



In the Matter of:

MILORAD STOJICEVIC,

ARB CASE NO. 05-081

COMPLAINANT,

ALJ CASE NO. 2004-SOX-073

v.

DATE: October 30, 2007

ARIZONA–AMERICAN WATER,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Milorad Misha Stojicevic, *pro se*, Etobicoke, Ontario

For the Respondent:

John J. Balitis, Jr., *Fennemore Craig, P.C.*, Phoenix, Arizona

FINAL DECISION AND ORDER

Milorad Stojicevic complained that Arizona-American Water Company (AAW) violated the employee protection provisions of both Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act (SOX)¹, and Section 1450 of the Safe Drinking Water Act of 1974 (SDWA)² when it terminated

¹ 18 U.S.C.A. § 1514(A)(West 2007). The SOX's implementing regulations are found at 29 C.F.R. Part 1980 (2007).

² 42 U.S.C.A. § 300j-9(i)(West 2007). The SDWA's implementing regulations are found at 29 C.F.R. Part 24. The Department of Labor has amended these regulations since

his employment on May 20, 2003. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed the complaint. Stojicevic appeals, claiming that the ALJ erred in finding that (1) AAW had a legitimate non-discriminatory basis for terminating Stojicevic's employment, and that (2) Stojicevic did not engage in protected activity under SOX. We accept the ALJ's recommendation that the complaint be denied and we affirm his recommended decision.

BACKGROUND

For convenience, we briefly restate certain background facts. Additional details are provided in the ALJ's Recommended Decision and Order (R. D. & O.).

Mark Clark hired Stojicevic as a project manager for Citizens Utilities Company (Citizens) in January 2001. R. D. & O. at 4. Approximately one year later, AAW, headquartered in Phoenix, Arizona, became Stojicevic's employer when it purchased the assets of Citizens and each of its subsidiaries. *Id.* Stojicevic's responsibilities included low-level oversight on technical issues in development and engineering projects in Bullhead City and at Lake Havasu. R. D. & O. at 5. Tom Condit served as the project manager for the Lake Havasu work site and Fred Schneider supervised the entire project. *Id.*

Stojicevic's relationship with the Phoenix office became strained; he "did not have a lot of respect for the folks in the Phoenix office and, as such, he did not feel he should be reporting to the folks in the Phoenix office." Transcript (T.) at 100. Stojicevic asserted that AAW was poorly managing the project, citing both technical and financial errors. T. at 189-91. Stojicevic also maintained that Condit lacked the necessary expertise to supervise the project. *Id.* As Stojicevic's e-mails became increasingly "curt and rude," communications between Stojicevic and his managers worsened. T. at 101.

At a company meeting at the end of 2002, Stojicevic voiced his problems with the handling of the Lake Havasu site. T. at 248. He requested removal from the project and from Condit's supervision. *Id.* Following the meeting, Schneider told Stojicevic that his attitude and inability to work with the Lake Havasu team would reduce his usefulness to AAW. R. D. & O. at 5. Stojicevic's failure to procure contracts or purchase orders for work to be performed by outside contractors also caused tension between Stojicevic and the Phoenix office management. *Id.* at 5.

On January 13, 2003, Stojicevic e-mailed Condit, asserting that the "[c]aissing pipe is not cap welded and protected according to technical standards." Complainant's Exhibit (CX) 1. In February 2003, the project team met and Schneider believed that they had resolved the technical issues. R. D. & O. at 6. But on February 17, 2003, Stojicevic e-mailed Schneider detailing numerous technical and financial problems with the

Stojicevic filed his complaint. 72 Fed. Reg. 44,956 (Aug. 10, 2007). Even if the amended regulations were applicable to this case, they would not change the outcome.

development of the Lake Havasu site. See Respondent's Exhibit (RX) 3. Stojicevic indicated that he was "open to discuss all of the [technical issues] but ... not on the [basis] of company hierarchy." *Id.* Following the February 17 e-mail, Schneider informed Stojicevic that company policy dictated the proper procedure for voicing complaints. R. D. & O. at 6. Further, Schneider told Stojicevic that if could not work within the current hierarchy, he should look for other employment. *Id.* Schneider counseled Stojicevic to improve the tone and tenor of his communications. *Id.*

On March 28, 2003, AAW issued a performance report for Stojicevic, listing him as "meets expectations." RX 5. While noting that Stojicevic "is an asset to the Mohave operations," the review rated Stojicevic's communication and cooperation skills as "needs improvement." *Id.* In April 2003 Stojicevic met with Paul Townsley, AAW's President for the Western Region. They discussed Stojicevic's technical concerns, communication issues, and how the disagreements with Schneider would affect future references. R. D. & O. at 6.

Threatening E-mail

On April 29, 2003, Stojicevic sent a lengthy e-mail to Schneider. RX 7. Schneider described the e-mail as "offensive" and "threatening." R. D. & O. at 6. Multiple points in the e-mail are written as if Schneider is the author. *Id.* In the e-mail, Stojicevic accused project team members of hiding behind their titles. *Id.* He concluded the e-mail by stating, "[n]ext time tell full story. I will very soon." *Id.*

After receiving the April 29th e-mail, Schneider issued Stojicevic a counseling report detailing how his behavior violated the Employee's Guide for Conduct. RX 9. The report stated that Stojicevic's behavior included "interfering or refusing to cooperate with the authorized supervisory associates in the performance of their duties," "making, or publishing of false, vicious, or malicious statements concerning any associate, supervisor, the company or its products," "threatening, intimidating, coercing, or interfering with other associates," and "insubordination." *Id.* The report concluded with a recommendation for AAW to suspend Stojicevic for one day. R. D. & O. at 6.

On April 30, 2003, Stojicevic sent a letter to Paul Townsley, president of American Water Works, of which AAW is a subsidiary, detailing his problems with his work experience at AAW. RX 6. In the letter, Stojicevic detailed numerous problems, including a lack of communication with the engineers, poor pump design resulting in low water pressure, faulty well design that could allow bacterium in the aquifer, and poor management resulting in financial loss. *Id.*

Stojicevic was to serve his suspension on May 20, 2003. *Id.* Nevertheless, he came into work. *Id.* At the office, Clark approached Stojicevic and told him that he was on suspension and should not be in the office. *Id.* Stojicevic promptly left. *Id.* Clark then reported the incident to Schneider. *Id.* Later that day, Stojicevic visited the Lake Havasu work site to meet with a client. *Id.* An employee notified Clark that Stojicevic had been seen at a work site in a company vehicle and Clark relayed this information to

Schneider. *Id.* The same day, after learning from Clark that Stojicevic had been at work for the second time in violation of his suspension, Schneider terminated Stojicevic's employment.

Stojicevic timely filed a complaint with OSHA on June 11, 2003, alleging violations of the SOX and SDWA whistleblower provisions. On August 25, 2004, OSHA dismissed the complaint. He appealed and was granted a hearing before an ALJ on October 22, 2004. On March 24, 2005, the ALJ issued a recommended decision dismissing Stojicevic's complaint.

I. Discussion

a. Safe Drinking Water Act - 42 U.S.C.A. § 300j-9(i)

The environmental whistleblower statutes authorize the Secretary of Labor to hear complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies.³ The Secretary has delegated authority for review of an ALJ's initial decisions to the ARB.⁴ Under the SDWA regulations in effect when Stojicevic filed his complaint, the ARB engages in de novo review of the ALJ's recommended decision.⁵

The legal standard

The environmental whistleblower protection provisions prohibit employers from discharging or otherwise discriminating against any employee "with respect to the

³ *Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 9 (ARB Feb. 28, 2003).

⁴ 29 C.F.R. § 24.8 (2003). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

⁵ *See* 29 C.F.R. § 24.8 (2003); *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ No. 1997-CAA-002, 1997 CAA-009, slip op. at 15 (ARB Feb. 29, 2000). The SDWA's amended regulations provide for substantial evidence review of the ALJ's factual findings. 29 C.F.R. § 24.110(b) (2007). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). As indicated above, even if the Board applied a substantial evidence review to the ALJ's findings in this case, such review would not change the outcome of our decision, because even applying the less restrictive de novo review standard, we agree with the ALJ's ultimate recommendation that Stojicevic's complaint be denied.

employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activities such as initiating, reporting, or testifying in any proceeding regarding environmental safety or health concerns.⁶ To prevail on his SDWA complaint, Stojicevic must establish by a preponderance of the evidence that he engaged in protected activity, that AAW was aware of the protected activity, that he suffered adverse employment action, and that AAW took the adverse action because of his protected activity.⁷ Stojicevic's failure to establish causation defeats his SDWA complaint.⁸

In analyzing an environmental whistleblower case, the ARB and reviewing courts generally apply the framework of burdens developed for use in deciding cases under Title VII of the Civil Rights Act of 1964⁹ and other discrimination laws.¹⁰ To establish a prima facie case of unlawful discrimination under the environmental whistleblower statutes, a complainant need only present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination.¹¹ A complainant meets this burden by initially showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in protected activity under the statute of which the employer was aware, that the complainant suffered adverse employment action and that a nexus existed between the protected activity and the adverse action.¹² Once a complainant meets his initial burden of establishing a prima facie case, the burden then shifts to the employer to simply produce evidence or articulate that it took adverse action for a legitimate, nondiscriminatory reason (a burden of production, as opposed to a burden of proof). When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, the rebuttable presumption created by the complainant's prima facie showing "drops from the case."¹³ At that point, the

⁶ See 29 C.F.R. § 24.2. *Accord Morriss v. LG&E Power Servs., LLC.*, ARB No. 05-047, ALJ No. 2004-CAA-014, slip op. at 31-2 (ARB Feb. 28, 2007).

⁷ *Morriss*, ARB No. 05-047, slip op. at 31-2; *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 2004-CAA-005, slip op. at 4 (ARB Nov. 29, 2006); *Schlagel v. Dow Corning Corp.*, ARB No. 2002-092, ALJ No. 2001-CER-001, slip op. at 5 (ARB Apr. 30, 2004).

⁸ *Schlagel*, ARB No. 02-092, slip op. at 5.

⁹ 42 U.S.C.A. § 2000e, *et seq.*

¹⁰ *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-047, slip op. at 9 (ARB Jan. 31, 2007); *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 17 (ARB Feb. 28, 2003).

¹¹ *Schlagel* ARB No. 02-092, slip op. at 5 n.1.

¹² *Id.* at 6 n.1; *Jenkins*, ARB No. 98-146, slip op. at 16-17.

¹³ *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence.¹⁴

Thus, after the ALJ has fully tried a whistleblower case on the merits, he or she does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity.¹⁵ Accordingly, the Board will decline to discuss an ALJ's findings regarding the existence of a prima facie showing in a case the ALJ has fully tried on the merits.¹⁶

Finally, if the complainant proves by a preponderance of the evidence that a retaliatory motive played at least some part in the respondent's decision to take an adverse action, only then does the burden of proof shift to the respondent employer to prove by a preponderance of the evidence that the complainant employee would have been fired even if the employee had not engaged in protected activity.¹⁷

It is undisputed that AAW is a water utility governed by the SDWA.¹⁸ It is also undisputed that AAW took adverse employment action against Stojicevic when it terminated his employment on May 20, 2003.

¹⁴ *Morriss*, ARB No. 05-047, slip op. at 32; *Schlagel*, ARB No. 02-092, slip op. at 6 n.1; *Jenkins*, ARB No. 98-146, slip op. at 18. Cf. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁵ *Morriss*, ARB No. 05-047, slip op. at 32; *Schlagel*, ARB No. 02-092, slip op. at 6 n.1; *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-033, slip op. at 9 n.9 (ARB Oct. 31, 2003), *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 6 n.12 (ARB Sept. 30, 2003), *Simpkins v. Rondy Co., Inc.*, ARB No. 02-097, ALJ No. 2001-STA-059, slip op. at 3 (ARB Sept. 24, 2003), *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 7-8 n.11 (ARB Mar. 29, 2000). *Accord U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 (1983) ("Because this case was tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made our a prima facie case.").

¹⁶ *Andreae v. Dry Ice, Inc.*, ARB No. 97-087, ALJ No. 95-STA-24, slip op. at 2 (ARB July 17, 1997).

¹⁷ *Morriss*, ARB No. 05-047, slip op. at 32; *Schlagel*, ARB No. 02-092, slip op. at 6 n.1.

¹⁸ See 42 U.S.C.A. § 300f(4)(West 2007).

Protected activity

Congress enacted the SDWA “to assure that water supply systems serving the public meet minimum national standards for protection of public health.”¹⁹ As the First Circuit Court of Appeals wrote in *Natural Res. Defense Council, Inc. v. U.S. E.P.A.*,²⁰

The SDWA was enacted in 1974 to assure safe drinking water supplies, protect especially valuable aquifers, and protect drinking water from contamination by the underground injection of waste. The SDWA required the EPA to promulgate standards to protect public health, by setting either (1) maximum contaminant levels for pollutants in a public water supply, or (2) a treatment technique to reduce the pollutants to an acceptable level if the maximum contaminant level is not economically or technologically attainable.^[21]

The SDWA’s whistleblower protection provisions prohibit employers from discriminating against an employee who has:

(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,

(B) testified or is about to testify in any such proceeding or,

(C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.^[22]

The ALJ described Stojicevic’s alleged protected activities: “Complainant alleges that he raised concerns with management about the capacity of the projected well to support the water needs of the Lake Havasu community This includes maintaining

¹⁹ H.R. Rep No. 93-1185 (1974), as reprinted in 1974 U.S.C.C.A.N. 6454.

²⁰ 824 F.2d 1258, 1268 (1987).

²¹ See also *United States v. Mass. Water Res. Auth.*, 256 F.3d 36, 38 (1st Cir. 2001) (“In 1974, Congress . . . passed the Safe Drinking Water Act . . . with the basic goal of protecting the purity of the drinking water provided by the nation’s public water systems.”).

²² 42 U.S.C.A. § 300j-9(i)(1).

sufficient water pressure to put out fires.” R. D. & O. at 8. The ALJ acknowledged that the “SDWA is not itself specifically concerned” with the subject matter of Stojicevic’s complaints about the well capacity and water pressure, but that “this issue is relevant to public safety, which is a main concern of the environmental whistleblower statutes generally.” R. D. & O. at 8. The ALJ concluded that Stojicevic’s “complaints to the Phoenix office about water safety therefore could be considered protected activity under the SDWA.” *Id.*

AAW did not challenge the ALJ’s determination that Stojicevic engaged in protected activity; thus, we will not review it.²³ Nevertheless, we note that Stojicevic’s complaints, as described by the ALJ, on their face, do not implicate the coverage of the SDWA’s enumerated protected activities i.e., “a proceeding under this subchapter [i.e., an SWDA whistleblower proceeding] or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State proceeding.”²⁴ Accordingly, we note that the ALJ’s determination that Stojicevic’s complaints concerning well capacity and water pressure were protected under the SDWA’s whistleblower provision is highly questionable.

Knowledge

The ALJ found that AAW was aware of Stojicevic’s engagement in protected activity prior to his suspension and termination. R. D. & O. at 8. AAW has not challenged this finding and therefore, we need not review it.²⁵

Causation

The ALJ states the applicable legal standard as:

In order to make a *prima facie* case of discriminatory treatment under an environmental whistleblower statute, such as the SDWA, the complainant must prove four elements:

- (1) The respondent is governed by the SDWA;
- (2) The complainant engaged in protected activity as defined by the SDWA;

²³ See *Hall v. U.S. Dep’t of Labor*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-005, slip op. at 6 (ARB Dec. 30, 2004) (failure to present argument or pertinent authority waives argument), *aff’d*, 476 F.3d 847, 861 n.8 (“allegations unsupported by legal argument or citation to evidentiary support in the record are insufficient to raise the specific legal theory [appellant] now alleges ARB overlooked”).

²⁴ 42 U.S.C.A. § 300j-9(i)(1).

²⁵ *Hall*, ARB Nos. 02-108, 03-013, slip op. at 6.

(3) The respondent had actual or constructive knowledge of the protected activity and took some adverse action against the complainant; and

(4) An inference is raised that the protected activity of the complainant was the likely reason for the adverse action.

If the Complainant makes out a *prima facie* case of discrimination, the employer must prove that it took the adverse employment action for a legitimate, non-discriminatory reason. If the employer carries this burden, then the complainant must show that the reason proffered by the employer was a pretext for a discriminatory motive.

R. D. & O. at 4.

The ALJ incorrectly stated that after the complainant establishes an inference of discrimination, the burden of proof shifts to the respondent to prove that it took the action for a legitimate non-discriminatory reason. Thus, the ALJ imposed an improper burden on AAW, requiring it to prove that its reason for terminating Stojicevic's employment was legitimate and non-discriminatory. R. D. & O. at 9. Instead, at this stage all the respondent is required to do is to articulate evidence of a non-discriminatory reason for taking the action. Therefore, once AAW alleged a legitimate non-discriminatory reason for the termination, i.e., Stojicevic's hostile and inappropriate behavior and acts of insubordination, the burden was on Stojicevic to prove by a preponderance of the evidence that AAW terminated his employment because he engaged in protected activity.²⁶ In any event, given the ALJ's ultimate conclusion that Stojicevic failed to carry his burden of proof, his misapplication of the burdens of proof and persuasion was harmless.

The ALJ found that Stojicevic engaged in inappropriate behavior including sending e-mails that were hostile and rude and "his unwillingness to follow Respondent's management hierarchy when making complaints." *Id.* Stojicevic was suspended for one day because of "his inability to work with his supervisors, inappropriate comments, hostile attitude, and insubordination." *Id.* He ignored the suspension and was sent home again. Nevertheless, he returned to the job site later that day. AAW terminated his employment for his continued insubordination. R. D. & O. at 9.

Stojicevic contends that Schneider's misinterpretation of his April 29 e-mail prompted AAW to suspend him. CB at 2; *see* RX 7. Stojicevic claims that since English is not his first language, his "writing style can be awkward and tone can be misunderstood." *Id.* AAW responds, noting that Stojicevic conducted all of his business matters in English, and was well versed in proper use and tone. Respondent's Brief (RB) at 7.

²⁶ *Morriss*, ARB No. 05-047, slip op. at 32-4.

The ALJ found that the e-mail was reasonably interpreted as “hostile.” R. D. & O. at 9. Moreover, although this e-mail ultimately led to the suspension, AAW management previously had warned Stojicevic on numerous occasions about his demeanor and tone. In February 2003, Schneider approached Stojicevic, counseling him to improve his tone and demeanor in dealings with the other employees at AAW. T. at 254-56. Further, AAW placed Stojicevic on notice by issuing a March 28, 2003 performance review that indicated Stojicevic needed to improve his communication skills with other employees due to improper tone. RX 5. Stojicevic was not simply misunderstood in his e-mail. He was well aware that his actions were improper and continued to engage in them.

Even if Stojicevic proved that his tone was proper and merely misunderstood, such evidence alone would not establish that AAW’s interpretation of his e-mails as hostile was discriminatory. It is not sufficient for Stojicevic to establish that the decision to terminate his employment was not “just, or fair, or sensible . . . rather he must show that the explanation is a phony reason.”²⁷ Thus, Stojicevic must show that AAW’s proffered explanations are false and a pretext for discrimination. He has not done so here.

Stojicevic also contends that his e-mail on April 29 was a response to Schneider’s attempts to “blacklist” him through e-mail. CB at 5. He argues that Schneider sent an e-mail claiming that Stojicevic’s calculations on a particular tank were wrong. *Id.* He claims that his calculations were correct according to engineering standards. *Id.* He does not, however, provide any evidence that Schneider believed Stojicevic’s calculations to have been correct, and therefore his e-mail rejecting them was just a pretext for discrimination, nor that he had any discriminatory motive in rejecting the tank size. *Id.*

Stojicevic further contends that he returned to work on May 20, 2003, to meet with a client. CB at 7. He claims that he had a field meeting with a trade representative, which was scheduled a week prior. *Id.* Moreover, he claims he had no chance to cancel the meeting. *Id.* Nevertheless, Stojicevic was indisputably insubordinate, especially in light of the admonition earlier in the day to leave the work site. In any event, even if Stojicevic believed his actions were in AAW’s best interests, he has not carried his

²⁷ *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-038, slip op. at 10 (ARB July 31, 2002)(citing *Kahn v. U.S. Sec’y of Labor*, 14 F.3d 342, 349 (7th Cir. 1994)). *Accord Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000), (“[t]his court does not sit as a super-personnel department and will not second-guess an employer’s decisions”); *Skouby v. The Prudential Ins. Co.*, 130 F.3d 794, 795 (7th Cir. 1997) (same); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-1508 (5th Cir. 1988) (discrimination statute “was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers;” statute cannot protect employees “from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated”).

burden of proving that AAW suspended him in retaliation for protected activity rather than because he insubordinately refused to comply with AAW's suspension.²⁸

As the ALJ found, Stojicevic has not provided any evidence that "the motive behind the adverse employment action" was discriminatory. R. D. & O. at 10. Stojicevic has failed to show that AAW terminated his employment because he engaged in protected activity. Failing to do so, he has not shown a causal link and has failed to prove his case under the SDWA's whistleblower protection provisions.

b. Sarbanes-Oxley - 18 U.S.C.A. § 1514A(a)(1)

The Secretary of Labor has also delegated her authority to issue final agency decisions under the SOX to the ARB.²⁹ Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.³⁰ In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision" ³¹ Therefore, the Board reviews an ALJ's conclusions of law de novo.³²

The legal standard

The employee protection provision of the SOX prohibits employers from retaliating against employees for providing information or assisting in investigations related to securities fraud:

(a) Whistleblower protection for employees of publicly traded companies.--No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge,

²⁸ See n.31 supra.

²⁹ See Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002). See also 29 C.F.R. § 1980.110.

³⁰ See 29 C.F.R. § 1980.110(b).

³¹ 5 U.S.C.A. § 557(b).

³² See *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of 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, 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, 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.³³

SOX actions are governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code (the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, (AIR 21), 49 U.S.C.A. § 42121 (West 2005)).³⁴ To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) the respondent knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in

³³ 18 U.S.C.A. § 1514A(a).

³⁴ 18 U.S.C.A. § 1514A(b)(2)(C).

the unfavorable action.³⁵ The respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.³⁶

Stojicevic was a covered employee of AAW, a corporation governed by Sections 12 and 15(d) of the Securities Exchange Act.³⁷ There is no dispute that he suffered an adverse action when AAW terminated his employment. At issue is whether Stojicevic engaged in protected activity under the SOX.

Protected activity

With respect to the protected activity requirement, Stojicevic must prove by a preponderance of the evidence that he provided information to AAW that he reasonably believed constituted a violation of 18 U.S.C.A., sections 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of Federal law relating to fraud against shareholders.³⁸ Under the SOX, the employee's communications must "definitively and specifically" relate to any of the above listed federal securities laws.³⁹

Stojicevic alleged that "Respondent made financially unsound choices" R. D. & O. at 7. However, the ALJ found that Stojicevic "has not offered any proof that Respondent made false statements or misrepresentations to its shareholders and investors regarding its earnings, such that its conduct constituted fraud." *Id.* The ALJ concluded that Stojicevic "has not shown that he engaged in activity protected under SOX." *Id.*

Stojicevic argues to us that in early April 2003 he complained about financial and technical issues on a large number of projects, which "did not comply with technical [and] engineering standards and law." Complainant's Brief (CB) at 4. Further, he contends that AAW's failure to "alert and inform shareholders, consumers, developers and investors of ... 'complainant's valid technical concerns' does amount to misleading" them. CB at 10.

³⁵ *Getman*, slip op. at 8; see AIR 21, § 42121(a)-(b)(2)(B)(iii)-(iv). See also *Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004).

³⁶ § 42121(a)-(b)(2)(B)(iv); *Peck*, slip op. at 10.

³⁷ 15 U.S.C.A. § 78l (West 2007).

³⁸ *Welch*, ARB No. 05-064, slip op. at 8.

³⁹ *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at 17 (ARB Sept. 29, 2006).

Substantial evidence supports the ALJ's finding that Stojicevic did not allege fraud since he does not argue before the Board any specific instances of fraud or false statements. Instead, Stojicevic argues that the ALJ erred in his legal conclusion, since AAW's failure to inform the stockholders of Stojicevic's complaints about mismanagement and violations of SDWA and local regulations constituted misrepresentations. However, as we held in *Harvey v. Home Depot*:

Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX. To bring himself under the protection of the act, an employee's complaint must be directly related to the listed categories of fraud or securities violations. 18 U.S.C.A. § 1514A(a); 29 C.F.R. §§ 1980.104(b), 1980.109(a). See *Getman*, slip op. at 9-10 (requiring that the employee articulate the nature of her concern). A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough.⁴⁰

At most in this case, Stojicevic demonstrated that AAW's poor management could adversely affect its financial condition. Accordingly, since Stojicevic did not demonstrate that AAW defrauded, or attempted to defraud, its investors, or violated any rule or regulation of the SEC, he has not shown that he engaged in protected activity under the SOX.

II. Other Legal Concerns

In his brief to the ARB, Stojicevic lists complaints of other alleged misdoings by his employer, AAW. He claims that AAW violated the "immigration act" and that there was a "strong indication of obstruction of justice" on the part of AAW. CB at 12. However, these issues are outside the scope of the ARB's delegated authority to issue final agency decisions.⁴¹

⁴⁰ *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, 115; ALJ Nos. 2004-SOX-020, 36, slip op. at 14 (ARB June 2, 2006).

⁴¹ See Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board).

CONCLUSION

Stojicevic bore the burden of proving intentional discrimination by a preponderance of the evidence. We find that he has failed to do so for the reasons stated above. Accordingly, we **AFFIRM** the ALJ's recommendation and **DENY** Stojicevic's SDWA and SOX complaints.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge