



In the Matter of:

VELCO GIUROVICI,

ARB CASE NO. 07-027

COMPLAINANT,

ALJ CASE NO. 2006-SOX-107

v.

DATE: September 30, 2008

EQUINIX, INCORPORATED,

RESPONDENT.

Appearances:

For the Complainant:

Velco Giurovici, *pro se*, Munster, Indiana

For the Respondent:

Gerald L. Maatman, Jr., Esq., Michael A. Cox, Esq., Chicago, Illinois

FINAL DECISION AND ORDER

Velco Giurovici filed a complaint against his former employer, Equinix, Inc., under the whistleblower protection provision of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (West Supp. 2006), and its implementing regulations at 29 C.F.R. Part 1980 (2007). The Department of Labor's Occupational Safety and Health Administration (OSHA) dismissed the complaint without an investigation. Giurovici objected to OSHA's findings and requested review by an Administrative Law Judge (ALJ). The ALJ dismissed Giurovici's complaint and he appealed to the Administrative Review Board (ARB). We affirm.

BACKGROUND

In his Recommended Decision and Order (R. D. & O.),¹ the ALJ accurately recited the relevant facts, which are generally not disputed. We summarize. Velco Giurovici began work for Equinix as an IBX site engineer at its data center in Chicago, Illinois on October 6, 2000.

¹ The following abbreviations will be used: Complainant's exhibit, CX; Respondent's exhibit, RX; and hearing transcript, TR.

The company supplies internet exchange services and a guaranteed power supply for its customers' computer systems.

Initially, Giurovici's work was excellent, but in 2001 he received an oral warning for failing to record his daily duties in a logbook as requested by his supervisor. RX 2. Giurovici received a written warning in August 2003 noting that his performance was below the acceptable level. RX 4. His supervisor, James Amedeo, wanted to fire him, but corporate managers intervened. TR at 325-28. Giurovici's performance appraisals for 2003 and 2004 were good overall, but he received a "needs improvement" rating in teamwork for both years. And his "excellent" ratings in accountability, leadership, and communication had slipped to "good." CX 11.

On June 24, 2005, a fire at the ConEd substation, which provided electricity to the Equinix data center, caused a power failure. RX 11. Equinix's automatic control system failed, causing generator interruptions as the engineers, including Giurovici, attempted to operate the system manually and keep power flowing to Equinix customers. *Id.*

An Incident Follow-up Action Report of the subsequent investigation was issued to customers on July 1, 2005. Respondent's Exhibit (RX) 11. The report stated that intermittent short circuits occurred in two of the generators, due to insulation failures. *Id.* Corrective measures were proposed, including more frequent inspections and some retraining of engineers in the manual operation of the generators during emergencies. *Id.*

Giurovici did not agree with some of the report's conclusions and conveyed his concerns to David Pickut, Vice President for Operations and Engineering, who headed the investigation. Pickut replied by e-mail dated July 6, 2005, asking Giurovici for details because there were "still some holes" in the sequence of the generators going off-line. CX 1. Pickut asked Giurovici for his assessment of what went "wrong." *Id.*

Giurovici e-mailed Pickut the data he extracted from the computer log of the generator operations. CX 1. He stated that insulation on the jumper cable from the ground bar of one generator had melted and touched a jumper cable, creating the short circuit. *Id.* He added that a May 11, 2005 software program change, which had not been tested, had proven to be inadequate for the generator load. *Id.*

Giurovici testified that the incident report was a "bunch of marketing strategy mumbo jumbo" designed "to save face for the company." TR at 87. He added that he kept his mouth shut about the "untrue facts" in the report because he did not want to hurt the company's reputation and its share prices. TR at 97-98, 101.

Tier1Research, a company that provides news about technology, issued a report on the situation, noting that the outage caused significant rebooting, but that Equinix had resolved all customer problems by the next day. CX 8. The company added that no material customer fallout or expansion delays would result from the outage, that customers would receive credits, and that the outage would not affect Equinix's projected profit for the quarter. *Id.*; TR at 158. The report concluded: "All's clear" for Equinix. CX 8.

On March 14, 2006, Giurovici received another “good” overall performance rating for 2005, but a “needs improvement” in three categories, teamwork, communication, and leadership. RX 6. The appraisal noted that he was “excellent” in job knowledge, but was not always willing to offer information that might help his fellow employees. The appraisal added that Giurovici was reluctant to take control of a situation and show leadership. *Id.*

After consulting with Equinix’s personnel department, Amedeo sent Giurovici a counseling memorandum on April 7, 2006. RX 8. The memo specified work deficiencies in the three areas and noted, “for you to decide not to do work and not tell me is an act of insubordination and makes you subject to immediate termination.” The memo also warned: “if your teamwork does not immediately improve,” you can be terminated.

That same day, Giurovici called Equinix’s headquarters in California and informed a vice president that he wanted a face-to-face meeting to discuss documents concerning the 2005 power outage. TR at 152-53, 204. Giurovici was asked to send the documents by facsimile or mail, but stated that that he “wouldn’t get anywhere” if he sent all the evidence he had to California. TR at 153. Giurovici testified that the documents “created” by Amedeo regarding the outage were “falsely reported to customers and shareholders via e-mail.” TR at 208-09. Giurovici added that he never showed the documents to corporate headquarters because “they didn’t want to see” them. TR at 210.

Personnel manager Erica Van Zandt later spoke with Giurovici about his allegation that Amedeo was harassing him with “piddly stuff” in retaliation for disagreeing with the 2005 investigation report. RX 10. Van Zandt’s notes reflect Giurovici’s disagreements with Amedeo about three issues- - the April 7, 2006 counseling memo, work requests from a fellow engineer who was temporarily in charge, and his apprehension that he would be fired. *Id.*

Van Zandt testified that Giurovici was “very upset” with Amedeo. TR at 425. She asked Giurovici to mail or fax copies of the documents “he needed to show somebody” so that they could set up a call and discuss them, but he refused. TR at 426. Van Zandt added that she had no “sense” of the topic in the documents and that Giurovici would not give her any information. *Id.*

In an effort to help Giurovici improve his teamwork, Amedeo asked him to conduct training for his co-workers on the generators, parallel switchgear, and fire systems. RX 9. Giurovici did the latter training, but failed to provide a training binder and sign-in sheet, as Amedeo had asked. RX 10. Amedeo reminded Giurovici about the training assignments twice, and on April 18, 2006, informed his manager, Marion Madeja, that Giurovici had failed to respond to his request about generator training. RX 9. Amedeo stated that while Giurovici has the knowledge to train others and thereby improve his performance ratings, “he has again isolated himself from the team.”

Madeja testified that Giurovici's work performance did not improve, despite further counseling. TR at 263-66. In addition, Giurovici resisted following directions from a co-worker who had a lead position while Amedeo was on vacation. TR at 340-08. Amedeo recommended

that Giurovici be fired, but Madeja made the final decision on April 27, 2006, based on Giurovici's insubordination and unacceptable performance in teamwork and communication.

Giurovici filed a claim on May 11, 2006, which OSHA dismissed on June 14, 2006. Giurovici objected to OSHA's findings and requested a hearing, which was held on September 12-13, 2006. The ALJ dismissed Giurovici's complaint, and he appealed.

JURISDICTION AND STANDARD OF REVIEW

The ARB's jurisdiction to review the ALJ's decision is set out in Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The ARB reviews an ALJ's findings of fact in SOX cases under the substantial evidence standard. 20 C.F.R. § 1980.110(c). However, the ARB exercises de novo review of the ALJ's conclusions of law. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006).

ISSUE

The dispositive issue is whether Giurovici engaged in activity that the SOX protects. We also consider, as did the ALJ, whether, if Giurovici had proven that his protected activity was a contributing factor to his discharge, Equinix established by clear and convincing evidence that it would have fired Giurovici absent any protected activity.

DISCUSSION

Title 806 of the SOX prohibits covered employers from retaliating against employees who provide information or assist in investigations related to listed categories of fraud or securities violations. 18 U.S.C.A. § 1514A. That provision states:

(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, 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 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud],

or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

- (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.

18 U.S.C.A. § 1514A.

Thus, the SOX protects employees who provide information to a covered employer regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (fraud “in connection” with “any security” or the “purchase or sale of any security”), any rule or regulation of the Securities and Exchange Commission (SEC) (*see, e.g.*, 17 C.F.R. Part 210 (2007), Form and Content of the Requirements for Financial Statements), or any provision of federal law relating to fraud against shareholders.

To be protected under the SOX, the whistleblower must ordinarily complain about a material misstatement of fact (or omission) concerning a corporation’s financial condition on which an investor would reasonably rely. The protected complaint must “definitively and specifically” relate to the SOX subject matter, be specific enough to permit compliance, and support a complainant’s reasonable belief. *Smith v. Hewlett Packard*, ARB No. 06-064, ALJ Nos. 2005-SOX-088-092, slip op. at 9 (ARB Apr. 29, 2008); *see Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, 115; ALJ Nos. 2004-SOX-020, -036, slip op. at 14-15 (ARB June 2, 2006).

Complaints filed under the SOX are governed by the legal burdens of proof set forth in 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 Supp. 2005). 18 U.S.C.A. § 1514A(b)(2)(C). To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the

unfavorable action. *Harvey* slip op. at 9-10. See AIR 21, § 42121(a)-(b)(2)(B)(iv). See also *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004).

If the complainant establishes by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action, the respondent can still avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at 16 (ARB Sept. 29, 2006); *Harvey*, slip op. at 10. See 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv). See also *Peck*, slip op. at 10.

Giurovici failed to prove that he engaged in protected activity

Initially, the ALJ accepted the parties' stipulations to coverage under the SOX and Giurovici's status as a covered employee. R. D. & O. at 2.

In addition to detailing his work history, Giurovici's complaint stated: "I am charging Equinix of fraud under section 1343." He alleged that Equinix created the problem that caused the 2005 power failure and then reported false information to shareholders. Giurovici asserted that after his performance evaluation on April 7, 2006, he contacted headquarters and offered to provide documents related to the alleged fraud but was turned down and then fired 20 days later. Giurovici's Complaint (unnumbered).

The ALJ found that Giurovici's assertions in his complaint may have amounted to a reasonable belief that Equinix violated section 302 of the SOX, which requires corporate officers to certify that corporate statements contain no untrue statements of material fact and fairly present in all material aspects the financial condition of the corporation. 15 U.S.C.A. § 7241(a); R. D. & O. at 14. The ALJ concluded that Giurovici offered no evidence to show that any factual inaccuracies in the 2005 report were material to the representation of Equinix's financial condition. Moreover, Giurovici's allegations "did not even approximate any of the basic elements of a claim of securities fraud." *Id.*

The relevant inquiry is not what Giurovici alleged in his OSHA complaint, but what he actually communicated about alleged fraud in financial matters prior to his April 27, 2006 discharge. *Platone*, slip op. at 17. Giurovici did not provide information to, or assist in an investigation by, a federal regulatory or law enforcement agency, or a member or committee of Congress. 18 U.S.C.A. § 1514A(a)(1)(A), (B). He did not participate in any proceeding relating to an alleged violation under sections 1341, 1343, 1344, or 1348 or any SEC rule or regulation, or any provision of federal law relating to fraud against shareholders. 18 U.S.C.A. § 1514A(a)(2). Therefore, Giurovici must establish that he provided information to his employer or assisted in an investigation, prior to his April 27, 2006 discharge, regarding conduct that he reasonably believed constituted mail, wire, radio, TV, bank, or securities fraud, or violated any SEC rule or regulation, or any provision of federal law relating to fraud against shareholders. 18 U.S.C.A. § 1514A(a)(1)(C).

Giurovici's communications with Pickut about the 2005 power outage report revealed no reference to any financial matters. Giurovici was concerned that the programming of the generators had been changed without his knowledge and that Pickut did not have an accurate picture of the power interruptions. Giurovici did not convey to Pickut in 2005 or at any time thereafter that his disagreements with the conclusions in the 2005 report² meant that Equinix was engaged in securities fraud or had violated a SEC rule or regulation or any federal law relating to fraud against shareholders. Nothing in the record shows that Giurovici complained to Pickut or his supervisors, Amedeo and Madeja, prior to his discharge, that the 2005 report issued by Equinix would directly or specifically implicate the listed categories of fraud or securities violations under the SOX.

Even if Giurovici's theories were correct, the record contains no evidence showing that Giurovici had a reasonable belief, or indeed any belief at all, that the information in the 2005 report would have an adverse effect on Equinix's shareholders or its financial condition. Giurovici's testimony that the 2005 report was designed to "save face" for Equinix is irrelevant to Equinix's financial condition. Giurovici's disagreements with the report's conclusions are not in themselves mail, wire, radio, TV, or bank fraud and have no bearing on financial matters.

Giurovici also claimed that his offer to corporate headquarters in April 2006 to reveal documents allegedly related to security fraud constituted protected activity. TR at 152-53. But Giurovici admitted that he never submitted these documents to Van Zandt or anyone else at Equinix. TR at 210. Van Zandt noted that Giurovici kept mentioning that he had "important documentation that he needed to show me," but he refused to mail or fax the documents and would not divulge their contents. RX 10. None of the documents Giurovici submitted to the ALJ as evidence contains any reference to financial matters whatsoever. See CX 1, 3, 5, 8, 10-12, and 14; TR at 177-84.

Thus, Giurovici did not raise specific concerns about corporate fraud or securities violations with his supervisors prior to his discharge. Only after he was fired did he allege that Pickut included inaccurate information in the 2005 report to avoid harm to Equinix's reputation and to ensure that the value of stock options owned by him and other managers would not suffer. TR at 97-100; Complainant's Brief at 11.

Such speculative allegations after Giurovici's discharge are insufficient to constitute protected activity under the SOX. See *Smith*, slip op. at 11 (complainant's speculation does not constitute a complaint relating to any instance of corporate misrepresentation or fraud against shareholders). See also *Harvey*, slip op. at 15 ("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."). Thus, Giurovici has failed to establish that he engaged in protected activity, one of the required elements of a SOX complaint. Therefore, we dismiss his complaint.

² The report itself contains no financial information whatsoever - it is a technical explanation of what happened on June 24, 2005, and what corrective measures would be implemented to ensure no repeat of the incident. RX 11.

Equinix established that it would have fired Giurovici in any event

We have concluded, as did the ALJ, that Giurovici's complaint must be dismissed. Even were we to determine that Giurovici engaged in protected activity and met his burden of proof to establish that his protected activity was at least a contributing factor in his discharge, Equinix could still avoid liability by demonstrating by clear and convincing evidence that it would have fired Giurovici absent any protected activity.

The ALJ concluded that Equinix's evidence of Giurovici's deteriorating job performance and insubordination established that it would have fired Giurovici even if he had engaged in protected activity. R. D. & O. at 17. We agree.

Giurovici claimed that Amedeo harassed him with e-mails and issued him a warning on "piddly [work] stuff" in retaliation for Giurovici's reporting to Pickut that Amedeo changed the generator programming in 2005 and failed to test it prior to the outage. Complainant's Brief at 11. Giurovici also disputed the reasons that Equinix provided for firing him. *Id.* at 12-13.

However, the record shows that on his March 14, 2006 performance appraisal for 2005, Giurovici received a 2.67, which was barely enough to qualify for an overall "good" rating. RX 6. Three categories - teamwork, leadership, and communication - needed improvement, and Amedeo commented that Giurovici should concentrate on being a team player by helping his co-workers and taking charge of projects. *Id.*; see RX 5 (earlier Amedeo had issued a "last warning" to Giurovici about documenting his shift work in the logbook).

In a series of e-mails following up on the performance appraisal, Amedeo outlined a weekly training program for Giurovici to conduct for the new engineers to help him improve his leadership and communication skills. RX 7. Amedeo also asked Giurovici to prepare instructional binders and document who took and completed the training. *Id.*

On April 7, 2006, Amedeo sent Giurovici a written warning that his "lack of teamwork, leadership, and communication [had] become a deterrent to Equinix" since his performance review. RX 8. The memo noted his refusal to carry out assigned tasks, document his daily work, and complete the training program. Referring to Equinix's employment policy, RX 4, Amedeo stated: "[F]or you to decide not to do work and not tell me is an act of insubordination and makes you subject to immediate termination." RX 8.

In subsequent e-mails to Giurovici, Amedeo inquired about the training but received no response. RX 11. In one e-mail, Amedeo stated that Giurovici ignored Amedeo's request for a training binder, was not prepared to conduct training on generator maintenance, and "was just too resistive to be of value to the newer guys." RX 9.

Amedeo testified that Giurovici had had warnings throughout the years about the need to describe in the logbook what tasks he had accomplished during his night shifts. TR at 339-41. Amedeo stated that Giurovici's negative reactions to the April 7 memo confirmed his conclusion

that the situation “could not go on” and something would have to be done. TR at 344-45. After consulting with the personnel department and his supervisor Madeja, Amedeo fired Giurovici during a telephone conference on April 27, 2006. TR at 345-48.

Giurovici’s own testimony demonstrates why he was fired. Giurovici stated that he worked nights, and if no equipment went down, there was nothing to write in the logbook or put in an e-mail; besides, it was a small shop, and the night shift workers talked with the day engineers before going home, so there was no lack of communication. TR at 133-34, 142, 144. He added that he did not include the weather radio in preventive maintenance as Amedeo had requested because that “didn’t make any sense.” TR at 135.

Further, Giurovici stated that he would not take orders from another engineer, even though Amedeo, on vacation, had asked that worker to take charge. TR at 138-40. As for training, Giurovici testified that his refusal to complete the training was based on his “poor” performance appraisal - “if I’m that bad, why would I go and train” another. TR at 143. Finally, Giurovici stated that his annual performance reviews worsened because he “could not put up with Jim’s demands, do what I say because I’m your boss.” TR at 146.

In sum, Equinix adduced clear and convincing evidence that it would have fired Giurovici because of his deteriorating performance, demonstrated insubordination, and refusal to participate in teamwork. Accordingly, we affirm the ALJ’s determination.

CONCLUSION

We agree with the ALJ’s conclusion that Giurovici did not prove that he engaged in SOX-protected activity. Even if Giurovici had met his burden of proof, we agree with the ALJ’s determination that Equinix would have fired Giurovici absent any protected activity. Because Giurovici failed to establish a required element of his case, we **AFFIRM** the ALJ’s recommended decision and **DENY** Giurovici’s complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge