May 28, 2004 e-mail to Ms. Benetz, except that he read section 409 and tried to understand it. (Pearl Dep. pp. 79-80) (DSOF #104)

45. When plaintiff sent his May 28, 2004 e-mail to Ms. Benetz regarding the possible violation of the SOX 409 requirement that publicly held companies "shall disclose to the public on a rapid and current basis such additional information concerning material

changes in the financial conditions,” he understood “material changes in financial condition” to mean “any” change in financial condition. (Pearl Dep. pp. 87-88) (DSOF #105)

46. Plaintiff acknowledges that in his communications with defendant about the possibility of a \$12 million understatement of earnings, “I was saying that there may be a Sarbanes-Oxley violation. I don’t have knowledge that it occurred or didn’t occur.” (Pearl Dep. p. 708) (DSOF #106)

47. There was no \$12 million understatement of earnings in 2004 due to any problems related to the processing of invoice payments under the PeopleSoft System, due to any other problems in the Procurement Department managed by Diane Benetz, or due to any other reason. Although a \$12 million error would be immaterial to DST’s financial position or operations (based upon DST’s market capitalization, stockholders’ equity, total assets, revenues and pre-tax income), DST reviewed financial results for the eight quarterly periods prior to May 2004 and the eight quarterly periods subsequent to date, and there was no basis for such an assertion. (Givens Dec. ¶ 8) (DSOF #108)

## **2. Improper Disposal of MIPS**

48. The measurement used in the Computer Associates (hereinafter CA) contract for the amount of designated CA software that DST may use is Millions of Instructions Per Second (“MIPS”). (Horan Dep. p. 113) (DSOF #38)

49. In 2001, DST and CA entered into a contract that provided DST could use up to 55,000 MIPS of designated CA software through March 30, 2008. (Dooley Dep. pp. 110-12) (DSOF #39)

50. Plaintiff had no role in the negotiation of the 2001 agreement other than to verify a couple of exhibits. (Pearl Dep. p. 717) (DSOF #40)

51. By 2004, according to documents prepared by plaintiff, DST’s actual MIPS usage was only 14,990, and it was projected to grow to only 22,207 in 2008 and 34,828 in 2012. (Pearl Dep. pp. 52, 163-65, 257; Pearl Dep. Exs. 10, 15) (DSOF #41)

52. On December 31, 2004, DST and CA entered into an extension of the 2001 CA contract. (Dooley Dep. pp. 46-47; Horan Dep. Ex. 8) (DSOF #42)

53. Under the terms of the 2004 contract extension, DST paid \$24.8 million and relinquished the right under the 2001 contract to 20,000 MIPS of authorized usage through March 2008, and CA agreed to provide certain new software products and to extend authorized MIPS usage at the 35,000 level until March 2012. (Pearl Dep. p. 408) (DSOF #43)

54. The 2004 CA contract extension also provided DST with the right to use more

than 35,000 MIPS if necessary and to extend MIPS usage beyond March 2012 under a fee schedule. (Pearl Dep. pp. 657-59) (DSOF #44)

55. Based on what plaintiff knew in December 2004, there was no need for DST to secure authorized MIPS usage from CA in excess of 35,000 MIPS. (Pearl Dep. p. 187) (DSOF #45)

56. According to plaintiff's calculations, the 2004 contract extension with CA would result in an annual cost savings in the amount of \$2,667,938. (Pearl Dep. p. 304; Pearl Dep. Ex. 15) (DSOF #46)

57. Plaintiff also acknowledged that the 2004 CA contract extension reduced the annual cost to DST of the CA mainframe software by about \$4 million. (Pearl Dep. p. 654) (DSOF #47)

58. Plaintiff agrees that the CA extension agreement was a favorable contract for the company. (Pearl Dep. p. 311) (DSOF #48)

While plaintiff did testify as set forth above, he controverts this testimony by stating that he thought the agreement was a bad deal for DST because it gave up 20,000 MIPS. He also points to his testimony that he could have negotiated a better contract that would have saved more money. (Plaintiff's Controversion, doc. #68)

59. Plaintiff testified that the essence of his complaint to DST was what happened to the 20,000 MIPS that he contends were given away under the 2004 contract extension and the value associated with them. (Pearl Dep. p. 342) (DSOF #49)

60. At the time plaintiff made his complaint about the 20,000 MIPS allegedly "given away" under the terms of the December 31, 2004 contract extension, the financial statements for the period ending on December 31, 2004 had not yet been filed. (Pearl Dep. pp. 561-62) (DSOF #50)

61. It was not plaintiff's job to approve contract terms. (Pearl. Depo. pp. 578-79) (DSOF #54)

62. Plaintiff does not know if there is an accounting rule that applies to the question of what happened to the missing MIPS and what happened to the value associated with them—"I don't know anything about the accounting rule that applies to the 2004 extension, I don't think I've ever questioned that one." (Pearl Dep. pp. 328-30) (DSOF #55)

63. Plaintiff has never asserted that the 2001 CA contract lost value as a result of the 2004 contract extension. (Pearl Dep. p. 302) (DSOF #56)

64. Plaintiff testified that the premise of his criticism of the accounting treatment

of the 2004 extension agreement is his view that the 20,000 MIPS had a book value for accounting purposes and that the book value should have been reduced. (Pearl Dep. p. 561) Plaintiff did not know if the accounting books of DST assigned an accounting value to allowable MIPS usage. (Pearl Dep. pp. 312-13, 342) (DSOF #57)

65. Plaintiff never made any effort to try to determine whether there was a book value allocated to the 20,000 MIPS that he contends were given up under the 2004 extension agreement. (Pearl Dep. p. 312) (DSOF #58)

66. Plaintiff never identified the value that DST assigned to the CA contract extension in DST's publicly filed financial statements. (Pearl Dep. p. 288) (DSOF #59)

67. Plaintiff did not know from the accounting perspective what, if anything, DST did with respect to the 20,000 MIPS issue after the 2004 extension agreement. (Pearl Dep. p. 343) (DSOF #60)

68. Plaintiff has no idea of what the correct accounting value was that should have been assigned to the CA contract. (Pearl Dep. p. 485) (DSOF #61)

69. Plaintiff did not know if allowable MIPS usage is assigned an accounting value on the financial books of DST. (Pearl Dep. p. 313) (DSOF #62)

70. Plaintiff did not know of any accounting rules or principles that apply to the question of how a company such as DST ought to treat a contract such as the CA contract. (Pearl Dep. p. 313) (DSOF #63)

71. Plaintiff did not have any personal knowledge about internal control issues by DST with respect to either the negotiation of contracts or the accounting of those contracts. (Pearl Dep. p. 401) (DSOF #64)

72. With respect to the software contracts with CA, DST never assigned a book value to the MIPS licenses or to the MIPS usage authorizations under the contract. DST never assigned a book value to the 20,000 MIPS that Hershel Pearl contends were "given away" in the 2004 contract negotiations. (Givens Dec. ¶ 4) (DSOF #65)

73. For accounting purposes, DST generally recorded the amounts paid under the CA contracts as a "prepaid expense" on the DST financial statements, except for amounts attributed to current expenses or to the capitalization of perpetual software licenses. There was no account value attributed to MIPS. With respect to the amounts paid by DST under the 2004 amendment/extension of the CA contact, DST allocated approximately \$5 million to capital assets and \$19.5 million to prepaid expense. It was a routine accounting treatment in which DST took the unamortized amount paid under the previous contract and the amount paid under the 2004 amended/extension allocated to prepaid expense and amortized that total amount over the remaining life of the amended/extended contract. (Givens Dec. ¶ 5) (DSOF

#66)

74. The accounting of the 2004 CA contract amendment/extension was reviewed by DST's outside independent accounting auditor, Price Waterhouse Cooper ("PWC"). PWC reviewed the contract and how DST accounted for the contract in its financial statements. PWC did not report any problems with DST's accounting of the transaction and certified DST's financial statements as in accordance with generally accepted accounting principles. (Givens Dec. ¶ 6) (DSOF #67)

75. Plaintiff did not know how the corporate financial statements treated the CA contract and the 20,000 MIPS, and based his belief that the corporate financial treatment somehow violated SOX or SEC rules or regulations or federal laws relating to shareholder fraud purely on the internal financial budgets that he saw. (Pearl Dep. p. 604) (DSOF #68)

76. Plaintiff knew the internal department budgets that he saw while employed were not the corporate accounting statements of the company. (Pearl Dep. p. 602-03) (DSOF #69)

77. Plaintiff did not know whether any of the internal budgeting information that he saw went into the corporate financial statements. (Pearl Dep. p. 603) (DSOF #70)

78. Plaintiff never saw any document that reflected a book value of the 20,000 MIPS; he only saw the budget and expense review that allocated a dollar amount to the entire contract. (Pearl Dep. p. 606) (DSOF #71)

79. Plaintiff testified that "I've always heard that MIP was a misleading indicator of a pricing system" and "it's a bogus number." (Pearl Dep. pp. 284-85) (DSOF #72)

80. Plaintiff testified that he knows of no way to determine or even estimate the fair market value of MIPS. (Pearl Dep. pp. 284-85) (DSOF #73)

### **3. Violation of Ethics Policies**

81. Plaintiff contends that the failure of Mr. Hager, Ms. Horan and Mr. McDonnell to take action to address his report that Mr. Dooley allegedly had indicated a refusal to work with Mr. Pearl if Pearl was transferred to Benetz's department may be violations of SOX section 406. (Pearl Dep. pp. 271-72) (DSOF #118)

82. Plaintiff believes that if CFO Hager knew about Mr. Dooley's refusal to work with Pearl and failed to act on it, that was a violation of SOX section 406. (Pearl Dep. p. 263) (DSOF #119)

83. On January 14, 2005, plaintiff raised SOX section 406 for the first time in an e-mail to Ms. Horan. (Pearl Dep. p. 263) (DSOF #120)

84. Plaintiff explained that his opinion was that “Hager should have intervened the moment that Diane told him that Jack said I won’t work with him if you transfer him down here.” (Pearl Dep. p. 265) (DSOF #121)

85. Plaintiff believes that Mr. Hager violated SOX section 406 by “not stepping in and taking action when it was alleged to him that Mr. Dooley had refused to work with you if you transferred to Benetz’s department.” (Pearl Dep. p. 267) (DSOF #122)

86. Plaintiff believes that under SOX section 406, DST was obligated to publish on its website a waiver of the code of ethics for Hager, Horan and McDonnell because they failed to take action when it was reported to them that Dooley had allegedly refused to deal with Pearl if he was transferred to Benetz’s department. (Pearl Dep. pp. 267-68, 272) (DSOF #123)

87. Plaintiff referred to alleged violations of the DST Systems, Inc. Business Ethics and Legal Compliance Policy in his communications to defendant, but in his deposition plaintiff testified that Mr. Hager violated only the conflict of interest policy when he allegedly did not address the report by plaintiff that Mr. Dooley blocked his transfer. (Pearl Dep. pp. 439-41; and as modified by doc. #77-2, Pearl Dep. Ex. 32) (DSOF #124)

#### **4. Lack of Good Judgment in Contract Negotiations**

88. In a memorandum dated November 19, 2004, plaintiff identified eight contracts and, in part, stated the following:

My Conflict of Interest arises from the contract transactions I’ve seen us execute that I don’t believe were in DST’s best financial interest. I’m not saying we shouldn’t have made these purchases; but we should have used better judgment. The lack of good judgment on DST’s part, I’m projecting, will cost us \$109.205 M.

(Pearl Dep. Ex. 7) (DSOF #27)

89. Plaintiff’s November 19, 2004 memorandum did not refer to any SEC rules or regulations or Sarbanes-Oxley or any other laws or regulations relating to fraud against shareholders. (Pearl Dep. p. 397; Pearl Dep. Ex. 7) (DSOF #28)

90. Plaintiff’s November 19, 2004 memorandum did not contend that any lack of good judgment in negotiating contracts violated any SEC rules or regulations or Sarbanes-Oxley or any other laws regarding fraud against shareholders. (Pearl Dep. pp. 398-99; Pearl Dep. Ex. 7) (DSOF #29)

91. Plaintiff also testified that he did not know whether a lack of good judgment in negotiating a contract does or does not constitute any kind of violation of SEC rules or

regulations, Sarbanes-Oxley or any other federal rules or regulations regarding fraud against shareholders. (Pearl Dep. pp. 397-98) (DSOF #31)

92. Plaintiff testified that he did not assert that a lack of good judgment in negotiating contracts was a SOX violation. (Pearl Dep. pp. 350, 484) (DSOF #32)

Plaintiff objected to this fact on the basis that it mischaracterized plaintiff's testimony. Plaintiff testified as follows:

- Q. Now, were you asserting that a lack of good judgment in negotiating contracts was a Sarbanes-Oxley violation? You're not asserting that are you?
- A. No.
- Q. Pardon me?
- A. No.
- Q. And you weren't asserting that in this Exhibit 15, were you?
- A. No, I think I said there were Sarbanes-Oxley violations that were—because they were not good fiscal management is what I said.
- Q. All right. But I want to make sure I understand that. You're not saying that the lack of good judgment in negotiating a contract is a Sarbanes-Oxley violation, are you?
- A. In this e-mail, I did state, "Sarbanes-Oxley violations because they were not good fiscal management due to lack of a good judgment in negotiating the contract," that what I stated.

(Pearl Dep. p. 350)

93. At another point, plaintiff testified that a lack of good judgment in negotiating a contract violates SOX, but could not identify what provision of SOX.

- Q. How does a lack of good judgment in negotiating a contract constitute a Sarbanes-Oxley violation?
- A. Back to where the—this lack of good judgment is costing me, a shareholder, a value in stock price.
- Q. And you think that constitutes a violation of Sarbanes-Oxley?
- A. I thought so at the time.
- Q. And what section of Sarbanes-Oxley does that violate?
- A. I don't know.
- Q. And you didn't know at the time, did you?
- A. No.
- Q. And you never told DST what section of Sarbanes-Oxley that violated, did you?
- A. No.

(Pearl Dep. p. 351) (DSOF #33)

94. Plaintiff testified in his deposition that when he asserted a lack of good judgment in the contracts DST had negotiated, he was presenting information that he believed constituted fraud against shareholders. (Pearl Dep. pp. 818-19) (DSOF #35)<sup>4</sup>

##### **5. Lack of Cash Flow Projections**

95. In about March 2005, plaintiff attended a meeting with Jack Dooley, Stewart Ramsey, Diane Benetz, Tam Harper and others that included a discussion about whether they could pay for a BMC contract. (Pearl Dep. pp. 597-600) (DSOF #87)

96. Plaintiff was told that “they didn’t know how much cash they had on hand, they didn’t know if they could pay—if we did a BMC contract, they didn’t know if they could pay for it or not. They had no idea, also, what bills were coming due and the amount of the bills.” (Pearl Dep. p. 599) (DSOF #88)

97. Plaintiff offered to write a computer query to help them produce cash flow reports and was told no. (Pearl Dep. p. 598) (DSOF #89)

98. Plaintiff later went back to Mr. Ramsey and told him, “Stewart, I’m willing to write for volunteer—willing to volunteer to write some of these reports or these queries to pull this information up. If that’s important, I’d be happy to do it.” (Pearl Dep. p. 599) (DSOF #90)

99. Mr. Ramsey told plaintiff he did not want him to do it. (Pearl Dep. p. 600) (DSOF #91)

100. Plaintiff then went to Ms. Benetz and “asked her the same thing. I said, ‘Here, I’ll be happy to do this, if it would help the company.’” (Pearl Dep. p. 600) (DSOF #92)

101. Ms. Benetz told plaintiff there was no need for him to do that. (Pearl Dep. p. 600) (DSOF #93)

102. Plaintiff did not have any conversation with anyone else regarding the cash flow report issue. (Pearl Dep. p. 600) (DSOF #94)

103. During the investigation, Mr. Pearl never raised any issue relating to the lack of a cash flow report or any other issue related to cash flow. (Horan Dec. ¶ 7) (DSOF #95)

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<sup>4</sup>Plaintiff controverted this factual statement, objecting to the use of the term “ultimately.” Thus, the Court eliminated that term from the factual statement.

## **6. Lack of a Disaster Recovery Plan for Lock\Line**

104. In plaintiff's February 14, 2005 e-mail to Ms. Horan, he stated "another possible Sarbanes-Oxley violation would be the lack of a complete disaster recovery plan for lock\line." (Pearl Dep. p. 537; Pearl Depo. Ex. 32) (DOS #109)

105. In 2005, Lock\Line, LLC was a second tier subsidiary of DST Systems, Inc. and was not a publicly traded company. (Horan Dec. ¶ 3) (DSOF #110)

106. Plaintiff's source of information regarding the disaster recovery plan was "guys from lock\line calling me up." (Pearl Dep. p. 538) (DSOF #111)

107. The guys told him that they had a failure and lost their scheduling package and had no back up for it. (Pearl Dep. p. 538) (DSOF #112)

108. Plaintiff claims that he raised the issue of a disaster recovery plan in relation to section 442, but he does not recall what specific law section 442 was in the SEC. (Pearl Dep. p. 390) (DSOF #113)

109. Plaintiff did not know what law section 442 was part of and still does not know. (Pearl Dep. p. 537) (DSOF #114)

110. Plaintiff still believes the legal issue related to Sarbanes-Oxley and involved in this disaster recovery plan question is section 442. (Pearl Dep. p. 538) (DSOF #116)

111. Plaintiff claims his source of information about section 442 was the SEC website. (Pearl Dep. p. 539) (DSOF #117)

### **III. DISCUSSION**

#### **A. Sarbanes-Oxley Violations (Count I)**

Enacted on July 30, 2002, Title VIII of the Sarbanes-Oxley Act of 2002 was designated as the Corporate and Criminal Fraud Accountability Act of 2002 and was intended to provide "whistleblower" protection to employees of publically traded companies by providing a private cause of action for retaliation against employees who engage in protected activity. Section 1514A(a) states, in relevant part:

No [publicly-traded 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 [18 U.S.C.] 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, when the information or assistance is provided to or the investigation is conducted by—

\* \* \*

(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) ....

18 U.S.C. § 1514A(a)(1)(C).

A plaintiff alleging a cause of action for violations of SOX must demonstrate by a preponderance of the evidence that the plaintiff's protected activity was a contributing factor in the unfavorable personnel action. Thus, plaintiff Pearl must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. See Collins v. Beazer Homes USA, Inc., 334 F.Supp.2d 1365, 1375-76 (N.D. Ga. 2004). Proximity in time between the protected activity and the adverse personnel action is sufficient to raise an inference of causation. Id. An employer may avoid liability if it can demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. Id. at 1376.

Defendant alleges that plaintiff did not engage in any protected activity under SOX. (Doc. #62 at 35) In assessing whether protected activity is involved, the Court must first analyze whether the complaints relate to one of the six enumerated categories in section 1514A, that is: (1) mail

fraud—(18 U.S.C. § 1341); (2) wire fraud—(18 U.S.C. § 1343); (3) bank fraud—(18 U.S.C. § 1344); (4) securities fraud—(18 U.S.C. § 1348); (5) violations of any rule or regulation of the SEC; or (6) violations of any provision of federal law relating to fraud against shareholders. See Allen v. Admin. Review Bd., 514 F.3d 468, 476-77 (5<sup>th</sup> Cir. 2008).

Plaintiff acknowledges that his complaints do not fall under categories 1 through 4. (Plaintiff's Suggestions in Opposition, doc. #68, at 55) Thus, the first inquiry is whether plaintiff Pearl's complaints relate to categories 5 or 6, that is, did plaintiff raise issues concerning violations of any rule or regulation of the SEC or any provision of federal law related to fraud against shareholders.

In evaluating whether a complaint falls into one of these categories, a plaintiff need not demonstrate an actual violation of the law—only that he reasonably believed there was a violation of one of the enumerated categories or regulations or laws. See Collins v. Beazer Homes USA, Inc., 334 F.Supp.2d 1365, 1376 (N.D. Ga. 2004). The reasonableness test “is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts.” Id. (quoting Legislative History of Title VIII of H.R. 2673, available at 2002 WL 32054527).

For an employee “to reasonably believe that a violation occurred they must have a subjective and objectively reasonable belief that fraud occurred.” Van Asdale v. Int'l Game, Tech., 498 F.Supp.2d 1321, 1333 (D. Nev. 2007); Lerbs v. Buca Di Beppo, 2004-SOX-8 (ALJ June 15, 2004). Under the subjective component, the complainant must actually believe that the employer was in violation of relevant law. Under the objective portion of the reasonableness requirement, the employee's belief must be objectively reasonable. See Van Asdale, 498 F.Supp.2d at 1333. Reasonableness is determined on the basis of the knowledge available to a reasonable person in the

same circumstances with the employee's training and experience. Id. The Court will examine each of the complaints made by plaintiff to determine if any of them constituted protected activity within the meaning of the Act.

1. Under Reporting of Earnings

On May 28, 2004, plaintiff sent an e-mail to Diane Benetz stating that there may be an understatement in earnings in the amount of \$12 million dollars. (See Undisputed Fact No. 37, supra) Plaintiff's information about the \$12 million dollars in under reported earnings came from an unidentified person in Diane Benetz's department who told him that there was an amount of invoices that had been paid and not recorded. (See Undisputed Fact No. 41, supra) Plaintiff did not consult with anyone prior to sending the May 28, 2004 e-mail and never learned any more factual information. (See Undisputed Fact Nos. 43 and 44, supra) In his deposition, plaintiff acknowledged that he was saying there might be a SOX violation, but that he did not have knowledge that it did or did not occur. (See Undisputed Fact No. 46, supra)

With respect to this claim, plaintiff had scant factual information on which to make the allegation. Plaintiff did not know who had made the report to begin with; he had not seen any of the documents which he suspected might be the cause of the under reporting of the income; he did not attempt to obtain any further factual information; and he admits he did not have sufficient knowledge to know if a SOX violation had occurred. Thus, plaintiff did not have a subjective belief that a violation had occurred. See Van Asdale v. Int'l Game, Tech., 498 F.Supp.2d 1321, 1333 (D. Nev. 2007)(no reasonable jury could find that plaintiff had a belief that fraud had occurred since her testimony was that she had no belief one way or the other). Because of the lack of information, plaintiff also lacked an objectively reasonable basis on which to base his report. See Bechtel v.

Competitive Tech., Inc., 2005-SOX-33, 29-32 (ALJ Oct. 5, 2005)(complainant’s belief that company president engaged in insider trading not objectively reasonable where “[t]he snippet of conversation that [complainant] overheard is too vague to make a reasonable guess at [the president’s] intentions, never mind to reach the serious conclusion that complainant drew”). This was not a situation where even though no SOX violation was ultimately found, plaintiff had actual information, as opposed to rumor and hearsay, that would support an alleged SOX violation.

2. Improper Disposal of MIPS

The undisputed facts demonstrate that the contract extension in which plaintiff alleges MIPS were given up renegotiated a number of items and by plaintiff’s own calculations resulted in a cost savings to the defendant of approximately \$2.6 million, provided new software products and reduced the annual cost to DST of the CA mainframe computer by \$4 million. (See Undisputed Fact Nos. 53, 56 and 57, supra) Moreover, if additional MIPS were needed, DST could buy more under a fee schedule. (See Undisputed Fact No. 54, supra) Other than knowing the renegotiated contract gave up approximately 20,000 MIPS, plaintiff had no information as to whether there was an accounting rule for the “missing MIPS,” had no idea what the correct accounting value for the MIPS was and did not try to determine if there was a book value allocated to the 20,000 MIPS. (See Undisputed Fact Nos. 62, 65 and 68, supra) At the time that plaintiff made his complaint that the 20,000 MIPS had been given away and not properly reported, the financial statements for the period ending on December 31, 2004 had not been filed. (See Undisputed Fact No. 60, supra) Further, plaintiff based his belief that the financial treatment of the MIPS violated SEC rules or constituted shareholder fraud on internal budgeting information and he did not know if any of that information went into corporate financial statements. (See Undisputed Fact Nos. 75 and 77, supra)

While a claimant is not required to be an accountant to report SOX violations, to the extent that a claim is made that a financial report violates SEC regulations based upon accounting improprieties, the claim must be based on something more than mere speculation. Plaintiff never cited any SEC requirements or any other rule or regulation purportedly violated by DST's renegotiation of a contract which reduced the number of MIPS provided pursuant to earlier agreements, nor did plaintiff identify any publically filed financial statement which he claimed was inaccurate. Plaintiff never asserted that the 2001 contract with CA lost value as a result of the 2004 contract extension, and plaintiff also testified that he knew of no way to estimate the fair market value of MIPS. (See Undisputed Fact Nos. 63 and 80, supra) Plaintiff did not know if MIPS usage had been assigned an accounting value on the DST financial books, and plaintiff did not know of any accounting rules that apply to the question of how DST should treat the CA contract. (See Undisputed Fact Nos. 69 and 70, supra) Aside from an accounting rule on missing clothing inventory, plaintiff had never read any other accounting rule that related to the issues he was raising concerning DST. (See Undisputed Fact No. 35, supra) As with the alleged under reporting of earnings, plaintiff chose to raise issues concerning the reduction in MIPS in the contract extension with little if any factual basis for his complaints or fear that SOX was being violated. As noted in Harvey v. Home Depot U.S.A., Inc., ARB Case No. 04-114, \*15, ALJ Case No. 2004-SOX-20 (ARB June 2, 2006), the mere possibility that a challenged practice could adversely affect the financial condition of a corporation and that the effect on the financial condition could be withheld from investors is not enough to constitute protected activity under SOX.

### 3. Violations of Ethics Policies

Plaintiff contends that the failure of Hager, Horan and McDonnell to take any action to

address the alleged refusal of Jack Dooley to work with plaintiff if he were transferred to Dooley's department obligated DST to publish on its website a waiver of the code of ethics for those individuals. Plaintiff claims that this failure to waive the code of ethics violated section 406 of SOX and that Mr. Hager's failure to step in and take action when it was alleged Mr. Dooley refused to work with plaintiff Pearl also constituted a violation of SOX.

Plaintiff cites no authority for the contention that the failure to address personnel matters in a manner satisfactory to the complaining party constitutes a violation of SOX. A similar argument was rejected in Harvey v. Home Depot U.S.A., Inc., ARB Case No. 04-114, \*13-15, ALJ Case No. 2004-SOX-20 (ARB June 2, 2006). There, the complaining party voiced concerns about racial and employment discrimination to the Board of Directors and executives of the company. In Harvey, the Department of Labor Administrative Review Board, although recognizing that a company that tolerates discriminatory practices may not be acting in the best interests of its shareholders, concluded that allegations of employment discrimination do not point to violations of the statutes concerning mail fraud, wire fraud, bank fraud, shareholder fraud or violations of SEC rules. The Board noted:

... While Title VII protects individuals against discrimination, SOX protects shareholders from inaccurate reporting of a publically held corporation's financial condition. ...

\* \* \*

... Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX. ...

Id. at 14.

4. Lack of Good Judgment in Contract Negotiations

Plaintiff claimed that those negotiating contracts for DST failed to use good judgment and plaintiff estimated that this lack of good judgment cost the company in excess of \$109 million. (See Undisputed Fact No. 88, supra) Plaintiff initially testified that he did not know whether a lack of good judgment in contract negotiations violated SOX. (See Undisputed Fact No. 92, supra) Subsequently, plaintiff testified he was asserting a SOX violation because “they were not good fiscal management.” (See Undisputed Fact No. 92, supra) Finally, plaintiff testified that when he presented information about a lack of good judgment in contract negotiations, he was presenting information he believed constituted fraud against shareholders. (See Undisputed Fact No. 94, supra) Plaintiff appears to suggest in argument that had he been allowed to negotiate these contracts, he could have negotiated better deals for DST, and in the case of the CA contract extension established a different, more favorable cost structure for the MIPS.

Allegations that plaintiff or someone else could have negotiated a better deal for DST or saved the company money does not constitute protected activity as it does not implicate shareholder fraud or SEC violations. See Fraser v. Fiduciary Trust Co. Int’l, 417 F.Supp.2d 310, 322 (S.D.N.Y. 2006)(e-mails to management suggesting that large losses sustained across accounts could have been avoided if plaintiff’s advise for investment strategy had been heeded was not protected activity); Stojicevic v. Ariz.-Am. Water Co., 2004-SOX-73, \*13-14 (ALJ Mar. 24, 2005)(allegation of poor management that could adversely affect the company’s financial condition insufficient to constitute protected activity under SOX).

5. Lack of Cash Flow Projections

Plaintiff contends that management of DST did not know how much cash they had on hand,

what bills were coming due and the amount of the bills. (See Undisputed Fact No. 96, supra) Thus, on several occasions plaintiff offered to write a computer program to help produce cash flow reports. (See Undisputed Fact Nos. 97, 98 and 100, supra) Both Mr. Ramsey and Ms. Benetz declined plaintiff's offer. (See Undisputed Fact Nos. 99 and 101, supra) Plaintiff did not have conversations with anyone else concerning the cash flow issue. (See Undisputed Fact No. 102, supra)

This type of conduct cannot form the basis for a SOX claim. See Lerbs v. Buca Di Beppo, 2004-SOX-8, \*14 (ALJ June 15, 2004)(questions concerning reclassification of negative cash account balance were general inquiries and did not constitute protected activity). Plaintiff never identified any particular concerns about the failure of employees of DST to accept his offer to produce cash flow projections, and in his briefing plaintiff does not offer any arguments as to how this claim implicates SOX.

6. Lack of a Disaster Recovery Plan for Lock\Line

In his e-mail of February 14, 2005, plaintiff stated that another possible SOX violation was the lack of a complete disaster recovery plan for Lock\Line. The first problem with plaintiff's argument is that Lock\Line is a wholly owned subsidiary of the defendant, not a publically traded company. See Tumban v. BioMerieux, Inc., 2007 WL 778426, \*2 (M.D.N.C. Mar. 13, 2007)(SOX only applies to publically traded companies). Moreover, even if SOX were extended to cover wholly owned subsidiaries of publically traded companies, plaintiff had no information other than "guys from lock\line calling me up" and telling plaintiff they had lost their scheduling package and had no backup. (See Undisputed Fact Nos. 106 and 107, supra) To be entitled to protection, the information reported by the whistleblower must have a degree of specificity, and specific concerns must be stated. See Lerbs v. Buca Di Beppo, 2004-SOX-8, \*14 (ALJ June 15, 2004).

This claim does not involve a publically traded company, does not implicate securities fraud or SEC rules violations and is not sufficiently specific to satisfy SOX.

B. Wrongful Discharge (Count II)

In Count II of his complaint, plaintiff alleges a state law claim for wrongful discharge. He argues that his claim comes within the public policy exception to Missouri's employment-at-will doctrine. Defendant argues that by its terms the common law at-will doctrine as it developed in Missouri does not apply where there is a statutory remedy for the allegedly protected activity. Defendant cites cases such as Osborn v. Professional Service Industries, Inc., 872 F. Supp. 679 (W.D. Mo. 1994), and Prewitt v. Factory Motor Parts, Inc., 747 F. Supp. 560, 565-66 (W.D. Mo. 1990), for the proposition that application of the public policy exception to the employee-at-will doctrine requires two factors: (1) that the discharge violates some well-established public policy; and (2) that there is no remedy to protect the interests of the aggrieved employee.

In response, plaintiff characterizes the defendant's argument as one of preemption and argues that in this case preemption is neither express nor implied. However, the Court concludes that in the circumstances of this case, the issue is not one of preemption, but whether the plaintiff can meet the elements for a wrongful discharge claim. Here, there is a remedy for the violations alleged, and thus, plaintiff cannot establish a wrongful discharge claim. See Repetti v. Sysco Corp., 730 N.W. 2d 189, 193-94 (Wis. Ct. App. 2007)(no state law action for wrongful discharge available where an official has an adequate remedy under SOX).<sup>5</sup>

Even if plaintiff were correct, and the second requirement for a wrongful discharge action

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<sup>5</sup>The court in Repetti recognized that SOX was not intended to supplant or replace other federal or state whistleblower laws. However, Wisconsin, like Missouri, had no applicable state statutes.

could be ignored, plaintiff does not explain how his conduct could be protected activity under state common law in light of the undisputed facts concerning the allegations made by plaintiff.

#### IV. CONCLUSION

Having concluded that plaintiff's conduct did not amount to protected activity within the meaning of SOX, the Court need not address the other issues raised by the parties in connection with Counts I and II of the Complaint. Accordingly, it is

ORDERED that defendant's motion for summary judgment, doc. #61, is granted.

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*/s/ Sarah W. Hays*  
SARAH W. HAYS  
UNITED STATES MAGISTRATE JUDGE