

U.S. Department of Labor

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Issue Date: 09 August 2012

CASE NO.: 2012-SOX-00003

In the Matter of:

ANDREW CLARK,
Complainant,

v.

WELLS FARGO HOME MORTGAGE,
Respondent.

Before: Richard M. Clark
Administrative Law Judge

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

This case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("Sarbanes Oxley" or "SOX"), 18 U.S.C. § 1514A, and the implementing regulations found at 29 C.F.R. § 1980.

On June 19, 2011, Andrew Clark ("Complainant") filed a formal complaint with the Department of Labor's Occupational Health and Safety Administration ("OSHA"). Complainant alleged that his employer, Wells Fargo Home Mortgage ("Respondent"), violated the employee protection provisions of Section 806 of Sarbanes Oxley and the Consumer Financial Protection Act of 2010 and Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), 12 U.S.C. § 5567, and other related legislation. That claim was amended to include his June 2011 termination by Respondent. According to OSHA, on October 8, 2011, Complainant filed a second complaint against Respondent for "illegal jailing as retaliation." On October 19, 2011, following an investigation by the Department, OSHA found that the claim was not covered under the Dodd-Frank Act and that "there [was] no reasonable cause to believe that Respondent violated SOX." It found that "[a] preponderance of the evidence indicates that Complainant's protected activity was not a contributing factor in either the discipline or termination of his employment." Complainant refuted these findings by letter dated November 1, 2011.

On June 13, 2012, Respondent filed a Motion for Summary Decision and to Strike Complainant's November 1, 2011, letter ("Motion") pursuant to 29 C.F.R. § 18.40. The Motion argues that (1) the November 1, 2011, letter sent by Complainant does not constitute a timely

objection to the Department's finding and should therefore be stricken in its entirety, and the matter dismissed, and (2) even if the Secretary's findings are reviewed, Complainant cannot make a *prima facie* case that Respondent violated Sarbanes Oxley, and Respondent is therefore entitled to summary decision as a matter of law.

On July 11, 2012, this Office issued an order informing Complainant, who is appearing *pro se*, of his right to respond to Respondent's Motion and granting him an extension of time for which to do so. Complainant responded with a series of motions received on July 20, 2012, including a Motion to Deny Respondent Motion to Dismiss and for Summary Decision ("Opposition Motions").

For the reasons stated below, this Decision grants Respondent's Motion for Summary Decision due to Complainant's failure to set forth sufficient information from which to find a *prima facie* case of workplace retaliation.

I. Background

A. The Acts

Congress enacted Sarbanes Oxley on July 30, 2002, as part of a comprehensive effort to combat corporate fraud. *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, slip op. at 8 (ARB May 25, 2011). Included in the Act were whistleblower protection provisions, which were intended to respond to a "culture, supported by law, that discourage[d] employees from reporting fraudulent behavior not only to the proper authorities . . . but even internally." S. Rep. No. 107-146, at 5 (2002). Section 806 of SOX extends these whistleblower protections to "employees of publicly traded companies." 18 U.S.C. § 1514A(a); 29 C.F.R. § 1980. It prohibits covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information or otherwise assist their supervisors, Congress, or a federal agency in an investigation regarding conduct that the employee reasonably believes is a violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), 1348 (securities fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law related to fraud against shareholders. 18 U.S.C. § 1514A; 29 C.F.R. § 1980.100.

The Dodd-Frank Act was enacted on July 21, 2010, as "[a]n act to promote the financial stability of the United States by improving accountability and transparency in the financial system." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010); 124 Stat. 1376. Section 1057 of the Dodd-Frank Act prohibits covered employers from discharging or discriminating against any covered employee because that employee has provided information to the employer or government authorities regarding what he reasonably believes to be a violation of the Act's Bureau of Consumer Protection ("Bureau") subchapter or any provision of law subject to the Bureau's jurisdiction. 12 U.S.C. § 5567.

B. Complainant's Employment with Respondent

On September 10, 2009, Complainant was hired as a Home Mortgage Consultant ("HMC") by Respondent in Eugene, Oregon. Motion, Attachment 5, Ex. 5. Complainant wrote that he has 30 years of experience in the mortgage lending business, including work at a local Oregon brokerage prior to his work for Respondent. Motion, Attachment 5, Ex. 22 at 2; Opposition Motions. Complainant signed an Employment Agreement and a Team Member Acknowledgement indicating that he had received *The Handbook for Wells Fargo Team Members*, which contained the Code of Ethics and Business Conduct, the Information Security Policy, and the Electronic Human Resources Systems Authorization. Motion, Attachment 5, Ex. 8.

All indications were that after an initial adjustment period in 2009, Complainant was successfully acclimating himself into Respondent's business culture, and producing at a rate that was in line with or exceeding that of other HMCs. *See* Motion, Attachment 5, Ex. 10 at 3, 7, 16 (supervisor Alan Martin writing in performance evaluations that "2010 was a great step forward for [Complainant] in regards to [his] personal production;" "[Complainant] not only withered [sic] the storm, he adapted, and found ways to excel.")

In early 2011, Complainant alleged that, given the new legal and regulatory environment surrounding mortgage lending, he received mandatory online video training about the Dodd-Frank Act. Opposition Motions. In March 2011, all HMCs, including Complainant, were converted to non-exempt employees and given new compensation plans and detailed time-tracking systems because of the new regulatory environment. *See* Motion, Attachment 5, Ex. 6, Ex. 7, Ex. 14 at 23, Ex. 56 at 2. These changes took effect in April 2011. The timing of these changes roughly corresponded with changes in Complainant's behavior in April 2011. *See* Motion, Attachment 5, Ex. 11 at 1 ("Mr. Martin writing in response to forwarded April 15, 2011, email that "this is about when [Complainant's] personality started to change.")

C. Change in Behavior and Complaint

On April 15, 2011, Complainant sent an email message to Branch Sales Manager and supervisor Alan Martin and to several co-workers entitled "Screwed Beyond Comprehension." Motion, Attachment 5, Ex. 11 at 4. After a week of "major marketing," Complainant lamented that Respondent's current mortgage rates were "so far out of the market it is not even funny" and that he was "totally screwed." *Id.* When a co-worker challenged Complainant's assertion in part, Complainant responded "I don't really give a cockroaches [sic] arse [sic]. I don't give a fly#ke [sic] what the ##\$\$%\$ [sic] they think, I will persistently wear them down like a bad case of aids, who cares, they never send me crap how could it go downhill from there?" *Id.* at 2. This was the first instance of an inappropriate email sent by Complainant in the record. His supervisor, Alan Martin, told Complainant he did not want "this type of whining and email vulgarity to be part of [his] branch's culture." Motion, Attachment 5, Ex. 12 at 1. According to Mr. Martin, Complainant responded that he was not whining, but that his email was meant to be funny, and he was simply "deflating [himself] from being incorrect in a major marketing faux pas." He asked Mr. Martin for a hug. Motion, Attachment 5, Ex. 13 at 1.

On April 17, 2011, Complainant sent a letter to Mark Oman, Respondent's Senior Executive Vice President of Home and Consumer Finance, alleging that Respondent's retail mortgage interest rate and fees appeared to be materially higher than other mortgage sources, and that, through referrals based on relationship marketing or theoretical factors such as security or brand name, Respondent was potentially "steering" customers to loans with higher rates and fees. Motion, Attachment 5, Ex. 14 at 1. Complainant also complained of company inefficiencies from his management that were purportedly detrimental to Respondent, and costing it millions of dollars. *Id.* In a subsequent April 26, 2011, email attachment sent to Tim Grochala, Mr. Martin, and Area Sales Manager Doug Grenz, Complainant wrote that "[t]here is absolutely no doubt in my mind that under all these circumstances a judge/jury would indeed consider [this activity] steering," and even if they did not, it would take a great amount of paperwork and time for a judge to sort this all out. Motion, Attachment 5, Ex. 21 at 2, Ex. 27 at 1-2. Days later, in an email to Respondent's Human Resources department ("HR"), Complainant further explained that using "relationship marketing" and nonfinancial factors such as trust and sense of security to attract potential mortgage buyers to Respondent's higher cost loans could constitute illegal steering. Motion, Attachment 5, Ex. 36 at 1. Complainant noted that he feared being sued for steering, and because he lacked the resources to defend himself, he felt the need to bring this issue to Respondent's attention. Motion, Attachment 5, Ex. 21 at 2.

On April 25, 2011, Complainant met with his supervisor, Mr. Martin. According to Complainant, he told Mr. Martin that he had reported two significant issues to Wells Fargo management and was nervous about potential repercussions. Motion, Attachment 5, Ex. 22 at 2. This is the first evidence in the record of Complainant telling his supervisor Mr. Martin of his internal complaints. He told Mr. Martin that all of his actions were carried out to benefit Wells Fargo. *Id.* Complainant claimed that Mr. Martin threatened his employment on account of using unapproved marketing materials. *Id.* However, Mr. Grenz denied that Mr. Martin made any such threat, and claimed that Mr. Martin would have needed to obtain his approval before taking any disciplinary action against Complainant, which, according to Mr. Grenz, Mr. Martin did not seek in April 2011. *Id.*; Motion, Attachment 5, Ex. 21 at 1, Ex. 35 at 1; Grenz Decl. ¶ 5. After the meeting, Mr. Martin immediately emailed his manager Mr. Grenz suggesting that Complainant had "gone off the deep end," and recalled that Complainant spent 45 minutes telling him about a letter and documentation he had sent "to people in the highest places." Motion, Attachment 5, Ex. 19 at 2. He also alerted HR about this meeting. *Id.*

Mr. Martin had a different recollection of the meeting than Complainant. According to Mr. Martin, Complainant told him he got the idea for his actions from the TV comedy South Park. *Id.* He felt that Complainant's complaints were rooted in the new compensation system, and that Complainant "seem[ed] to believe that if he can't make a large income per year in doing [the new 3 step business process], then [Respondent] will owe him income through going to court and legal proceedings." Motion, Attachment 5, Ex. 24 at 1. Mr. Martin observed that Complainant's demeanor had changed drastically and that it was affecting the productivity of other mortgage consultants in the office. *Id.* He was concerned that security may need to step in to resolve the issue. *Id.*

Shortly after the meeting, Complainant emailed Mr. Grenz and hoped they could "forget about the meeting" and that he was "not asking [Mr. Grenz] to do anything at all." Motion,

Attachment 5, Ex. 20 at 3. In an email to Mr. Grenz, Complainant also suggested that he was experiencing personal and financial difficulties, but that he could deal with his personal issues later, and that “as soon as [he] massively ramp[ed] up production [his] concerns [would] no doubt go away.” *Id.*, see also Motion, Attachment 5, Ex. 35 at 1-2.

On April 28, 2011, Complainant had an unscheduled meeting with the Area Sales Manager, Mr. Grenz. According to Mr. Grenz, Complainant believed that, because Respondent’s retail rates were .50% higher than their wholesale rates, as a retail HMC, he was being required to “steer” his customers illegally to a higher priced product. Motion, Attachment 5, Ex. 25 at 1. Mr. Grenz stated that Complainant had a “strategy,” and that much like military strategy, he had every scenario covered including his own murder, had put “false flags” in place, and expected to be handsomely compensated by Respondent in the amount of \$50 million for this information, or, in the alternative, he would pursue legal action after he was wrongfully terminated by Respondent. *Id.* at 1-2. Mr. Grenz recalled that Complainant became emotional over a refund on a loan where he had lost the commission, and also suggested that he was having financial difficulties because of mounting spousal support payments, and had to do whatever it takes to make a living in light of these rising costs. *Id.* In their meeting, Complainant also expressed displeasure over the new corporate parking policy, Mr. Martin’s past suggestion that Complainant move to the Springfield, Oregon, office if he didn’t like the new policies, and his dislike for District Manager Kyle Banks who took away “all dignity” from his team members. *Id.* Mr. Grenz alerted others in the company of this meeting.

From April to July 2011, Complainant repeatedly expressed his desire to resolve this situation, preferably through some “mutually satisfactory agreement” that would allow him to “move along elsewhere and forget all this immediately.” Motion, Attachment 5, Ex. 40 at 1. On May 9, 2011, Complainant emailed Elise Resier, Respondent’s Employee Relations Manager, about a potential settlement. Motion, Attachment 5, Ex. 85 at 1. He requested 20 years of pay at \$250,000 annually, \$2 million for his employment complaint, and a complete non-disclosure of the terms of the settlement. *Id.* Complainant explained that the information he provided to Respondent had “large value,” that he was an above-average “[p]roducer” in the Oregon market, that he feared that he was engaging in illegal “steering,” that his employment was “directly threatened” by Respondent,” and that his manager had created an “abusive” work environment that discouraged him from providing valuable input to the company. *Id.* On or around May 12, 2011, Ms. Reiser referred Complainant’s complaints to a subject matter expert on steering. Motion, Attachment 5, Ex. 44 at 1. Complainant contends, however, that because Ms. Reiser had no expertise on these issues that Respondent had used improper channels for communicating violations. Opposition Motions at 10.

In May 2011, in light of his recent erratic behavior, Respondent conducted a criminal background check on Complainant. Its inquiry revealed two felony charges for robbery and burglary in Bent County, Oregon, dating from 1979 for a man named Andrew Clark. Motion, Attachment 5, Ex. 31 at 2. In September 2009, prior to his employment with Respondent, Complainant denied that he had ever been convicted of a felony within the past 10 years, or of any crime involving dishonesty or breach of trust such as theft or falsification. Motion, Attachment 5, Ex. 64 at 4. In June 2011, Respondent contacted Complainant about his potential criminal background. Motion, Attachment 5, Ex. 32. In a handwritten note of unknown origin,

Complainant allegedly admitted some transgressions in the distant past, although he claimed the charges were expunged. Motion, Attachment 5, Ex. 65. Complainant now feels that these charges were manufactured and used to retaliate against him. Opposition Motions at 10.

In May 2011, Complainant submitted an ethics report with Respondent's Ethics Hotline alleging possible steering violations. *See* Motion, Attachment 5, Ex. 48 at 1. Complainant expressed concern about Respondent purportedly charging a .25% higher interest rate than competitors on retail loans, because it forced him to either close a loan for a higher interest rate or "steer" customers to competitors. *Id.* Complainant was also concerned about the new requirement that he track his overtime hours. *Id.* Between the new time tracking practices and the steering concerns, Complainant believed that he was unable to make sales or commissions in April 2011. *Id.* He stated his intention to contact federal agencies about the problem, requested compensation for his work in April 2011, and referred to himself as a "whistleblower" who should be rewarded and compensated as such. *Id.*

On or around May 23, 2011, Ms. Reiser said that she spoke to Complainant and informed him that Respondent's Legal Department had reviewed his concerns and found that Respondent was operating within the new legal rules and regulations. Reiser Decl. ¶ 7. She scheduled a follow up conversation with Liz Bryant, Complainant's fourth-tier manager, to further discuss his complaints, and thanked him for bringing his concerns forward. *Id.*

In a May 24, 2011, email to Mr. Grenz and a subsequent email to Ms. Reiser, Complainant raised a new issue, suggesting that Respondent was engaging in fraud by entering transactions as "face-to-face" interactions even when contact occurred over the telephone. Motion, Attachment 5, Ex. 49 at 1, Ex. 56 at 2-3. Mr. Grenz denied ever instructing Complainant or other HMCs to improperly record a phone call as a face-to-face meeting, and was not aware of any contrary assertions by Mr. Martin. Grenz Decl. ¶ 4. Complainant made loose comparisons between Respondent's current situation and that of the one-time accounting firm Arthur Anderson, made passing references to the plight of peasants in Potemkin and to Schindler's List, and again expressed a desire to be paid for his work. Motion, Attachment 5, Ex. 49 at 1. Complainant said he planned to file a report with the FBI regarding this fraud. *Id.* Other emails sent by Complainant to Ms. Reiser on May 24, 2011, expressed his fear of being sued, terminated, or de-licensed by Respondent, while Respondent could shift blame to Complainant and use its monetary and legal resources to defend itself. Motion, Attachment 5, Ex. 52 at 1. On the same day, Mr. Martin sent an email to Mr. Grenz and Ms. Reiser noting that, although his co-workers did not view Complainant as a physical threat, they were growing tired of listening to his "commotion." Motion, Attachment 5, Ex. 55 at 1.

On May 25, 2011, Respondent sent Complainant an email clarifying his compensation structure. Motion, Attachment 5, Ex. 56 at 1. Ms. Reiser explained that he was paid \$12 per hour for each hour worked, and also received commissions and bonuses only to the extent they exceeded this hourly pay. *Id.* Respondent assured Complainant that he would never earn less than \$12 per hour for each hour worked, and that this compensation structure was in compliance with federal and state regulations. *Id.* Complainant felt that this payroll structure was initiated to retaliate against him and to "starve the worker honestly reporting" violations. Opposition Motions at 10.

On or about May 25, 2011, Complainant filed violations with the FBI and Portland office of the Department of Labor. Opposition Motions at 7. On May 26, 2011, Complainant told his supervisor Mr. Martin that he would return to his work and let others, including the FBI and Department of Labor, handle his larger concerns. Motion, Attachment 5, Ex. 58 at 1. He promised to enter sales calls that he believed were “compliant with Dodd-Frank/SAFE,” but would only work “strictly within the law.” *Id.* On May 31, 2011, Complainant left a voice message with Ms. Reiser saying “[e]verything is good actually. I obviously want to withdraw my complaints. I finished the job that I had set out to do . . . for the company of course.” Motion, Attachment 5, Ex. 59 at 1 (ellipsis in original). Complainant also said “it all gets down to the whistleblower laws and (*word unknown*) rights and defensibility . . . [s]o anyway, everything is cool.” *Id.*

However, problems with Complainant’s conduct continued. On June 1, 2011, Mr. Martin sent an email to Ms. Reiser writing that Complainant’s “appearance and demeanor appeared to be sloppy.” Motion, Attachment 5, Ex. 60 at 1. According to Mr. Martin, he encountered Complainant at a retail bank store, and Complainant seemed “extremely agitated,” and was trembling, animated, and very loud when he spoke. *Id.* Mr. Martin recalled that three times Complainant came close to him and reached to “touch/grab” his elbow. *Id.* This occurred in a public setting where customers were present. *Id.* On the whole, Mr. Martin found that Complainant’s conduct had become increasingly unprofessional since April 2011, and described his conduct at this encounter as abrasive and confrontational. *Id.* On the same day, Mr. Martin wrote that he found Complainant telling his whistleblower story to a co-worker, and when Mr. Martin told Complainant that he felt it was inappropriate to continue discussing these issues, Complainant placed a “firm hand on [his] back,” and asked Mr. Martin if this was the time when he would be fired. Motion, Attachment 5, Ex. 62 at 1.

D. Formal Warning

On June 2, 2011, Complainant received a formal warning from Mr. Martin for a violation of Respondent’s Workplace Conduct/Professionalism policy. Motion, Attachment 5, Ex. 66 at 1. Mr. Grenz stated that he “believed that [Complainant] was abusing [Respondent’s] electronic system, and was also creating an uncomfortable and disruptive working environment for his coworkers.” Grenz Decl. ¶ 6. Specifically, Mr. Martin referenced his encounter with Complainant at the retail bank store where Complainant touched Mr. Martin and spoke very loudly, and the fact that several of his co-workers stated that Complainant’s conversations were interfering with their ability to work. *Id.*; see Ex. 17 (co-worker Ms. Adair discussing “unusual behavior” by Complainant and that she wanted “nothing to do with it”); Ex. 65 (Mr. Martin’s notes that co-worker named Brad thought Andy was acting “unstable”). Ex/ 74 (“mission accomplished” email regarding his whistleblower efforts distributed to co-workers). Specifically, Mr. Martin quoted the *Wells Fargo Team Member Handbook* in his written warning, which instructs employees to conduct themselves in the utmost professional and appropriate manner at all times.¹ *Id.* He warned that future violations of this or other company

¹ According to the January 2011 *Wells Fargo Team Member Handbook*, employee actions “must always reflect the highest possible standards of business conduct and ethics.” Motion, Attachment 5, Ex. 4 at 5. “Unprofessional and inappropriate workplace behavior is any conduct that violates the policies in this section of [the] handbook,” and “includes but is not limited to outburst, yelling, rudeness, or annoying conduct that interferes with another team

policies could result in “further corrective action, up to and including termination of employment.”² *Id.* at 2. Mr. Martin gave Complainant the contact information for Respondent’s Employee Assistance Counseling in case he wished to further discuss work and personal issues. *Id.*

Complainant, Mr. Martin, and Mr. Grenz all discussed the formal warning on the afternoon of June 2, 2011. Motion, Attachment 5, Ex. 67 at 1. According to Mr. Martin, Complainant repeatedly agreed that his work conduct was inappropriate, and although he did not appear to read the full warning, Complainant signed the warning, and noted that “this is more than fair.” *Id.* Mr. Martin recalled Complainant saying “[t]his whole thing started out as green, and it wasn’t until I got [two-thirds] of the way into it that I realized how bad that was.” *Id.* Mr. Grenz allegedly informed Complainant that his complaints were being reviewed by various departments of Respondent, and Complainant seemed very appreciative that the issues he raised were being reviewed. *Id.* According to Mr. Martin, Complainant revealed that he was having some personal issues with his ex-spouse over child support payments and that his bank accounts had been “cleaned out.” *Id.* Complainant began to “lightly sob” over these personal issues. *Id.* Mr. Martin described Complainant as “lost” and “overwhelmed,” and worried that his own “professed ‘paranoia’” would continue to be a problem for him. *Id.* at 2. Mr. Grenz had a similar impression of the meeting. Motion, Attachment 5, Ex. 68 at 1. He wrote that Complainant repeatedly agreed with the warning and appeared very upset over a recent alimony dispute with his ex-wife, which required him to pay \$5,500 per month in alimony, and meant that all of his salary was being seized by court order. *Id.* at 2. Mr. Grenz did not believe Complainant was a danger to the workplace, but felt that he was “unable to cope with what was happening in his personal life.” *Id.*

After the meeting, Complainant wrote to Ms. Reiser that “I no longer have unreported concerns and Management has provided satisfactory answers.” Motion, Attachment 5, Ex. 69 at 1. He noted that “it now appears likely there will soon be some form of federal action . . . to ‘put off’ the whistleblower thing and investigate what information is being sucked out of companies and for what purposes. I am only one of many all over the country actively reporting this as a national security [sic] concern.” *Id.*

Shortly after his formal warning, and throughout June 2011, a series of bizarre emails followed from Complainant to several of Respondent’s employees including Ms. Reiser and Mr. Martin. Through company email, Complainant sent a series of messages with confusing and seemingly important subject headers that ultimately discussed Jesus and the bible, compared his persecution to people of Jewish faith, linked to video footage of the Bovine Freedom Movement, and opined on the Indian race, ethanol, modern warfare, the historical value of stagecoaches, and the heartland of America. *See, e.g.* Motion, Attachment 5, Ex. 2, Ex. 33, Ex. 51 at 2, Ex. 70 at 1-

member’s ability to perform his or her job.” *Id.* at 8. Employees are instructed to “use good judgment in making sure that [their] behavior supports our company standards of professionalism . . . [f]ailure to do so can be grounds for corrective action, which may include termination of your employment.”

² According to the January 2011 *Wells Fargo Team Member Handbook*, “employment with a Wells Fargo company has no specified term or length; both you and Wells Fargo have the right to terminate your employment at any time, with or without advance notice and with or without cause. This is called ‘employment at will.’” Motion, Attachment 5, Ex. 4 at 3. Complainant’s employment agreement also stated that his employment was “at will.” Motion, Attachment 5, Ex. 5 at 1.

4, Ex. 80, Ex. 84. Complainant was told by several of Respondent's employees that, according to the Wells Fargo Handbook, the company email system should not be used for this purpose.³ *See, e.g.* Motion, Attachment 5, Ex. 70 at 1, 4. Mr. Martin repeated his warning that "continued violations will lead to additional corrective action including termination." *Id.* at 1.

On June 10, 2011, Complainant had a follow up phone call with Ms. Reiser and Ms. Bryant regarding his complaints. Reiser Decl. ¶ 8. According to Ms. Reiser, Ms. Bryant had prepared detailed talking points to address Complainant's concerns and explain why Respondent believed that they were not in violation of the current rules and regulations. *Id.*; *see* Motion, Attachment 5, Ex. 53. Ms. Reiser reported that Complainant acted in a condescending, disrespectful, and difficult manner throughout this call, and did not appear interested in Ms. Bryant's answers. Reiser Decl. ¶¶ 9-10; *see* Motion, Attachment 5, Ex. 72 at 1. Ms. Reiser felt that his behavior was inappropriate and unprofessional. *Id.* The irrelevant emails continued.

Also on June 10, 2011, Complainant raised yet another concern regarding a home appraisal issue. *See, e.g.* Motion, Attachment 5, Ex. 73. Complainant said that he was told by Respondent that he was not in compliance with Dodd-Frank for his direct communications to the appraiser in the Hayen loan. *Id.* at 4; *see* Ex. 53 at 2 (suggesting direct communication with appraiser is not permitted). According to Mr. Martin, Respondent did not continue to pursue this loan, and the issue was resolved. *Id.* Complainant believed that the issues had not been resolved, feared legal troubles, and repeated that he hoped to reach an internal resolution, but those hopes were "waning." *Id.*

On June 14, 2011, Mr. Martin received a forwarded email that Complainant had sent to his co-workers. The email, originally sent on May 31, 2011, was entitled "Mission Accomplished." *See, e.g.* Motion, Attachment 5, Ex. 74 at 2. It detailed that, beginning on April 15, 2011, Complainant began looking at internet forums and found that several Wells Fargo employees "all over were waiting for some reward they thought they could get form the government." *Id.* He claimed that all of his actions and reports were designed to give him and Respondent "tam qui" rights to all possible violations. *Id.* According to Complainant, his May 25, 2011, filing, internal reporting, and FBI report "all were necessary to positively perfect the claim." *Id.* Complainant was convinced that he had a duty to report the "first transaction occurrence of anything 'odd'" to the FBI as a "first-line defense against company risk." *Id.* On June 14, 2011, Complainant emailed Mr. Martin, denying he had a "master plan," and stating that he thought Respondent was not responding to his complaints and perhaps concealing information. *See, e.g.* Motion, Attachment 5, Ex. 75 at 2. Complainant hoped to speak with an expert on Dodd-Frank regarding his concerns, and once again expressed his desire to find a "nice tidy way" to resolve this matter and to "call it a company success story" without seeking legal recourse. *Id.*, Ex. 76 at 1. Complainant told Mr. Martin that he was "scared" and intimidated, and therefore required to "take the next step as a defensive position." *See, e.g.* Motion, Attachment 5, Ex. 76 at 1. He pleaded for a "graceful" way out through some sort of internal resolution, and stated that "this is really all something we can laugh about its [sic] so funny in a lot of ways." *Id.* He said that he reported violations to the FBI and Department of Labor to

³ According to the handbook, "electronic communication . . . must be handled in a professional manner." Motion, Attachment 5, Ex. 4 at 8. "Appropriate use of systems and features, as well as the appropriate content of electronic communication, is required." *Id.* at 17.

“protect the company,” and also sent this information to the “very top levels” of Respondent’s company, but never let lawyers touch company information or his writings because “we are family.” *Id.* Complainant was convinced of the righteousness of his actions, and said the non-righteous go to court. *Id.* Complainant referred to himself as a “rat,” was hopeful that he would be rewarded for his actions, and felt that “this could all make such a pretty picture, its [sic] all in the spin.” *Id.* at 4. On June 19, 2011, Complainant filed this action with OSHA. Motion, Attachment 5, Ex. 1 at 1.

Mr. Martin and Mr. Grenz met with Complainant on June 21, 2011, regarding his June 14, 2011, email chain. *See, e.g.* Motion, Attachment 5, Ex. 79. According to Mr. Grenz, Complainant felt scared over the threat of losing his employment. *Id.* Complainant communicated that he had received a graceful way out from Respondent, but would not elaborate further as to what that meant. *Id.* Complainant again expressed displeasure over the new time tracking system and the new scrutiny of his daily work activities. *Id.* According to Mr. Grenz, Complainant’s final comment at that meeting was that “I’m the best actor there is. I can be the grieving Jew one day and the grieving Muslim the next day. I can turn that switch off and then be normal Andy like today.” *Id.*

On June 27, 2011, when Ms. Reiser again asked Complainant to stop sending irrelevant emails, he replied “I don’t have to do shit. I am going to fucking court.” Motion, Attachment 5, Ex. 80 at 17, Ex. 82 at 1.

E. Termination and Subsequent Developments

On June 28, 2011, Complainant was terminated for violating Respondent’s workplace conduct and professionalism policy. Grenz Decl. ¶¶ 9-10. Mr. Grenz stated that:

[Complainant’s] unprofessional, profane, and disrespectful behavior was unacceptable. Given the number of prior conversations in which I had clearly reminded [Complainant] of [Respondent’s] (and my) expectations regarding appropriate workplace conduct, I concluded that [Complainant] had no intention of conducting himself in a professional manner. I terminated him on June 28, 2011.

Grenz Decl. ¶ 9.

Mr. Grenz declared that his decision to fire Complainant:

had absolutely nothing to do with any reports or questions he raised about [Respondent’s] rate spreads, logging of sales activities or compensation . . . I would have taken or approved the same disciplinary action for any other HMC who engaged in similar belligerent and unprofessional behavior, regardless of any internal reports or complaints. When [Complainant] repeatedly ignored all guidance and suggestions toward improvement, I determined that my only option was to terminate him.

Grenz Decl. ¶ 10.

Complainant asked Tim O'Hara of Respondent's Corporate HR to conduct a review of his termination. Motion, Attachment 5, Ex. 51 at 6. In a July 5, 2011, email to Mr. O'Hara, Complainant reiterated his objective to come to "some agreeable terms" with Respondent. Motion, Attachment 5, Ex. 51 at 4. Complainant wrote, "I am relatively cheap, flexible, and can posture all within the framework of any objective of pretty much anyone. It would be great if you could find some nice fast way for this to work out, let me legally assign the tam qui rights and absolve the company in the fashion required." *Id.* He wrote that without this, he had "no choice but to very quickly move to the next steps on a personal basis. I do not believe in using the legal system to resolve disputes, I considered it a last and painful course of action which is why I am anxious for a mutually favorable outcome." *Id.*

Since Complainant's discharge, he has returned to Respondent's facilities. Complainant was subsequently arrested by the City of Eugene, Oregon, police for second degree criminal trespassing on Respondent's property. Motion, Attachment 6. Complainant contends that Respondent conspired with the police, hired additional security to justify planned police involvement, ordered a police "well-being" visit to his home on July 18, 2011, and ordered his "SWAT kidnapping." Opposition Motions at 5, 9, 11. Complainant contends that this arrest was unwarranted, torturous, and retaliatory in nature. *Id.*

On July 24, 2011, Complainant sent an email to Respondent's counsel that said, "[m]y favorite spoof was filing the May 25 report which is a workof [sic] art and then another one personally [sic] that looked a little crazy." Motion, Attachment 5, Ex. 57 at 1. In August 2011, Complainant sent several inappropriate emails to Respondent's counsel about a potential sexual encounter, and left a voice message suggesting Complainant had been seeking information about Respondent's counsel's family. Motion, Attachment 8 at 2-3, 44-46. Respondent's counsel also contends he sent several inappropriate faxes to her firm, although Complainant questions the authenticity of these faxes, states they are irrelevant, and contends they were fabricated to retaliate against him and to entrap him as a guilty party in these proceedings. *Id.* at 2; Opposition Motions at 7, 12.

After Complainant's termination, Respondent has brought suit against Complainant in a different forum, the District Court of Oregon, seeking a temporary restraining order and injunction that would halt Complainant's use of a personal website to divulge Respondent's company information. Motion, Attachment 4. Judge Hogan found that Complainant disclosed Respondent's trade secrets and confidential information publicly through his website, wfopsreport.com in violation of his Employment Agreement and the Computer Fraud and Abuse Act. *Id.* On August 11, 2011, Judge Hogan granted a temporary restraining order against Complainant enjoining this disclosure and ordering the return to Respondent of all confidential information. *Id.* at 3-4. On August 28, 2011, Judge Hogan granted a preliminary injunction enjoining Complainant from publishing, disclosing, or retaining Respondent's trade secrets, confidential information, and equipment. *Id.* at 15. That order found that Complainant had destroyed the computer Respondent gave him, and had, since July 14, 2011, been using his own website to upload Respondent's proprietary information. *Id.* at 8-9. Images submitted by Respondent showed that Complainant's work computer had been destroyed. Motion, Attachment 7. In a July 24, 2011, email to Respondent's counsel, Complainant said that he feared Respondent would "alter" his computer, refused to return it, and said it had been

“killed.” Motion, Attachment 5, Ex. 57 at 2. Complainant maintains that no non-public data was released through his website. Opposition Motions at 3.

II. Summary Decision Legal Standard

In cases before this Office, the standard for summary decision is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, slip op. at 5 (ARB June 28, 2011); *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (ARB May 27, 2010). Under 29 C.F.R. § 18.40(d), an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show there is no genuine issue as to any material fact and the party is entitled to summary decision as a matter of law. *Mara*, ARB. No. 10-051, at 5. “A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation.” *Frederickson*, ARB No. 07-100, at 5-6 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The primary purpose of summary judgment is to isolate and promptly dispose of unsupported claims or defenses. *Catrett*, 477 U.S. at 323-24.

If the party moving for summary decision demonstrates an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact that might affect the outcome of the case and is supported by sufficient evidence. *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 987 (9th Cir. 2006). The non-moving party may not rest upon the mere allegations of his or her pleadings, but must instead set forth “specific facts” showing there is a genuine issue of fact for hearing. 29 C.F.R. § 18.40(c); *Mara*, ARB. No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. Where the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial,” there is no genuine issue of material fact, and the moving party is entitled to summary decision. *Catrett*, 477 U.S. at 322-23. In assessing a motion for summary decision, the administrative law judge must consider the record in the light most favorable to the non-moving party and draw all inferences in favor of the non-moving party. *Mara*, ARB. No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6.

III. Analysis

A. The Limited Scope of this Proceeding

Complainant has alleged causes of action under the Sarbanes Oxley⁴ and Dodd-Frank Acts.⁵ The provisions at issue were meant to protect whistleblower employees who engaged in protected activity under the Acts, and suffered an adverse action on account of their endeavors.

⁴ Under Sarbanes Oxley, a person who alleges retaliatory discharge or discrimination may seek relief by filing a complaint with the Secretary of Labor. 18 U.S.C. § 1514A(b)(1)(A); see 29 C.F.R. § 1980.103(c). Congress authorized the Assistant Secretary of Labor to issue “written findings” on the complaint, and the complainant may object to those findings and request a hearing by an administrative law judge (“ALJ”). 29 C.F.R. § 1980.105. Assuming jurisdiction is proper, Congress ceded adjudicatory authority to the ALJ to conduct a *de novo* review of

Therefore, while congress has ceded authority to the Department of Labor to investigate whistleblower complaints under both the Sarbanes Oxley Act and the Dodd-Frank Act, this authority is limited, and does not extend to complaints made against non-employers. *See* 18 U.S.C. § 1514A; 12 U.S.C. § 5567.

Here, in his November 1, 2011 Objections to OSHA’s findings, and subsequent Opposition to Respondent’s Motion, Complainant has made several complaints against the City of Eugene, Oregon Police Department, and the United States District Court for the District of Oregon. References were also made by Complainant to records on PACER from district court proceedings, to which this Office does not have access, and which are not relevant to the proceedings here. *See* Opposition Motions at 2, 5. Complainant also complained of battery by process on the part of Respondent’s law firm in district court and in this Office, the use of district court for a Strategic Lawsuit Against Public Participation (“SLAPP suit”) against him, both of which are charges this Office lacks the authority to address. *Id.* at 3-5, 12. He also referenced garnishment of his wages in spousal support proceedings, a guardianship proceeding, Google-based defamation, Respondent’s role in an illegal kidnapping by SWAT team, Respondent’s possible role in the delivery of illegal human organs to the United States, and allegations under the Racketeer Influenced and Corrupt Organizations Act (“RICO”). *Id.* at 3-6, 11.

None of these complaints fall within the purview of Sarbanes Oxley or Dodd-Frank for two reasons. First, several of the accused parties were never employers of Complainant, and therefore are outside of the employment relationship presupposed in the whistleblower protection statutes. *See* 18 U.S.C. § 1514A; 12 U.S.C. § 5567. There is no evidence in the record suggesting that Respondent was conspiring with any of these parties, as Complainant contends. Second, this Office lacks jurisdiction over these causes of action, as it is not a court of general jurisdiction, and lacks authority to hear RICO, battery by process, defamation, spousal support, guardianship, or kidnapping causes of action.

Additionally, Complainant lists several allegedly retaliatory actions by Respondent that occurred after he was terminated on June 28, 2011, and “became deadly.” Opposition Motions at 6-7, 10-11. However, these actions are beyond the scope of this Decision, because they occurred after the employee-employer relationship was terminated, when Complainant was no longer a protected “employee” under either Act. *See* 18 U.S.C. § 1514A; 12 U.S.C. § 5567.

the findings, and hear the case on the merits. *Id.* § 1980.109(c). The ALJ can “provide all relief necessary to make the employee whole” or to deny the complaint. *Id.* § 1980.109(d)(1). While the Department of Labor is vested with this authority, the whistleblower protection provisions of Sarbanes Oxley, however, only extend to “employees of publicly traded companies” who suffer an adverse action at the hands of their employers. *Id.* § 1514A(a); *see* 29 C.F.R. § 1980.103.

⁵ Under the Dodd-Frank Act, Congress authorized a person who alleges retaliatory discharge or discrimination to file a complaint with the Secretary of Labor. 12 U.S.C. § 5567(c). The Secretary of Labor has the authority to initiate an investigation of the complaint and to issue a preliminary order or findings on the matter. *Id.* § 5567(c)(2)(A)(i). Either party may object to these findings and request a hearing on the record. *Id.* § 5567(c)(2)(C). However, like Sarbanes Oxley, Section 1057 of the Dodd-Frank Act extends protection only to “covered employee[s]” of service providers who engage in protected activity and suffer an adverse action propagated by their employer. 12 U.S.C. § 5567.

Consequently, this Decision will only consider issues related to Sarbanes Oxley and Dodd-Frank.

B. Motion to Strike

Respondent first argues that Complainant's November 1, 2011, objections to OSHA's findings fail to challenge any specific finding made by OSHA, and should therefore be stricken in their entirety, and Complainant's complaint should be dismissed. Motion at 2-4.

Under 29 C.F.R. § 1980.106(a):

any party who desires review, including judicial review, of the findings and preliminary order. . . must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1980.105(b). The objections, request for a hearing, and/or request for attorney's fees must be in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney's fees.

In this case, OSHA issued its findings on October 19, 2011. Motion, Ex. 2. On November 1, 2011, Complainant issued a letter to the Chief Administrative Law Judge opining that "the findings on subject case dated October 19, 2011 [were] completely incorrect." *Id.*, Ex. 3. Complainant then listed three separate objections, including Respondent's alleged coordination with the City of Eugene Police on his arrest, Respondent's alleged requests for personal phone records and computer equipment from Complainant, and the Department of Labor's right to regulate the language and content of Complainant's speech. Complainant has, at the very least, generally objected to the findings of the Labor Secretary through a timely letter. Respondent offers no legal authority as to why to letter should not be construed as an objection to the Secretary's findings and why this Office should not review the October 19, 2011, findings of the Secretary. Therefore, the request to strike is denied and this Motion will be evaluated on the merits.

C. Motion for Summary Decision

In the alternative, Respondent moves for summary decision, arguing that Complainant has failed to make a *prima facie* case to prevail on his SOX claim. Motion at 20.

Complainant filed this claim on June 19, 2011, under Sarbanes Oxley and the Dodd-Frank Act. Motion, Attachment 5, Ex. 1 at 1. However, the Dodd-Frank Act was enacted on July 21, 2010, and the whistleblower protection provision did not become effective until July 21, 2011.⁶ On July 11, 2011, OSHA advised Complainant that it lacked jurisdiction to investigate

⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 1058 ("This subtitle shall become effective on the designated transfer date"); 12 U.S.C. § 5582 (designated transfer date parameters); 75 Fed. Reg. 57252-02 (Sept. 20, 2010) (Secretary of Treasury Geithner setting transfer date to July 21, 2011); see *Mahood v. Advanced Motor Devices*, No. 2012-CFP-00001, slip op. at 1 (Jan. 31, 2012) ("OALJ jurisdiction over whistleblower claims under the [Dodd-Frank] Act became effective on the 'designated transfer date' which was set as of July 21, 2011. Thus, the OALJ has no jurisdiction over a complaint under the Act that alleges protected activity and adverse employment actions that occurred prior to July 21, 2011.")

complainant under Dodd-Frank. It did, however, address the complaint under SOX. Motion, Attachment 5, Ex. 1 at 1. Complainant contends that corporate retaliation via “SWAT kidnapping” and “SLAPP filings” occurred after July 21, 2011, Opposition Motions at 8, but, as discussed above, this Office does not have authority to rule on those issues, and furthermore, the record established that both Complainant’s formal warning and termination occurred in June 2011. No employment relationship existed after June 28, 2011, and Complainant could therefore not have suffered a cognizable adverse action after July 21, 2011, the date the Dodd-Frank employee protection provisions became effective. Therefore, only the SOX complaint will be addressed here.

Respondent is a division of Wells Fargo Bank. Wells Fargo Bank is a company within the meaning of Sarbanes Oxley, in that it has a class of securities registered under section 12 of the Securities and Exchange Act of 1934, codified at 15 U.S.C. § 78l, 18 U.S.C. § 1514A; 29 C.F.R. § 1980.101. As an integrated subsidiary of Wells Fargo Bank, Respondent is a covered employer under SOX. 18 U.S.C. § 1514A. As an individual who formerly worked for Respondent, Complainant is a covered employee under SOX. 29 C.F.R. § 1980.101.

To prevail in a SOX claim, Complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity under the Act, (2) Respondent knew or suspected that the Complainant engaged in the protected activity, (3) Complainant suffered an adverse action, and (4) the circumstances were sufficient to demonstrate that the protected activity was a contributing factor in the adverse personnel action against Complainant. *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009); 29 C.F.R. § 1980.104(e)(2); see 49 U.S.C. § 42121(b)(2)(B)(i); *Zinn v. Am. Comm’l Lines, Inc.*, ARB No. 10-029, slip op. at 5-6 (ARB Mar. 28, 2012). The complaint need not take any particular form, but will be dismissed unless complainant alleges the existence of material facts and evidence to make a *prima facie* showing of these four elements. 29 C.F.R. §§ 1980.103(b), 1980.104(e)(1)-(2). These elements will be scrutinized in turn, in light of the relevant summary decision standard.

1. Protected Activity

Under 18 U.S.C. § 1514A(a)(1) of Sarbanes Oxley, protected activity is defined as:

any lawful act done by the employee – (1) to provide information . . . regarding any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C. §§] 1341 [mail fraud], 1343 [wire 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 . . . a person with supervisory authority over the employee. . . .

Id.; see also *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009). The Ninth Circuit, relying on an Administrative Review Board (“ARB”) decision called *Platone v. FLYi, Inc.*, ARB No. 04-154, slip op. at 17 (Sept. 29, 2006), has held that a complainant’s actions must “‘definitively and specifically’ relate to [one] of the listed categories” of violations within 18 U.S.C. § 1514A(a)(1), although complainant need not cite directly to the statute he believes was

violated. *Van Asdale*, 577 F.3d at 996 (internal citation omitted). However, the ARB, sitting *en banc*, has recently taken issue with the “definitive and specific” evidentiary standard set forth in *Platone*, arguing that such a heightened standard is in conflict with the legislative intent and plain language of SOX to protect “all good faith and reasonable reporting of fraud.” *Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, slip op. at 17-18 (ARB May 25, 2011) (citing 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26 2002)); see 18 U.S.C. § 1514A (“no company may discharge an employee because of any lawful act he “reasonably believes” constitutes a violation). While the “definitive and specific” standard is thereby in doubt, both the ARB and the Ninth Circuit agree that to trigger the protections of the Act, the “focus is on whether the employee reported conduct that he or she *reasonably believes* constituted a violation of federal law” that is related to one of the violations listed in Section 806 of SOX. *Sylvester*, ARB No. 07-123, at 19 (emphasis in original); see *Van Asdale*, 577 F.3d at 1000. Specifically, “an employee must . . . have (1) a subjective belief that the conduct being reported violated a listed law, and (2) this belief must be objectively reasonable.” *Van Asdale*, 577 F.3d at 1000; accord *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009); *Sylvester*, ARB No. 07-123, at 14; *Zinn*, ARB No. 10-029, slip op. at 7. A reasonable but mistaken belief that respondent’s conduct constitutes a violation of the applicable law can constitute protected activity. *Van Asdale*, 557 F.3d at 1002; *Sylvester*, ARB No. 07-123, at 16.

It is not clear here which of the six enumerated categories of violations under SOX Complainant contends that Respondent violated. While the ARB has recently reversed its course in *Platone* and held that a complaint need not definitively or specifically relate to one of the enumerated categories of violations, need not approximate every element of the fraud, and has also held that a reference to shareholder or investor (securities) fraud is not required to establish protected activity under SOX, the complaint must still generally address or relate to one of the enumerated categories of corporate fraud set forth in Section 806 of the Act. *Sylvester*, ARB No. 07-123, at 19-21, 23 (disagreeing with level of specificity required in *Platone*, *Allen*, and *Day*, but still conducting inquiry into type of fraudulent activities alleged by complainant). Here, Complainant alleged that Respondent engaged in illegal steering of customers to mortgages, propagated “fraud” in the mislabeling of telephone transactions with customers as face-to-face transactions, and had improper direct contact with an appraiser in violation of Dodd-Frank. He also alerted Respondent of perceived management inefficiencies and expressed his displeasure with the new compensation and time tracking systems. Even if read broadly, none of the alleged violations appear to fall into the six general categories of fraud covered under SOX. 18 U.S.C. § 1514A(a)(1).

In his various concerns expressed via letter and email to Respondent, Complainant did not reference the Sarbanes Oxley Act; instead, his primary focus was on the Dodd-Frank Act, which as explained above, was not actionable at the time of his termination. In his complaint to OSHA, Complainant did not cite to specific conduct on the part of Respondent that violated SOX; rather, he, in a conclusory manner, alleged a violation of Sarbanes Oxley. The only time Complainant mentioned “fraud” was when he stated he was told to record telephone meetings as face-to-face meetings when documenting sales calls. That bare allegation, which has been denied by Respondent, without more, does not generally fall into the category of corporate fraud. The alleged “steering” concerns and concerns over improper contact with an appraiser on the Hayen loan are not covered by SOX, but rather by the Truth in Lending Act added as part of the

Dodd-Frank Act's Mortgage Reform and Anti-Predatory Lending Act. 15 U.S.C. § 1639b(c) (steering); 15 U.S.C. § 1639e (appraisal independence requirements). The alleged poor company management by Complainant's supervisors, while potentially damaging to the value of the company, is not the type of conduct that has been construed to constitute fraud against shareholders, or any other type of fraud for that matter. Company inefficiency, in itself, is not fraudulent.

Even if we assume, for the sake of argument, that Complainant's violations fell near the bounds of the listed categories of fraud under SOX, to constitute protected activity and trigger SOX's protections, Complainant must "reasonably [believe]" that the complained-upon "fraud" constitutes a violation of Sarbanes Oxley by satisfying the two part-test reasonableness test set forth in *Van Asdale* and *Sylvester*. 18 U.S.C. 1514A(a)(1); *Van Asdale*, 577 F.3d at 1000; *Sylvester*, ARB No. 07-123, at 14-15.

To satisfy the subjective component of this test, the complainant must have an actual, good faith belief the conduct he complained of was a violation of relevant law. *Day*, 555 F.3d at 54 n. 10; *Sylvester*, ARB No. 07-123, at 14. The legislative history of SOX makes clear that its protections were "intended to include all good faith and reasonable reporting of fraud," even if that belief is mistaken, and that "there should be no presumption that reporting is otherwise, absent specific evidence." *Van Asdale*, 577 F.3d at 1001-02 (citing 148 Cong. Rec. 57420 (daily ed. July 26, 2002)). Absent evidence that employee's complaints were made in bad faith, the subjective component is satisfied; it is irrelevant whether the fraud actually occurred. *Id.* at 1002; *Day*, 555 F.3d at 54. Here, based on the totality of the evidence, Complainant has not set forth "specific facts" to demonstrate that there is a genuine dispute of material fact over whether his complaint was subjectively reasonable. 29 C.F.R. § 18.40(c); *Mara*, ARB. No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. When read in isolation, Complainant's assertion by email to Mr. Grenz that "[t]here is absolutely no doubt in my mind that under all these circumstances a judge/jury would indeed consider [this activity] steering" suggests that his steering complaints were made in good faith, under the reasonable belief that Respondent was engaging in illegal activity. However, that statement is contradicted by Complainant's own words just days later, when, after meeting with his supervisors, he emailed Mr. Grenz and hoped they could "forget about the meeting" and told Mr. Grenz he was "not asking [him] to do anything at all." While Complainant sporadically seemed convinced of the righteousness of his actions, and claimed that his complaints were made for the benefit of the company, he contradicted himself on several occasions. His repeated, contradictory statements establish that the complaints were not made in good faith, but as part of a larger plan to obtain compensation from Respondent.

Complainant often seemed intent on using his complaints as leverage to obtain a sizable settlement from Respondent. On April 28, 2011, according to Mr. Grenz, Complainant told him that he had a "strategy," and hoped to receive compensation in the amount of \$50 million from Respondent. On May 9, 2011, he asked Ms. Reiser for \$2 million plus an annual salary in an undisclosed settlement for raising his complaint. In his May 2011 ethics report, Complainant wrote that he wanted to be protected and rewarded as a whistleblower. Complainant repeatedly expressed his desire to Mr. Martin and Mr. Grenz to resolve his complaints in a "tidy" and "graceful" way, to be paid or rewarded for his work, and threatened to take "the next step" of legal action if the issues could not be resolved. After his termination, Complainant asked Mr.

O'Hara if they could "find some nice, fast way to work this out," that he was relatively cheap and flexible, and that without such an agreement he would have "no choice" but to resort to the legal system for resolution. While the efforts to be compensated for his complaints do not conclusively establish that the complaints were not made in good faith under a reasonable belief of fraud, collectively, these efforts suggest that Complainant's complaints may have been a form of bribery or part of a larger scheme to obtain compensation from Respondent. This is particularly true given the unfortunate personal financial obligations Complainant faced due to his rising monthly alimony costs, and Mr. Grenz's recollection that Complainant told him he had to do whatever it takes to make a living.

There are four pieces of evidence that further suggest Complainant's complaints were a fabrication that were not rooted in a subjective, good faith belief of fraud. In May 2011, Mr. Martin wrote that Complainant told him he got the idea for his actions from the comedy South Park. Second, On June 21, 2011, while meeting with Mr. Martin and Mr. Grenz, Complainant said, "I'm the best actor there is. I can be the grieving Jew one day and the grieving Muslim the next day. I can turn that switch off and then be normal Andy like today." Third, Complainant later told Respondent's counsel that his "favorite *spoof* was filing the May 25 report which is a workof [sic] art and then another one personally [sic] that looked a little crazy." (emphasis added). Fourth, Mr. Grenz also recalled that Complainant spoke of a master strategy, in which he hoped to be compensated for his complaints and had every contingency covered, much like military strategy. Together, these comments suggest that Complainant's purported violations did not arise out of a good faith, reasonable belief on fraud, but as part of a strategic plan against Respondent that was rooted in deceit and as derived a means of supplementing his income. Complainant has not offered any other evidence to refute or counter the reasonable interpretation of the evidence offered by Respondent in support of the motion for summary decision.

Additionally, on May 31, 2011, and in early June, Complainant suggested to Ms. Reiser that he wished to withdraw or no longer had concerns about Respondent's conduct. In late April 2011, after discussing with his complaints with his supervisors, Complainant asked Mr. Grenz to "forget about the meeting" and asked him not to pursue any action on the complaints. These repeated withdrawals and changes of heart indicate that Complainant did not consistently, actually, and reasonably believe that Respondent was engaging in a violation of the law.

While summary decision is inappropriate where there is a genuine dispute of material fact, Respondent has set forth facts to demonstrate that Complainant did not subjectively believe that the conduct he reported violated Sarbanes Oxley, and Complainant has not offered "specific facts" to rebut these assertions. 29 C.F.R. § 18.40(c). Although given an extension of time to reply, in his Opposition Motions, Complainant does very little to explain how his complaints were reasonably related to the corporate fraud covered by Sarbanes Oxley. Instead, the incidents Complainant appears to be focused on in his Opposition Motions are outside the scope of this Decision. Construing the record in the light most favorable to Complainant, *Mara*, ARB. No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6, in light of his repeated, self-contradictory statements against his own belief of fraud, he has not made a sufficient showing that the violations he raised were subjectively reasonable. *Catrett*, 477 U.S. at 322-23; 29 C.F.R. § 18.40(c). Even if his belief of illegal activity was mistaken, the record established that the complaints were not made in good faith, but as part of a plan to be compensated by Respondent.

Further, Complainant's beliefs are also not objectively reasonable. To satisfy the objective component of this test, complainant must have an objectively reasonable belief that the conduct complained of constituted a violation of the law set forth in 18 U.S.C. § 1514A. The objective component is evaluated using a reasonable person standard, "based on the knowledge available to a person in the same factual circumstances with the same training and experience as the aggrieved employee." *Sylvester*, ARB No. 07-123, at 15. This standard closely approximates the standard applicable to Title VII retaliation claims. *Id.* The complainant need not provide a citation to the precise legal provision in question, and need not show there was an actual violation of the provision at issue; rather, he must show that belief of the purported violation was reasonable given the most general elements of the fraud. *Sylvester*, ARB No. 07-123, at 15 ("a complainant can have an objectively reasonable belief of a violation of the laws in Section 806 . . . even if the complainant fails to allege, prove, or approximate specific elements of fraud . . . [i]n other words, a complainant can engage in protected activity under Section 806 even if he or she fails to allege or prove materiality, scienter, reliance, economic loss, or loss causation.") This is a mixed question of law and fact; if there is a genuine issue of material fact, it cannot be decided as a matter of law, but if no reasonable person could have believed the facts amounted to a violation, it may be decided as a matter of law. *Welch v. Chao*, 536 F.3d 269, 277-78 n.4 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008); see *Sylvester*, ARB No. 07-123, at 15.

Here, after a thorough examination of the record, Complainant alleged four potentially actionable violations by Respondent: the steering violation, "fraud" in reporting phone sales calls as face-to-face contact, inefficient mismanagement of company time, and Complainant's own violation for direct communication with an appraiser. As discussed above, his other complaints, including Respondent's role in his arrest by the Eugene Police Department, and his objections to the district court proceedings against him, are either unsubstantiated, beyond the scope of this Office's authority, and/or beyond the scope of Sarbanes Oxley, which pertains to actions against an employee by its employer. Although Complainant is not a lawyer, his considerable, thirty years of experience in mortgage lending business and training are considered in this analysis. *Sylvester*, ARB No. 07-123, at 15. For all four of these complaints, no fact finder could find that a person of like training and experience could have an objective, reasonable belief that the conduct was a violation of Sarbanes Oxley.

With respect to the alleged steering, Complainant initially explained to Mr. Oman, Respondent's Senior Executive Vice President of Home and Consumer Finance, that offering mortgages with higher rates and fees than its competitors based on relationship marketing or other factors such as brand name and security may constitute illegal steering. "Steering" actually refers to the practice of coercing a prospective borrower to a specific lender or type of loan so that the originator of the loan will receive greater compensation. See 15 U.S.C. § 1639b(c)(1). Complainant later described the potential steering as charging .25% more interest than competitors, which forced him to either close a loan for a higher rate or "steer" the customer to competitors. However, he also argued that because Respondent's retail rates were .50% higher than its wholesale rates, he was therefore required to "steer" his customers to a higher priced retail product. Complainant's allegations of steering all describe the alleged offense in an inconsistent manner. Complainant argues that charging higher rates than its competitors based

on brand or reputation may constitute steering, that steering to competitors may constitute steering, or that charging retail, rather than wholesale rates, may constitute steering. This inconsistency suggests that Complainant was not aware of what actually constituted steering under the law, or that he hoped to describe steering in multiple ways, hoping one of the allegations would resonate with Respondent or in court. While Complainant need not set forth in vivid detail all of the elements of steering to have an objectively reasonable complaint, the fact that he could not even define it in a consistent manner undermines the reasonableness of his allegations.

Additionally, mortgage originators are also prohibited from steering consumers to residential mortgages that the consumer lacks the reasonable ability to repay, or has predatory characteristics or effects. *Id.* § 1639b(c)(3). Complainant's allegations are devoid of facts alleging Respondent was engaged in any of this conduct or other seemingly illicit conduct. With respect to the compensation structure of sales, Ms. Reiser told Complainant that, under Respondent's new system, he would receive an hourly fee plus commission for sales, and that this the "fee plus commission" compensation structure was in compliance with federal and state regulations. Furthermore, an objectively reasonable person who has sold mortgages for thirty years would not find anything illegal or objectionable about charging a slightly higher interest rate than another lender, although it may have made it more difficult for Complainant to sell Respondent's products. That, in itself, is the nature of competitive markets in a capitalist society; lenders are different companies, they set their own rates that are generally in line with the market, but like any other sector, the rates vary from firm to firm. When Ms. Bryant tried to explain the company's view that there was no violation, Complainant did not appear interested in this explanation, and Complainant's belief of potential steering should have become less reasonable had he listened to Respondent's explanation. *See Day*, 555 F.3d at 58 ("[a] company's explanations given to the employee for the challenged practices are also relevant to the objective reasonableness of an employee's belief in shareholder fraud:" belief of fraud becomes less reasonable as complainant is given explanations by the company). Furthermore, steering is not an offense covered under Sarbanes Oxley; rather it is a component of the Dodd-Frank Mortgage Reform and Anti-Predatory Lending Act. 15 U.S.C. § 1639b(c).

Although the ARB's recent decision in *Sylvester* is instructive, unlike the complainant in *Sylvester*, Complainant here has failed to draw even a generalized connection from the alleged steering to the six enumerated categories of violations in Section 806 of SOX. 18 U.S.C. § 1514A. In *Sylvester*, the two complainants alleged fraud in the form of failing to disclose clinical data to shareholders, which they alleged was an attempt to maximize the profits of the company, thereby impacting shareholder value, and further argued could constitute mail or wire fraud, as the data was reported as accurate through U.S. mail and wire communications such as the Internet. *Sylvester*, ARB No. 07-123, slip op. at 5-6. The ALJ dismissed the complaints pursuant to FRCP 12(b)(1), but the ARB reversed, finding these complaints sufficient to plead protected activity under SOX and consequently sufficient to defeat the motion to dismiss because they "describe[d] how the allegedly fraudulent activities relate to the financial status of the company" and also "state[d] that those activities relate[d] to one or more of the six enumerated categories of violations in SOX Section 806, with a specific emphasis on mail and wire fraud." *Id.* at 23. Here, however, Complainant has failed to explain how the alleged steering constituted any type of fraud under SOX. Furthermore, unlike *Sylvester*, where the allegations were

sufficient to survive a motion to dismiss the complaints, the procedural posture in this case is different: this case is at the summary decision stage, beyond the pleadings stage, which is a more rigorous standard, where the non-moving party may not rest upon the mere allegations of his or her pleadings, but must instead set forth “specific facts” showing there is a genuine issue of fact for hearing. 29 C.F.R. § 18.40(c); *Mara*, ARB. No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. This is not to say that Complainant had to identify specific statutory provisions or regulations when complaining of Respondent’s conduct., or set forth the specific elements constituting the alleged fraud. *Sylvester*, ARB No. 07-123, slip op. at 22; *see Day*, 555 F.3d at 55-56. However, given Complainant’s extensive experience in banking and his training, a similarly situated person in similar factual circumstances could not reasonably believe that Respondent’s charging of higher rates than competitors would constitute illegal steering.

With respect to the alleged fraudulent reporting of sales calls, Complainant has set forth few details substantiating this claim. Complainant’s allegations that he was told to record telephone conversations as face-to-face interactions is a bare allegation devoid of factual support in the record. There is no indication from Complainant that Respondent encouraged this incorrect documentation of sales encounters, or intended to engage in this type of “fraud.” In fact, Mr. Grenz denied in his declaration ever instructing Complainant or other HMCs to improperly record a phone call as a face-to-face meeting, and was not aware of any contrary assertions by Mr. Martin. Complainant did not put forth any evidence or “specific facts” further explaining this allegation of “fraud” in his Opposition Motions. Again, unlike the complainant in *Sylvester*, Complainant here has failed to draw even a generalized connection between this alleged “fraud” and the six enumerated categories of violations in Section 806 of SOX. 18 U.S.C. § 1514A; *see Sylvester*, ARB No. 07-123, slip op. at 6, 23.

On the issue of Complainant’s criticisms of upper level mismanagement and their perceived inefficiencies, Complainant has set forth little or no facts to evaluate these claims. Complainant alleged that his managers spend all day attending conferences, emailing materials, and talking amongst themselves, rather than making sales, which he alleged had a detrimental effect on the company. Complainant did not reference this violation in his Opposition Motions, or explain why this constitutes fraudulent activity. Furthermore, inefficient use of time is not in itself fraudulent. No similarly situated person would find it objectively reasonable to believe that Respondent’s decision of what tasks their managers perform on a daily basis is a violation of the law. *See Day*, 555 F.3d at 57 (general or conclusory accusations of accounting violations insufficient to survive summary judgment); *Welch*, 536 F.3d at 279 (conclusory, general statements insufficient to establish objective belief of protected activity).

With respect to Complainant’s direct contact with an appraiser, it was Complainant’s own conduct that led to improper communications with the loan appraiser on the Hayen loan. According to Mr. Martin, Respondent notified Complainant that his conduct was in violation of Dodd-Frank, and Respondent acted accordingly by not pursuing that loan further. Respondent took corrective action in this scenario, and was not responsible for the communication; Complainant was. Furthermore, this conduct is not an offense covered under Sarbanes Oxley; rather it is was an amendment to the Truth in Lending Act added as part of the Dodd-Frank Act’s Mortgage Reform and Anti-Predatory Lending Act. 15 U.S.C. § 1639b(e).

On the whole, Complainant has failed to show that his belief of Respondent's violations were objectively reasonable. *Sylvester*, ARB No. 07-123, at 15. Because Complainant proffered little or no evidence sufficient to generate a genuine issue of material fact that his complaints were generally the type of fraud covered by SOX, or were objectively or subjectively reasonable, he cannot demonstrate that he engaged in protected activity. Summary decision is therefore appropriate for Respondent. *Day*, 555 F.3d at 58; *Reamer v. Ford Motor Co.*, ARB No. 09-053, slip op. at 6 (July 21, 2011) (granting summary decision where complainant could not show he engaged in protected activity).

IV. Order

For these reasons, Respondent's Motion for Summary Decision is **GRANTED**. The matter is dismissed.

A

RICHARD M. CLARK
Administrative Law Judge

San Francisco, California

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.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, 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 appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).