**U.S. Department of Labor**

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

**Issue Date: 20 June 2006**

Case No.: 2006-SOX-00071

In the Matter of:

ALVIN REED,
Claimant,
v.
MCI, INC,
Respondent.

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

On May 15, 2006, MCI, INC., ("Respondent") filed a Motion for Summary Decision, pursuant to 29 C.F.R. §§ 18.40 and 18.41(a). Respondent argues that Alvin Reed ("Complainant") raises no genuine issues of material fact and cannot make a prima facie showing that he engaged in protected activities within the meaning of § 806 of the Sarbanes-Oxley Act of 2002 ("SOX" or the "Act"). Respondent also argues that Complainant did not timely file his complaint. On June 5, 2006, Complainant filed a Response. On June 15, 2006, Respondent filed a Reply.

FACTS

The following facts are not disputed:

1. Respondent is a publicly traded company and is an entity covered by the provisions of SOX.

2. Respondent hired Complainant on April 10, 2000, as a Senior Software Systems Engineer. Complainant last reported for work on January 21, 2005, and was placed on Family and Medical Leave Act (FMLA) leave, effective January 22, 2005.

3. Complainant remained on FMLA until his FMLA leave eligibility expired on April 16, 2005. From then until October 21, 2005, although Respondent informed Complainant of its 26-week termination policy, Respondent extended Complainant's leave until October 21, 2005. Pursuant to the 26-week termination policy, Respondent could have terminated Complainant as early as August 2005.

4. By letter dated, October 28, 2005, Respondent notified Complainant that his employment was terminated effective October 21, 2005.

5. On January 16, 2006, Complainant filed a SOX complaint. Therein, Complainant alleges he "was fired from MCI Inc. on October 21, 2005 for refusing to commit felonies."

6. In the Response to Motion for Summary Decision, the only "protected activity" alleged is the reporting of misuse of unlicensed computer software by Respondent's employees.

## DISCUSSION OF LAW AND FACTS

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds "the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Id. Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. Lincoln v. Reksten Mgmt., 354 F.3d 262 (4th Cir. 2003); Green v. Ingalls Shipbuilding, Inc., 29 BRBS 81 (1995) (stating the purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact). However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

*Timeliness of Complaint*

As Complainant notes in his reply, Respondent argues in its Motion that the company "decided to wait to initiate his termination from employment" even after Complainant was informed of the 26-week termination policy. While Complainant may have been aware the Respondent could have terminated his employment at any time after August 2005, there has been no evidence submitted that the decision to terminate him had in fact been made prior to October 21, 2005. The Court finds that there are material facts in issue as to whether the complaint was timely filed.

*Protected Activity*

SOX provides protection for employees of publicly traded companies who engage in protected activities. SOX provided that no such company or its officers, employees, contractors, subcontractors, or agents "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because the employee engaged in certain lawful acts:

(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 [*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, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

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

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1342, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

The protected activity alleged in the complaint and response involves the Complainant's reporting to Respondent that they were using unlicensed computer software. The complaint does not address any violation of (1) 18 U.S.C. § 1341 (mail fraud and swindle); (2) 18 U.S.C. § 1343 (fraud by wire, radio, or television); (3) 18 U.S.C. § 1348 (securities fraud); (4) any rule or regulation of the Securities and Exchange Commission; or (5) any provision of federal law relating to fraud against shareholder. 18 U.S.C. § 1514A(a).

The goal of SOX is to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws. SOX affords protection only to those employees who blow the whistle about something related to the five violations noted above. Complainant does not allege any violation of the first four categories but alleges Respondent defrauded stockholders by reporting profits partly on the use of pirated software. Complainant notes that the penalty per incident could be as high as $150,000 and that thousands of incidents could have occurred. In addition to potential fines, the loss of good will caused by requiring employees to use pirated software could cost stockholders a significant portion of the value of the company.

While Complainant may have believed that Respondent was violating copyright laws through the use of pirated software, there is nothing in the complaint or in the Response indicating the Complainant reasonably believed that Respondent was committing a violation of any of the enumerated security laws or that Respondent was committing a fraud on its shareholders. Retaliation against an employee is a violation of SOX only if it is in response to the employee's reasonable belief of fraud related to shareholders or a violation of one of the statutes enumerated in SOX. The matter complained of, the use of unlicensed computer software, does not fall within the purview of the employee protection provisions of SOX.

## CONCLUSION

Based on the foregoing discussion, construing all facts in the light most favorable to Complainant, the Court finds that Complainant did not engage in activities protected under the Act. Respondent is thus entitled to summary decision as a matter of law.

## RECOMMENDED ORDER

It is RECOMMENDED that Respondent's Motion for Summary Decision be GRANTED.

A

LARRY W. PRICE
Administrative Law Judge

LWP/ccb
Newport News, Virginia

**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