**U.S. Department of Labor**

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

**Issue Date: 15 November 2006**

CASE NO. 2006-SOX-107

In the Matter of:

VELCO GIUROVICI,
Complainant

v.

EQUINIX, INC.
Respondent

Appearances:

For the Respondent,
Michael A. Cox, Esq.

Before: RICHARD A. MORGAN
Administrative Law Judge

## DECISION AND ORDER

### BACKGROUND AND PROCEDURAL HISTORY

This action involves a complaint under the employee protection provisions of the Corporate and Criminal Fraud and Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, *et seq*. ("Sarbanes-Oxley," "SOX," or "Act", enacted July 30, 2002) and the implementing regulations at 29 C.F.R. Part 1980.

On May 11, 2006, Complainant, Velco Giurovici, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA"), alleging that his former employer, Respondent Equinix, Inc., (hereinafter "Equinix") violated the Act. Complainant alleged that Respondent terminated his employment, on April 27, 2006, in retaliation for having reported to management officials that the company report, sent to customers and shareholders, concerning the power outage, in its Chicago Data Center, on June 24, 2005, was false in several respects.

On June 14, 2006, following an investigation, OSHA found no reasonable cause to believe that the Respondent had violated the Act. Specifically, OSHA found, *inter alia*, that the

Complainant had not established, by a preponderance of the evidence, that Complainant's alleged activities were protected or a contributing factor in his termination.

On July 10, 2006, the Complainant objected to OSHA's findings and requested a hearing before an Administrative Law Judge. On July 20, 2006, I issued a Notice of Hearing scheduling the matter for a hearing beginning on September 12, 2006 in Chicago, Illinois. The location was later changed to DuPage County, Illinois.

A hearing was conducted September 12 through 13, 2006. Complainant's Exhibits ("CX") 1, 3, 5-6, 8, 10-12, and 14 were admitted in evidence. Respondent's exhibits ("RX") 1-14 were admitted in evidence. The parties submitted closing arguments and briefs on October 31, 2006.

## STIPULATIONS

The parties stipulated that:

1. Equinix, Inc. is a Company covered by the Act.
2. Mr. Giurovici began work for the Respondent on or about October 6, 2000 and worked for approximately 5 1/2 years.
3. Mr. Giurovici was an IBX "site engineer" responsible for electrical during all times of his employment with Respondent.
4. Mr. Giurovici's job duties, as an IBX site engineer, included overseeing electrical and mechanical contractor work and operations, performing power distribution, mechanical, electrical and HVAC start up operations, performing maintenance on air handling units and chilled water distribution systems as well as documenting and reporting all mechanical or electrical problems.
5. Mr. Giurovici worked an average of 45 hours per week. He earned $37.07 per hour with a 15% night shift differential. He had 8.33 hours vacation per base period (24 pay periods).
6. Mr. Giurovici discontinued participation in a company-sponsored Employee Stock Purchase Plan, in 2005.
7. On or about June 24, 2005, Equinix experienced a problem in the operation of its standby electrical generators plant, which resulted in sporadic power interruptions to customer loads and interruptions to cooling systems operation from approximately 8:30 P.M. that day until systems were stabilized and utility power was restored at 3:30 A.M. on the following day.
8. Subsequent to June 24, 2005, Equinix investigated the power outage.
9. The company-stated results of the investigation into the June 24, 2005 power outage were published to its customers and the results of the investigation were not published for the shareholders. The shareholders were provided information regarding credit amounts resulting from the power outage. Some employees, notably Mr. Giurovici, received copies of the investigation.
10. Mr. Giurovici received no severance pay upon his termination
11. Mr. Giurovici filed a complaint with OSHA on May 11, 2006 and thus it was timely filed.

## ISSUES

1. Does Equinix qualify as a company covered by SOX, i.e., any company with a class of securities registered under section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 781) and any company required to file reports under section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 780(d))?

2. Whether the Complainant, Mr. Velco Giurovici, was an employee of the Respondent, Equinix, on the dates of the alleged protected activity in 2005 and 2006?

3. Whether the Complainant, Mr. Velco Giurovici, engaged in protected activity under SOX, on July 6-7, 2005, and/or April 7, 2006, or some other established date, that is, was he, or persons acting on behalf of him, about to provide or did provide their employer or the Federal Government information relating to any alleged or actual violation of any federal law relating to SOX activity, i.e., regarding any conduct which the employee reasonably believed constituted a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders?

4. If the Complainant, Mr. Velco Giurovici, engaged in protected activity as an employee of the Respondent, Equinix, whether the Respondent was aware of the protected activity?

5. Did the Complainant, Mr. Velco Giurovici, suffer unfavorable personnel actions, i.e. was he discharged or discriminated against in respect to compensation, terms, conditions, or privileges of employment?

6. If the Complainant, Mr. Velco Giurovici, engaged in protected activity as an employee of the Respondent, Equinix, and the Respondent was aware of the protected activity, did the protected activity contribute, in part, to the decision by the Respondent to terminate the Complainant?

7. If the Complainant, Mr. Velco Giurovici, established a violation of the employee protection provisions of SOX , whether the Respondent, Equinix, demonstrated by clear and convincing evidence that it would have disciplined Mr. Giurovici and/or terminated Mr. Giurovici, even in the absence of the protected activity?

8. If the Respondent, Equinix, Inc., presented clear and convincing evidence of a legitimate motive for terminating Mr. Giurovici, whether the Complainant established by a preponderance of the evidence that the Respondent retaliated against him for engaging in protected activity, i.e., that the Respondent's stated legitimate reasons were a pretext?

9. If the Complainant established the elements of his complaint, what injuries, if any did he suffer?

10. If the Respondent violated the act, what are appropriate compensatory damages, costs and expenses and what further relief, if any, (i.e., reinstatement, compensation,

terms, conditions and privileges of employment, abatement orders) should be ordered?

## FACTS

### *Preliminary Facts*

Equinix, among other activities, maintains about seventeen facilities in the United States and four in Southeast Asia, with a headquarters in Foster City, California. It is a "mutual network data center." Their Chicago Data Center site opened June 30, 2000.[1] The Data Center sites supply internet exchange services and an uninterrupted power supply to its customers, who maintained their server and network equipment on site. Equinix has agreements with its customers that their equipment will be up 100 percent of the time with respect to power, cooling and other factors. (TR 244).

The Chicago Data Center site, where Mr. Giurovici formerly worked, was managed by Mr. Marion Madeja, the Site Manager IBX Operations, who employed a staff of about twenty-five, in three departments. (EX 13; TR 243). James Amedeo, Manager, Facilities Operation, who reported to Mr. Madeja, had a staff including six engineers, who each had different skills and many IBX network technicians. (EX 13). The engineering department was to maintain and operate the infrastructure 24-7, including plumbing, hardwiring, all mechanical and electrical systems, according to Mr. Madeja. When James Amedeo was away, Mark Allen, Mr. Giurovici's engineer peer, acted in his stead.

Mr. Amedeo had observed Mr. Giurovici's work with one of Equinix's electrical contractors building the facility, in 2000, and "brought him aboard" because of his knowledge. Mr. Giurovici was an "at will" employee. (EX 4). Mr. Giurovici was skilled in electrical work. He initially worked the day shift then switched to nights, which had different tasks. Mr. John Best, another former site engineer, testified that Mr. Giurovici was the only one in the Data Center who knew what he was doing. Mr. Erik van Pelt, who worked for an Equinix contractor, Liebert Global Services, testified he had worked with Mr. Giurovici five to six years, they communicated well, he knew his equipment and they had never had a problem. Mr. Randy Sharp, who worked for an Equinix contractor, Murphy Electric, testified that he had known Mr. Giurovici five to six years, he "really understood" what goes on in the Data Center, and they had never had any major disagreements. Mr. Dana Dole, a former Equinix technician, testified he had worked with Mr. Giurovici for many years. They had discovered a contaminated fuel problem, in 2003, which was corrected thanks to Mr. Giurovici.

Mr. Giurovici admitted he was bound to follow supervisor's instructions and did not always do everything Mr. Amedeo directed. Mr. Giurovici is quite an intelligent man. Although he knew his work extremely well, he was not very tolerant of what he considered foolish bureaucratic work requirements with which he disagreed, such as making log entries concerning

[1] CX 14 contains a series of photographs depicting the workplace. Mr. Giurovici described each one. (TR 159-175).

his routine daily work, and he was intolerant of ignorance.[2] (See, e.g., TR 193). And, while the company wanted to have some routine maintenance performed in-house, such as repairing urinals and changing light bulbs and ballasts, Mr. Giurovici felt that as an engineer repairing urinals was beneath him. That caused friction with his supervisors, who very much valued his work, but were not pleased with his attitude. (See, e.g., TR 261, 297-8). Moreover, Mr. Giurovici easily took offense, even when not reasonable. For example, not continuing training new engineers because he felt his poor 2006 performance review reflected he was not qualified; the fact that he had not been offered supervisory duty as had Mark Allen; and, taking personal offense at the training recommendation in the outage report recommendations.

Mr. Amedeo attested to Mr. Giurovici's technical expertise and thorough knowledge. Initially, his work was good. Then it began a steady downward trend over the ensuing years. (See also TR 304). It seemed to Mr. Amedeo and Mr. Madeja that Mr. Giurovici would pick and choose the tasks he wanted to complete and did not communicate well. (See, e.g., TR 259). For example, Mr. Giurovici chose not to prepare a "shift turnover" to identify problems for the next shift[3]; not to create a training binder for site fire systems he had been directed to assemble; not further training new engineers because he felt slighted on his 2006 performance review; and, not providing a signed "sign-up" sheet for training he had conducted because he felt he would be held responsible for mistakes subsequently made by the trainees. (EX 6, 7). Mr. Amedeo testified he received numerous complaints from Mr. Giurovici's coworkers.

Equinix's Employee Manual provides that employees may be disciplined or terminated for poor performance or misconduct. (EX 4). "Poor performance" included "unsatisfactory work attitude" or "failure to follow instructions." Misconduct included "insubordination."

In September 2001, Mr. Amedeo gave Mr. Giurovici an "oral warning" for not recording his daily work in a log book and for writing "this is a bunch of B.S." in the log book. (EX 2). In August 2003, Mr. Amedeo had recommended Mr. Giurovici's termination following counseling for not timely installing electrical rectifiers as directed. (EX 3). He testified about other directives he had given Mr. Giurovici, such as training peers and reporting his work, with which the latter had not fully complied. Mr. Giurovici had an excuse for most. For example, he believed the "B.S." comment was a joke. He believed it was unnecessary to report that he had performed his routine work in shift "turnovers", in great part because of daily shift change meetings during which such matters were discussed. He had not installed certain lights as directed because they were the wrong kind. He had not promptly installed the electrical rectifiers, as directed because they were not located where his boss had indicated. Although management had chosen Mark Allen, his peer, to perform some supervisory duties, Mr. Giurovici, would neither accept that nor follow his instructions, insisting Mr. Allen had no authority over him. (See, e.g., TR 262). However, other than the wrong light bulb matter, his

[2] Fortunately, he chose to refuse to install light bulbs which Mr. Amedeo ordered him to install, which he considered dangerous. (TR 201). However, that was just another incident which did not ingratiate him with his supervisor because of his lack of communication about it. (TR 260).

[3] In fact, Mr. Blickhahn testified he too was reprimanded for failing to do so.

employer viewed his conduct very differently.[4] Mr. Sam Kapoor, Vice President, Operations, visited in 2003 to work out problems between Mr. Giurovici and Mr. Amedeo.

Mr. Giurovici received an overall "excellent" performance appraisal, on March 5, 2002 (for 2001). He received an "exceptional" in teamwork, and "excellent" on knowing his job, customer orientation, accountability, leadership, and communicating. Mr. Giurovici received overall "good" performance appraisals on March 12, 2004 (for 2003) and March 30, 2005 (for 2004).[5] (CX 11). While he received "good" on knowing his job, accountability, leadership, and communicating, "exceptional" in customer orientation, he received a "needs improvement" in both years for team work.

On June 24, 2005, a fire, at the ConEd electrical power substation, which provided electrical power to Equinix's Chicago IBX Date Center, precipitated a power failure. As planned, Equinix's six back-up generators started when the power from the electrical grid was interrupted, at about 9:40 P.M.. Edward Blickhahn, another former Equinix engineer was on duty at the time. Mr. Giurovici arrived within an hour of the outage followed by Jim Amedeo. One by one, nearly all of Equinix's generators went off line, some as planned and some inexplicably. The engineers attempted to operate the generators manually when the automatic control system failed. They managed to keep one or two on-line and coupled with battery back-up, Equinix's customers received power. The ConEd grid was restored about 12:00 A.M. and Equinix restarted its systems to restore power to its customers.

Dave Pickut, Equinix's Vice President, Operations and Engineering, responded to the outage and later investigated its causes. I find him very credible. He was very responsive to Mr. Giurovici's concerns and theories. Mr. Enrique Lopez assisted him in the investigation. Equinix's policy was to report such incidents and their causes to its customers within forty-eight hours. Mr. Lopez and Mr. Pickut spoke to all the Chicago IBX facility staff and reviewed the technical records and data. He prepared a draft report which he sent to Equinix's customer communications department before it was issued on July 1, 2005.

Mr. Pickut never believed the outage involved a safety issue. While on hindsight, the incident report contained a few errors, according to Mr. Pickut, it was based on the best information available at the time it was issued and is generally accurate. (EX 11). Ultimately, Equinix was able to find a cause of the generator failures, a contractor's (Russ Electric) software error and installation error, in the Programmable Logic Control or "PLC", which was not identified in the 7/1/2005 report.[6] The PLC automatically controlled start-up and shutdown of the generators. Equinix did not assign any blame to any employee nor did it attempt too as a matter of policy, according to Mr. Pickut.

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[4] Some of his former coworkers or Equinix contractors, i.e., Randall Sharp and Eric Van Pelt, testified they had no problems with the Complainant.

[5] Mr. Giurovici received a pay raise, in 2006, as a result of his 2005 Focal Performance Review. (CX 12). But, he was disappointed Mr. Blickhahn, who had a similar performance appraisal, received 2000 shares and he received none. (TR 116).

[6] This error was in the software Mr. Amedeo had installed, in May 2005, which had not been tested, apparently because it had performed during a June 3, 2005 power outage. (TR 277-279).

*Facts Surrounding Alleged Protected Activity*

Mr. Giurovici, a diligent and knowledgeable engineer, suspected the Equinix outage had resulted from a May 2005 software change approved by Jim Amedeo which had not been tested prior to implementation or made known to anyone. He was extremely concerned with the report's accuracy, his safety and his job. He testified that "[T]he Data Center was the most important thing in my life." Mr. Giurovici carefully screened the 7/1/05 report, gathered additional PLC technical data and chronology of the failure with the help of a fellow engineer, Mr. Blickhahn, and, in July 2005, contacted Mr. Pickut with his concerns and theory of what had occurred.[7] Mr. Blickhahn testified that he believed the report was "totally bogus" and that the cause (of the generator failures) was the earlier, non-mechanical, software change. According to Igor Genchanok, a Russ Electric service technician, he (Igor) had changed the software program at Equinix, on May 11, 2005, and to his knowledge it was not tested. Mr. Giurovici believed that if the system had not been programmed correctly it would not work. On July 6, 2005, Mr. Giurovici emailed technical data to Mr. Pickut, including a chronology from the PLC. The latter responded with a technical answer, saying no one is to be blamed, and stating, "[L]et us know where you feel this assessment is wrong." (CX 1-3).

Mr. Giurovici testified he had raised the matter with Equinix's CEO, in July 2005. Mr. Dan Walker was Equinix's Director of Sales, in the Chicago office, 33 North LaSalle, Suite 2110, during the time period of Complainant's employment. Mr. Walker had infrequent visits to the Chicago IBX Center to escort customers around, to showcase the facility. During some of those visits, Mr. Walker who interacted with Mr. Giurovici and worked with the customers, asked Mr. Giurovici to show some of the customers the electrical components. During the first part of July 2005, Mr. Walker came to the Chicago IBX Center on Cermak Street with Mr. Peter Van Camp, Equinix CEO, and outside of the building met with Mr. Giurovici for about five to ten minutes. Mr. Giurovici and Mr. Van Camp were in a private conversation that Mr. Walker did not hear. Thereafter, the three gentlemen went inside the building and took an elevator up to the second floor of the facility. Mr. Walker did not recall the conversation that Mr. Giurovici had with Mr. Van Camp. Mr. Giurovici testified that he raised the outage report matter.

Mr. Giurovici testified that he believed the report was inaccurate because Equinix did not want to hurt its reputation and share price, since higher management had stock options. He submitted an article, dated 6/8/05, by Tier1 Research concerning the Equinix power outage which concluded "All is clear" for Equinix and "no material customer fallout" resulted. (CX 8). Tier1 stated the outage would not affect the "guidance increase" from the management. The guidance increase means that management will issue a press release that our guidance (or profit) for 2006 or 2005, year end, we're going to make $250 million. So, according to Mr. Giurovici, Tier1 said, the outage would not have any effect on that guidance increase released by the management of Equinix.

[7] Specifically, he challenged the accuracy of comments concerning: saving fuel; short circuits; the timing and number of generator failures; synchronization of generators; frequency of infrared scans; and, the authority of engineers to shut the plant down. Much of the report, he testified, was "marketing mumbo jumbo." (TR starting at p. 80).

Mr. Giurovici received a "good" performance appraisal, on March 14, 2006. (EX 6). However, he felt it was "poor." While he received an "excellent" on knowing his job, every other block was rated either "good" (customer orientation and accountability) or "needs improvement" (team work, leadership, communicating). (EX 6). This was not much of a change since in his two earlier performance appraisals he had gotten poorer ratings than in March 2002. The performance appraisals for 2003 and 2004 evidenced a negative trend in team work, leadership, and communicating. Mr. Giurovici essentially contended he was not part of a "team" and had no one with whom to communicate.

Ms. Erica Van Zandt, Equinix Human Resources, testified that either Jim Amedeo or Marion Madeja had raised the matter of terminating Mr. Giurovici, for on-going insubordination and nonperformance, with her. She advised them first to provide him with a written warning, which they did, on April 7, 2006. In the memorandum, Mr. Amedeo reiterated deficiencies mentioned in his 2004 and 2005 performance reviews and identified instances which demonstrated Mr. Giurovici's lack of teamwork, communication and leadership. (EX 8). Mr. Amedeo addressed his failure to change out lights and ballasts, failure to provide greater detail in end-of-day reports, and the fact he declined to provide training as directed because of having received a poor performance review. (EX 10). Mr. Amedeo testified that Mr. Giurovici's conduct did not improve after the April 7, 2006 memorandum. Then, Mr. Amedeo's boss, Mr. Madeja, gave him a list of problems with Mr. Giurovici, primarily that he refused to do the work assigned by Mr. Allen in a Mr. Amedeo's absence, and Mr. Amedeo felt the problem could not go on.[8] In fact, Mr. Madeja spent 45 minutes counseling Mr. Giurovici and informed him the "status quo" could not continue. (TR 265). He had told him "many times" how to improve. Mr. Madeja testified it accomplished nothing, Mr. Giurovici's behavior "got worse" and "people were getting more concerned."

On April 7, 2006, Mr. Giurovici contacted Vice President Keri Crask, at Equinix's headquarters, and said he wanted to visit the California headquarters, at his own expense, and bring documents concerning the June 2005 outage which he would not identify. Ms. Van Zandt spoke with him shortly thereafter. Her notes of the conversation were admitted as EX 10. Mr. Giurovici felt he was being harassed by Mr. Amedeo because of reporting the change the latter had made to the program which Mr. Giurovici believed caused the 2005 power outage. Mr. Giurovici was asked to fax the documents, but never did. Mr. Giurovici did not inform either Mr. Amedeo or Mr. Madeja of his 4/7/06 call. (TR 210). Ms. Van Zandt informed Sam Kapoor, Vice President, Operations, and her boss, Mr. Hazelwood of the conversation. Mr. Giurovici admitted, by then, no one had blamed him for the outage, but he felt slighted by the recommendation that engineers get additional training. (TR 212). Ms. Van Zandt testified about the reasons Mr. Best and Mr. Blickhahn were terminated, which was wholly unrelated to the quality of their work or the 2005 power outage. Neither Mr. Amedeo nor Mr. Madeja or anyone else ever accused Mr. Giurovici (of fault) regarding the power outage. (TR 211).

Although Mr. Amedeo recommended the termination, Mr. Madeja made the final decision. Mr. Amedeo was unaware of what Mr. Giurovici told Mr. Pickut and/or the corporate offices about the 2005 power outage and report. Mr. Madeja testified the basis for termination

[8] In fact, Mr. Giurovici argued that he wanted to prove the pattern that "somebody does not comply with Jim's order or what Jim wants, he's out the door." (TR 57).

was primarily insubordination followed by Mr. Giurovici's unacceptable teamwork and communications. (TR 268). Mr. Madeja believed if he had not terminated Mr. Giurovici, he might have lost another engineer "stressed-out" presumably over Mr. Giurovici's conduct.

Since his termination, Mr. Giurovici has sought employment with about ten potential employers but remains unemployed. He has signed-up with Local Union 143, as a journeyman electrician. He began collecting $396 weekly unemployment, in May 2006, which ends after six months. (TR 235).

## LAW

### *The Act*

The Act states:

> No company with a class of securities registered under section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms or conditions of employment because of any lawful act done by the employee—
>
> (1) To provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341,[9] 1343,[10] 1344,[11] or 1348,[12] any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-
>
> (A) a Federal regulatory or law enforcement agency;
> (B) any Member of Congress or any committee of Congress; or,
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
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> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. Section 1514A. Civil Action to Protect Against Retaliation in Fraud Cases.

[9] 18 U.S.C. § 1341 prohibits mail fraud.
[10] 18 U.S.C. § 1343 prohibits fraud by wire, radio, or television.
[11] 18 U.S.C. § 1344 prohibits bank fraud.
[12] 18 U.S.C. § 1348 prohibits securities fraud.

The purpose of the Act and its whistleblower provision, in particular, is to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." H.R. Rep. No. 107-414 (2002), at 2002 WL 661627, quoted in *Smith v. Hewlett Packard,* No. 2005-SOX-88, 8 (ALJ January 19, 2006). Specifically, the whistleblower provision, at section 806, was enacted to "encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies" by encouraging and providing whistleblower protection to employees who "detect and stop actions which they reasonably believe to be fraudulent." S. Rep. No. 107-146 (2002), at 2002 WL 863249, at 19.

*Applicable Regulations and Elements of Entitlement*

In *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006), the Administrative Review Board ("ARB" or "Board") clarified a common misconception concerning the appropriate regulatory standard in a whistleblower case before an Administrative Law Judge. Specifically, it explained that the *prima facie* case standard does not apply at the hearing level, but instead only applies during the preliminary investigatory stage of the proceeding before OSHA. *Brune*, ARB No. 04-037 at 12.[13] At the hearing stage- when the case is before an Administrative Law Judge or ARB- a complainant must "demonstrat[e]…that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint." *Id*. at 13

As the Board explained in *Brune*, the relevant distinction is the burden of proof imposed on a complainant. A *prima facie* case is defined as "[t]he establishment of a legally required rebuttable presumption" or "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." *Id.* at 12-13 (citing BLACK'S LAW DICTIONARY at 1209 (7th ed. 1999)). The burden imposed at the hearing stage, however, requires that a complainant "demonstrate" the requisite elements of entitlement. "Demonstrate," the Board continued, "means to prove by a preponderance of the evidence." *Id.* at 13n.33 (citing *Dysert v. United States Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). Therefore, a complainant's burden at the hearing stage is higher as merely raising an *inference* is insufficient; rather, a complainant must *prove* unlawful discrimination. *Brune*, ARB No. 04-037 at 14 (emphasis added).

The applicable regulation setting forth the Complainant's burden is 29 C.F.R. § 1980.109(a), which states, "A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."

In *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005), the Board put forth four elements that a complainant must prove to satisfy the burden under § 1980.109:

[13] *Brune* arose in the context of an alleged violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). As prescribed by 18 U.S.C. § 1514A(b)(2), an action under the Act is governed by 49 U.S.C. § 42121(b) and the procedural rules for AIR 21. *See also Reddy*, *infra* ARB No. 04-123 at 7 (stating that "[t]he legal burdens of proof set forth in [AIR 21] govern [Sarbanes-Oxley] actions."

(1) The complainant engaged in protected activity;
(2) The named person knew that the complainant engaged in protected activity;[14]
(3) The complainant suffered an unfavorable personnel action; and,
(4) The protected activity was a contributing factor in the unfavorable action.

*Reddy*, ARB No. 04-123 at 7.

If the Complainant satisfies this burden, thereby proving discrimination by a preponderance of the evidence, the Respondent may then avoid liability by demonstrating "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity." 29 C.F.R. § 1980(a); *Brune*, ARB No. 04-037 at 14.

## DISCUSSION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

### *Jurisdiction*

The parties stipulated and I find that Equinix qualifies as a company covered by SOX, i.e., any company with a class of securities registered under section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 781) and any company required to file reports under section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 780(d)). Moreover, the parties stipulated and I find that the Complainant, Mr. Giurovici, was an employee of the Respondent, on the dates of the alleged protected activity in 2005 and 2006, and was covered by the Act.[15] The parties stipulated and I find that the complaint was filed on May 11, 2006, within days of Mr. Giurovici's April 27, 2006 termination, and thus, was timely filed.[16]

### *Protected Activity*

To establish a SOX violation, the Complainant must establish that he engaged in activity protected by the Act.

The applicable regulation defines "protected activity" as any lawful act:

> (3) 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. [§§] 1341,[17] 1343,[18] 1344,[19] or 1348,[20] any rule or regulation of the Securities and Exchange Commission, or any

[14] Though not specifically mentioned in 20 C.F.R. § 1980.109(a), the requirement that protected activity must have contributed to a respondent's decision to take an unfavorable personnel action assumes that the respondent knew about the complainant's protected activity. *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) at 6.
[15] Counsel stated the Complainant had worked for an Equinix-affiliated managing company. (TR 17).
[16] An action shall be commenced, by filing a complaint with the Secretary of Labor (OSHA) not later than 90 days after the date on which the violation occurs. 18 U.S.C. Section 1514A(b)(1)(A) and ((2)(D).
[17] 18 U.S.C. § 1341 prohibits mail fraud.
[18] 18 U.S.C. § 1343 prohibits fraud by wire, radio, or television.
[19] 18 U.S.C. § 1344 prohibits bank fraud.
[20] 18 U.S.C. § 1348 prohibits securities fraud.

provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-

(i) A Federal regulatory or law enforcement agency;
(ii) Any Member of Congress or any committee of Congress; or,
(iii) A person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or,

(4) To file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to alleged violations of 18 U.S.C. [§§] 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

29 C.F.R. § 1980.102(b).

To establish protected activity, the complainant must only establish that he reasonably believed that the respondent engaged in a fraud enumerated under the Act; he need not prove the accuracy of the allegation. *Halloum v. Intel Corp.*, 2003-SOX-7 at 15 (ALJ March 4, 2004), *aff'd*, ARB No. 04-068 (ARB Jan. 31, 2006). The complainant's belief must be scrutinized under both subjective and objective standards such that he must actually believe that the respondent was in violation of an enumerated fraud and that belief must be reasonable. *Lerbs v. Buca di Beppo, Inc.*, 2004-SOX-8 at 13 (ALJ June 15, 2004)(citing *Melendez v. Exxon Chem. Am.*, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000)).[21] Moreover, the complainant need not have specifically identified the law or regulations he believed the respondent was violating. *Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1365, 1377 (N.D. Ga. 2004). Protected activity, however, must be specific in relation to a given practice, condition, directive, or event. *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

In *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006), the Administrative Review Board ('ARB") held that:

> In defining the scope of protected activity under other Federal whistleblower protection provisions, the Board has held that an employee's protected communications must relate "definitively and specifically" to the subject matter of the particular statute under which protection is afforded. The Corporate and Criminal Fraud Accountability Act of 2002 does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills. Rather, under the SOX, the employee's communications must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. §

[21] In assessing for objective reasonableness, the relevant consideration is the knowledge available to a reasonable person in the circumstances, including training and experience, of the complainant. *Lerbs*, 2004-SOX-8 at 13.

1514A(a)(1). Thus, for example, an employee's disclosure that the company is materially misstating its financial condition to investors is entitled to protection under the Act.

USDOL/OALJ Reporter at 17 (footnote omitted). In *Platone*, the ARB held that the Complainant's actions were not protected activity.

When a SOX whistleblower complaint is grounded in Federal mail and wire fraud statutes, "the alleged fraudulent conduct must at least be of the type that would be adverse to investor's interests." USDOL/OALJ Reporter at 15 (footnote omitted). The ARB cited in support of this holding the fact that the preamble to the SOX states: "To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes. Sarbanes-Oxley Act of 2002, Pub L. No. 107-204, 116 Stat. 745 (2002) (emphasis added)."

Moreover, in *Platone*, the ARB held that the complainant's allegation that the respondent had violated SEC Rule 10b-5 was baseless where her revelations about a potential billing problem did not even approximate any of the basic elements of a claim of securities fraud [*i.e.*, a material misrepresentation (or omission), scienter, a connection with the purchase, or sale of a security, reliance, economic loss and loss causation], where she did not identify a fraudulent scheme "in connection with the purchase or sale of any security," and where she testified to less than $1,500 in potential losses (which would be unlikely to be considered "material" by a reasonable shareholder).

The Complainant here essentially asserts that he believed this alleged activity to constitute a fraud against shareholders.[22] He speculated that the July 2005 report was falsified to enhance the value of stock options held by senior management. Although evidence was elicited that some, in senior management, may have held stock options, no evidence was submitted which reflected any change in share value.

Complainant's allegations essentially may amount to a reasonable belief that the Respondent violated 15 U.S.C. § 7241, section 302 of the Act.[23] § 302 requires corporate officers to certify that corporate reports do not contain untrue statements of material fact and fairly present, in all material respects, the financial condition of the corporation.[24] It is therefore

[22] The Act enumerates six types of fraud of which a reasonable belief may give rise to protected activity: (1) A violation of § 1341; (2) A violation of § 1343; (3) A violation of § 1344; (4) A violation of § 1348; (5) Any rule or regulation of the Securities Exchange Commission; (6) Any provision of federal law relating to fraud against shareholders. In this case, the Complainant has only alleged that he reasonably believed the Respondent's alleged activities were fraudulent against shareholders. Accordingly, the first five enumerated frauds are not applicable in this case. Therefore, in determining whether the Complainant engaged in protected activity, it is only necessary to consider the sixth enumerated fraud and determine whether the Complainant reasonably believed that the Respondent violated a federal law related to fraud against shareholders.

[23] Complainant has not identified this violation by code section; however, as stated in *Collins*, he is not required to do so. Rather, he is essentially arguing that the condition he perceived amounted to a violation of § 302.

[24] **Corporate responsibility for financial reports**

(a) Regulations required

The Commission shall, by rule, require, for each company filing periodic reports under section 78m(a) or 78o(d) of this title, that

useful to consider whether any of the Complainant's allegations constitute a reasonable belief that the Respondent violated § 302.

As stated, the Complainant essentially alleges that he believed the misrepresentation violated a federal law related to fraud against shareholders. He essentially argues that § 302 of the Act, which requires accuracy in corporate disclosures, justifies his belief in a violation of such a federal law. In *Harvey v. The Home Depot, Inc.*, 2004-SOX-20 (ALJ May 28, 2004) and *Harvey v. Safeway, Inc.*, 2004-SOX-21 (ALJ Feb. 11, 2005), both of which involved the same complainant, the Administrative Law Judge addressed § 302 as a basis for protected activity under SOX.[25] In *Home Depot*, the Administrative Law Judge aptly observed that § 302 requires accuracy of reporting of material facts. *Home Depot*, 2004-SOX-20 at 15. He further explained, in *Safeway*, that § 302 represents "Congress's intention to protect shareholders by requiring the accurate reporting of significant information concerning a corporation's financial condition." *Safeway*, 2004-SOX-21 at 31 (emphasis in original). Therefore, the Administrative Law Judge concluded that basing a SOX claim on a belief that certain conduct amounts to a violation of § 302 implicates a materiality threshold. *Home Depot*, 2004-SOX-20 at 15. Put differently, a complainant could only reasonably believe that perceived conduct was a fraudulent misstatement of corporate financial condition if that conduct was material toward the representation of that condition.[26]

Here, although the Complainant's Tier1 evidence suggests "materiality", he has not established that any factual inaccuracies in Equinix's July 2005 report were actually "material" to the representation of Equinix's financial condition. Nor has he established the Respondent violated SEC Rule 10b-5 where his revelations did not even approximate any of the basic elements of a claim of securities fraud [*i.e.*, a material misrepresentation (or omission), scienter, a connection with the purchase, or sale of a security, reliance, economic loss and loss causation], and, where he did not identify a fraudulent scheme "in connection with the purchase or sale of any security."

However, the existence of a protected activity and or the Respondent's knowledge of the same are not the primary deciding points in this case. The crux of the case lies in the fact the employer did not consider Mr. Giurovici's references to the event or possible inaccuracies in the

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> the principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, certify in each annual or quarterly report filed or submitted under either such section of this title that -
>
> (1) the signing officer has reviewed the report;
>
> (2) based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading;

[25] The same Administrative Law Judge issued both decisions.

[26] In each case, the Administrative Law Judge found that the alleged conduct did not rise to the requisite level of materiality to support a reasonable belief that the respondent fraudulently misrepresented its financial condition. *See Home Depot*, 2004-SOX-20 at 15 (finding that an individual claim of race discrimination could not materially impact the corporation's financial condition); *Safeway*, 2004-SOX-21 at 31 (finding that shortages in a single employee's paycheck did not represent significant information concerning a corporation's financial condition).

report of the event in reaching its decision to terminate him. So, even assuming *arguendo,* that the Complainant had engaged in protected activity, the Respondent had a legitimate basis upon which to discharge the Complainant.

*Knowledge of Protected Activity*

An essential element of SOX complaint is that the Respondent was aware or had knowledge of the Complainant's alleged protected activity. *Grant*, 2004-SOX-63 at 44. In this case, there is little issue whether the Respondent's management had knowledge of the activity the Complainant alleges to be protected. Namely, the Respondent was aware of the Complainant's reported concerns. [27]

Therefore, assuming *arguendo,* that the Complainant had engaged in protected activity, the Respondent was aware of that activity.

*Unfavorable Personnel Action*

Similarly, as the parties have stipulated that the Respondent terminated the Complainant, there is no issue as to whether he suffered an adverse employment action. Therefore, the Complainant has established this element of his claim.

*Contributing Factor*

To establish a violation under the Act, the Complainant must demonstrate that protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. 29 C.F.R. § 1980.109(a). The Complainant need not establish that his protected activity was the primary motivating factor in order to establish causation. *Halloum*, ARB No. 04-068 at 8. A "contributing factor" includes "any factor which, alone, or in connection with other factors, tends to affect in any way the outcome of the decision." *Halloum*, 2003-SOX-7 at 18 (citing *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). In establishing causation, a complainant may demonstrate the respondent's motivation through circumstantial evidence of discriminatory intent. *Platone v. Atlantic Coast Airlines, Inc.*, 2003-SOX-27 at 27 (ALJ April 20, 2004). When a complainant makes such a circumstantial showing, the Administrative Law Judge must evaluate all evidence pertaining to the mindset of the employer regarding the protected activity and the adverse action. *Id*. at 28.[28] Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation. *Id*. However, its presence does not compel a finding of causation, particularly when there is a legitimate intervening basis for the adverse action. *Grant*, 2004-SOX-63 at 46.

Mr. Giurovici had questioned Equinix's July 2005 report extensively right after it was issued. Mr. Pickut went out of his way to accommodate Mr. Giurovici's concerns and even reviewed the technical data the latter had submitted. Mr. Giurovici informed him of the programming change. In some instances, Mr. Giurovici's theory was plain wrong, such as that

[27] However, it was not established that Messrs. Madeja or Amedeo knew of the April 7, 2006 call to Equinix Headquarters.
[28] *Accord*, *Timmons v. Mattingly Testing Services*, 95-ERA-40 at 5 (ARB June 21, 1996).

there was a safety concern or that the time line he compiled differed from the report's. Moreover, there is no reason to disbelieve that he mentioned his concerns about the accuracy of the July 2005 report to Mr. Peter Van Camp, Equinix CEO, in their brief encounter in early July 2005. So, when he tried to raise the same matters, related to the report, in April 2006, when he was on the receiving end of disciplinary actions, it was merely a repetition. However, those actions by Mr. Giurovici played absolutely no role whatsoever in either his performance appraisals nor did they form any basis for his supervisor's evident frustration over Mr. Giurovici's documented progressively deteriorating work attitude.[29] In fact, Mr. Amedeo had had problems with Mr. Giurovici in 2003, well before the outage and subsequent report.

This circumstantial evidence fails to establish the requisite element of causation for two reasons: (1) first, it gives no indication of a discriminatory mindset on the part of the Respondent; and (2) second, it is overwhelmed by the direct evidence of a legitimate intervening basis for termination.

Therefore, even assuming *arguendo,* that the Complainant had established protected activity, he has not established that any such protected activity was a contributing factor in his termination.

*Clear & Convincing Evidence*

If the Complainant demonstrates that he has engaged in protected activity, the Respondent knew of his protected activity, he suffered an adverse employment action, and the protected activity contributed to the adverse action, he has established a violation under SOX. 29 C.F.R. § 1980.109(a). The Respondent could only then avoid liability by demonstrating, by clear and convincing evidence, that it would have taken the same adverse action in the absence of any protected activity. *Id*. In this case, because the Complainant has demonstrated neither protected activity nor causation, he has not established a violation under SOX. However, even if he had established a violation, the Respondent would avoid liability because it has demonstrated clearly and convincingly that it would have terminated him absent any such protected activity.

To meet this burden, the Respondent must demonstrate more than the preponderance of the evidence but need not prove its position beyond a reasonable doubt. *See Yule v. Burns Int'l Sec. Serv.*, 1993-ERA-12 (Sec'y May 24, 1995). In *Halloum*, the Administrative Law Judge found that adverse action taken to enforce explicit company policy, which the complainant knew and violated, met this standard. *Halloum*, 2003-SOX-7 at 19, *aff'd* ARB No. 04-068.

For similar reasons, the Respondent's decision to terminate the Complainant also meets this standard. Equinix's policy clearly sets forth that discipline and/or termination may result from either poor performance or misconduct. The deterioration of the Complainant's cooperation with his supervisor and work attitude was definitively documented in a series of performance appraisals and counseling memoranda. Even though Mr. Amedeo had brought Mr. Giurovici aboard because of his excellent job knowledge, it was he who made the painful decision to terminate him after abundant warnings. Mr. Giurovici's own intolerant attitudes,

[29] Although Mr. Giurovici argued things "started tumbling down" after he originally commented about the to Mr. Pickut, in 2005, his performance appraisals demonstrate otherwise. (TR 21).

mentioned above, had caused Mr. Amedeo to realize he had become what he called a "cancer" in the workplace who had to be let go in spite of his excellent job knowledge.

Therefore, even had the Complainant established a violation under SOX, the Respondent would avoid liability under the Act.

## CONCLUSIONS

The Complainant has not established a violation under the Act as he has not demonstrated that he has engaged in protected activity. Additionally, even if he had established protected activity, he has not demonstrated that any alleged protected activity was a contributing factor in his termination. Moreover, even if a violation were found, the Respondent demonstrated, by clear and convincing evidence, that it would have terminated the Complainant in the absence of any alleged protected conduct. The Complainant has not established the elements of a violation of the Act.

## ORDER

It is ordered that the Complainant's complaint be DISMISSED.

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RICHARD A. MORGAN
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS**: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the

Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).