

**U.S. Department of Labor**

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**Issue Date: 03 February 2010**

CASE NO.: **2010-SOX-00003**

In the Matter of

**KEITH PRIOLEAU,**  
Complainant

v.

**SIKORSKY AIRCRAFT CORP.,**  
Respondent

*Appearances:*

Keith Prioleau,  
Stratford, CT, *pro se*

David C. Salazar-Austin, Esq. & Albert Zakarian, Esq. (Day Pitney LLP),  
Hartford, CT, for Respondent

Before: Daniel F. Sutton, Administrative Law Judge

**DECISION AND ORDER GRANTING SUMMARY DECISION  
AND DISMISSING COMPLAINT**

**I. Introduction**

The above matter arises from a Complaint alleging a violation of the employee protection provisions under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(a)(1) (hereinafter “Sarbanes-Oxley”). Keith Prioleau (the “Complainant”) filed a Complaint with the Occupational Safety and Health Administration of the U.S. Department of Labor (“OSHA”) alleging he was terminated by Sikorsky Aircraft Corporation (“Sikorsky”) in retaliation for filing a notice about a purported conflict between Sikorsky’s Legal Hold Notices and its automatic e-mail deletion scripts. OSHA denied the Complainant’s Complaint, and he thereafter filed his notice of objection with the Department of Labor’s Chief Administrative Law Judge (“ALJ”).

This matter is before the ALJ upon Sikorsky’s motion for summary decision pursuant to 29 C.F.R. §§ 18.40-18.41. Sikorsky’s two main arguments are that: Complainant did not engage in protected activity; and Sikorsky is not a publicly traded company and therefore is not subject to 18 U.S.C. § 1514A. Upon consideration of the matter, the ALJ has concluded for the reasons

set forth below that no genuine issue of material fact exists; Complainant did not engage in protected activity. As there is no issue of fact for trial and Sikorsky is entitled to judgment as a matter of law, the ALJ concludes that Sikorsky is entitled to summary decision dismissing Complainant's Complaint alleging that his employment was terminated in violation of Sarbanes-Oxley.

## **II. Procedural History**

The Complainant filed a Complaint with OSHA on September 14, 2008. Whistleblower Complaint of Retaliation Under the Sarbanes-Oxley Act 2002 ("Complaint"), at 1. By letter dated September 25, 2009, the Secretary of Labor, acting through her agent, the Regional Administrator for OSHA, Region I, dismissed the Complaint, stating that "Complainant has not engaged in protected activity." OSHA Dismissal Letter, Sept. 25, 2009, at 2-3. In a letter dated October 24, 2009, the Complainant filed his notice of objection and request for a *de novo* review of the claims by an ALJ pursuant to 29 C.F.R. § 1980.106. Sarbanes-Oxley Whistleblower Complaint of Retaliation dated Oct. 24, 2009 ("Notice of Objection"), at 1-2.

On October 29, 2009, the hearing was set for 9:00 a.m. on Friday, January 8, 2010 in Hartford, CT. Notice of Assignment and Hearing and Pre-Hearing Order dated Oct. 29, 2009, at 1. On November 4, 2009, Anthony M. Small sent a letter to the ALJ making an appearance for Sikorsky. Small Appearance Letter dated Nov. 4, 2009. On November 18, 2009 Albert Zakarian and David C. Salazar-Austin from Day Pitney LLP made appearances for Sikorsky and filed a motion for an extension of time; Sikorsky's attorneys requested ten additional days to file a summary decision motion. Respondent's Motion for Extension of Time. In an order issued the next day, the ALJ allowed the motion for extension of time to file a summary decision motion; and Sikorsky was given until November 30, 2009 to file the motion. Order dated Nov. 19, 2009. On November 24, 2009 the Complainant filed an unopposed "Motion for Continuance" to continue the hearing date. Complainant's Motion for Continuance dated Nov. 24, 2009, at 1-2. In an order issued on November 30, 2009, the ALJ allowed the continuance and gave the parties ten days from the date of the order to file an agreed schedule of pre-hearing activities and proposed alternate hearing dates. Order dated Nov. 30, 2009. The Complainant filed the "Complainant's and Respondent's New Jointly Agreed Upon Hearing Schedule" with the ALJ on December 9, 2009, wherein the parties proposed that the hearing take place on March 9, 2010. In an order, the ALJ modified the schedule and set the hearing date for March 9, 2010 in Hartford, CT. Order Rescheduling Hearing and Extending Pre-Hearing Deadlines dated Dec. 16, 2009.

On November 30, 2009, Sikorsky filed its motion for summary decision, in which it asserted that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Respondent's Motion for Summary Decision ("Resp. Motion"). The Complainant filed a response to Sikorsky's motion on December 9, 2009 with attached affidavits. Affidavit and Reply Motion to Respondent's Motion for Summary Decision ("Compl. Reply").

## **III. Factual Background**

Sikorsky, a subsidiary of United Technologies Corporation ("UTC"), has a government-funded contract called the CH-53K Heavy Lift Replacement (HLR) Helicopter System

Development Design (SDD) Program. Complaint, at 1-2. The Complainant was a systems engineer assigned to work on that program. Complaint, at 2.

#### A. Sikorsky's Corporate Structure

The parties agree that:

Respondent Sikorsky is not a company that falls within the meaning of 18 U.S.C. § 1514A in that it is neither a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) nor required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)). Rather, Respondent is a Wholly Owned Subsidiary of United Technologies Corporation (UTC), which is a company within the meaning of 18 U.S.C.

Notice of Objection, at 2; Resp. Motion, at 2. Although Complainant admits that Sikorsky is not a company for the purpose of 18 U.S.C. § 1514A, he

contends by virtue of Respondent being integrated with its parent company it too will be covered under SOX, because the two companies share a unity of interest, observe the same corporate formalities such as shareholder meetings, corporate policy, standards, guidelines, commingling of funds, assets and services.

Notice of Objection, at 2-3. In its motion for summary decision, Sikorsky emphasizes that the Complainant has neither alleged nor “produced any evidence to suggest that UTC made or influenced the decision to terminate Complainant; that UTC was aware of the decision to terminate Complainant, or of his purported activity; or even that UTC generally controls Sikorsky’s employment-related decisions.” Resp. Motion, at 6-7.

In his response to Sikorsky’s summary decision motion, the Complainant offers scant evidence suggesting that UTC was involved in the decision to terminate Complainant. He points to the fact that after the Complaint was filed with OSHA, the senior in-house counsel at Sikorsky filed an appearance in the case. Compl. Reply, at 3. The Complainant argues that “SAC and UTC employees can perform their job duties and responsibility at either company interchangeably,” Compl. Reply, at 3, because the in-house counsel wrote “I am making an appearance for the company. Kindly address any further correspondence to Sikorsky and/or UTC to me . . . .” Compl. Reply, at A1.

The Complainant does offer some evidence that Sikorsky is “integrated [with] and controlled” by UTC. Compl. Reply, at 5. He states that in 2007, both Sikorsky and UTC grandfathered him “as a 10 year employee based on prior work experience at other UTC divisions.” Compl. Reply, at 3. Complainant alleges that UTC hired Towers Perrin, a company specializing in human capital and risk management, “to determine how many years the Complainant should be grandfathered for his work at different UTC business units” and that they made this decision while he was working for Sikorsky. Compl. Reply, at 3-4. Complainant also

avers that UTC paid for his Master's Program classes at the University of Connecticut, and that any time he needed training he would visit the UTC Business Training Portal to sign up for and take the training. Compl. Reply, at 4. He asserts that the Data Retention Policy to which Sikorsky adheres is a UTC policy. Compl. Reply, at 4. The Complainant also states that while he was employed as a computer scientist for Computer Sciences Corporation<sup>1</sup> ("CSC"), he "was part of a team that aided in the design[] of UTC entire computer infrastructure with a team of UTC employees called UTC Shared Services[, and] [t]he mission . . . was to consolidate and integrate all of UTC business units Information Technology (IT) into the central control of UTC Shared Services." Compl. Reply, at 4. Lastly, the Complainant states that "it [is] very difficult to comprehend the Respondent's claim that Sikorsky is not well integrated and controlled by UTC at a level that pierces the corporate veil." Compl. Reply, at 5.

#### B. Complainant's Alleged Protected Activity

Complainant alleges that he and other salaried employees received an e-mail on June 2, 2009 distributed by Kevin Lenehan, the litigation director of Sikorsky's legal department. Complaint, at 2-3; Notice of Objection, at 3; Resp. Motion, at 2. According to the Complainant, the e-mail stated that "[t]he Legal Department issues a legal hold notice when it determines Sikorsky needs to preserve electronically stored information (ESI), documents, and/or tangible things that may be needed in connection with a pending or reasonably anticipated litigation, government or internal investigation, or subpoena." Complaint, at 2-3; Resp. Motion, at 2. Complainant also alleges that he received an e-mail from CSC on June 6, 2009 warning "Complainant [and other Sikorsky employees] that in compliance with the UTC Retention Policy, a computer application (script) was running that would automatically place email older than 30 days in a system cleanup folder where it would be automatically deleted after an additional 21 days." Notice of Objection, at 3-4; Complaint, at 3; Resp. Motion, at 2-3. On June 8, the Complainant electronically submitted his report of this problem and briefly described it as "Conflict between Legal Hold Notice and CSC scripts." Resp. Motion, at Tab 2, page 1. The report warned of a possible violation and conflict between Sikorsky's e-mail legal hold policy and its automatic e-mail deletion procedures. Complaint, at 2-3. The report read as follows:

A process need to be in place for when a Compliance with Legal Hold Notification is sent to employees by the Sikorsky legal department to quote preserve electronically stored information ESI, documents and or tangible things that may be needed in connection with a pending or reasonably anticipated litigation, government or internal investigation, or subpoena. For starters, this notification needs to be more specific in regards to what an employee should be preserving, for how long, what formats for preservation are appropriate, and a slew of other details I can not begin to touch upon due to current ACE charging constraints.

Moreover, an apparent conflict with this Legal Hold Notification exist with UTC Corporate Policy Manual in regards to the short term retention of ESI in that the Legal Hold Notice in one hand tells employees we must preserve ESI but on the

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<sup>1</sup> According to the Complainant, CSC "is the UTC sub-contractor delivering computer support services to UTC and all of its divisions." Complaint, at 3.

other hand the Computer Sciences Corporation CSC Help Desk automatically sends out a notice to employees on a biweekly bases that retaining ESI for longer than 30 days is prohibited. As a matter of fact, automatic scripts run on employees computers that delete ESI older than 30 days old. This conflict creates a condition where employees attempting to comply with the Legal Hold Notice may actually violate the policy because of the automatic retention scripts deletes preservation attempts.

Furthermore, the Legal Hold Notice does not appear to be sent to sub-contractors. This may or may not be an issue but I thought I should mention it since I witnessed it.

Resp. Motion, at Tab 2, page 3.

The Complainant states that he was out on authorized leave beginning on June 9, 2009, the day after he wrote this report. Notice of Objection, at 5. The Complainant alleges that his employment was terminated two hours after his arrival back to work on June 23, 2009, and he alleges that his internal report was the basis for Sikorsky's retaliatory termination of his employment. *See* Notice of Objection, at 5-6; Complaint, at 8; *see also generally* Resp. Motion, at Tab 3 (Sikorsky Aircraft Corporation Separation Agreement and General Release ("Separation agreement")).

In his Complaint to OSHA, the Complainant states that he "was seriously alarmed and felt that this SOX violation had to be immediately reported to management." Complaint, at 3. In essence,

[t]he Complainant was seriously concerned that the Script made it difficult for employees to comply with a Legal Hold Notice and could potentially inadvertently delete the ESI (the Conflict) during shareholders litigation, leading to fraud. Moreover, this Conflict would weaken the effectiveness of the company's internal controls in violation of the Securities and Exchange Act of 1934 by violating PCAOB [Public Company Accounting Oversight Board] rules standard AS5 (although not stated in these exact words).

Notice of Objection, at 4. In the Complainant's Notice of Objection to the OSHA findings, he cites section 3 of Sarbanes-Oxley, which states:

A violation by any person of this Act, any rule or regulation of the [Securities and Exchange Commission] issued under this Act, or any rule of the [Public Company Accounting Oversight Board] shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.

15 U.S.C. § 7202(b)(1). Then the Complainant cites Auditing Standard (“AS”) No. 5 of the Public Company Accounting Oversight Board (“PCAOB”), which states:

Effective internal control over financial reporting provides reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes. If one or more **material weaknesses** exist, the company’s internal control over financial reporting cannot be considered effective.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, AUDITING STANDARD NO. 5 – AN AUDIT OF INTERNAL CONTROL OVER FINANCIAL REPORTING THAT IS INTEGRATED WITH AN AUDIT OF FINANCIAL STATEMENTS para. 2 (2007), [http://www.pcaobus.org/Rules/Rules\\_of\\_the\\_Board/Auditing\\_Standard\\_5.pdf](http://www.pcaobus.org/Rules/Rules_of_the_Board/Auditing_Standard_5.pdf) [hereinafter PCAOB AS No. 5] (footnotes omitted, emphasis in original). The Complainant also points to Item 308 of Regulation S-K, 17 C.F.R. § 229.308, which requires management to report on the “registrant’s internal control over financial reporting.” Among other things, the regulation requires that this report contain the following:

Management’s assessment of the effectiveness of the registrant’s internal control over financial reporting as of the end of the registrant’s most recent fiscal year, including a statement as to whether or not internal control over financial reporting is effective. This discussion must include disclosure of any material weakness in the registrant’s internal control over financial reporting identified by management. Management is not permitted to conclude that the registrant’s internal control over financial reporting is effective if there are one or more material weaknesses in the registrant’s internal control over financial reporting.

*Id.* § 229.308(a)(3). Complainant alleges that

[b]y reporting to management the conflict between Sikorsky’s Legal Hold Notice, CSC background email deleting computer Script, and UTC’s 30 day Records Retention Policy, [he] was reporting a ‘material weakness’ in Respondent’s internal controls; which effectively resulted in an ineffective financial reporting mechanism to Respondent financial reporting system in violation of section 404 of the SOX Act.

Notice of Objection, at 6-7. Complainant reiterates that section 3 of Sarbanes-Oxley states that a violation of PCAOB AS No. 5 is a violation of Sarbanes-Oxley. *See* 15 U.S.C. § 7202(b)(1). In his Notice of Objection, the Complainant admits that “[m]aybe [he] should have used a different word choice other than the word ‘conflict’ and used the word ‘fraud’ in his internal report . . . .” instead. Notice of Objection, at 8. He states that the “SEC violation” that Sikorsky committed was “[t]he internal controls weakness or break-down.” Notice of Objection, at 8; *see also* PCAOB AS No. 5 (“If one or more material weaknesses exist, the company’s internal control over financial reporting cannot be considered effective.”). In other words, he alleges that the failure to have effective internal control over financial reporting, as PCAOB AS No. 5 requires, is a violation—via section 3—of Sarbanes-Oxley. *See* 15 U.S.C. § 7202(b)(1) (“A violation . . .

of . . . any rule of the [Public Company Accounting Oversight Board] shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934.”). The Complainant alleges that “the company’s internal control over financial reporting cannot be considered effective” because “[t]he automatic Script doesn’t know the difference between records pertinent to SOX reporting and non-pertinent records.” Notice of Objection, at 10. He further states that due to the fact that the employees are busy and the script will delete “anything older than 51 days,” the employees “may not get a chance to police their email folders to ensure the automatic script is not deleting relevant” records under Sarbanes-Oxley. Notice of Objection, at 10.<sup>2</sup>

#### IV. Discussion, Findings, and Conclusions

##### A. Availability of Summary Decision

The regulations implementing the Sarbanes-Oxley employee protection provisions state that “[e]xcept as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, 29 CFR part 18.” 29 C.F.R. § 24.107(a). 29 C.F.R. § 18.40 contains a summary decision procedure which is applicable in administrative proceedings conducted under Sarbanes-Oxley. *Friday v. Northwest Airlines, Inc.*, USDOL/OALJ Reporter, ARB No. 03-132, ALJ Nos. 2003-AIR-00019 & 2003-AIR-00020 at 3-4 (ARB Jul. 29, 2005), available at 2005 WL 1827745, at \*2-3.

The OALJ summary decision rule provides that “[a]ny party may . . . move with or without supporting affidavits for a summary decision on all or any part of the proceeding.” 29 C.F.R. § 18.40(a). “[An] administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40(d). A “material fact” is one whose existence affects the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A “genuine issue” exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party,” *Anderson* at 248, “drawing all reasonable inferences in favor of that party.” *Williams v. Utica College of Syracuse University*, 453 F.3d 112, 116 (2d Cir. 2006) (citing *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995)). “The burden is on the moving party ‘to demonstrate the absence of any material factual issue genuinely in dispute.’” *American Intern. Group, Inc. v. London American Intern. Corp. Ltd.*, 664 F.2d 348, 351 (2d Cir. 1981) (quoting *Heyman v. Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975)). When the party moving for summary judgment does not bear the ultimate burden of proof at trial, that party “need not prove a negative when it moves for summary judgment on an issue that the [nonmoving party] must prove at trial. It need only point to an absence of proof on [the nonmoving party’s] part, and, at that point, [the nonmoving party] must ‘designate specific facts showing that there is a genuine issue for trial.’” *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 111 (2d Cir. 2001) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). “Only

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<sup>2</sup> The Complainant also argues that Sarbanes-Oxley “explicitly states that certain types of records must be retained for minimum periods and that a failure to appropriately archive information required by regulators under the Act can have serious consequences,” but he does not cite a statute showing that this is a violation. Notice of Objection, at 11.

when reasonable minds could not differ as to the import of the evidence is summary judgment proper.” *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991).

Sikorsky raises two issues in support of its motion for summary decision. First, Sikorsky argues that it is not a covered employer because it is a non-publicly traded company; second, it argues that the Complainant did not engage in protected activity as defined by Sarbanes-Oxley. Resp. Motion, at 5, 8.

#### B. Protection Under Sarbanes-Oxley

Section 806 of Sarbanes-Oxley offers protection for employees of publicly traded companies who provide information to a covered employer or a Federal Agency or Congress relating to alleged violations of mail fraud (18 U.S.C. § 1341), fraud by wire, radio, or television (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344), securities fraud (18 U.S.C. § 1348), rules and regulations of the Securities and Exchange Commission, and any other provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A. *See also Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 07-021-22, ALJ No. 2004-SOX-00011 at 5-7 (ARB Aug. 31, 2009) [hereinafter *Klopfenstein II*].

Section 806 of Sarbanes-Oxley states in relevant part:

(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. § 781), 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 or conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 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

(2) to file, cause to be filed . . . 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. § 1514A. The Congressional Record states that the purpose of section 806 of the Act is to “provide whistleblower protection to employees of publicly traded companies . . . when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent,” and to “protect those who report fraudulent activity that can damage innocent investors in publicly traded companies.” 148 Cong. Rec. S7420, 2002 WL 1731002 (daily ed. July 26, 2002).

The Administrative Review Board (“ARB”) has held, and the United States Code provides, that Sarbanes-Oxley complaints are governed by the same burdens of proof as in the whistleblower 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). *Klopfenstein II*, ARB No. 07-021-22 at 5-6; 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 personnel action.” *Klopfenstein II*, ARB No. 07-021-22 at 6 (citing AIR 21, § 42121(a)-(b)(2)(B)(iii)-(iv); 29 C.F.R. §§ 1980.104(b), 1980.109(a)). The ARB held that before an ALJ looks at whether the employee and employer are covered under Sarbanes-Oxley, “[i]t is desirable as a first order of business for an adjudicator to determine whether the putative whistleblower has engaged in activity that the statute at issue protects. If he or she did not, that ends the case.” *Klopfenstein II*, ARB No. 07-021-22 at 6. As such, the ALJ will first analyze whether the Complainant engaged in protected activity.

The first issue is whether the Complainant’s report on June 8, 2009 constituted protected activity. The Complainant’s activity will be protected under Sarbanes-Oxley if he reported information which he “reasonably believe[d] constitute[d] a violation of . . . any rule or regulation of the Securities and Exchange Commission.” 18 U.S.C. § 1514A(a)(1). Sikorsky argues that the Complainant has not implicated any substantive law violation and that he has not definitively stated that Sikorsky has committed fraud. Sikorsky cites case law holding that fraud may include “any means of disseminating false information into the market on which a reasonable investor would rely.” *Ames Dep’t Stores, Inc., Stock Litigation*, 991 F.2d 953, 967 (2d Cir. 1993); Resp. Motion, at 8-9. Additionally, Sikorsky argues that Complainant’s “Conflict between Legal Hold Notice and CSC scripts” report alleges no fraud and at most reports that there “may” be a violation of the ESI policy, but not that there was a definitive allegation of fraud. Resp. Motion, at 9-10. Sikorsky also argues that the Complainant’s report did not objectively state that there was fraud; and further that what matters is whether the Complainant’s *report* alleges fraud, and not what the Complainant *later* argues in his Complaint to OSHA. Resp. Motion, at 8-10.

The ARB has held that “an employee’s protected communications must relate ‘definitively and specifically’ to the subject matter of the particular statute under which

protection is afforded.” *Platone v. FLYI, Inc.*, USDOL/OALJ Reporter, ARB No. 04-154, ALJ No. 2003-SOX-00027 at 17 (ARB Sept. 29, 2006) (quoting *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-00031 at 9 (ARB Sept. 30, 2003)). On one hand, “[a] whistleblower need not cite the specific law or regulations that he believes is being violated in allegedly protected activity.” *Menz v. Lannett Co., Inc.*, USDOL/OALJ Reporter (PDF), ALJ No. 2007-SOX-00072 at 12 (ALJ May 27, 2008) (citing *Portes v. Wyeth Pharmaceuticals*, 2007 WL 2363356, No. 06 Civ. 2689 (S.D.N.Y. Aug. 20, 2007); *Fraser v. Fiduciary Trust Co. Int’l*, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006)). On the other hand, if the Complainant’s report is “barren of any allegations of conduct that would alert [Sikorsky] that [Complainant] believed the company was violating any federal rule or law related to fraud on shareholders,” then the report does not constitute protected activity. *Fraser*, 417 F. Supp. 2d at 322.

The “reasonable belie[f]” for which the statute calls is “scrutinized under both a subjective and objective standard. The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Allen v. Administrative Review Board*, 514 F.3d 468, 477 (5th Cir. 2008). “[T]he statute requires [the Complainant] to have held a reasonable belief about an *existing* violation, inasmuch as the violation requirement is stated in the present tense: a plaintiff’s complaint must be ‘regarding *any conduct which [he] reasonably believes constitutes a violation* of [the relevant laws].’” *Livingston v. Wyeth*, 520 F.3d 344, 352 (4th Cir. 2008) (emphasis in original) (quoting 18 U.S.C. § 1514A(a)(1)); see *Guyden v. Aetna, Inc.*, 544 F.3d 376, 384 (2d Cir. 2008) (“The provision[] focus[es] on the plaintiff’s state of mind rather than on the defendant’s conduct . . .”). The Fourth Circuit held that complaints of violations that “ha[ve] happened” or are “in progress” constitute reasonable belief. *Id.* That court “rejected the claim, however, that a reasonable belief that a violation has occurred or is in progress can include a belief that a violation is about to happen upon some future contingency.” *Livingston*, 520 F.3d at 352 (citing *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 340-41 (4th Cir.2006)). *But see Smith v. Corning Inc.*, 496 F.Supp.2d 244, 249-50 (W.D.N.Y. 2007) (rejecting the Respondent’s argument that activity is not protected where the allegations “only pertain to the potential for fraud occurring in the future” and holding that “plaintiff[’s] alleg[ations] that defendants repeatedly refused to address a problem that was resulting in incorrect financial information being reported to the company’s general ledger. . . . is sufficient to allege protected activity for purposes of surviving a Rule 12(b)(6) motion”). In other words, an allegation that a violation “may” occur, does not constitute “conduct which the employee reasonably believes constitutes a violation of . . . any rule or regulation of the Securities and Exchange Commission.” 18 U.S.C. § 1514A(a)(1); *Livingston*, 520 F.3d at 352; see also *Harvey v. Home Depot U.S.A., Inc.*, DOL/OALJ Reporter (PDF), ARB No. 04-114-15, ALJ Nos. 2004-SOX-00020 2004-SOX-00036 at 15 (ARB June 2, 2006) (“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. Accordingly, [Complainant’s] . . . letter does not express his reasonable belief that [Respondent] was defrauding shareholders or violating security regulations.”).

Here, the Complainant’s report states that there is a “conflict [which] creates a condition where employees attempting to comply with the Legal Hold Notice *may* actually violate the policy because of the automatic retention scripts deletes preservation attempts.” Resp. Motion, at

Tab 2, page 3 (emphasis added). The Complainant goes on to state that the fact that the “Legal Hold Notice does not appear to be sent to subcontractors. . . . may or may not be an issue . . . .” Resp. Motion, at Tab 2, page 3. Although these complaints seem to allege a mere possibility of future violation, for a summary decision motion, all reasonable inferences must be drawn in favor of the Complainant. *See Williams*, 453 F.3d at 116. The Complainant also states in his report that “an apparent conflict . . . exist . . . .” Resp. Motion, at Tab 2, page 3. The Complainant seems to be referring to a present violation. That is to say, Complainant is complaining of a conflict whereby e-mails are subject to two different policies. By virtue of the policies, when an employee heeds the instruction of one policy, he or she necessarily violates the other policy. For example, if an employee holds an e-mail in accordance with the Legal Hold Notice for longer than 30 days, that employee will be violating the policy in place by CSC “that retaining ESI for longer than 30 days is prohibited.” Resp. Motion, at Tab 2, page 3. Although the Complainant uses words like “may . . . violate” and “may or may not be an issue,” Resp. Motion, at Tab 2, page 3, which would not constitute protected activity under *Livingston*, 520 F.3d at 352, he describes the conflict in the present tense at other points in the Complaint. Construing the report in a light most favorable to the non-moving party, the Complainant is entitled to an inference that he is complaining of an existing, present violation.

However, just because the ALJ construes the report as alleging an existing violation, does not mean that the complaint of violation is one protected by Sarbanes-Oxley. In view of that, the Complainant does not put Sikorsky on notice that it is violating any federal law or rule related to fraud against shareholders. In the first paragraph of his report, the Complainant warned that the Legal Hold Notification “needs to be more specific in regards to what an employee should be preserving, for how long, what formats for preservation are appropriate, and a slew of other details . . . .” Resp. Motion, at Tab 2, page 3. In the second paragraph, the Complainant stated that there exists “an apparent conflict with the Legal Hold Notification” and the “UTC Corporate Policy Manual.” Resp. Motion, at Tab 2, page 3. He stated that an “employee[] attempting to comply with the Legal Hold Notice may actually violate the policy because of the automatic retention scripts delet[ing] preservation attempts.” Resp. Motion, at Tab 2, page 3. The third paragraph noted that the Legal Hold Notification did “not appear to be sent to subcontractors.” Resp. Motion, at Tab 2, page 3. None of the language in the three paragraphs resembles anything relating a violation of a federal law or a law protecting against fraud towards shareholders. As such, the report does not constitute protected activity. *See Fraser*, 417 F. Supp. 2d at 322.

After the Complainant filed his Complaint with OSHA, in his Notice of Objection, he admitted that “[m]aybe the Complainant should have used a different word choice other than the word ‘conflict’ and used the word ‘fraud’” instead. Notice of Objection, at 8. Further, he explains why the reported “conflict” constituted fraud, using reasons to which no reference is made in his initial report. He argues that the “conflict . . . manifests into a material weakness or break-down of the . . . internal controls.” Notice of Objection, at 8. Complainant stated that the conflict “effectively resulted in an ineffective financial reporting mechanism to Respondent financial reporting system in violation of section 404 of the SOX Act.” Notice of Objection, at 6-7. He then argues that he knew through his training that such a weakness is a violation of PCAOB AS No. 5, which states that “[i]f one or more material weaknesses exist [in Sikorsky’s financial reporting], the company’s internal control over financial reporting cannot be considered effective.” PCAOB AS No. 5. He further stated that a violation of AS No. 5 turns into a violation

of the Securities Exchange Act of 1934, 15 U.S.C. § 7202(b)(1) (“A violation . . . of . . . any rule of the [Public Company Accounting Oversight Board] shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934.”), and a violation of the Securities Exchange Act of 1934 is a violation of section 3 of Sarbanes-Oxley. 18 U.S.C. § 1514A(a)(1). In other words, he alleges that the failure to have effective internal control over financial reporting, as PCAOB AS No. 5 requires, is a violation of section 3 of Sarbanes-Oxley.

The case law clearly states that what matters is the content of the initial communication, not the later interpretation that his words meant something else. *Platone*, ARB No. 04-154 at 17 (“In determining whether [Complainant] engaged in protected activity, the relevant inquiry is not what [he] alleged in [his] . . . OSHA complaint, but what [he] actually communicated to [his] employer prior to the [June 23, 2009] termination.”). None of the concerns that the Complainant raised in his report resemble the violations of which he later accuses Sikorsky. The ALJ does not read “employees attempting to comply with the Legal Hold Notice may actually violate the policy because of the automatic retention scripts deletes preservation attempts,” Resp. Motion, at Tab 2, page 3, as being equivalent to an allegation of fraud against shareholders. Although the Complainant subsequently mentions the possibility of a financial record being destroyed as a result of the reported conflict between Sikorsky’s policies, his initial report alleged nothing of the sort. “To have an objectively reasonable belief there has been shareholder fraud, the complaining employee’s theory of such fraud must at least approximate the basic elements of a claim of securities fraud.” *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009). As the Second Circuit held, an employee who merely alleges a “GAAP violation or accounting irregularity, standing alone, [is] insufficient to state a securities fraud claim.” *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000) (noting that an irregularity might be sufficient if combined with evidence of fraudulent intent); *see also Platone v. U.S. Dept. of Labor*, 548 F.3d 322, 327 (4th Cir. 2008) (“[A] billing discrepancy, without more, does not equal fraud, and [the Complainant] failed to identify to [the Respondent] why she believed the actions related to the discrepancies would violate securities laws and constitute a fraud. The first time [the Complainant] made an actual allegation of fraud was in her OSHA complaint. Therefore, [the Complainant] did not sufficiently articulate her fraud theory to [the Respondent], and Sarbanes-Oxley does not afford her whistleblower protection.”). Further, neither “[a] disagreement with management about internal tracking systems which are not reported to shareholders,” nor “[a] complaint about corporate efficiency [are] within the intended protection of SOX.” *Day*, 555 F.3d at 56 (holding that the Complainant’s belief was not objectively reasonable). Therefore, since the Complainant did not alert Sikorsky in his report of any suspected fraud against shareholders, the ALJ finds that he has not engaged in protected activity.

Since the Complainant has not engaged in protected activity, it is not necessary to analyze the other three elements required for the Claimant to be successful under the Sarbanes-Oxley paradigm. As the ARB stated, “[i]f he or she did not [engage in protected activity], that ends the case.” *Klopfenstein II*, ARB No. 07-021-22 at 6. As such, there is no need to determine whether Sikorsky is an employer covered under Sarbanes-Oxley.

### C. Conclusion

The Complainant has failed to show that there are genuine issues of material fact warranting an evidentiary hearing. The ALJ concludes, after considering the entire record in a light most favorable to him and drawing all reasonable inferences in his favor, that the Complainant did not engage in protected activity. Accordingly, Sikorsky is entitled to summary decision.

### V. Order

Sikorsky's motion for summary decision is **ALLOWED**, and the Complaint filed by Keith Prioleau is **DISMISSED**.

**SO ORDERED.**

**A**

**DANIEL F. SUTTON**  
Administrative Law Judge

Boston, Massachusetts