



Issue Date: 08 August 2014

Case Number: 2010-SOX-00034

In the Matter of:

**JEROLD S. SHERMAN,
Complainant,**

v.

**ALLSTATE CORPORATION ET AL.,
Respondents.**

Appearances:

For Complainant:
Jerold S. Sherman, Pro se

For Respondents:
Mark A. Lies II, Esquire

Before:
Christine L. Kirby
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provision of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C. § 1514A (“Act” or “SOX”) as implemented by 29 C.F.R. Part 1980 and under the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall street Reform and consumer Protection Act of 2010, 12 U.S.C. § 5567 (“CFPA”). The SOX provision, in part, prohibits an employer with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 and companies required to file reports under Section 15(d) of the Securities Exchange Act of 1934 from discharging, or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to alleged violations of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 1348 (security fraud), any

rule or regulation of the Securities and Exchange Commission (“SEC”), or any provision of federal law relating to fraud against shareholders.

Procedural History

On October 19, 2009, Complainant filed a timely complaint with the United States Department of Labor’s Occupational Safety and Health Administration (“OSHA”) under Section 806 of SOX. Complainant alleged that he suffered retaliation after he provided information to his supervisors about serious compliance failures that he uncovered while performing his duties as a SOX Compliance Coordinator. In addition to his employer, Allstate Corporation (“Allstate”), Complainant named several of Allstate’s management-level employees as individually liable respondents: Paul Upshaw, Tim Kathrens, Dianne Ferrara, Kristyn Rebollar, Kim Syme, and Cynthia Whitley. OSHA investigated the complaint and on May 26, 2010, it concluded that there was no reasonable cause to believe that Respondents violated SOX, finding that Complainant did not engage in protected activity under Section 806.

On June 25, 2010, Complainant filed a timely objection and request for a *de novo* hearing. I scheduled a hearing on the merits of this matter several times to accommodate the parties’ requests for additional time to complete discovery. On August 2, 2011, I issued an *Order* granting Respondents’ request for a *Protective Order*. I issued an *Order* granting Respondents’ request to expand the *Protective Order* on November 23, 2011.

Complainant filed a *Motion for Summary Judgment or Partial Summary Decision* on May 8, 2012. On July 2, 2012, Respondents filed their *Response in Opposition to Complainant’s Motion for Summary Judgment or Partial Summary Decision*, as well as their own *Motion for Summary Decision*. Complainant filed his *Response to Respondents’ Motion for Summary Decision* on August 14, 2012. Additionally, on July 2, 2012, Complainant filed a *Motion for Sanctions Due to Respondents’ Willful Spoliation of Evidence and Criminal Obstruction of Justice under U.S.C. 18 Sec. 1519 and the Sarbanes-Oxley Act of 2002*. Respondents filed a *Response to Complainant’s Motion for Sanctions* on July 17, 2012. In an *Order* dated October 11, 2012, I denied Complainant’s Motions for Summary Judgment and Sanctions and granted Respondents’ Motion to dismiss the claims against Respondents Upshaw, Ferrara, Rebollar, and Syme.

On September 10, 2013, the formal hearing in this matter commenced with the telephonic testimony of Complainant’s witness, Amit Jalota. On September 16-18, 2013, the formal hearing continued in Chicago, Illinois. The parties were afforded a full opportunity to adduce testimony, offer documentary evidence, and submit post-hearing memoranda. I admitted the following exhibits into evidence: Complainant’s Exhibits (“CX”) A-CC and Respondent’s Exhibits (“RX”) 1-34. Nine witnesses testified at the Chicago hearing: Complainant, Joseph Scarzone, Brian Pride, Helene Johanson, Joseph Bonk, Dianne Ferrara, Cynthia Whitley,

Timothy Kathrens, and Paul Upshaw.¹ The parties have both filed Closing Briefs which I have considered in rendering this decision.

COMPLAINANT'S POSITION

Complainant asserts that Respondent took adverse personnel action against him, consisting of termination of his employment, because he engaged in SOX protected activity, i.e., he raised concerns of potential SOX violations in a meeting on April 14, 2009, concerning the unauthorized access of persons known as “Super Users” to Allstate’s database platforms. Complainant claims that Respondents were unhappy because he identified issues demonstrating that the Security Department was not identifying and approving Super Users properly, and he feared that the company would submit inaccurate reports to the SEC, resulting in shareholder fraud. Complainant claims specifically that Respondent was attempting to minimize the degree of control failure being presented and he believed disclosure fraud to the SEC was occurring or about to occur. He asserts that because of his protected activity at the April 14, 2009, meeting, his job description was changed so that his position could be eliminated under the guise of a “Reduction in Force” (“RIF”). (Tr. 15-17).

RESPONDENTS' POSITION

Respondents assert that Complainant never engaged in SOX protected activity. They assert that Allstate’s Internal Audit Department, not Complainant, had already identified the potential Super User security deficiencies, and that Complainant, as a member of the Allstate Technology Organization (“ATO”) Compliance group was merely performing his job, which was to help the Security Department remediate these issues. They assert that Complainant was terminated as part of a company-wide RIF that already had been in progress for a couple of years prior to the time of Complainant’s selection, and he was eliminated due to an organizational restructuring which made his position obsolete. They assert that the decision to eliminate Complainant's position was made well before the April 14, 2009, meeting where the alleged protected activity occurred. They further assert that even if this tribunal were to find that Complainant demonstrated a prima facie case of retaliation, Complainant would have been eliminated for legitimate, non-retaliatory reasons due to his transmittal of an internal company document to his personal computing device and subsequent lying to company management by stating that he had deleted the document, when, in fact, he had not done so.

ISSUES

1. Whether Complainant engaged in protected activity within the meaning of the SOX.
2. Assuming Complainant engaged in protected activity, whether Respondents were aware of the protected activity.

¹ Although I have reviewed each exhibit and the transcript of testimony in great detail, in the interest of judicial efficiency, I will not fully summarize the evidence, but will reference relevant exhibits and testimony as necessary in the findings and discussion which follow.

3. Whether Complainant suffered an adverse action.
4. Assuming Complainant engaged in protected activity and suffered adverse action, whether his protected activity was a contributing factor to the adverse action.
5. If Complainant demonstrates a prima facie case of retaliation, whether Respondents have demonstrated by clear and convincing evidence that they would have taken the same adverse action irrespective of Complainant having engaged in protected activity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Specific Findings of Fact

1. Complainant was hired by Allstate in June 1999 and worked in Allstate's Allstate Technology Organization ("ATO") from January 2008 until his termination on September 19, 2009. (Tr. 37, 263, RX 18).
2. Complainant's job title is described inconsistently throughout the record. In testimony, Complainant describes his title as "ATO Compliance Coordinator." (Tr. 46). However, the job description, which he testified describes the position for which he was hired, lists the position as "IT Controls (SOX) Process Analyst." (Tr. 46, 129-130, CX-B-1). Respondent, Kathrens, testified that this job description describes the position Complainant occupied. (Tr. 589). In CX-D-1, an Allstate document, Complainant's role is listed as "Compliance Coordinator." (Tr. 131). In e-mail correspondence written by Complainant, he self-identifies his title as "Process Reengineering Consultant." (CX-H; CX-I; CX-Q). In CX-CC, an e-mail from Complainant's supervisor, Paul Upshaw, Complainant is listed as a "Compliance Coordinator." In Upshaw's testimony, Complainant was referred to as an "ATO Compliance Coordinator." (Tr. 699, 703, 817). Elsewhere in testimony, Complainant refers to himself as a "Consultant." (Tr. 121). On cross examination, Complainant testified that his job was "ATO Compliance Coordinator." (Tr. 222). In his 2008 Performance Appraisal, Complainant is also referred to as an "ATO Compliance Coordinator." (RX 10).

Respondent, Kathrens also referred to Complainant as an "ATO Compliance Coordinator." (Tr. 592, 640). In his testimony, he explained that while Complainant's title was "ATO Compliance Coordinator," his job "deliverable or responsibility" changed from when he was first hired into the position. Kathrens explained that at the time he wrote the business case document, at issue in this case, Complainant was working on the Super User Project one hundred percent of the time, coordinating the remediation of Super User security issues. He explained that Complainant was, in fact, chosen to handle the Super User project because it was extremely challenging and Complainant's role was to get the Super User issues to closure. (Tr. 605-607). In the business case document (CX-R-3), he therefore listed Complainant's position as a "Consultant" but described Complainant's "accountabilities" as being "Super User Audit Issue Closure Coordinator," because that was the role that Complainant was performing. In the business case document that was later drafted by the Human Resources Manager, Complainant was referred to as the "Super User Audit Coordinator." While this term was an accurate

reference to the duties Complainant was assigned to perform during that time period, it was a misnomer of his job title.

Based on my review of the entire record, I find that starting in January 2008, Complainant was an ATO Compliance Coordinator in Allstate's ATO Compliance Division. This was a "Consultant" level position. In his role as a Compliance Coordinator, his duties included, *inter alia*, integrating IT controls into ATO processes, thereby enabling Allstate to be in compliance with laws and regulations, including the Sarbanes Oxley Act ("SOX"). (CX-B-1). Initially, his duties included performing SOX compliance coordinator duties for incident management.

Complainant was assigned by Upshaw to coordinate the closure of the Super User objectives beginning around July of 2008. (Tr. 822). Initially, he assisted Chris Hoban in coordinating closure of the Super User control issues, but eventually he transitioned into taking over coordination of them from Hoban around December of 2008. (Tr. 822). The actual owner of the control was Diane Ferrara, but Complainant's job was to help her close the Super User issues. (Tr. 822-823). By December 10, 2008, Complainant's role and job deliverable within the Compliance Division had thus changed from his initial role when hired. In his role on the Super User project, he was to relay the issues identified by Internal Audit to the Area of Responsibility ("AOR") business unit and work with the AOR to assess and resolve the issues. (Tr. 815, et seq.). The AOR in the Super Users Project was the Security Department, which was managed by Dianne Ferrara. (Tr. 816). Complainant's work on the closure of the Super User issues eventually occupied one hundred percent of his attention. (TR. 606-612, 720, RX 10).

3. The Super User project had been initiated within ATO in the summer of 2008. (Tr. 821). The initial goal was to bring the Super User issues to closure by December 30, 2008. However, when the issues were not closed by that date, a new goal of June 30, 2009, was established for their closure. (Tr. 615-616, 632-633, 643-645). Complainant was not solely at fault for the failure of the Super User issues to close by the December 30, 2008, deadline. They failed to close due to some issues that were beyond Complainant's control. (Tr. 828, RX 10). Three of the four Super User issues were ready to close by June 24, 2008. (Tr. 242, 244, 536-539, 850-851).

4. Complainant received an overall rating of "Fair" on his 2008 Performance Evaluation. I find that this was not a negative rating or an adverse action. The rating recognized that Complainant was new to the team, in the process of learning the job, the work was going through a transition process, and Complainant was showing progress and learning how to be successful in his new role. (RX 10). Despite the "Fair" rating, Complainant was given a raise, which is something that would not normally have occurred following the receipt of a "Fair" rating. However, management felt that Complainant's performance was deserving of a raise. (Tr. 831, 646). Thus, it appears that management was satisfied with Complainant's work and progress. Complainant did not appeal the rating and did not believe it was discriminatory or retaliatory. (Tr. 221, 830-831).

5. Although Complainant had been found in the 2008 and previous performance evaluations to have a confrontational and stubborn personal interaction style which hindered his ability to

work effectively with others, it appears that he was working on this issue and that it had not held him back from being hired for the ATO Compliance Team, advancing professionally, or receiving raises. (RX 10, RX 22-26). I find based upon the testimony of Upshaw and Kathrens and the performance evaluations, that Complainant was knowledgeable about his job and performed it adequately. Management's main concern with Complainant's performance appears to be that he said what was on his mind and was lacking the social skills or "filter" to present his ideas in a manner that would not offend others and would promote collaboration.

I find that Respondents' suggestion in this case that Complainant was a poor performer who was unable to work with others is inaccurate, has clouded the relevant issues, and caused unnecessary vitriol. I further find that Complainant's "Fair" 2008 Performance Evaluation had no bearing on the selection of his position for elimination as part of the RIF. (Tr. 655, 677-679).

6. Allstate has a meeting protocol that personnel are to follow in conducting meetings. (Tr. 185-186, 527, 834, RX 7). The purpose of the protocol is to insure that meetings are conducted in a productive manner. By the terms of the protocol, those leading the meeting are *inter alia* to: provide an agenda and purpose for the meeting, send all materials at least 24 hours prior to the meeting start time, and start meetings on time. (RX 7).

7. Over the course of the Super Users Project, ATO Compliance held weekly meetings to discuss the status of the project. (Tr. 832). Complainant scheduled a status meeting for April 14, 2009, with Upshaw, Ferrara, and others to discuss how the AOR (i.e., the Security Department lead by Ferrara) was not identifying and approving Super Users properly, and how to go about remediating the problem. (Tr. 84). Complainant and his manager, Upshaw, met approximately one week prior to the April 14, 2009, meeting (in a pre-meeting), to discuss how Complainant could be most effective in facilitating the April 14, 2009, meeting. (Tr. 28, 834). At the pre-meeting, Upshaw told Complainant to present the data in a clear manner so that the source and meaning of the data would be clear and easily understandable to the meeting attendees. (Tr. 835). Complainant showed Upshaw a draft of the deck that he planned to present at the meeting. (CX-J). The draft contained a recommendations page. Upshaw told Complainant to make sure that the data was supported and that recommendations were tied to a requirement with a clear path of what they were trying to fix. Upshaw did not tell Complainant to remove the recommendations or any information from the draft deck, but instead told Complainant to make sure the deck contained formulas and information to make it clear where the data came from. (Tr. 837-838). Complainant's perception was that he was to remove the recommendations page, but his testimony was inconsistent as to who told him to remove this page and when. (Tr. 90-92).

8. Complainant did not follow the meeting protocol and send out all materials for the meeting at least 24 hours prior to the meeting start time, as required. Rather, he sent out the key material only eighteen minutes before the meeting, thereby not giving the attendees an opportunity to study the materials, understand where the data came from and what it meant. (Tr. 840). Therefore, some of the attendees were caught off-guard by some of Complainant's data and analysis. At the April 14, 2009, meeting, Complainant reported to Upshaw, Ferrara, and other attendees that the controls which he had responsibility to monitor and evaluate were out of control. Ferrara and other attendees immediately started questioning the source and validity of

the data. Complainant interrupted Ferrara and was perceived as adversarial and confrontational in tone. (Tr. 841-843).

9. Upshaw was listening in on the meeting telephonically. Upshaw did not believe that Complainant handled the meeting well because Complainant failed to follow the meeting protocol, surprised attendees with new information that they did not understand and was confrontational in tone. He began typing an e-mail with his concerns to Complainant during the meeting and sent it to him shortly after the meeting. (Tr. 843 et seq., 196 et seq., RX 13). In the e-mail, Upshaw stated *inter alia* that the meeting was very ineffective due to Complainant's failure to follow basic meeting protocols. He stated that Complainant failed to state clear objectives and intended outcomes for the meeting. He stated that Complainant's "shock and awe" approach to spewing data was not collaborative. He criticized Complainant's distribution of the presentation only 18 minutes before the meeting which did not provide attendees time to understand it or do any research to validate what was being shared. He stated that Complainant's approach appeared to be adversarial and did not appear to be effective in providing the consulting that moves them to closure. He faulted Complainant for talking over Ferrara when she was asking clarification questions. (*Id.*).

10. Complainant responded to Upshaw's e-mail by addressing each point, justifying his actions at the meeting. He disagreed with Upshaw's opinion that the meeting had not gone well. He objected to Upshaw's interpretation of his presentation as "shock and awe" and expressed concern about how the information he had been providing to stakeholders was being communicated to leadership. He explained that he was fulfilling his role as a consultant by providing his feedback on the accuracy of their measurements and an analysis of the data they were providing. Complainant stated that Ferrara was over-talking any explanation of the data that reflected poorly on the performance of her team and he believed she failed to provide him with the opportunity to present the information, and chose to intimidate and drive the discussion per her agenda. Complainant stated he was not going to be intimidated into compromising the definition and intent of the controls. He further stated that he believed they were not properly reporting data in Root Cause Reports that are part of Conditions for Closure and part of the Quality Review Guide. (RX 13).

11. Upshaw responded to Complainant's response to his e-mail. Upshaw thanked Complainant for his response to his concerns and clarified that his concerns were not with "what" was provided at the April 14, meeting, but rather with "how" it was provided and shared. He again criticized Complainant for failing to distribute the information prior to the meeting in enough time to allow the participants to prepare. Complainant responded again in an e-mail disputing each of Upshaw's points. He admitted to not providing the deck in advance because it would have created an "avalanche of phone calls" and he wanted them all to hear it at the same time. Complainant expressed his opinion that the meeting was very successful. Complainant admitted that he did not share the presentation with Ferrara and others because then, in his opinion, there would be no point to having a meeting. Complainant stated that he believed Ferrara's team was so focused on delivering conditions for closure that they were failing to do root cause analysis on what needed to be fixed to meet the conditions. Complainant thanked Upshaw for the feedback and said he would take it "as a gift." Following this e-mail exchange,

Upshaw scheduled a time to meet with Complainant in person to further discuss how the meeting could have been handled differently to be more effective (RX 13).

12. Complainant and Upshaw met on April 15, 2009, to discuss the concerns identified in the previous day's correspondence. (Tr. 103). Upshaw explained Ferrara's concerns about the data Complainant had presented, and requested Complainant to be more responsive to Ferrara's needs. Complainant, however, perceived this meeting as a threat and believed that Upshaw was threatening to remove him from the control if he continued to report information with which the process owner did not agree. (Tr. 111-118). On April 15, 2009, Complainant complained to a co-worker that Upshaw had threatened to remove him from the controls due to his presentation. (CX K). Complainant also met with Respondent Kathrens on April 17, 2009, to discuss Ferrara's concerns regarding the information that he presented at the April 14, 2009, meeting. Complainant likewise interpreted this meeting as threatening.

Complainant was not removed from coordination of the Super User control project. (Tr. 116, 225). He continued to work with Ferrara's team to remediate the issues and expressed his belief on May 28, 2009, that the team was making every effort to deal with their situation. (RX 29). In an e-mail dated June 5, 2009, Complainant expressed that there was "good news" regarding progress on the Super User issues. (Tr. 232-235, RX 15). On June 24, Complainant sent an e-mail to Ferrara informing her that he had submitted the Super User gaps for closure. He thanked Ferrara for her guidance, feedback, and understanding. He stated that while their roles differed and this could sometimes lead to constructive conflict, this usually is the path that leads to successful efforts. In this e-mail, Complainant was indicating that three of the four Super User issues would close, which was a positive step. (Tr. 236, 242-246, RX 28). By the end of June 2009, three of the four Super User issues had, in fact, closed. (Tr. 850-851).

13. On July 6, 2009, in a meeting regarding Super User issue closure, Ferrara mentioned to Upshaw and Complainant that she had received an audit report regarding an "Open Door Audit." (Tr. 855-856). In April 2009, Allstate had hired an outside consulting firm to test for gaps in its computer security. This was known as an "Open Door Audit." Neither Upshaw nor Complainant, nor anyone on the ATO compliance team had been involved in this audit. The audit had nothing to do with remediation of the Super User issues. Complainant asked Ferrara if she would send him a copy of the audit report and she subsequently sent it to him, Upshaw and another employee via e-mail on July 6, 2009. (Tr. 248, 532). At the time she sent it, Ferrara did not realize that Upshaw and Complainant were not allowed to have access to this report. The report was not marked as a confidential document, and Complainant transmitted it to his iPhone to read at a later time. (Tr. 249). At the time he sent it to his iPhone, Complainant did not know that the report was confidential. (Tr. 249-250).

After Ferrara sent the report, Cynthia Whitley called Upshaw and told him that the security system had alerted her that Complainant had sent a copy of the audit report outside the company to his personal e-mail. She directed Upshaw to get on the phone with Complainant and make sure he deleted the copy of the audit because it was confidential and privileged information. Upshaw called Complainant and relayed this information to him. Complainant told Upshaw that he was immediately deleting the report. However, Complainant did not, in fact,

delete the report, despite his representation to his supervisor that he had done so. (Tr. 250-252, 856-858).

Complainant stated in his opening statement that he believed the report showed the potential for fraud had been occurring since April 14, 2009, and would continue in the future. (Tr. 16-17). However, I find he did not clearly articulate why the report lead him to believe this. Nor did he relay this belief to any member of Allstate's management team prior to the termination of his employment. Based on Complainant's brief and my review of the entire record, I find that Complainant's beliefs concerning the meaning of the Open Door Audit and whether it provided any evidence of potential past or future misreporting to the SEC were speculative and formulated in the course of this litigation. (C. Br. at 17-18).

14. Allstate had a company policy regarding information technology usage which Complainant had signed. (Tr. 252-255, RX 20). By the terms of the policy, employees were not to transmit company documents externally, such as through e-mail or display them on an external website without protection. (*Id.*, Tr. 657). Complainant violated Allstate's policy by transmitting a company document to his personal e-mail. He further violated company policy by representing that he had deleted the document, when, in fact, he had not done so. Respondent was unaware that Complainant had failed to delete the audit report until after Respondent's employment had been terminated and it became apparent in the course of discovery. Therefore, I find that Complainant's violations of company policy had nothing to do with the selection of his position for inclusion in the RIF.

15. In 2008, Respondent Cynthia Whitley was the Director of Information Security Governance for Allstate. In early 2009, she still had that role, but the ATO Compliance group (headed by Kathrens) also moved under her control. The reason she acquired this group is because Allstate was being reorganized and conducting a reduction in force ("RIF"). At the end of January 2009, the vice-president, Deb Campbell, to whom Whitley and Respondent Kathrens both reported was eliminated in the RIF reorganization. Whitley and Kathrens were both to report to John Bader. At the end of February 2009, Bader told Whitley that he was going to have Kathrens report to Whitley instead of to him because he had too many new direct reports. Since Whitley had no knowledge of the ATO Compliance group, she continued to let Kathrens run the organization on his own, although he would now report to her. She had no involvement whatsoever in closing the Super User issues and no knowledge of the April 14, 2009, meeting or any issues related thereto. (Tr. 566-569).

16. In November of 2008, over 100 employees were eliminated in a RIF of the ATO organization. (Tr. 640). The reason for the RIF was declining economic conditions which impacted the company. The company was evaluating projects and determining which ones to eliminate to reduce expenses. Because Allstate was eliminating projects, that meant they were not going to need certain personnel resources any longer. (Tr. 570-571).

On February 26, 2009, Whitley's boss, Bader, met with her and told her that they were going to have to reduce expenses by 20% by the end of 2010. After the meeting with Bader, she then met with Kathrens and told him she needed him to start working on how he could reduce expenses in the ATO Compliance group by 20%. On March 2, 2009, Whitley and Kathrens met

to discuss reduction of expenses. Kathrens informed Whitley that he had evaluated his processes and since the Super User project would be coming to an end, he planned to eliminate the positions of Complainant and another employee, Mantel, whose duties were concentrated on closure of the Super User project. (Tr. 571-578, 647-649, RX 3). Although the Super User issues did not completely closed by June 30, 2009, at the time Kathrens decided to include Complainant's position in the RIF, he believed that all of the issues would be closed by that date. (Tr. 668).

Since Kathrens reported to her, on March 23, 2009, Whitley met with Bader and informed him that the positions of Complainant and Mantel would be eliminated in the RIF. (Tr. 579-581). Whitley had Kathrens prepare the business case document which would explain the basis for this RIF decision and work directly with the human resources division to complete any necessary paperwork for elimination of these two positions. (Tr. 581-583). I find that by March 23, 2009, Allstate's management had decided to eliminate Complainant's position in the RIF, absent an improvement in economic conditions which might make the RIF unnecessary. (Tr. 656-657).

17. Kathrens hand-wrote a draft of the business case document on March 9, 2009, in which he explained the justification for eliminating the positions of Complainant and Mantel. Kathrens made the decision to eliminate Complainant and Mantel on this date. (Tr. 652-653). He did not prepare the business case document on his computer, because of its sensitive nature and his fear that word of the RIF would leak to other employees, causing panic. He did not date the document, put it on letterhead, or sign it. (Tr. 653-654). He later shredded the hand-written document. (Tr. 671). On April 25, 2009, he typed the document which he had prepared initially on March 9, 2009, and sent it to human resources for processing. (Tr. 595- 603, CX R 1-4). In the typed document, Kathrens listed Complainant's position as a "Consultant" and listed his accountabilities as "Super User Audit Issue Closure Coordinator." The human resources manager took the information from Kathrens' typed document and used it to prepare a business case document dated June 4, 2009, in which he referred to Complainant's position as the "Super User Audit Coordinator." This was a misnomer of Claimant's title, although it was an accurate statement of the work deliverables for which Complainant was responsible. (CX R 5-7, RX 17). However, the effect of this mistake in nomenclature was to later give Complainant the impression that his title had been changed for the purpose of fitting his position into the RIF. (Tr. 12-121). Complainant also believed that Kathrens had improperly listed his title, although I find that he properly listed Complainant as a "Consultant" and his reference to "Super User Audit Coordinator" was a reference to Complainant's primary job responsibilities at the time, rather than to his job title. (Tr. 606).

18. The reason that Complainant's position was eliminated was because the work he was performing on the Super User project, which occupied the large majority of his time, was supposed to come to a close and the remainder of it would be transferred to the business process owner's area. (Tr. 633-636). Also, Kathrens determined that he had too many "Consultant" level employees which were more expensive than "Professional" employees. (Tr. 650-651). Consideration of performance would only come into play in a RIF if work duties were not going to go away. In such a case, the company would look at performance evaluations to determine whom to eliminate. In the case of Complainant, I find his performance evaluations did not play a

role in determining whether to eliminate his position. (Tr. 584, 677-679). I also find that the selection of his position for elimination under the RIF had absolutely nothing to do with Complainant's alleged protected activity of April 14, 2009, which had not yet occurred, or with any other protected activity.

19. Complainant was notified on July 22, 2009, by Respondent Kathrens and Larry Matson of Human Resources, that his position was being eliminated due to realignment of work and reorganization, and that his employment would be terminated by September 19, 2009. (Tr. 18). Due to the timing of the announcement approximately three months after the April 14, 2009, meeting and related discussions thereof, coupled with the misnomer of his title in the business case document, it appeared to Complainant that the elimination of his position was related to events surrounding the April 14, 2009, meeting. This belief was also reinforced in the course of this litigation by Respondents' inaccurate suggestion that Complainant's employment was terminated, in part, due to poor performance and inability to work with others. As stated above, I find this suggestion to be unsupported by the evidence of record. Because Complainant did not secure another position within Allstate within a 60-day period, his termination became effective on September 19, 2009.

20. Kathrens delayed the elimination of Complainant's position to allow Complainant to reach his ten-year anniversary and receive additional insurance benefits. (Tr. 655-656).

Applicable Law

Congress enacted the SOX on July 30, 2002, as part of a comprehensive effort to address corporate fraud. SOX Title VIII is designated the Corporate and Criminal Fraud Accountability Act of 2002 (the Accountability Act). Section 806, the SOX's employee-protection provision, prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain fraudulent acts. 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.

Section 806 complaints filed 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. 2010).² Accordingly, to prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that: (1) he or she engaged in activity or conduct that the SOX protects; (2) the respondent knew he or she engaged in protected activity; (3) the respondent took unfavorable personnel action against him or her; and (4) the protected activity was a contributing factor in the adverse personnel action.³ If the complainant carries his burden of proving causation, the respondent can avoid liability by demonstrating clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.⁴

Protected Activity

The first requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, U.S. Department of Labor, (“Secretary”) has broadly defined protected activity as a report of an act that the complainant reasonably believes is a violation of the subject statute. Under SOX, 18 U.S.C. § 1514A(a)(1), an employee engages in protected activity when he provides information regarding corporate conduct which the employee believes “constitutes a violation of” at least one of six specific categories of criminal fraud or security violations set out in the Act. The employee’s belief must be subjectively and objectively reasonable. Although an employee is not required to identify the specific criminal provision, SEC rule or regulation, or applicable provision of federal law, his protected communication must nevertheless relate to one. The six categories specified by 18 U.S.C. § 1514A(a)(1) in which violation may be reported by an employee are:

² See 18 U.S.C.A. § 1514A(b)(2)(C).

³ See 18 U.S.C.A. § 1514A(b)(2). See also, *Feldman v. Law Enforcement Associates Corp.*, No 12-1849, 2014 WL 1876546 (4th Cir. May 12, 2014).

⁴ *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, slip op. at 8; (ARB July 29, 2005); cf. 29 C.F.R. § 1980.104(c); see 49 U.S.C.A. § 42121 (a)-(b)(2)(B)(iv). See also, *Feldman*, supra, n. 9.

1. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1341, Frauds and Swindles [mail fraud]. This provision establishes that use of the Post Service or a private or commercial interstate carrier as a means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

2. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1343, Fraud by Wire, Radio, or Television [wire fraud]. This provision establishes that use of wire, radio, or television communication as means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

3. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1344, Bank Fraud [bank fraud]. This provision establishes that executing a scheme or artifice to defraud a financial institution is a felony crime punishable by not more than thirty years imprisonment.

4. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1348, Securities Fraud [securities fraud].⁵ This provision establishes that executing a scheme or artifice a) to defraud any person in connection with any security of an issuer of a class of securities registered under Section 12 of the Securities Exchange Act or that is required to file reports under Section 15(d) of the Securities Exchange Act; or b) to obtain by means of false or fraudulent pretenses any money or property in connection with the purchase of such security identified in a) above is a felony crime punishable by not more than twenty-five years imprisonment.

5. Any rule or regulation of the Securities Exchange Commission.

6. Any provision of federal law relating to fraud against shareholders.

To sustain a complaint of having engaged in SOX-protected activity, where the complainant's asserted protected conduct involves providing information to one's employer, the complainant need only show that he or she "reasonably believes" that the conduct complained of constitutes a violation of the laws listed at Section 1514. 18 U.S.C.A. § 1514A(a)(1). "The Act does not define 'reasonable belief,' but the legislative history establishes Congress's intention in adopting this standard. Senate Report 107-146, which accompanied the adoption of Section 806, provides that 'a reasonableness test is also provided . . . which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts.' See generally, *Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993)." S. Rep. 107-146 at 19 (May 6, 2002)." *Sylvester v. Parexel Int'l*, at 14, ARB No. 07-123, ALJ Nos. 2007-SOX-39, 2007-SOX-42 (ARB May 25, 2011).

The ARB has interpreted the concept of "reasonable belief" to require a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and that the belief be objectively reasonable. To satisfy the subjective component of the "reasonable belief" test, the employee must actually have believed that the conduct complained

⁵ This criminal provision was added by Section 807 of the Sarbanes-Oxley Act (2002).

of constituted a violation of relevant law. The objective component “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.” *Sylvester* at 14-15, citing *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009).

The reasonable belief standard requires an examination of the reasonableness of a complainant’s beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities. *Sylvester*. at 15. The Complainant need not establish the various elements of criminal fraud to prevail on a section 806 retaliation complaint. *Id.* at 21-22. Additionally, an employee’s whistleblower communication is protected where based on a reasonable, but mistaken, belief that the employer’s conduct constitutes a violation of one of the six enumerated categories of law under Section 806. *Sylvester* at 16, citing *Halloum v. Intel Corp.*, ARB No. 04-068, ALJ No. 2003-SOX-7, slip op. at 6 (ARB Jan. 31, 2006).

In considering whether Complainant engaged in a SOX protected activity there are thus three factors to examine: 1) whether the report or action relates to a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders; 2) whether Complainant’s belief about the purported violation was subjectively and objectively reasonable; and 3) whether Complainant communicated his concern to either his supervisor (or other person working for the employer who has the authority to investigate, discover, or terminate misconduct); a federal regulatory or law enforcement agency; or a member or committee of Congress. 18 U.S.C. § 1514A(a)(1).

Complainant’s Position

Complainant argues that he engaged in general protected activity by the very nature of his job as a SOX Compliance Coordinator which was to help coordinate the company’s compliance with SOX, as well as other regulations. He also argues specifically that on April 14, 2009, he engaged in protected activity by presenting data demonstrating that the Security Department was not identifying and approving Super Users properly, attempting to minimize the degree of control failure being presented, and he feared that consequently the company was submitting or would submit inaccurate reports to the SEC, resulting in shareholder fraud. (Tr. 15, et seq., C. Br.).

Respondents’ Position

Respondents argue that Complainant did not engage in protected activity under SOX merely by virtue of his job responsibilities as a SOX Compliance Coordinator. They further argue that Complainant did not engage in protected activity at the April 14, 2009, meeting because he was merely doing what he had been hired and directed by Upshaw to do, i.e., presenting data to help remediate the Super User issues which had already been identified by Respondents as needing correction. They argue that Complainant never communicated that he believed Respondents were engaged in any form of fraud or illegal activity. (R. Br at 18-22).

Respondents argue that Complainant did not subjectively believe that the Company was in violation or would violate the laws listed under SOX based on three of Complainant's communications with his coworkers after the April 14, 2009, meeting which indicated that he believed Ferrara's team was making every effort to deal with the situation, the Super User issues for three platforms could be submitted for closure, and his belief that things were going well and the closures were near completion. (RX 15, 28, 29, R. Br at 21). Respondents also argue that Complainant's belief was not objectively reasonable as it was normal for ATO Compliance to identify failures and this did not mean the Company was or would be in violation of SOX. (R. Br. at 22).

Discussion

Complainant argues that, by virtue of his position as an ATO SOX Compliance Coordinator, any and all activities performed in the course of his job should have been considered "protected activity." This is a very broad interpretation of the statute and one for which Complainant does not cite any supportive authority. The text of section 1514A(a)(1) plainly protects only employees who "provide information, cause information to be provided, or otherwise assist in an investigation" regarding reasonably believed violations of specified statutes, rules, and regulations. 18U.S.C. §1514A(a)(1). Consequently, I find that Complainant did not engage in protected activity merely by virtue of his position.

However, at the April 14, 2009, meeting, Complainant asserts he was going beyond his normal day-to-day job duties in that he was attempting to show that members of the AOR were in the process of violating or would violate SEC rules in the future by misrepresenting data to minimize the degree of control failure being presented, which would result in inaccurate reporting to the SEC and shareholder fraud. Respondent argues that Complainant was merely performing his job and had already discussed the information he planned to present at the April 14, 2009, meeting with his supervisor, Upshaw, who did not discourage him from presenting the information, but merely offered suggestions as to how to effectively present it. At the meeting, Complainant did, in fact, present his data, concluding that, in its current state, the process was unable to meet the target required for SOX compliance. He asserted that root cause analysis was not occurring effectively, resulting in failure to remove or confirm existing but unauthorized users. He also asserted that even when no authorization existed, there was a failure on some platforms to remove unauthorized users, resulting in ongoing risk to the enterprise.

Complainant's presentation prompted immediate questions from the head of the AOR, Ferrara, who questioned the source and accuracy of Complainant's data. Following the meeting, Complainant engaged in an email exchange with his supervisor, Upshaw, as well as personal meetings with Upshaw and Kathrens in which they were critical of his April 14, 2009, presentation and faulted him for being confrontational and argumentative.

It is beyond the purview of this tribunal to determine the underlying question of whether, in fact, data was being misrepresented or members of Allstate had violated or were going to violate a law listed in Section 1514A of SOX. Rather, I am to determine whether Complainant subjectively believed that the conduct complained of constituted a violation of federal security laws and whether a reasonable person in the same factual circumstances, with the same training

and experience as Complainant, would have believed that the conduct complained of constituted a violation.

After review of the entire record, I find that Complainant did subjectively believe that the conduct he was complaining of constituted a violation of federal securities laws based on his credible testimony in this regard as well as his actions shortly after the April 14, 2009, meeting. In an e-mail on that date he specifically told Upshaw that he believed Ferrera was attempting to intimidate him and drive the discussion per her agenda. He stated he was not going to be intimidated into compromising the definition and intent of the controls and stated that Ferrara and her team were failing to properly report data in the root cause reports. (RX 13:6). Additionally, his state of mind is shown by his April 15, 2009, instant message conversation with Scarzone in which he alleged that he was being threatened with removal due to the information he had presented. Although at later dates in May and June 2009, as pointed out by Respondents, Complainant appeared to believe that Ferrara and her team were successfully remediating the problems, his state of mind at later dates has no bearing on what he subjectively believed on April 14, 2009.

With regard to objective reasonableness, Respondents contend that Complainant did not “blow the whistle” on illegal activity, because he never complained that Allstate engaged in any of the categories of fraud referenced in Section 806 or that it violated securities laws. Respondents further contend that the information Complainant provided at the April 14 meeting related to the very compliance issues that Super Users Project was assembled to resolve. Complainant, on the other hand, has submitted documents regarding the information that he provided at the April 14 meeting, which he represents to be the basis of his reasonable belief that a fraud or securities law violation had been, or was likely to be, committed.

A review of the *Sylvester* decision, and the ARB’s decisions subsequent to it, clarify what a Complainant must communicate in order to have engaged in protected activity. Contrary to Respondents’ argument, *Sylvester* explains that SOX complainants need not complain of shareholder or investor fraud to engage in protected activity under SOX, nor need they allege or prove the specific elements of fraud. *Sylvester*, ARB No. 07-123, at 19; 22. Moreover, the ARB in *Inman v. Fannie Mae*, ARB No. 08-060, ALJ No. 2007-SOX-47 (ARB June 28, 2011), explained that “neither the SOX nor its implementing regulations indicate that an employee does not engage in protected activity when he informs his employer about violations of which the employer is already aware.” *Inman*, ARB No. 08-060, slip op. at 7. Instead, Complainant need only demonstrate that he provided information to his supervisors regarding his reasonable belief that Allstate’s reporting practices violated, or would violate, one of the laws listed in Section 1514A. Complainant alleges that he did just that, and has provided documentary evidence regarding the information that he conveyed at the meeting, which he alleges formed the basis of his belief that Allstate had committed or was about to commit a securities law violation. I find after reviewing the entire record and based on the standards discussed above, that a reasonable person in the same factual circumstances, with the same training and experience as Complainant could have believed that SEC violations had occurred or would occur in the future.

Accordingly, I find that Complainant’s presentation at the April 14, 2009, meeting constituted protected activity.

Knowledge of Protected Activity

Although Respondent disputes that Complainant's presentation at the April 14, 2009, meeting constituted protected activity, it does not dispute that members of Allstate's management team, including Upshaw were present at the meeting and that Respondent Kathrens was aware of Complainant's presentation and spoke to him about it on April 17, 2009.

Adverse Action

The ARB clarified the standard of what constitutes an adverse action against SOX whistleblowers in *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003, ALJ No. 2007-SOX-5 (ARB Sept 13, 2011). The Board cited to the plain language of SOX section 806 which states that no employer "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." *Id.* at 15. The Board found that by explicitly proscribing non-tangible activity, the language of SOX bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers. The Board found that the express statutory language of section 806 is more expansive than the Title VII provisions addressed in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006),⁶ and consequently demands a correspondingly broader interpretation. The Board adopted the standard of actionable adverse action set forth in *Williams v. American Airlines Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 12-15 (ARB Dec. 29, 2010), i.e., that the term "adverse action" refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. *Menendez* at 17. The Board nevertheless found that the *Burlington* standard serves as a helpful guide for the analysis of adverse actions under SOX. *Id.* The Board also emphasized that adverse actions must be reviewed both separately and in the aggregate.

Complainant has alleged one adverse personnel action was taken against him: termination of employment. Respondent does not dispute that its termination of Complainant's employment constituted an adverse action, and I specifically find that termination was an adverse personnel action.

Contributing Factor

Despite having engaged in protected activity and suffered an adverse personnel action, to establish discrimination under SOX, Complainant must also prove by a preponderance of the evidence a causal connection between his protected activity and the unfavorable personnel action.

⁶ The Supreme Court's holding in *Burlington* addressed both the degree and scope of protection Title VII's anti-retaliation provision (Section 704) affords. With respect to the degree of actionable harm, the Court held that a Title VII plaintiff bringing a retaliation claim need only show the employer's challenged actions are "materially adverse" or "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

The ARB recently clarified that a “contributing factor” is “any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-952, ALJ No. 2005-SOX-33, slip op. at 12 (ARB Sept. 30, 2011), citing *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Clark v. Airborne, Inc.*, ARB NO. 08-133, ALJ No. 2005-AIR-27, slip op. at 7 (ARB Sept. 30, 2010). It found that the contributing factor standard was “intended to overrule existing case law, which required that a complainant prove that his or her protected activity was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor” in a personnel action.” *Bechtel* at 12, citing *Allen v. Stewart Enter., Inc.*, ARB No. 06-081, ALJ Nos. 2004 SOX-60, -62; slip op. at 17 (ARB July 27, 2006). Therefore a complainant need not show protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected” activity. *Bechtel* at 12, citing *Walker v. Am. Airlines, Inc.*, ARB No. 05-28, ALJ No. 2003-AIR-17, slip op. at 18 (ARB Mar. 30, 2007).

Causation may be proven through either direct or circumstantial evidence. Thus, if a complainant shows that an employer’s reasons for its actions are pretext, he or she may, through the inferences drawn from such pretext, meet the evidentiary standard of proving by a preponderance of the evidence that protected activity was a contributing factor. *Bechtel* at 12-13. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer’s policies, shifting explanations for an employer’s actions, and more.⁷ *Bechtel* at 13, citing *Sylvester*. An ALJ must weigh the circumstantial evidence as a whole to properly gauge the context of the adverse action in question. *Bobreski* at 13-14. A complainant is not required to prove pretext as the only means of establishing the causation element of a SOX whistleblower claim. As the ARB has stated, to prevail on a complaint, the employee need not necessarily prove that the employer’s reasons for the adverse action was pretext. However, doing so provides the complainant with circumstantial evidence of the mindset of the employer, which may be sufficient to establish by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse employment decision. *Bechtel* at 13, citing *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-11, slip op. at 19 (ARB May 31, 2006).

As discussed above, I found that there was one adverse personnel action taken with regard to Complainant, termination of employment.

Complainant’s Position

Complainant argues that his protected activity of April 14, 2009, was a contributing factor in his September, 19, 2009, termination. In support of this belief, he argues that the temporal proximity between his April 14, 2009, protected activity and his inclusion in the RIF on June 3-4, 2009, is circumstantial evidence of retaliation. He argues that Kathrens and Whitley were unclear regarding whether Complainant’s performance review was a basis for including

⁷ Circumstantial evidence may also include evidence of motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011).

him in the RIF. He disputes the credibility of Whitley and Kathrens who testified that the decision to include him in the RIF was made in March 2009, well before the protected activity. Complainant does not find their testimony convincing and argues that meeting notices do not establish the topics of meetings held in February and March 2009. Finally, he argues that his job description was changed in order to include his position in the RIF.

Respondent's Position

Respondent argues that Complainant's alleged protected activity was not a contributing factor in its decision to terminate Complainant's employment. Respondent argues that there is undisputed evidence that the decision to terminate Complainant's position was made by Respondent Kathrens on March 9, 2009, well before the April 14, 2009, protected activity.

Discussion

Complainant is correct in asserting that temporal proximity of protected activity and adverse personnel action may be circumstantial evidence that the protected activity was a contributing factor to his termination of employment. Certainly the time period between Complainant's April 14, 2009, protected activity and his notification on July 22, 2009, that his position was being eliminated is short enough that the evidence must be evaluated to determine whether it signifies that the protected activity was a contributing factor. However, I find that the probative significance of the temporal proximity between these events is diminished upon consideration of the entire record and sequence of events that led up to Complainant's termination. I find that the circumstantial evidence is outweighed by other evidence in the record which demonstrates that the decision to terminate Complainant's employment was made by March 9, 2009, several weeks before the protected activity in this case.

I found the testimony of Whitley and Kathrens regarding when Complainant was chosen for inclusion in the RIF to be credible and consistent. Although, Complainant is correct in asserting that the meeting notices in and of themselves do not establish what was discussed at the meetings, I find that the meeting notices, when coupled with the credible testimony of Respondents Whitley and Kathrens, provide further support for Respondents' position. I also find that the evidence establishes that during the time period in question, Allstate had already eliminated the positions of several employees from the ATO Compliance Organization, as well as other parts of the company, and was in the process of analyzing the ATO Compliance Organization for further reductions in spending and personnel.

As discussed in my specific findings of fact above, I find that Complainant's job performance or performance evaluations had nothing to do with the selection of his position for inclusion in the RIF. Although it could appear that this was the case by a reading of the business case document prepared by Kathrens, in his testimony Kathrens clarified that he only mentioned that Complainant had received a "Fair" rating because the business case format required him to include this information, but that in fact it had nothing to do with the selection of Complainant's position for the RIF. However, I could understand how Complainant may have received this impression based on a plain reading of the document coupled with Respondents' emphasis in the course of litigation that he was a poor performer who could not get along with co-workers. As

stated in my specific findings of fact above, I believe that this emphasis clouded the true issues in this case.

Furthermore, as discussed in my findings of fact number 17 above, I find that neither Kathrens nor any other member of Allstate changed Complainant's job title in order to include his position in the RIF.

Accordingly, I find that Complainant cannot establish by a preponderance of the evidence that his protected activity was a contributing factor to Respondent's decision to terminate his employment. Since Complainant has thus failed to establish this necessary causation element, he has not established a prima facie case of retaliation. Since Complainant has not established all of the necessary elements of his claim, I need not address whether the Respondent could avoid liability by demonstrating clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.

CONCLUSION

Complainant engaged in SOX-protected activity and suffered an adverse personnel action. However, based on the preponderance of the evidence, I find Complainant's SOX-protected activity did not contribute to the adverse action taken against him. Accordingly, since Complainant failed to prove the requisite entitlement element of causation, his SOX employee discrimination complaint must be dismissed.

ORDER

The discrimination complaint of JEROLD S. SHERMAN against ALLSTATE CORPORATION, *ET AL.*, brought under the employee protection provisions of SOX, is **DISMISSED**.

SO ORDERED

CHRISTINE L. KIRBY
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.