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Office of Administrative Law Judges
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Issue Date: 09 January 2007

OALJ CASE NO.: 2006-SOX-00102

In the Matter of:

WILLIAM COOK,
Complainant,

v.

CERIDIAN TAX SERVICES, INC.,
Respondent,

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT

INTRODUCTION

This matter arises out of a claim filed with the Occupational Safety and Health Administration ("OSHA") alleging retaliation in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A ("SOX").

Respondent has moved for summary decision (the "Motion"), arguing that Complainant did not present any admissible evidence in opposition to the Motion, and even if he had, he cannot establish that he engaged in protected activity.

Complainant, who is proceeding *pro se*, has not properly responded to Respondent's Motion with admissible evidence showing the existence of any genuine issues of material fact. Moreover, because he has not shown that his conduct amounts to activity protected by SOX, Complainant has not made out a *prima facie* claim of retaliation sufficient to permit me to infer that he suffered discrimination. As no genuine issue of fact remains to be decided, I hereby grant Respondent's motion for summary decision for the reasons explained herein.

PROCEDURAL BACKGROUND

On June 16, 2005, Complainant filed a written complaint with the Regional Administrator for OSHA, Region IX, under the whistleblower protection provisions of SOX. On or about May 24, 2006, OSHA sent by certified mail to Complainant's last address a letter of findings dismissing his complaint for failure to establish a *prima facie* allegation of protected activity. The letter informed Complainant of his right to appeal the dismissal and request a hearing before an administrative law judge, and it provided the applicable timelines, addresses, and requirements for requesting a hearing. OSHA also mailed Complainant copies of the applicable regulations.

On June 28, 2006, Complainant's attorney at the time filed objections to the letter of findings and requested a hearing before the Office of Administrative Law Judges ("OALJ").

On July 7, 2006, this case was assigned to me. On July 14, 2006, I issued a notice of hearing setting trial for December 14, 2006, in Long Beach, California.

By letter motion dated November 8, 2006, Complainant stated that he elected to no longer retain the services of his attorney, Frank Pray, Esq., as of October 27, 2006 and stated that all future correspondence be directed to Complainant representing himself *pro se* at his home address. The letter motion further requested a continuance of the trial in Long Beach, California so that Complainant could continue his attempts to retain alternate legal counsel.

By order issued November 20, 2006, I granted Complainant's motion to proceed *pro se* and continued the trial indefinitely to allow a ruling on Respondent's Motion For Summary Decision, which had been filed on November 17, 2006.

In the Order of November 20, 2006, I admonished that "*Complainant should immediately continue his efforts to retain new counsel as soon as possible* but, in any event, **Complainant's response to the motion for summary decision must be filed no later than Thursday, December 14, 2006** thereby allowing Complainant in excess of 45 days from October 27, 2006 in which to retain new counsel or proceed on his own in *pro se* to respond to the motion for summary decision."

The November 20, 2006 Order also required Complainant to:

> "serve a response to Respondent's Motion for Summary Decision with supporting evidence via facsimile (without exhibits) and via overnight mail (with exhibits) to Respondent and the Court *no later than Thursday, December 14, 2006*. **Failure to file a timely response to my orders or applicable statutes and/or regulations may result in sanctions including dismissal of the complaint or answer, as applicable."**

On December 15, 2006, Complainant filed his response to the Motion (Complainant's Response") without supporting affidavits, declarations under penalty of perjury, or other admissible evidence. His response did contain his unverified statement of facts and what appears to be a copy of a decision of the Court of Appeals of the State of California styled *Lujan v. Minagar,* 124 Cal. App. 4th 1040 (2004).

On December 22, 2006, Respondent filed its reply to Complainant's Response arguing that Complainant failed to present any admissible evidence in opposition to its Motion, and even if all of Complainant's factual statements are considered, the Motion should be granted because Complainant has not established that he engaged in any protected activity or that he was aware of any violations of SOX while at Respondent.

As of the date of this Order, Complainant has not complied with my November 20, 2006 Order by filing supporting evidence to his response to the Motion.

ISSUES FOR DETERMINATION

1. Should the complaint be dismissed for Complainant's failure to comply with a lawful order of the administrative law judge by failing to submit any admissible evidence in support of his opposition to Respondent's Motion?

2. Has Complainant demonstrated a *prima facie* case of retaliation under SOX that is sufficient to create the inference of discrimination and overcome summary decision?

FINDINGS OF FACT

As Complainant has failed to submit any admissible evidence in opposition to the Motion as of January 9, 2007, the following findings of fact are based solely on the Motion, and the affidavits and exhibits submitted therewith.

Respondent Ceridian Tax Services, Inc. ("Respondent") is a national information services company that provides human resources and payroll services to it customers. Affidavit of William Volkel, ("Volkel Aff.") ¶ 1. Complainant William J. Cook ("Complainant") began work for Respondent on July 29, 2003, as Director of Tax Operations in Respondent's Fountain Valley, California office. He had more than two decades of tax management experience in various positions. In particular, Complainant's background included many years working in payroll tax management and administration. Deposition of Willliam Cook ("Cook Depo."), 26:22-27:10; Volkel Aff. Ex. A. William Volkel, Vice President, Tax, was Complainant's direct supervisor. Volkel Aff. ¶ 1. Complainant was the direct supervisor of Anita Gross, Manager of Tax Compliance, which included the Risk Mitigation Department. Complainant Depo. 126:3-7. The Risk Management Department consisted of four staff employees, including Eri Olmos and Pat Rajasingham. Volkel Aff. ¶ 12 and Ex. B.

One of the duties of the Risk Management Department was to review IRS penalties issued to Respondent clients, primarily for late payroll tax payments, and to seek reductions thereof by explaining the circumstances which led to the penalties. Complainant Depo. 5 1:25-52:19. For example, if a customer had a computer software problem which led to a mis-calculation of the amount due, the IRS could issue a penalty for an underpayment. The Risk Mitigation Department would write a letter to the IRS, referred to as an "abatement letter," requesting that the penalty be rescinded. *Id.* It was standard practice for the Respondent employee writing an abatement letter to sign it "under penalty of perjury." Complainant Depo. 55:17-22. Respondent employees wrote hundreds of abatement letters to the IRS each year. Complainant Depo. 57:18-58:8. One of Complainant's duties was to oversee the department responsible for the abatement letters. Complainant Depo. 52:15-19.

Complainant's first months with Respondent were of concern to Respondent. His management style was less than professional, as demonstrated by incidents in which employees complained that Complainant had called them such pet names as "sweetie," "sweetheart,"

"buddy," and "richy." Volkel Aff. ¶ 2. In an effort to educate Complainant about the professionalism necessary in his senior management position, the Company required him to participate in an "Executive Coaching" program. Volkel Aff. ¶ 2. Eventually, Complainant's conduct improved, and the Company believed that he was performing his duties in an appropriate manner.

In January 2005, Eri Olmos tendered her notice of resignation. Declaration of Tiffany Hall, ("Hall Decl.") ¶¶ 2-4). As part of the termination process at the end of January, Ms. Olmos met with Tiffany Hall, Human Resources Consultant for Respondent. At that time, Ms. Olmos disclosed to Ms. Hall the series of events described below, which had commenced more than one year earlier. *Id*.; Affidavit of Eri Olmos ("Olmos Aff.") ¶ 7.

In summer 2003, Ms. Olmos informed Complainant that she believed her co-worker, Pat Rajasingham, was making misstatements in his abatement letters and was not making the letters available for review on the Company's database. Hall Decl. ¶ 5*;* Olmos Aff. ¶ 3; Complainant Depo. 67:16-68:9 (testifying that he recalled the conversation with Ms. Olmos, but did not recall her complaints about Mr. Rajasingham). Employees in the department had a system of posting their letters in a program known as "Workshare," which allowed other employees to review pending abatement letters. Olmos Aff. ¶ 3. Ms. Olmos said she found Mr. Rajasingham's failure to post his letters in Workshare suspicious and she also thought he was not thoroughly researching the factual explanations given in his letters. Olmos Aff. ¶ 4. Complainant's response to Ms. Olmos was that he and Anita Gross had discussed her concerns, and "[Anita] is going to address it with [Mr. Rajasingham]." Hall Decl. ¶ 5*;* Olmos Aff. ¶ 4.

In February 2004, by emails sent to both Complainant and Ms. Gross, Ms. Olmos communicated her concerns that Mr. Rajasingham was engaging in unethical and unlawful behavior in making false statements under penalty of perjury in tax abatement letters submitted to governmental taxing agencies. Olmos Aff. ¶ 5 and Ex. A. Ms. Olmos reported that she believed Mr. Rajasingham had done so on many occasions, and she referred Complainant and Ms. Gross to the IRS website on fraud. *See* Olmos Aff. Ex. A. In this email, Ms. Olmos also told to Complainant and Ms. Gross that Mr. Rajasingham regularly failed to place copies of the deceptive letters into the Workshare system, as required by Company policy.

In January 2005, Ms. Olmos again reported to Complainant and Ms. Gross her continuing concerns about irregularities in Mr. Rajasingham's abatement letters, reporting that she believed the situation was getting worse and that Mr. Rajasingham's conduct amounted to fraud. Olmos Aff. ¶ 6; Olmos Aff. Ex. B.

Later that month, another employee who had heard about the situation reported the matter to Ms. Hall. Ms. Hall was alarmed by the employee's account of what had transpired and immediately contacted Bill Volkel, Complainant's direct supervisor. This was the first time Mr. Volkel had been advised of these matters. Volkel Aff. ¶¶ 3-4.

About this same time, Ms. Olmos tendered her resignation and agreed to provide Ms. Hall with more information about Mr. Rajasingham and her superiors at the time of her exit interview. Hall Decl. ¶ 4-5; Olmos Aff. ¶ 7. Just prior to Ms. Olmos' departure from Respondent the

following week, Ms. Olmos met with Ms. Hall and relayed the history of the situation, including her multiple reports to Complainant and Ms. Gross regarding Mr. Rajasingham's conduct. Hall Decl. ¶¶ 4-5. Ms. Olmos also reported her concerns regarding Mr. Rajasingham, Complainant, and Ms. Gross to the Company's ethics hotline. Olmos Aff. ¶ 7 and Ex. C.

After meeting with Ms. Olmos, Ms. Hall conveyed the information she obtained to Mr. Volkel, who immediately initiated a full investigation into Mr. Rajasingham's conduct, as well as the conduct of Complainant and Ms. Gross in apparently failing to respond appropriately to Ms. Olmos' earlier communications. Volkel Aff. ¶¶ 6-7. George Lewis, an internal auditor with Respondent who had no connection to the parties or departments involved in the matter, was assigned to conduct the investigation. Volkel Aff. ¶ 6.

Following an extensive investigation which included review of approximately one hundred inquiry responses and communications with numerous witnesses, Mr. Lewis reported his findings mid-March 2005. Volkel Aff. ¶ 7. Mr. Lewis reported that Mr. Rajasingham had included inappropriate information in numerous tax abatement letters. Volkel Aff. ¶ 7. While the information did not rise to the level of fraud, Mr. Rajasingham's tactics and conduct did not conform to the standards established by Respondent, and potentially exposed Respondent and its clients to preventable and costly inquiries, audits and penalties. Volkel Aff. ¶ 7.

The Company's investigation also confirmed that Ms. Olmos had communicated her concerns regarding Mr. Rajasingham's conduct to both Complainant and Ms. Gross as early as January 2004, just as she reported. Volkel Aff. ¶ 8. As the superior manager in the situation, it was Complainant's responsibility to receive the report and do what Ms. Olmos and Mr. Volkel later did: report the matter to his superior (i.e. Mr. Volkel), report the matter to the ethics hotline, and/or see that an internal audit was immediately initiated. Complainant did not take any of these steps, as evidenced by the fact that one year later, in January 2005, the misconduct that Ms. Olmos had reported the previous year was continuing.

As a result of Complainant's failure to handle and respond to Ms. Olmos' complaints about Mr. Rajasingham's conduct, and after discussing the results of the investigation with the audit committee, Mr. Volkel decided to terminate Complainant's employment as of March 17, 2005. Volkel Aff. ¶ 10; Complaint at 2.

Complainant admitted in his deposition in this matter that he was not aware of any illegal conduct by Mr. Rajasingham. Complainant Depo. 124:14-125:18. He did not believe that Mr. Rajasingham's letters were improper or inappropriate. Complainant Depo. 180:2-18. He also admitted that he was not aware of any illegal conduct occurring at Respondent during his employment, and that he never reported any illegal activity. Complainant Depo. 162:1-163:20-23. Furthermore, Complainant admits that he did not bring the concerns voiced by Eri Olmos to the attention of his superiors. Complainant Depo. 156:13-15 (admitting that he never forwarded Olmos' emails to Volkel).

CONCLUSIONS OF LAW

I. The Complaint Should Be Dismissed Due to Complainant's Failure to Comply With a Lawful Order by Refusing to Submit Supporting Admissible Evidence

Despite prior notice and admonishment, Complainant has failed to comply with my November 20, 2006 Order and administrative rule of procedure 18.40, found at 29 C.F.R. § 18.40. When a Complainant fails to respond to a lawful order or fails to meet procedural deadlines, an administrative law judge has the authority to dismiss a complaint. Under 29 C.F.R. § 24.6(e)(4)(i)(B), the administrative law judge may, at the request of either party or on his own motion, issue a recommended decision and order dismissing a claim upon the failure of the complainant to comply with a lawful order of the administrative law judge. My November 20, 2006 Order specifically provided notice to Complainant his failure to properly respond to Respondent's Motion could result in the dismissal of his complaint. The Order also provided Complainant with "in excess of 45 days" to retain counsel or to show cause why his complaint should not be dismissed for his failure to do so.

Furthermore, 29 C.F.R. § 18.6(d)(2)(v) gives an administrative law judge the authority to strike all or part of a pleading, motion, or other submission of a party who fails to comply with an order concerning that pleading or motion.

Finally, the authority to dismiss a case also comes from an administrative law judge's inherent power to manage and control his or her docket and to prevent undue delays in the orderly and expeditious disposition of pending cases. *See Link v. Wabash Railroad Co*., 370 U.S. 626 (1962).

Despite my prior warning that his failure to do so would result in sanctions, including dismissal of his complaint, Complainant has not yet responded to my November 20, 2006 Order by submitting admissible evidence in opposition to Respondent's Motion. As of January 9, 2007, I find that Complainant has failed to comply with my November 20, 2006 Order. Accordingly, his complaint shall be dismissed for failure to comply with the lawful order of an administrative law judge pursuant to 29 C.F.R. § 24.6(e)(4)(i)(B).

Moreover, I further interpret the regulation at 29 C.F.R. § 24.6(e)(4)(i)(B) as providing me with the discretion to find that Complainant's failure to timely comply with my November 20, 2006 Order and his corresponding failure to properly submit admissible evidence in opposition to Respondent's Motion constitutes his "consent" to granting the Motion. *See U.S. v. Real Property Located in Incline Village*, 47 F.3d 1511, 1519 (9th Cir. 1995) (case dismissed pursuant to local district court rule allowing implied consent to dismissal for failing to file a pleading).

Finally, I find that Complainant's initial delay in prosecuting this case and seeking a continuance, combined with his failure to comply with my November 20, 2006 Order and deadlines, is causing undue delay to the orderly and expeditious disposition of this case and

others pending in my docket. Accordingly, I dismiss the claim under my inherent authority to to manage and control my docket. *See Link v. Wabash Railroad Co*., 370 U.S. 626 (1962).

II. Summary Decision Is Proper Because Complainant Has Failed to Present Sufficient Evidence to Raise the Inference that He Suffered Discrimination

Assuming *arguendo* that the complaint should not be dismissed due to Complainant's failure to comply with my November 20, 2006 Order and/or to prevent undue delay, summary decision in favor of Respondent is proper because Complainant has failed to present sufficient evidence to raise an inference that he suffered discrimination as a result of some protected activity. Complainant has not properly responded to Respondent's Motion. He has failed to prove or demonstrate the existence of a genuine issue of fact that he engaged in protected activity, which is a necessary element to his claim. *See Reddy v. Medquist*, ARB Case No. 04-123, 2004-SOX-35 (ARB Sept. 30, 2005) (whether Complainant engaged in protected activity is an "essential, material fact which [he] must show if challenged to do so on a motion for summary judgment."). Complainant has not presented any evidence to dispute that fact. As discussed below, this provides independent grounds for dismissing his claim.

A. Legal Standards

1. Summary Decision

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. 29 C.F.R. §18.40; *see also* Fed. R. Civ. P. 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue, and an issue of fact is "material" if, under the substantive law, it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670 (10th Cir. 1998). The primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U.S. 317, 323-34 (1986).

If the party moving for summary judgment demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact. *Reddy v. Medquist, Inc.*, ARB Case No. 04-123 (Sept. 30, 2005); *Lake Nacimiento Ranch Co. v. San Luis Obispo* 841 F.2d 872, 876 (9th Cir. 1987). The non-moving party may not rest upon the mere allegation or denials of his or her pleading, but must go beyond the pleadings to set forth specific facts showing that there is a genuine issue of fact that could affect the outcome of the trial. *Gassaway v. Northwestern Mut. Life Ins. Co.,* 26 F.3d 957, 960 (9th Cir. 1994); 29 C.F.R. § 18.40(c). The non-moving party must identify the specific facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler,* 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, speculation, or suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). The facts on which the opponent relies must be admissible at trial but a party opposing a motion for summary judgment may present testimony of its own witnesses by declarations. *Celotex Corp*, 477 U.S. at 324; *Curnow v. Ridgecrest Police*, 952 F.2d 321, 324 (9th Cir. 1991). Where the non-moving party "fails to

make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact and the proponent is entitled to summary decision. *Celotex Corp.,* 477 U.S. at 322-323; *see also, Webb v. Carolina Power & Light Co.,* 1993-ERA-42, slip op. at 5-6 (Sec'y July 4, 1995).

The non-moving party benefits from any factual dispute supported by the evidence. *See Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 456 (1992)*; Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, 99-TSC-4, at 4 (ARB Feb. 10, 2003) ("[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.") (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 99-107, 99-STA-21 (ARB Nov. 30, 1999).

2. Retaliation Under the Sarbanes-Oxley Act

Complainant has alleged that he was retaliated against in violation of the whistleblower provisions found in section 806 of the Sarbanes-Oxley Act. *See* 18 U.S.C. § 1514A. SOX protects employees of publicly traded companies who provide information or assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of various federal fraud provisions, including sections 1341 (fraud and swindles), 1342 (fraud by wire, radio, or television), 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. 18 U.S.C. § 1514A; 29 C.F.R. § 1980.102(a); *Hendrix v. American Airlines, Inc.*, 2004-AIR-10 and 2004-SOX-23 (ALJ Dec. 9, 2004).

The information or assistance must be provided to or the investigation must be conducted by a Federal regulatory or law enforcement agency, any Member of Congress or any committee of Congress, or 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). *See* 18 U.S.C. § 1514A (a)(1); *see also*, 29 C.F.R. § 1980.102(a), (b)(1). An employer may not discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee under the Act's protection. *Id.*

In *Brune v. Horizon Air Industries, Inc.*, the Administrative Review Board re-clarified the procedures and burdens of proof in whistleblower complaints under the Aviation Investment and Reform Act ("AIR 21"), which apply equally to whistleblower complaints under SOX. ARB Case No. 04-037 (Jan. 31, 2006); *see also Bechtel v. Competitive Industries, Inc.*, 2005-SOX-33 (ALJ Oct. 5, 2005) (claims under SOX follow same procedures governing AIR 21). The Board distinguished between a complainant's burden to secure the investigation of a complaint, which merely requires the complainant to establish a *prima facie* case that raises an inference of discrimination, and his burden to secure adjudication in his favor after he has raised an inference of discrimination, which requires him to prove intentional discrimination by a preponderance of the evidence. *See Brune,* ARB Case No. 04-037, at 14.

To make out a *prima facie* case of whistleblower retaliation under SOX, the complainant must present evidence sufficient to raise the inference that the complainant's protected activity was a contributing factor in a respondent's adverse employment action taken against the complainant. *Id.* at 12. A complainant may do so using either direct or circumstantial evidence showing that: (1) the employee engaged in protected activity, (2) the employer knew or suspected, actively or constructively, that the employee engaged in protected activity, (3) the employee suffered an unfavorable personnel action, and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. *Id.* at 13; 29 C.F.R. §§ 1980.104(b), 1980.109(a). A contributing factor need not be significant, motivating, substantial, or predominant, and can be "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004), quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). *See also, Collins v. Beazer Homes USA, Inc*., 334 F.Supp.2d 1365 (N.D. Ga. 2004). Ordinarily, temporal proximity between protected activity and unfavorable personnel action will satisfy the burden of making a *prima facie* showing of employer knowledge and that protected activity was a contributing factor. *Id.*

3. Summary of Legal Standards

In summary, if Complainant fails to establish the existence of a factual dispute as to any one of the prima facie elements of his retaliation claim, Respondent is entitled to summary decision. *See Celotex Corp.*, 477 U.S. at 322-23. *See also, Reddy v. Medquist*, ARB Case No. 04-123, 2004-SOX-35 (ARB Sept. 30, 2005) (whether Complainant engaged in protected activity is an "essential, material fact which [he] must show if challenged to do so on a motion for summary judgment.").

B. Legal Analysis

Respondent argues that Complainant has failed to submit any admissible evidence in opposition to its Motion which supports the existence of any factual dispute. Respondent also contends that summary decision is proper here because Complainant has failed to prove that he engaged in protected activity. For the reasons set forth below, I agree with Respondent and grant its Motion.

1. Complainant Has Not Responded to Respondent's Motion for Summary Decision with Specific Admissible Evidence which Demonstrates the Existence of a Genuine Issue of Material Fact

Complainant's failure to present admissible evidence opposing Respondent's Motion alone justifies granting the Motion. As discussed below, in moving for summary decision, Respondent has presented evidence that Complainant cannot raise a genuine issue that he engaged in protected activity, which Complainant has not disputed with admissible evidence. MOTION at 8-11.

If the moving party demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to prove the existence of a genuine

issue of material fact. *Reddy v. Medquist, Inc.*, ARB Case No. 04-123 (Sept. 30, 2005); *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). To survive summary decision, Complainant may not rest upon the mere allegation or denials of his complaint, but must go beyond the pleadings to set forth specific facts showing that there is a genuine issue that he engaged in protected activity and that Respondent's reasons for his termination were pretextual or incredible. *See Reddy v. Medquist, Inc.*, ARB Case No. 04-123 (Sept. 30, 2005); *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998); 29 C.F.R. § 18.40(c). As previously noted, Complainant must identify the specific facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler,* 144 F.3d at 671. He cannot rest on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988).

Despite allowing Complainant longer than the normal time to respond to a motion for summary decision under 29 C.F.R. § 18.40(a), he has failed to allege any specific facts, by reference to affidavits, deposition transcripts, specific exhibits, or anything else that would create a genuine issue of material fact necessary to defeat Respondent's Motion.

2. Complainant Has Not Shown that a Genuine Issue of Facts Exists as to Whether He Engaged in Protected Activity

Respondent argues that summary decision is proper here because Complainant has failed to establish that he engaged in any protected activity. In support of its contention, Respondent argues that Complainant has presented no evidence that: "(1) he engaged in any protected communication; (2) he was aware of any misconduct that would fall within the purview of Sarbanes-Oxley; or (3) any illegal conduct occurred at [Respondent]." MOTION at 10. Respondent further argues that instead, Complainant "specifically admitted that he does not believe any illegal conduct occurred in his department," and it points to Complainant's deposition testimony at page 180, lines 2-18. *Id.*

Complainant has failed to properly respond to Respondent's Motion by submitting admissible evidence. The only evidence presented by Complainant at any stage of his claim is his complaint letter, dated apparently some time in June 2005, in which he alleges that in early 2005, an internal audit uncovered some "alleged misconduct" on the part of an employee at Respondent who did not report directly to Complainant but who was within Complainant's Tax Operations organization. Complainant alleges that he was not part of any investigation and was not told what "alleged misconduct" was discovered, but that the investigated employee was terminated by respondent on March 17, 2005 and Complainant was terminated on March 18, 2005 and advised "the organization was put at serious risk and in that [*sic*] this individual was in my area, someone needed to assume responsibility, therefore my [Complainant's] employment was being terminated." In his response to Respondent's summary decision motion, dated December 13, 2006, Complainant asserts that he was not allowed to participate in the investigation of the alleged wrongdoing "for fear that the findings would likely point back to issues where Volkel and possibly others had responsibility." Complainant's Response at 5.

However, in response to a motion for summary decision, Complainant is not permitted to rest on allegations in his complaint, and must come forward with specific evidence showing the existence of a genuine issue of fact that he engaged in protected activity. *See Reddy v. Medquist, Inc.*, ARB Case No. 04-123 (Sept. 30, 2005); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998); 29 C.F.R. § 18.40(c). Although all evidence must be viewed in the light most favorable to, and all inferences are to be drawn in favor of, the non-moving party, Complainant has not submitted any evidence for me to view in the light most favorable to him, or from which I might determine that there exists a genuine issues of material fact. *See Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064 (Feb. 10, 2003). Instead, Respondent has presented admissible evidence to the contrary that at no time prior to his termination did Complainant believe that any illegal conduct occurred in his department. *See* MOTION at 10. Because Complainant has not properly responded to Respondent's evidence that he did not engage in protected activity, I find that he has not met his burden to show that a genuine issue of fact exists as to that essential element of his claim, thereby entitling Respondent to summary decision. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986) (Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact and the proponent is entitled to summary decision.). *See also Webb v. Carolina Power & Light Co.,* 1993-ERA-42, slip op. at 5-6 (Sec'y July 4, 1995).

Recognizing, however, that Complainant is proceeding *pro se*, I provide the following brief analysis of whether he engaged in protected activity, in an attempt to view the evidence before me in the light most favorable to Complainant, drawing all inferences on his behalf.

Protected activity under SOX is defined as reporting an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. *Marshall v. Northrup Gruman Synoptics*, 2005-SOX-8 (ALJ June 22, 2005). The employee's belief must be scrutinized under both subjective and objective standards. *Id.*, citing *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051 (July 14, 2000). The employee does not need to show that the employer's conduct *actually* caused a violation of the law, but must show that he reasonably believed the employer violated one of the laws or regulations enumerated under SOX. *Id.* The enumerated laws include sections 1341 (fraud and swindles), 1342 (fraud by wire, radio, or television), 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. 18 U.S.C. § 1514A; 29 C.F.R. § 1980.102(a); *Hendrix v. American Airlines, Inc.*, 2004-AIR-10 and 2004-SOX-23 (ALJ Dec. 9, 2004).

Fraud is an integral element of a SOX whistleblower claim, which contains an implicit element of deceit which would impact shareholders or investors. *Marshall*, 2005-SOX-8. In *Marshall*, the complainant alleged that he engaged in protected activity by reporting his concerns about improper financial accounting methods and ethical lapses, specifically that certain managers had engaged in fraudulent accounting activity with respect to the budget and that there had been willful misclassification of labor hours, depreciation, and capital expenses. *Id.* at 4-5. The ALJ disagreed, and granted the respondent's motion for summary decision on the ground that the complainant's raising of concerns that certain accounting practices violated the

respondent's internal and ethics policies did not qualify as protected activity under the SOX whistleblower provision. *Id.* at 4-6.

The ALJ concluded that though the *Marshall* complaint alleged financial and accounting fraud, it did not address any kind of fraud or any transactions relating to securities. *Id.* at 5-6. There was no allegation that the complained of activities resulted in a fraud against shareholders or investors, and there was nothing in the complaint or in the complainant's response to respondent's motion for summary decision indicated that complainant objectively or actually believed that respondent was committing a violation of any of the Act's enumerated securities laws or committing fraud on its shareholders. *Id.* at 6. Because complainant's complaints, even if true, did not fall under any of the employee protection provisions of the act, they did not amount to protected activity, and respondent was entitled to summary decision as a matter of law. *Id.*

I now turn to the evidence that is before me, which is taken from Complainant's complaint, his Response to the Motion dated December 13, 2006[1], and Respondent's pleadings, and consider it in the light most favorable to Complainant. Complainant alleges that he was not part of Respondent's internal investigation and was not told of any alleged misconduct. In addition, Complainant testified at deposition that he did not think there was anything inappropriate in the tax abatement letters written by one of the employees in his department who was ultimately terminated the day before Complainant lost his job with Respondent. Complainant Depo. 180:2-18.

Finally, in the allegations submitted by Complainant in opposition to the Motion—which I note are not supported by admissible evidence—Complainant alleges that any problem brought to his "attention by e-mail in 2004 pointed to procedural and processing issues only." Complainant's Response at 2. Complainant further admits that "[t]here was nothing in this communication [the 2004 e-mail] that indicated 'inappropriate behavior.' Complainant's Response at 3. Complainant concludes by stating that he was terminated by Respondent not for voicing some protected activity but "for not appropriately reporting misconduct." Complainant's Response at 5.

In *Klopfenstein v. PCC Flow Techs. Holdings Inc.,* the ARB explained that a complainant engages in protected activity when he provides information relating to "not only just fraud, but also [the] 'violation of . . . any rule or regulation of the Securities and Exchange Commission.'" *Klopfenstein v. PCC Flow Techs. Holdings Inc.,* ARB No. 04-149, at 3, 17 (May 31, 2006). *See also*, 18 U.S.C. § 1514A(a)(1). Further, the ARB emphasized that a Complainant need not make the first report or utilize every opportunity to report a concern, "so long as the Complainant's actual communications 'provide information, cause information to be provided, or otherwise assist in an investigation' regarding a covered violation." 18 U.S.C.A. 1514(A)(a)(1).

[1] As part of Complainant's Response, he attached, without discussion, a copy of the case *Lujan v. Minagar*, 124 Cal. App. 4th 1040 (2004). I find the *Lujan* case to be inapplicable here because it was decided under California law and not under SOX, to which my jurisdiction is limited. In addition, in this case, unlike *Lujan*, there is no evidence that Complainant was terminated based on a fear that he was going to report some type of wrongdoing. Instead, Complainant admitted that he was not aware of any wrongdoing at Respondent. While Complainant may have a valid wrongful termination action under California law, he fails to withstand Respondent's Motion under SOX for the reasons stated in this recommended decision.

The ARB further clarified the scope of activities covered by the SOX whistleblower provisions in *Harvey v. Home Depot,* holding that SOX only protects activities "directly related to the listed categories of fraud or securities violations." *Harvey v. Home Depot,* ARB No. 04-114 and 04-115, 04-SOX-20 and 04-SOX-36, at 14, 15 (ARB June 2, 2006). The ARB explained that a Complainant must reasonably believe that the alleged violations constitute mail, wire, radio, TV, bank or securities fraud, or violate an SEC rule or regulation, or some provision of Federal law pertaining to fraud against shareholders. *Id.* In *Harvey*, where the complainant's allegations related to discriminatory practices, management discretion, or *possible* violations of the Fair Labor Standards Act, the ARB held that they did not meet the definition of a SOX protected activity. The ARB stressed the requirement that a whistleblower's allegations relate to either Federal provisions governing fraud against shareholders or an SEC rule or regulation, as stated in the statutory language. *Id*. at 15.

I find that Complainant has not provided admissible evidence in support of any facts showing that there is a genuine issue of fact for the hearing. To the contrary, the admissible evidence submitted by Respondent and Complainant's own allegations show that he did not engage in any protected activity. Accordingly, because Complainant has failed to present evidence showing that he engaged in protected activity, there is no genuine issue of fact for trial. I therefore grant Respondent's Motion for Summary Decision.

CONCLUSION

I find that Complainant's claim should be dismissed based on his failure to comply with my lawful November 20, 2006 Order which has resulted in undue delay in the disposition of this case and other cases on my docket. I further find that, for the reasons explained herein, Respondent is entitled to Summary Decision on the present claim because Complainant has failed to make a *prima facie* showing sufficient to create the inference that Respondent discriminated against him for engaging in protected activity.

RECOMMENDED ORDER

For the reasons stated above:

IT IS ORDERED that Respondent's Motion for Summary Decision pursuant to 29 C.F.R. § 18.40 is hereby **GRANTED.**

IT IS FURTHER ORDERED that Complainant William Cook's complaint is hereby **DISMISSED With Prejudice** and without cost or attorneys' fees to either party.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL:

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).