



Issue Date: 26 February 2015

CASE No: 2012-SOX-00036

In the Matter of:

ROBERT EVANS,
Complainant,

v.

T-MOBILE, USA & DEUTSCHE TELEKOM, AG.,
Respondent.

Appearances: Thad M. Guyer, Esq.
For the Complainant

Laurence A. Shapero, Esq.
For the Respondent

Order Granting Summary Decision

T-Mobile, USA and Deutsche Telekom, AG. (“T-Mobile”) moved for entry of a final order without trial (summary decision) that dismisses the employment discrimination claim Robert Evans filed. This matter arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (the “Sarbanes-Oxley Act” or “Act”)¹ and the Secretary’s implementing regulations.² T-Mobile’s motion papers offer proof of facts that establish Evans is entitled to no relief, even though Evans has proof of each element of a whistleblower protection claim. Evans has not demonstrated a material dispute about the facts that preclude relief, so the motion is granted. Evans’ claim is dismissed.

A former employee of T-Mobile, Evans complained to OSHA on July 21, 2009 that T-Mobile discharged him in violation of the

¹ 18 U.S.C. § 1514A.

² 29 C.F.R. Part 1980.

employee protection provisions of the Act.³ OSHA investigated; it found Evans' discharge violated the Act.⁴ T-Mobile moved to stay the preliminary order OSHA's Regional Administrator entered on behalf of the Secretary of Labor⁵ that required T-Mobile to reinstate Evans.⁶ It supported the stay motion with exhibits 1 through 20. The motion papers and Evans' response showed exceptional circumstances to justify a stay of any reinstatement.⁷

T-Mobile argues it is entitled to a final order that dismisses the claim.⁸ In large measure it relies again on the 20 numbered exhibits offered with its motion for stay of reinstatement. The motion for summary decision adds Exhibits A through I, some of which are transcript excerpts from depositions Evans gave in this and some other matter pending in the U.S. District Court for the Western District of Washington. Most references in this order are to T-Mobile's numbered exhibits to the motion for stay, somewhat fewer are to the lettered exhibits annexed to its motion for summary decision. Evans has responded to the motion with exhibits (primarily his declaration), and argument.

Undisputed facts deprive Evans of any remedy: T-Mobile would have terminated Evans had he never engaged in an activity the Sarbanes-Oxley Act protects. In this circumstance "relief may not be ordered."⁹

First, when T-Mobile fired Evans it believed, for good reason, he had lied in an attempt to buttress another discrimination claim that T-Mobile had just investigated. Evans had claimed he suffered discrimination the federal Family and Medical Leave Act (FMLA) forbade. T-Mobile's investigation led a manager in Human Resources to believe Evans fabricated important facts bearing on the FMLA discrimination claim he made.

Second, he repeatedly told T-Mobile he wouldn't return to his job. The parties dispute whether Evans took leave voluntarily or the T-

³ Secretary's Findings & Preliminary Order, OSHA No. 0-1960-09-029, at *2.

⁴ *Id.* at *1, 8.

⁵ The statutory text instructs the Secretary of Labor to make a determination, and the determination letter in this case is titled "Secretary's Findings." *See* 18 U.S.C. § 1514A. The governing regulations, however, assign the Assistant Secretary of Labor for OSHA to make the findings. *See* 29 C.F.R. § 1980.101. I refer to them as the Secretary's Findings.

⁶ Respondent's Motion for Stay of Preliminary Reinstatement ("Motion for Stay").

⁷ Order Granting Stay of Reinstatement.

⁸ T-Mobile's Motion for Summary Decision.

⁹ 49 U.S.C. § 42121(b)(2)(B)(iv), incorporated into the Sarbanes Oxley Act at 18 U.S.C. § 1514A(b)(2)(A).

Mobile Human Relations department placed him on administrative leave involuntarily in early April 2009, as it investigated his FMLA discrimination complaint. Resolving that dispute is unnecessary to the outcome.

The record shows without contradiction that before and while Evans was on leave in April 2009, he repeatedly stated he would not return to the position where he claimed he had been subjected to FMLA discrimination. One of his reasons was that he lacked the skills to do that job. This corroborated—and certainly did not contradict—the performance improvement plan his managers already had implemented for him due to two quarters of what they had rated as unsatisfactory performance. He made it clear he didn’t trust his current manager to treat him fairly. While on leave in April he also submitted a written request that asked T-Mobile to accommodate his depression, anxiety, and panic attacks through a transfer to a new department and role, *i.e.*, to give him some new job elsewhere in T-Mobile. Based on these things, it wasn’t improper to terminate an employee who stated repeatedly he would not return to the job he had.

All this remains true even when Evans has offered what would be adequate proof to go to hearing on the substance of his Sarbanes-Oxley discrimination claim. Unrebutted evidence T-Mobile offered precludes relief; its proof allows it to “escape liability”¹⁰ for what otherwise may be a meritorious claim. I grant the motion, and dismiss the claim.

To understand the claim it is first necessary to review the proof about relevant aspects of the wireless business, how T-Mobile in particular did business, and the function of Evans’ specific (and only) job at T-Mobile.

Next, the proof about how Evan’s supervisors twice had rated his performance unacceptable, his two instances of extended medical leave in the 16 months he worked there, and the investigations T-Mobile made of the two discrimination complaints he submitted under the Family and Medical Leave Act (not the Sarbanes-Oxley Act) follow. The second investigation began not long after Evans returned from his

¹⁰ “If the employee proves that the alleged protected activity was a contributing factor to the adverse action, the employer, to *escape liability*, must prove by ‘clear and convincing evidence’ that it would have taken the same action in the absence of the protected activity.” 76 Fed. Reg. 68087 (Nov. 3, 2011) (emphasis added). See also the statement in the discussion of 29 C.F.R. §1980.109(b) that “*relief may not be ordered* if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.” 76 Fed. Reg. 68089 (emphasis added).

second medical leave, for stress. Around that time, T-Mobile's international partner carriers, including one or more Evans was assigned to work with, claimed T-Mobile owed them credits. Their claims arose from billing problems caused by a new feature T-Mobile test-launched with a subset of international partner carriers. How T-Mobile handled those claims is the basis for Evans' complaint for employment protection under the Sarbanes-Oxley Act. The legal significance of the undisputed material facts is considered last.

I. Facts T-Mobile has Shown

A. The Wireless Industry Generally

Businesses that provide wireless telephone services compete on price, and also on their ability to offer subscribers the broadest possible service area. To expand geographic coverage, wireless service providers like T-Mobile compete to partner with other technologically compatible networks. Potential partners must be spotted, partnership terms must be negotiated, and those relationships must be managed. Evans' claim arises within this context.

In areas where T-Mobile does not own radio frequency spectrum licenses, it negotiates to partner with operators of compatible wireless networks—not all networks are compatible. T-Mobile bills roaming charges to T-Mobile subscribers whose calls use those partner networks. The agreements are reciprocal. Customers of those other wireless carriers gain access to T-Mobile's American network; the international partner carriers then bill their subscribers for calls placed on T-Mobile's network.

T-Mobile benefits because T-Mobile can now bill a partner international carrier on a wholesale basis for calls the partner's retail subscribers place on T-Mobile's network. The international partner carrier benefits from an increase in billable call volume, using records of calls completed on the T-Mobile network to bill its subscribers at retail rates.¹¹ Calls an international partner carrier agrees to pay T-Mobile perhaps 10 cents per minute for wholesale, may be billed to its own subscribers for more, perhaps 30 cents a minute at retail. T-Mobile never directly bills retail customers of its international partner carriers, it bills the carriers.¹²

Successful interchange requires call records in a standard format, a "call detail record." When an international partner carrier's

¹¹ Motion for Summary Judgment, Ex. C, (Depo. of Kevin Pazaski) at p. 62.

¹² Motion for Summary Judgment, Ex. A, (Depo. of Troy Kleweno) at p. 30; Ex. C (Depo. of Kevin Pazaski) at 62–63.

subscriber uses the T-Mobile network, as the call ends something called MSC generates a call detail record.¹³ Much the same is true for a call a T-Mobile subscriber places on the network of an international partner carrier. Those call detail records are aggregated by a clearinghouse company known as Syniverse. It collects each call detail record, determines which international wireless network it belongs to, totals them, and remits a summary backed by the individual call data records to each wireless network. This leads to a wholesale billing.

The Syniverse clearinghouse data allows T-Mobile and each international partner carrier to tally network usage and reach a financial settlement based on how much each owes the other.¹⁴ Each call detail record appended to a Syniverse summary also gives the wireless service provider the data needed to bill its retail subscribers. Anything out of format is unbillable.¹⁵ Yet compatible wireless systems are not identical in their technology, features and services. The generally standard call detail record includes a place where some variations can be encoded. That variable section figures large in this Sarbanes-Oxley Act claim.

Before diving into technical detail, the type of work Evans did should be understood too.

B. The Job of a T-Mobile Partner Relationship Manager

T-Mobile employees sometimes refer to these wholesale billing agreements as “discount agreements.” At T-Mobile, Partner Relationship Managers identify potential international partners (working in association with employees in T-Mobile’s Corporate Development group); negotiate discount agreements with some collaboration from T-Mobile’s legal department; and implement the discount agreements.¹⁶ A Partner Relationship Manager’s work (according to T-Mobile’s job description) has general, strategic, financial, and customer service components.¹⁷ An incumbent needs to be skilled in “complex problem solving,”¹⁸ and have the “ability to prioritize tasks without [sic] minimal supervision and to work under ambiguity.”¹⁹ Qualifications for the job included “excellent financial

¹³ Motion for Summary Judgment, Ex. A, Depo. of Troy Kleweno at p. 31.

¹⁴ Motion for Summary Judgment, Ex. A, Depo. of Troy Kleweno at p. 30.

¹⁵ Motion for Summary Judgment, Ex. A, Depo. of Troy Kleweno at p. 31.

¹⁶ Motion for Stay, Ex. 2 at 00301.

¹⁷ Motion for Stay, Ex. 2 at 00301, description of Tasks and Responsibilities.

¹⁸ Motion for Stay, Ex. 2 at 00301, opening paragraph, second bullet point.

¹⁹ Motion for Stay, Ex. 2 at 00302, heading “Qualifications,” eighth bullet point.

analysis and pattern recognition skills.”²⁰ An incumbent is expected to “negotiate long term roaming agreements that include or incorporate technology evolution.”²¹ To do so, the incumbent had to “prepare financial analyses as part of Preference/Service/Discount agreements to ensure our offers are financially sound and deliver the highest value to T-Mobile.”²²

C. Evan’s Job and Work Group

T-Mobile hired Robert Evans as a “Partner Relationship Manager, International Roaming” to analyze, negotiate, and manage international agreements with other wireless telephone carriers.²³ His base salary was \$85,000.²⁴ In company jargon one significant part of the job was sales or “closing deals.” Evans was expected to find new wireless network carriers and reach agreements with them—on terms that would increase T-Mobile’s net revenue.

Evans’ geographic area of responsibility mainly was in the Caribbean.²⁵ He also managed T-Mobile’s relationship with some international partners further afield. One aspect of that management was to settle wholesale billings within the agreed time periods. He began at T-Mobile on November 30, 2007.²⁶

Evans saw his role as primarily sales—getting other partner networks for T-Mobile. Yet at his deposition he also described his job as requiring “financial analysis of proposals.”²⁷ He says when he was hired, he was promised technical support for financial analysis.

Evans was one of several Partner Relationship Manager who worked within T-Mobile the unit known as the Corporate Development and Wholesale department, internally abbreviated as the CD&W or CDW. Stan Simpliciano and Dirk Mosa were the department’s senior managers, several levels above Evans. Evans’ immediate supervisor originally had been Chander Chawla, who in turn reported to Jim Martinek. Chawla twice rated Evans’ performance as less than acceptable on formal quarterly performance evaluations. For a brief time after Evans’ returned from his second FMLA leave, Kevin Pazaki became his immediate supervisor.

²⁰ Motion for Stay, Ex. 2 at 003021, heading “Qualifications.”

²¹ Motion for Stay, Ex. 2 at 00301, heading “Tasks and Responsibilities, Strategic.”

²² Motion for Stay, Ex. 2 at 00301, heading “Tasks and Responsibilities, Financial.”

²³ Motion for Stay, Ex. 2 at 00301.

²⁴ Motion for Stay, Ex. 1 at 00068.

²⁵ Motion for Stay, Ex. 13 at ¶ 3.

²⁶ Motion for Stay, Ex. 1 at 00068.

²⁷ Motion for Stay, Ex. 3. A., at 22 (Evans depo.).

After his first three months or so at T-Mobile, on March 11, 2008, Evans applied for and was granted medical leave under the federal Family and Medical Leave Act to have back surgery. He was absent most of March, until the end of April (April 26, 2008).²⁸

D. Evans' Performance

Evans struggled to perform his duties as a Partner Relationship Manager before and after his surgery. From the time he began his employment on the last day of November 2007 through April 2, 2009, he only signed one deal—adding a Caribbean international wireless carrier to the T-Mobile network, Orange Dominicana, also known as Orange DR.²⁹ Orange is European business entity that is one of the largest wireless providers in the world; it does its business through local operating units such as Orange DR.³⁰

Negotiating the Orange DR agreement required significant involvement from Evans' supervisor.³¹ He received poor performance reviews for the two consecutive quarters—at the end of June and of September 2008—before he engaged in any sort of activity he claims the Sarbanes-Oxley Act would protect.

He achieved 2.8 out of 5 according to his first performance review, in June 2008.³² One goal he failed was to sign (i.e., complete) 3 discount agreements. He negotiated but did not finally complete the agreement with Orange DR; his managers saw no plan from him for obtaining others.³³

His performance score dropped to 2.2 out of 5 in his next quarterly review at the end of September.³⁴ He failed to achieve the assigned goal to sign another discount agreement.³⁵ His reviewers expressed frustration that Evans devoted significant time to dealing with his dissatisfaction with the June 2008 review. That preoccupation damaged his ability to complete satisfactorily all goals for the quarter that ended September 30.³⁶ The June (second quarter) performance review had criticized his failure to change behavior after managers brought shortcomings to his attention: late arrival at meetings, failure to meet deadlines, and changing the terms of an agreement he

²⁸ Motion for Stay, Ex. 4 at 00026; Ex. 8 at 00113.

²⁹ Motion for Stay, Ex. 3.A. at 175 (Evans depo.).

³⁰ Motion for Summary Decision, Ex. C, at 65 (Pazaski depo.).

³¹ Motion for Stay, Ex. 6 at 00495; Ex.-11 at ¶ 8.

³² Motion for Stay, Ex. 5 at 00003–00007.

³³ Motion for Stay, Ex. 5 at 00004.

³⁴ Motion for Stay, Ex. 6 at 00496.

³⁵ Motion for Stay, Ex. 6 at 00493, 00496.

³⁶ Motion for Stay, Ex. 6 at 00495, under heading Company Values.

negotiated unilaterally (i.e., without consulting his superiors).³⁷ His September review (the end of the third quarter) recognized his efforts to understand T-Mobile's business and his improved punctuality at meetings, while it continued to criticize his lack of understanding of the financial side of the business and his ineffectiveness in negotiating new roaming agreements.³⁸

The reviewer detailed how Evans's performance fell short. He insufficiently understood the terms of the Orange DR deal. He didn't understand the concept of "minimum annual guarantee," despite several conversations in which his manager tried to explain it. He did not prepare the financials for the deal as directed. The deal summary he presented for signature included a contingency clause that was no part of the deal. After confirming he had read the Orange DR agreement, and it was ready to be signed, the managers found "serious errors" in it.³⁹ Poor performance in that quarter led his manager to doubt he had the right skills for his position.⁴⁰

Two consecutive quarters of poor performance caused T-Mobile to impose a Performance Improvement Plan ("PIP") on him in early October 2008, shortly after the second quarterly review.⁴¹ The PIP had two elements. Evans was required to show a thorough understanding of the business and business financials in his work presentations, documents, and discussions.⁴² As the second, his work had to be thorough and accurate. Financials he had submitted that quarter for a potential discount agreement in Israel contained serious flaws unacceptable for someone in his role; in the Orange DR discount agreement he had submitted to his managers for signature he had miscalculated the discounts, given inconsistent examples and made typographical errors. In the future contracts submitted for review had to be error free, thorough, and accurate.⁴³ Failure to improve and sustain improvement could lead to further action that could include his separation from employment. He was no longer in "good standing," which meant he was ineligible for a bonus payout that quarter and "will not be able to transfer positions."⁴⁴

He responded with a written complaint to the Human Resources department that his superiors were discriminating against him by

³⁷ Motion for Stay, Ex. 5 at 00003–00007.

³⁸ Motion for Stay, Ex. 6 at 00495.

³⁹ Motion for Stay, Ex. 6 at 00495, first boxed paragraph.

⁴⁰ Motion for Stay, Ex. 5 at 00004; Ex.-6 at 00495.

⁴¹ Motion for Stay, Ex. 6 at 00495; Ex.-7 at 00488.

⁴² Motion for Stay, Ex. 7 at 00488, first bullet point.

⁴³ Motion for Stay, Ex. 7 at 00488, second bullet point.

⁴⁴ Motion for Stay, Ex. 7 at 00488, paragraph following bullet points.

setting unrealistic performance goals because of the medical leave he had taken for back surgery.⁴⁵ This is a complaint for relief from FMLA discrimination. At the end of October 2008 he took a second medical leave until March 2, 2009 for chronic stress.⁴⁶

After investigation, the T-Mobile Human Resources department concluded Evans suffered no discrimination because he took leave to have his back surgery.⁴⁷ What Human Resources personnel learned in the course of its investigation about the management styles of his immediate supervisor and next-level manager, Chander Chawla and Jim Martinek, led T-Mobile to terminate their employment in November 2008, while Evans was on his second medical leave (the leave for stress).⁴⁸

The week before Evans returned from the stress leave, he expressed to Ms. Reyes of Human Relations, who had investigated his FMLA claim, his desire not to return to his position; he asked to be transferred to a new position.⁴⁹ His request was denied because as a matter of T-Mobile policy employees on a PIP are not transferred.⁵⁰ His October 2008 PIP remained in effect on Evans' second return on March 2, 2009, and remained so throughout his employment.

E. Evans' Second Return

Problems with a new feature T-Mobile was launching known as VHE (an acronym described below) became an issue shortly after Evans returned. A combination of:

⁴⁵ Motion for Stay, Ex. 8 at 00113–00115.

⁴⁶ Motion for Stay Ex. 9 at 00055.

⁴⁷ Motion for Stay, Ex. 3.A. at 94–95 (Complainant's Deposition).

⁴⁸ Motion for Stay, Ex. 3.A. at 155–156 (Complainant's Deposition).

⁴⁹ Motion for Stay, Ex.19.B. at 01002 (recounted in Evans' Apr. 14, 2009 e-mail appended to the Jones declaration at ¶ 9); Ex.-18.B. at 01002 (same e-mail referred to in Hagan declaration at ¶ 11).

⁵⁰ Motion for Stay, Ex.18.B. at 01002, third full paragraph.

1. his ongoing attempts to have Human Resources relieve him from the October 2008 PIP, and
2. his related efforts to have Human Resources give him an internal transfer somewhere else in T-Mobile for:
 - a. hostility he perceived from colleagues, which he attributed to resentment that the investigation Human Resources made of his Family and Medical Leave Act complaint had led to the firing of Chawdra and Martinek, who were popular members of staff, while he was out on his second medical leave (for stress), and
 - b. the mismatch of his skills with his job as a Partner Relations Manager,

led him to complain a second time to Human Relations that he was suffering discrimination. Investigation of that second (new) Family and Medical Leave Act discrimination complaint, done while he was on leave for a third time, culminated in his termination.

Evans ascribes the termination to his vociferous criticism at a March 13, 2009⁵¹ meeting about how T-Mobile dealt with international partner carries on the VHE matter.

T-Mobile ascribes the termination to unrelated reasons:

1. What Human Resources employees viewed as a serious lie Evans told to buttress his new Family and Medical Leave Act discrimination complaint, and
2. His repeated statements that convinced Human Resources that he lacked the analytical skills to do his job, and would not return to work in the group and for the manager where he was assigned.

F. Evans' Return in Early 2009 After T-Mobile's Launch of VHE

Shortly after he returned, Evans attended a meeting on March 13, 2009, about a feature T-Mobile recently launched, known as "Virtual Home Environment" ("VHE"). VHE caused some billing problems that were the impetus for the meeting. Those problems are

⁵¹ Some witnesses give the date as March 18, 2009. Nothing hinges on the calendar date of the meeting. I refer to it only as March 13, 2009 to avoid confusion.

detailed later. First it is necessary to understand what VHE does, and how it affected wholesale billings.

VHE is a software feature. It corrects what are likely dialing errors made by a roaming subscriber, given that subscriber's past dialing history.⁵² It affected subscribers of an international partner carrier who traveled to the United States, as they were using the T-Mobile American network. Dialing corrections by VHE completed an additional 10% or so of the calls foreign subscribers tried to place.⁵³ This increased wholesale billings by T-Mobile to its international partner carriers through the Syniverse clearing system.⁵⁴ Although new to T-Mobile at the time, correction features of this type became standard in the wireless industry.⁵⁵

The declaration Evans offered to oppose summary adjudication says he believed that by March 2009 T-Mobile had implemented or activated the VHE feature for all its 450 international partner carriers.⁵⁶ That wasn't his testimony before T-Mobile made its motion for summary decision; he testified in his deposition he didn't know for "how many" international partner carriers T-Mobile had implemented the VHE feature before March 2009.⁵⁷ He believed it was more than 10 but did not know an exact number.⁵⁸ Nothing in the declaration explains the reason for a substantial change in his sworn testimony, to now contend all 450 of T-Mobile's international partner carrier were affected. He never intimated at his deposition all were involved. Nothing in the declaration directly acknowledges the shift, so he never offers to explain, clarify, or elaborate on this alteration his deposition testimony. The inconsistency is too stark to be meaningless. I regard this specific number as a sham alteration that doesn't preclude summary adjudication.⁵⁹

⁵² Motion for Stay, Ex. 11 at ¶ 3 (Anderson declaration); Ex. 12 at ¶¶ 4, 7 (Pinson declaration); Ex. 13 at ¶6 (Pazaski declaration); Ex. 14 at ¶4 (Soderstrom declaration).

⁵³ Motion for Summary Decision, Ex. A at 49 (Kleweno depo.).

⁵⁴ Motion for Summary Decision, Ex. C, at 62 (Pazaski depo.).

⁵⁵ Motion for Stay, Ex. 12 at ¶ 4 (Pinson declaration); Ex. 14 at ¶4 (Soderstrom declaration); Motion for Summary Decision, Ex. C, at 47, 58 (Pazaski depo.).

⁵⁶ The Complainant's Opposition to Respondents' Motion for Summary Decision ("The Complainant's Opposition"), Evans' Declaration, at ¶2.

⁵⁷ Motion for Summary Decision, Ex. D at 138–139 (Evans depo.).

⁵⁸ Motion for Summary Decision, Ex. D at 139 (Evans depo.).

⁵⁹ See both *Yeager v. Bowlin*, 963 F.3d 1076, 1080–1081 (9th Cir. 2012) (dealing with an egregious instance of memory loss at deposition somehow recovered for a summary judgment declaration); *Van Arsdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009) (permitting plaintiffs in district court to expand on their

T-Mobile's proof says it did rolling launch, or "soft launch" of VHE beginning in late 2008, implementing it for no more than 20 medium and small international partner carriers.⁶⁰ It stopped using it for 10 of those 20 after some experience with this "test bed" of international carriers.⁶¹ Only in 2010 did T-Mobile expand it beyond the original 20.⁶²

G. Billing Problems from the VHE Launch

T-Mobile had begun by early 2009 to bill the test group of international partner carriers for the calls VHE connected (not for the VHE service itself).⁶³ The partners were not informed that T-Mobile had launched the VHE correction feature. T-Mobile contends not giving notice was consistent with standard practice in the industry,⁶⁴ and conformed to industry guidelines issued by an entity known by the acronym GSMA, the association under which T-Mobile and its partners operate.⁶⁵ This contention is in line with the actions of 68 if its international partner carriers, who implemented VHE-type features on their networks without notifying T-Mobile in advance.⁶⁶ Evans offers no evidence to the contrary.⁶⁷

As launched, the VHE feature would alter the standard call data records,⁶⁸ by adding something called a CAMEL flag to them, which is explained below. Evans knew little about those flags.⁶⁹ Due to that flagged call data record, some international partner carriers in the trial group T-Mobile created couldn't bill their own subscribers for calls VHE facilitated, even though T-Mobile had billed, and the international partner carriers had paid T-Mobile wholesale rates for those calls.

deposition testimony in affidavits opposing summary judgment after analyzing the concept of sham declarations in the context of a Sarbanes-Oxley claim.)

⁶⁰ Motion for Stay, Ex.14 at ¶6 (Soderstrom declaration); Motion for Summary Decision, Ex. A at 41 (Kleweno depo.).

⁶¹ Motion for Summary Decision, Ex. A at 41, 48 (Kleweno depo.); Motion for Summary Decision, Ex. D at 138 (Evans depo.).

⁶² Motion for Summary Decision Ex. A, Depo. of Troy Kleweno at p. 41.

⁶³ The Complainant's Opposition, Evans' Declaration, at ¶2.

⁶⁴ Motion for Summary Decision, Ex. B at 42 (Wang depo.).

⁶⁵ Motion for Stay, Ex.14 at ¶6 (Soderstrom declaration).

⁶⁶ Motion for Stay, Ex.14 at ¶15 (Soderstrom declaration).

⁶⁷ Motion for Summary Decision, Ex. D at 59–61 (Evans depo.);

Complainant's Opposition, at Evans' Declaration, ¶2. The \$100 million figure Evans referred to implies that the feature had been implemented for all 450 international partner carriers.

⁶⁸ Motion for Summary Decision, Ex. A at 49 (Kleweno depo.).

⁶⁹ Motion for Summary Decision, Ex. D at 62–64 (Evans depo.).

The problem arose because when VHE corrected a dialing error on a call, it flagged the electronic call data record, varying it from a standard record.⁷⁰ The flag is known as a CAMEL record, which stands for “Customized Application for Mobile Network Enhanced Logic.” The very point of CAMEL is to customize something about the otherwise standard record of a call. This means the customizations may have different formats for each wireless carrier that uses them. CAMEL records can create billing problems if a wireless carrier’s billing system has not been programmed to recognize another network’s CAMEL format.⁷¹

This happened in early 2009 for Orange DR and Vodafone Ireland, with somewhat different results. Both billing systems read the call data records for calls that T-Mobile’s VHE assisted, and therefore had CAMEL flags, as if they were calls from subscribers using pre-paid accounts (e.g., who placed calls using pre-paid calling cards). Those two systems then discarded the records with the CAMEL flags as ones not to be billed. The testing T-Mobile did before the VHE launch had not taken this into account.⁷² A change T-Mobile made to the VHE software and implemented by June 2009, kept VHE-assisted calls from creating these CAMEL flags.

Under industry practice, billing disputes among wireless networks must be presented within six months of an alleged billing error, or it becomes void.⁷³

H. Two Claims that T-Mobile Owed Credits to its International Partners due to Implementing VHE

The situation with Orange DR was complicated by its own launch of a VHE feature on its network in October 2008, somewhat before T-Mobile’s soft launch activation of VHE. Orange DR found by early 2009 that it could not bill its subscribers for calls they made on the T-Mobile network that VHE assisted,⁷⁴ although it had paid T-Mobile the wholesale rate for those calls. Orange DR claimed T-Mobile owed it a refund of \$198,000, a claim Evans handled as the Partner Relations Manager for the Orange DR account. Orange DR aggressively insisted on the refund, importuning Evans often for the money, and threatening to sue for it. Communications with

⁷⁰ Motion for Stay, Ex.15 at ¶4 (Wang declaration).

⁷¹ Motion for Stay, Ex.14 at ¶5 (Soderstrom declaration).

⁷² Motion for Stay, Ex.14 at ¶12 (Soderstrom declaration).

⁷³ Motion for Stay, Ex.14 at ¶13 (Soderstrom declaration); Ex.15 at ¶6 (Wang declaration).

⁷⁴ Motion for Stay, Ex.14 at ¶7 (Soderstrom declaration).

international partners, including Orange DR, were by “wire,” in the forms of telephone calls and email.⁷⁵

Research by Orange DR and T-Mobile later discovered reciprocal problems with the call data record CAMEL flags each system created. Orange DR had problems processing CAMEL records for VHE calls its subscribers made on the T-Mobile network. Similarly, T-Mobile had problems processing CAMEL records for VHE calls T-Mobile subscribers placed on the Orange DR network, so T-Mobile could not bill its subscribers for those calls, although it had paid Orange DR the wholesale rate for those calls.⁷⁶

David Anderson, one of the financial analysts who supported Product Relationship Managers in Evans’ group, had estimated back in January 2009 the possible financial impact of the VHE error. His analysis assumed that T-Mobile “would have to refund all charges for all of its carries for whom it had enabled VHE.”⁷⁷ If those assumptions held true the total credits T-Mobile could owe could reach \$100 million.⁷⁸ A later estimate done in mid-March 2009 by Yvonne Wang estimated the potential exposure at \$34 million if no international carrier partner could bill their subscribers for T-Mobile’s VHE records with CAMEL flags, every such carrier requested credits, and T-Mobile was unable to negotiate any reduction in the credits.⁷⁹

After the Orange DR refund claim, on March 12, 2009 Vodafone Ireland claimed T-Mobile owed it a credit of €800,000 stemming from the VHE activation. Vodafone said it could not bill its subscribers for calls they placed on the T-Mobile network due to the CAMEL flags on VHE-assisted calls.⁸⁰ Vodafone Ireland seemed to raise a claim similar to the one Orange DR already had made to Evans, and to T-Mobile generally. This caused T-Mobile’s Director for CRM Capabilities and Development, Margret Soderstrom, to call a meeting the next day, on March 13, 2009, in which Evans participated.

This meeting plays a significant part in Evans’ Sarbanes-Oxley Act claim. The declaration of Evans and the exhibits he submitted diverge significantly from those T-Mobile relies on. Each then describes relevant events after the March 13, 2009 meeting differently. Were the issue limited to these conflicts, T-Mobile would not be

⁷⁵ Complainant’s Opposition, Evans’ declaration at ¶ 8.

⁷⁶ Motion for Stay, Ex.14 at ¶7 (Soderstrom declaration).

⁷⁷ Motion for Stay, Ex.11 at ¶4 (Anderson declaration).

⁷⁸ Motion for Stay, Ex.11 at ¶4 (Anderson declaration); the Complainant’s Opposition, Evans’ Declaration at ¶¶ 2, 3 & 4.

⁷⁹ Motion for Summary Decision, Ex. B at 37-38 (Wang depo.); Motion for Stay Ex. 14 at ¶ 11 (Soderstrom declaration).

⁸⁰ Motion for Stay, Ex.14 at ¶9 (Soderstrom declaration).

entitled to summary judgment. But some of the undisputed facts about events after the March 13, 2009 meeting deprive Evans of any remedy. They support a summary decision for T-Mobile.

I. The Meeting of March 13, 2009

Evans states in his declaration that he objected at the meeting with aggressive questions about how T-Mobile had implemented VHE:

1. without telling any of T-Mobile's international partners, and
2. when not all their networks could support the feature.⁸¹

Not only had Orange DR and Vodafone Ireland discovered the VHE charges,⁸² and asked T-Mobile for credits of \$198,000 and €800,000 euros respectively,⁸³ Evans believed two others wanted credits of between \$600,000 and \$700,000 for VHE charges.⁸⁴

Soderstrom's declaration generally acknowledges that Evans questioned Yovvne Wang aggressively about the credit request from Orange DR.

The Evans declaration also says that in the meeting his manager, Kevin Pazaski, said T-Mobile could not turn the VHE feature off because doing so would alert all international partner carriers to what was being done, and perhaps lead all to make claims to be paid back.⁸⁵

The meeting's participants developed a list of tasks to deal with the issue, tasks which Yvonne Wang summarized in an e-mail sent to the participants that day.⁸⁶

The responses Evans received to his questions convinced him that managers and others thought "his questions were not helpful in moving [the billing issue] toward a resolution."⁸⁷ Evans interpreted their "resolution" to be a purposeful silence meant to run out the clock on any refund claims.⁸⁸ Evans argues that T-Mobile engaged in a cover-up that constituted wire fraud, because the reciprocal billings between T-Mobile and its international partner carriers took place by

⁸¹ The Complainant's Opposition, Evans' Declaration at ¶¶ 2, 3 & 4.

⁸² The Complainant's Opposition, Evans' Declaration at ¶ 2.

⁸³ The Complainant's Opposition, Evans' Declaration at ¶ 4.

⁸⁴ The Complainant's Opposition, Evans' Declaration at ¶ 5.

⁸⁵ The Complainant's Opposition, Evans' Declaration at ¶ 3.

⁸⁶ Motion for Stay, Ex. 14 at ¶ 11 (Soderstrom Declaration).

⁸⁷ The Complainant's Opposition, Evans' Declaration at ¶ 5.

⁸⁸ The Complainant's Opposition, Evans' Declaration at ¶ 5.

email or telephone calls.⁸⁹ As will be seen, Evans has adequately alleged in his proof a predicate offense that brings his claims within the coverage of the SOX Act.

Soderstrom denied that even by late March, 2009 T-Mobile knew of any other international carrier partners other than Orange DR and Vodaphone Ireland that had billing difficulties VHE caused.⁹⁰ Evans contradicts her in his declaration, when he says another international partner carrier he serviced, TIM Brazil, steered most of its subscriber's calls (what the T-Mobile employees called "traffic") away from T-Mobile. TIM Brazil did so because T-Mobile had not responded to its urgent request that the VHE feature be turned off—because its network couldn't support it—which caused it to lose millions of dollars each month when it paid wholesale rates to T-Mobile for calls its customers made on the T-Mobile network, money TIM Brazil couldn't to recoup by billing its own customers.⁹¹ Evans dealt with TIM Brazil in his work, so he had a basis to have heard statements of dissatisfaction from representatives of TIM Brazil.

This third carrier is not especially significant, as what gives rise to Evans' protected activity under the SOX Act doesn't depend on the number of international carrier partners involved. Under Evan's proof, the use of VHE, even in a test bed of fewer than all international partner carriers, led international partner carriers to pay for more calls at wholesale to T-Mobile. Yet according to what Evans learned at the March 13th meeting, T-Mobile knew some partners (Orange DR, Vodaphone Ireland, and TIM Brazil) could not bill calls with CAMEL flags to their own customers, something that would cause them significant losses. Evans' objections, as described in his declaration, constitutes protected activity.

Evans also says Pazaski asked him after the meeting in an "agitated" manner who had invited him to the meeting, and instructed him to attend no more meeting on the topic of VHE. Evans interpreted this as an instruction to "remain silent," and as a threat that breaking silence about the billing problems the introduction of VHE caused would return Evans to the position he had been in with his two earlier managers, Chawla and Martinek, managers Evans believes he "caused to be fired for their abusive, predatory conduct."⁹² Evans' subjective interpretation is not easily categorized as a fact. On

⁸⁹ The Complainant's Opposition, Declaration of Robert Evans at ¶ 8.

⁹⁰ Motion for Stay, Ex. 14 at ¶ 13 (Soderstrom Declaration).

⁹¹ The Complainant's Opposition, Evans' Declaration at ¶ 7.

⁹² The Complainant's Opposition, Evans' Declaration at ¶ 10.

summary judgment I indulge that interpretation of his direct interaction with Pazaski. It isn't entirely an exercise in mind-reading.

After that meeting Pazaski sent an email to members of the "roaming team" (i.e., those dealing with roaming contracts with international partners) in which Pazaski recommended T-Mobile agree to pay the \$198,000 credit Orange DR was demanding.⁹³

J. Evans' New Discrimination Claim

On March 27, 2009, Evans e-mailed the T-Mobile Human Resources department asking that it relieve him from his PIP and transfer him to another department. Evans stated he didn't "feel comfortable or welcomed" in his current department and job.⁹⁴ Yet the March 2008 PIP had told Evans he wasn't eligible for transfer until his performance improved. He alleged in a follow-up email four days later (on March 31), that he was being "punished, harassed, retaliated & discriminated against for filing a discrimination against disability, harassment and hostile work environment claim."⁹⁵ Evans recounted the acts of discrimination he believed he suffered extensively in 15 numbered paragraphs.

K. Ongoing Problems with Evans' Performance

Evans' manager, Pazaski, prepared a draft of PIP to supplement the one Evans' managers had prepared in October 2008. The draft PIP focused on two areas for "immediate and sufficient improvement" expressed in a performance memo dated March 26, 2009.⁹⁶ The memo covered two topics: "understanding your job requirements," and "following through on tasks." These echoed PIP topics that had been the subjects of the early October 2008 PIP—understanding the business and submitting thorough and accurate work.⁹⁷

Pazaski recorded in the March 26, 2009 memo that on "numerous occasions" Evans had told Pazaski that his financial and analytical skills weren't strong—but Pazaski emphasized that these skills were necessary to succeed in his job.⁹⁸ On March 24th Evans had been unable to answer uncomplicated questions about his business strategy in dealings with Orange Caribe that should have been answered in 20 minutes, but took Evans the rest of the day to answer. Consequently he would be required to demonstrate thorough

⁹³ Motion for Stay, Ex. 13 at ¶ 8.

⁹⁴ Motion for Stay, Ex. 18.A at 00870.

⁹⁵ Motion for Stay, Ex. 18.B at 00873.

⁹⁶ Motion for Stay, Ex. 17 at 00585.

⁹⁷ Motion for Stay, Ex. 7.

⁹⁸ Motion for Stay, Ex. 17 at 00585.

understanding of roaming, and of business financials in his presentations, documents, and discussions. The requirement was very similar to the first requirement in the earlier PIP. The second requirement was that he follow through on tasks. Evans had failed to contact a person at Orange Caribe to get information he was instructed to obtain on March 13. At a meeting Evans had set up on March 18 to discuss strategy in dealing with Orange Caribe with his managers that would occur on March 20, he had not obtained the information even though a week had passed after he had been tasked to get it. Evans' responsibilities in Latin America had been narrowed on March 13th to allow him to concentrate on revenue accounting, and on fraud issues arising from existing discount agreements. But Evans had not resolved disagreements on amounts partners owed T-Mobile, which left T-Mobile with uncollected receivables, and damaged ongoing relationships with partners. Pazaski stated in the revised PIP he drafted that Evans needed to complete duties and tasks in a timely and thorough manner. These concerns echoed the second requirement of the October 2008 PIP.

Evans says, however, Pazaski never gave him that memo. The notation in the first bullet point paragraph "(may have better examples to include here)"⁹⁹ implies it is an unfinished and undelivered draft. What it does show is ongoing dissatisfaction with Evans' performance rooted in specific performance shortcomings that occurred after Evans returned from stress leave. They were similar to the ones in the original PIP that remained in effect.

L. Investigation of the New Discrimination Complaint

Kristen Hagan, the Senior Human Resources Director at T-Mobile, met with Evans on April 2, 2009 about this new (*viz.*, March 27, 2009) discrimination complaint.¹⁰⁰ Another Human Resources employee who was present, Loretta Guerra, took notes of the meeting. The 15 points Evans had listed in his March 27 email to Hagen gave a structure to a wide-ranging discussion.¹⁰¹

Evans says at the meeting Hagen was not particularly interested in his FMLA complaint. She seemed more focused on persuading him to resign and take a severance package that included a release of liability for T-Mobile.¹⁰² At this meeting he told Hagan that

⁹⁹ Motion for Stay, Ex. 17 at 00585.

¹⁰⁰ Motion, Ex. 18 at ¶ 7.

¹⁰¹ *Compare* Motion, Ex. 18B *with* The Complainant's Opposition, Evans' Declaration at its Ex.1 (Guerra notes).

¹⁰² The Complainant's Opposition, Evans' Declaration at ¶12.

he did not believe that he had the analytical skills to do his job.¹⁰³ The notes by Guerra show that during the meeting Evans told Hagen that the VHE feature had been implemented for three months, but the international partners could not bill their subscribers for the calls, which put the company at legal risk for \$100 million. Evans believed it was unethical. He also told Hagen people called me and told me I better watch my ass and get out of the department as soon as possible.¹⁰⁴ As to who told him this, the meeting notes indicate Evans said “I’ll write down & talk to him. I don’t think he’ll want to say anything.”¹⁰⁵

At the end of this meeting, Hagen placed Evans on administrative leave. T-Mobile contends he refused to return to his position, so it placed him on administrative leave while it investigated his new discrimination claims. Evans says he was placed on administrative leave by T-Mobile’s choice,¹⁰⁶ not for any refusal to return. An e-mail Guerra sent to Evans the morning following the meeting informs him that Christina Jones will investigate his discrimination claim. It sheds little light on what led to the administrative leave. The relevant portion of the e-mail says:

Christina Jones, HR Manager, will be calling you today at [phone number] to obtain information from you on the allegations you have presented to us. While the investigation is being conducted, you agreed you would be out on paid administrative leave, and would not conduct work on behalf of the company.¹⁰⁷

When Jones spoke to Evans by telephone on April 2, 2009, Evans told her he would not return to work on a performance plan, requested that the two performance reviews he had received be removed and that he be transferred to a different department.¹⁰⁸ This is not very different from Evans’ declaration opposing summary decision, where he says: “I did not want to return to my group until the fraud was stopped, but I wanted to be given other duties . . .”¹⁰⁹

¹⁰³ The Complainant’s Opposition, Evans’ Declaration, at its Ex.1 (Guerra notes) *passim*; Motion, Ex.-18 at ¶ 7.

¹⁰⁴ The Complaint’s Opposition, Evans’ declaration at ¶13 and its Ex.1 at pg. 11.

¹⁰⁵ The Complaint’s Opposition, Evans’ Declaration at ¶13 and its Ex.1 at pgs. 11, 19–20.

¹⁰⁶ “I was placed on administrative leave and barred from the work premises.” The Complaint’s Opposition, Evans’ Declaration at ¶ 15.

¹⁰⁷ Motion for Stay, Ex. 18.C at 00927.

¹⁰⁸ Motion for Stay, Ex. 19 at ¶ 5 (Jones Declaration).

¹⁰⁹ The Complaint’s Opposition, Evans’ Declaration at ¶13 and its Ex.1 at pgs. 11, 19–20.

During his administrative leave, on April 6, 2009, Evans once more emailed Director Hagan asking to be transferred. The next day (April 7, 2009), he emailed Jones (the investigator at Human Resources) asking to be transferred as well.¹¹⁰ In none of these emails did Evans propose to return into his Partner Relationship Manager position.

In four other separate emails Evans stated that he was not a “highly analytical” person.¹¹¹ On March 31, 2009 he emailed Hagan, writing that he “clearly stated several times this month that [he is] not a ‘highly analytical person.’”¹¹² In an email to Investigator Jones on April 7, he wrote that he had told his manager, Kevin Pazaski, that he is “not ‘a highly analytical individual’ and therefore . . . not able to succeed at this job.”¹¹³ That same day he emailed Brian Kirkpatrick, T-Mobile’s CFO¹¹⁴ saying that he is “not a ‘highly analytical’ individual,”¹¹⁵ as he asked for Kirkpatrick’s help in being transferred “into a more suitable role.”¹¹⁶ He obtained a medical certification while he was out on administrative leave as part of a request he submitted for a job accommodation. The accommodation he sought was “to have negative reviews and PIP removed, and be transferred to a new department and role.”¹¹⁷ His doctor said that his lack of the analytical skills his job demanded caused him anxiety and chronic pain.¹¹⁸ Then, in his April 14, 2009 email, Evans wrote, “I have stated repeatedly that I am not a ‘highly analytical person.’”¹¹⁹

The Human Resources department completed the investigation 20 days after the April 2 meeting, finding no evidence of discrimination.¹²⁰ The conclusion was that evidence failed to corroborate his claims of harassment or retaliation—most witnesses interviewed had denied Evans’ version of events.¹²¹

During her investigation of the claim Jones asked Evans a number of written questions, some asking for detail about who had

¹¹⁰ Motion for Stay, Ex.-18 at ¶ 10; Ex. 18.C; Ex.-19 at ¶ 9; Ex. 19.A; The Claimant’s Declaration at ¶ 14.

¹¹¹ Motion for Stay, Ex. 3.C; Ex. 18.D; Ex. 19.A; Ex. 19.B at 1002, 1015.

¹¹² Motion for Stay, Ex.-18.D at 01015.

¹¹³ Motion for Stay, Ex.-19.A at 00578.

¹¹⁴ Motion for Summary Decision Ex. D, Depo. of Robert Evans at p. 96.

¹¹⁵ Motion for Stay, Ex. 3.C at 00577.

¹¹⁶ Motion for Stay, Ex. 3.C at 00577.

¹¹⁷ Motion for Stay, Ex. 3.D., numbered paragraphs 2 & 3.

¹¹⁸ Motion for Stay, Ex. 3.D., numbered paragraphs 4, 5, & 6.

¹¹⁹ Motion for Stay, Ex. 19.B at 1002.

¹²⁰ Motion for Stay, Ex. 18 at ¶ 10.

¹²¹ Motion for Stay, Ex.-18; Ex. 19.

“blamed, harassed, isolated [and] ignored him.¹²² The next asked about comments employees and non-employees had made. The first of nine separate comments Evans listed was a comment made to him by former T-Mobile employee, James Lai. Evans wrote:

Comment: Your not going back to the CDW Department are you? Rob, you better get out of the CDW Department immediately. I just had a conversation with Stan and he explained to me that he and Dirk are not happy with you for getting Chandler and Jim fired and if you go back to that department they are going to retaliate against you.

To Whom: Me

Who is this person: He is a friend of Sam Simpliciano's.¹²³

Investigator Jones told Evans on April 17, 2009 that due to the detailed and serious nature of that retaliation allegation, she may contact Lai. Evans replied that Lai might get upset with him if Jones asked Lai about the subject.¹²⁴

T-Mobile's investigation of this allegation led Jones, the Human Resources Investigator, to a significant conclusion: Evans had lied about having been warned to get out of his department as soon as possible.¹²⁵ He lied about the phone conversation with James Lai, the former T-Mobile employee—the statements he attributed to Lai were false. Evans testified he had contacted James Lai by phone.¹²⁶

Jones interviewed James Lai. Lai angrily denied ever having had a telephone conversation with Evans about Stan Simpliciano or anyone else about a plan to retaliate against Evans, and had no reason to believe there was any such plan.¹²⁷ Lai was also angry because the timing Evans claimed for his call was wrong: Lai spoke to Evans before Chawla and Martinek had been terminated by T-Mobile. It could not have been any later because when Lai left T-Mobile for a job in Hong Kong in early November 2008 his telephone number changed.¹²⁸ Lai told Jones the call had come from someone who called himself “Chris Hartung” not Robert Evans, who asked question about Chawla and Martinek that made Lai uncomfortable. Lai did not know Chawla and Martinek had lost their jobs at T-Mobile until they met at a conference in Barcelona sometime after Lai had talked to Evans.

¹²² Motion for Stay, Ex. 18.D. at 01006 at questions 10, 11 and 12.

¹²³ Motion for Stay, Ex.-18 at ¶ 11; Motion Ex. 18.D at 01008.

¹²⁴ Motion for Stay, Ex. 19 at ¶ 11.

¹²⁵ The Complainant's Opposition, Evans' Declaration at ¶ 8.

¹²⁶ Motion for Stay, Ex. 3.A., Evans depo. of 9/16/2011 at 112.

¹²⁷ Motion for Stay, Ex. 19, at ¶ 11 (Jones Declaration).

¹²⁸ Motion for Stay, Ex. 18 at ¶13; Ex.-19 at ¶ 12.

The anger Lai expressed was consistent with Evans' statement to Jones that Lai likely would be upset if she contacted Lai. Jones also interviewed Stan Simpliciano: he denied ever telling Lai that he (Simpliciano) was angry at Evans. Jones inferred two things from what she learned. Evans had made false statements in an effort to bolster his retaliation allegations, assuming T-Mobile would not (or would be unable) to contact Lai. Evans' prediction that Lai would be upset if contacted was right, because Lai would deny that statements Evans falsely attributed to him. Lest the point be lost, the fact involved here is that Jones drew these inferences, not whether her inferences were correct.

Evans was terminated on April 23, 2009.¹²⁹ Human Resources wrote in an email that Evans was terminated because: he had provided false information during the investigation concerning a conversation he had with James Lai and wouldn't return to his position, even though the investigation concluded that there was no evidence that he was being harassed and/or discriminated against or that leadership did not want him on their team.¹³⁰ Furthermore, Human Resource repeated what it had told him before he returned on March 2, 2009 from his leave for stress: Evans could not have been transferred to another position because of his performance issues and because there were no other positions available.¹³¹

II. Standard of Review

A. Summary Decision Generally

A motion for judgment without trial (summary decision) is granted when the pleadings, affidavits, matters officially noticed, or materials obtained through discovery or otherwise present no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.¹³² The Secretary of Labor's regulation is modeled on Rule 56 of the Federal Rules of Civil Procedure, where "the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial."¹³³ Declarations offered in an Article III court "must be made on personal knowledge."¹³⁴ The cognate rule in this forum is that the proof offered

¹²⁹ Motion, Ex. 18 at ¶ 14.

¹³⁰ The Complainant's Opposition, Ex.-3 at 01148.

¹³¹ The Complainant's Opposition, Ex.-3 at 01139.

¹³² 29 C.F.R. § 18.40(d).

¹³³ *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249 (1985); *see generally*, *Stauffer v. Wal Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 2 (ARB Nov. 30, 1999); *Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42 slip op. at 4-7 (Sec'y July 14, 1995).

¹³⁴ Rule 56(c)(4). F.R.Civ.P.

by declaration or affidavit to support or oppose the motion must show that the declarant or “affiant is competent to testify to the matters stated therein.”¹³⁵

The motion tests whether the Sarbanes-Oxley Act provides a remedy when the admissible evidence is considered, indulging reasonable inferences in Evans’ favor.¹³⁶ Parts of declarations that assert facts the person isn’t competent to testify about don’t count. Unreasonable inferences are not indulged. An issue is genuine when there is enough evidence for a reasonable fact-finder to find in the non-moving party’s favor.¹³⁷ A material fact is one that would affect the outcome of the case; “factual disputes that are irrelevant or unnecessary”¹³⁸ don’t preclude the entry of summary decision.

A complainant is expected to present admissible proof of facts that are sufficient to establish each element of the claim in response to an employer’s motion for summary decision. Typically “[a] motion for summary decision after discovery focuses on the [purported] lack of evidence to support the asserted claims.”¹³⁹ A complete failure to offer proof on an essential element of the claim “renders all other facts immaterial.”¹⁴⁰

There is a corollary to the rule. The Act bars the Secretary from ordering relief against an employer who demonstrates with “clear and convincing evidence that it would have taken the same adverse [employment] action in the absence of any protected activity.”¹⁴¹ If T-Mobile offers that proof on its motion for summary decision, Evans must offer proof that creates a genuine issue of fact material to T-Mobile’s defense. Failure to do so entitles T-Mobile to a summary

¹³⁵ 29 C.F.R. § 18.40(c).

¹³⁶ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (holding that only legally permissible inferences are drawn); *Harp v. Charter Commc’ns, Inc.*, 558 F.3d 722, 727 (7th Cir. 2009) (rejecting any inference on summary judgment in a Sarbanes-Oxley discrimination claim that an entire department of 50 workers was laid off as a ruse to fire the complainant as retaliation for her objection that her employer was overpaying bills from an outside vendor; no proof countered the employer’s evidence that it reduced staff when the office failed to meet revenue projections).

¹³⁷ *See Anderson*, 477 U.S. at 248.

¹³⁸ *Anderson*, 477 U.S. at 248.

¹³⁹ *Evans II* at 10 n.41.

¹⁴⁰ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

¹⁴¹ 29 C.F.R. § 1980.109(b); *Livingston v. Weyth, Inc.*, 529 F.3d 344, 353, 356 (4th Cir. 2008) (affirming a summary judgment in a Sarbanes-Oxley claim on several grounds; the trial judge determined the employer had shown by clear and convincing evidence it would have fired the employee for insubordination after he threatened to have the police remove its director of human resources from a company-sponsored holiday party; the court acknowledged the defense but found it need not reach that issue).

decision that dismisses the claim for relief. This is one of those situations.

When a complainant fails to produce sufficient evidence to make out his claim, or to counter adequate evidence the employer offers that raises a defense, summary decision spares the parties the time and expense of a hearing whose result would be foreordained.¹⁴² One court of appeals has framed the requirements with uncharacteristic bluntness: summary judgment is “not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit when a party must show what evidence it has that would convince a trier of fact to accept its version of the events.”¹⁴³

An adjudicator considers the specific fact disputes framed in the motion and the proof offered in response, but need not search independently to discover a factual dispute.¹⁴⁴

B. The Sarbanes-Oxley Act’s Standards for Substantive Liability

In the past, some ALJs would rely on the three step burden shifting framework developed in cases seeking redress under Title VII of the Civil Rights Act of 1964,¹⁴⁵ such as *McDonnell Douglas Corp. v. Green*,¹⁴⁶ to analyze claims of retaliation under other employment discrimination statutes, such as the Sarbanes-Oxley Act. But they erred. The two step burden of proof enacted in the whistleblower protection portion of the Sarbanes-Oxley statute was borrowed from the statute that protects employees of air carriers and their contractors from retaliation for whistleblowing: the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹⁴⁷ Under that AIR 21 framework, the worker initially must show by a preponderance of the evidence that a protected activity was a “contributing factor” in

¹⁴² Summary judgment “affords a means of avoiding the delay and expense of a full trial when the action involves only a legal question and there are no triable issues of fact.” 10B Arthur R. Miller, Mary Kay Kane, et al., FED. PRAC. & PROC. CIV. § 2734 (3d ed.); *cf.*, *Orr v. Bank of America*, 285 F.3d 764, 781–83 (9th Cir. 2002) (amended decision) (affirming summary judgment because the plaintiff lacked admissible proof of her claim; she failed to authenticate much of her proof, and what remained largely was inadmissible hearsay).

¹⁴³ *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007), *quoting Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005) (other citations omitted).

¹⁴⁴ “*Materials Not Cited*. The court need consider only the cited materials, but it may consider other materials in the record.” Rule 56(c)(3), Fed.R.Civ.P.

¹⁴⁵ 42 U.S.C. § 2000e *et seq.*

¹⁴⁶ 411 U.S. 792, 802-804 (1973).

¹⁴⁷ Pub. L. No. 106-181, 114 Stat. 61 (Apr. 5, 2000) (AIR 21), codified at 49 U.S.C. § 42121(b).

the adverse personnel action the worker suffered.¹⁴⁸ If the worker does, the burden shifts to the employer, who must prove by “clear and convincing evidence” that it would have taken the same adverse action in the absence of the protected conduct, to avoid an order that gives the complainant relief.¹⁴⁹

The Sarbanes-Oxley Act extends employment protection to those who provide information “regarding conduct which the employee reasonably believes constitutes a violation of section . . . 1343 [fraud by wire, radio, or television].”¹⁵⁰ To succeed in a claim for employment discrimination, the elements Evans must prove at trial are: 1) Evans engaged in an activity or conduct that SOX protects; (2) T-Mobile knew of the protected activity, (3) T-Mobile took unfavorable personnel action against him; and (4) the protected activity was a contributing factor in the adverse personnel action.¹⁵¹ A “contributing factor” is any factor which alone, or in combination with other factors, tends to influence the adverse decision in any way.¹⁵² If the Evans does so, the burden shifts to the T-Mobile to prove “by clear and convincing evidence” that it would have taken the same adverse action in any event.¹⁵³ If T-Mobile succeeds, Evans gets no relief.¹⁵⁴

The evidence in the record is sufficient for a reasonable factfinder to conclude that Evans engaged in protected activity by complaining to the Human Relations Director, a corporate manager, about the VHE process on April 2, 2009. I accept for purposes of the motion Evan’s claim that he expressed doubts about the propriety of those billings. T-Mobile, in the person of that same Human Relations Director, knew of his complaint. Firing him was adverse action. That firing happened three weeks after the protected activity. This sort of

¹⁴⁸ 49 U.S.C. § 42121(b)(2)(B)(iii).

¹⁴⁹ 49 U.S. § 42121(b)(2)(B)(iv), implemented by 29 C.F.R. § 1980.104(c). The remedies otherwise available to Evans as relief are stated at 49 U.S.C. § 42121(b)(3)(B)(i) through (iii), and 29 C.F.R. § 1980.109(d)(1) .

¹⁵⁰ 18 U.S.C. § 1514A.

¹⁵¹ 49 U.S.C. § 42121(b), incorporated into the text of 18 U.S.C. § 1514A(b)(2)(C); 29 C.F.R. § 1980.109(a); *Sylvester v. Parexel Int’l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011) (which truncates the four elements into three).

¹⁵² *Fordham v. Fannie Mae*, ARB No. 12-061, OALJ No. 2010-SOX-051, slip op. at 19 (Oct. 9, 2014) (rehearing en banc pending on the appropriate “contributing factor” analysis after trial); *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022, slip op. at 17 (ARB June 30, 2009); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008).

¹⁵³ *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

¹⁵⁴ 49 U.S.C. § 42121(b)(2)(B)(iv).

temporal proximity ordinarily can be enough to raise the inference that the protected disclosure played at least some role in the firing.

Yet undisputed evidence shows two intervening reasons to fire him. Neither impairs any presumptions I indulge about the adequacy of Evans' proof of required elements for his SOX claim:

1. Evans offers no evidence to dispute that James Lai told the T-Mobile Human Resources investigators two salient things: (a) that Evans never spoke to him in the time frame Evans had led T-Mobile to believe; and (b) that Lai was adamant that he never told Evans not to return to T-Mobile due to some effort on-going effort by managers there to discriminate against him.
2. Evans repeatedly made clear by his own statements that he would not return to the CDW group to work under a PIP, and he was incapable of adequate performance as a Partner Relationship Manager. This corroborated the actions his earlier managers had taken to place him on the only PIP that was ever imposed. The PIP began in early October 2008, before he engaged any protected activity. T-Mobile actually concluded it should fire him for these reasons.

T-Mobile relied on the first ground in the emails it sent Evans shortly after his termination. It relied in both grounds as its defense when Evans made his claim for protection under Sarbanes-Oxley. T-Mobile's undisputed proof is adequate to satisfy the "clear and convincing" evidence standard on both aspects of its defense.

III. Facts Disputed by the Complainant

A. Protected Activity

Evans argues that a hearing is required because he and T-Mobile employees differ about events at the March 13, 2009 meeting.¹⁵⁵ Evans says he questioned the presenters at the meeting intensely about the VHE billing program.¹⁵⁶ Margret Soderstrom, the senior manager who called the meeting, recalls Evans asking aggressive questions.¹⁵⁷ Evans himself testified he "blew the whistle" at his April

¹⁵⁵ Compare the Complainant's Opposition at 2-3 *with* Motion for Stay Ex.-12 at ¶7 (Pinson Decl.); Ex.-13 at ¶ 9 (Pazaski Decl.); Ex.-15 at ¶ 7 (Wang Decl.); Motion for Summary Judgment, Ex. A (Deposition of Kleweno) at 47:11-16; Ex. B (Deposition of Yvonne Wang), at 28:9-15, 50:2-8.

¹⁵⁶ The Complainant's Opposition at 2-4.

¹⁵⁷ Motion for Stay, Ex. 14 at ¶ 10 (Soderstrom Decl.).

2, 2009 meeting with Director Hagan.¹⁵⁸ A hearing to resolve whether he first engaged in protected activity at the meeting on March 13th or two weeks or so later when he met with Human Resources Director Hagen on April 2nd isn't necessary. His proof adequately shows for purposes of this motion that he engaged in protected activity in what he told Hagan on April 2, as she met with him about his second discrimination complaint. A finding that his protected activity took place at the meeting of March 13 would add nothing of consequence to his claim. There is no material fact here to be resolved at trial.

His disclosure to Hagen need not have been couched as one made under the Sarbanes Oxley Act. He objected to what he saw as unethical billing practices. He had reason to believe they involved large sums of money. They involved transaction by wire. He engaged in protected activity.

B. Knowledge

Hagen knew of his objection to the way T-Mobile implement the test bed for the VHE feature on April 2, 2009.

C. Adverse Action

Firing is the quintessential adverse action.

D. Causation

The short time from the protected disclosure to the termination can raise an inference of causation. The response Evans filed to the motion for summary decision argues that the facts he has shown support an inference that he was terminated for his allegation of illegal corporate conduct. He fits them under the Sarbanes-Oxley Act as a form of wire fraud that T-Mobile perpetrated against international partner wireless carriers. He genuinely believed monkey business was going on that fleeced international partner carriers to the tune of millions of dollars. On this proof, infer that his belief was objectively reasonable.

Evans' claim would be sufficient to go to trial, had T-Mobile not shown un rebutted facts that would deny him a remedy from the Secretary. Denying the remedy does not say T-Mobile isn't substantively liable—or more correctly in this context—may be substantively liable under the facts Evans has shown in opposing the motion. This fine distinction, that Evans has demonstrated a viable

¹⁵⁸ Motion for Stay, Ex. 3.A. (Deposition of Robert Evans) at p.147, 13:56:59-13:57:25.

whistleblowing claim, but gets no relief, must be meaningless to him. But Congress made the distinction.

E. Reason for Termination

Evans did not produce evidence to contradict the material facts T-Mobile offers as a bar to relief—the independent reasons it had to fire him. Evans had failed to perform the requirements of his job over two quarters, which led to the performance improvement plan T-Mobile imposed in early October 2008, before the subject of VHE ever arose. It is undisputed that he lacked the skill his job required, not only because T-Mobile witnesses said it, but because he acknowledged it in writing and orally repeatedly before he was terminated. He expected T-Mobile to give him some other job, *i.e.*, to transfer him from the job he had been hired to do. It is not discrimination for an employer to terminate an employee who can't successfully perform his work. Nor is it discrimination for an employer to decline to transfer an employee who is failing in his job.

Evans does say in his declaration opposing summary disposition that he “was not invited or instructed to return to work either verbally or in writing, so it is simply not possible that I refused to return back to work.”¹⁵⁹ This addresses the issue from the wrong end. The question isn't what he intended. The issue is what he repeatedly had said to T-Mobile—what it understood. He made it clear he was not going to go back to the CDW group, to a job he couldn't do, or work for Pazaski, whose fairness and integrity he didn't trust. No employer, on this record, could conclude anything other than he would not return to the job he had.

Additionally, T-Mobile had reason to believe that Evans lied to Human Resources in an effort to bolster the strength of his discrimination claim. No party disputes that James Lai denied to the T-Mobile investigator the version of events Evans had given to T-Mobile. Evans himself acknowledges deceit in his dealings with Lai, just not as much deceit as T-Mobile inferred. (More will be said of this later.) He has failed to offer facts to dispute T-Mobile's proof on this point, which once again focuses on what T-Mobile believed.

1. Evans' Inability to Perform his Job

Evans argues that summary decision is improper because a dispute exists about whether he refused to come to work.¹⁶⁰ Director Hagan declared that at the end of the April 2 meeting, Evans refused

¹⁵⁹ The Complainant's Opposition, Evans' Declaration at ¶19.

¹⁶⁰ The Complainant's Opposition at ¶ 16-19.

to return to his job, so she placed him on administrative leave while T-Mobile investigated his discrimination allegations. Evans, however, asserts that at the end of the April 2 meeting he was immediately placed on administrative leave.¹⁶¹ He agrees he did not want to return to his work group, he wanted to be assigned other duties.¹⁶² He declared that he would have returned to his job after the investigation concluded if invited to do so.¹⁶³

Either way the dispute is resolved about whether Evans refused to return or T-Mobile placed him on administrative leave, how that issue is decided would not affect the outcome of his case. Evans himself repeatedly told people at T-Mobile that he wasn't capable of performing the job he had. Although Evans claims that his job requirements changed after he was hired to become "highly analytical,"¹⁶⁴ the position description required him to demonstrate complex problem solving and analytical skills.¹⁶⁵

The first bullet point on the October 8, 2008 PIP¹⁶⁶ dealt directly with his lack of a thorough understanding of the business and business financials.¹⁶⁷ The medical certification he provided to T-Mobile on April 17, 2009 when he applied for a transfer as a job accommodation said he was medically unable to return to his position because he lacked the necessary analytical skills, which caused him anxiety and stress.¹⁶⁸

In all of the correspondence that Evans had with Director Hagan and Investigator Jones after the April 2, 2009 meeting at Human Resources, he never expressed a desire to be reinstated into his position as a Partner Relationship Manager in the CDW group working under Kevin Pazaski. He asked repeatedly during the investigation to be transferred to another job instead.

His statements that he lacked the skills to successfully perform his job are consistent with the feedback provided by his co-workers, managers, and supervisors, and show only one thing: Evans' termination was imminent at the time he made his discrimination allegations, which at the time were based on FMLA discrimination.

¹⁶¹ "I did not want to return to my group until the fraud was stopped, but I wanted to be given other duties, not sent home on administrative leave." The Complainant's Declaration at ¶ 15.

¹⁶² The Complainant's Opposition, Evans' Declaration at ¶ 15.

¹⁶³ The Complainant's Opposition, Evans' Declaration at ¶ 16.

¹⁶⁴ Motion for Stay, Ex.-18.D at 01002; see also the Complainant's Declaration at ¶ 15: ". . . I primarily just wanted out of Pazaski's group, where my job duties had been substantially altered. . ."

¹⁶⁵ Motion for Stay, Ex. 2 at 00301-00302.

¹⁶⁶ Motion for Stay, Ex. 7.

¹⁶⁷ Motion for Stay, Ex. 7.

¹⁶⁸ Motion for Stay, Ex. 3.D.

Whether or not he refused to return after April 2, 2009, he could not do his job. On this record, no reasonable employer would reach a conclusion other than the one T-Mobile actually reached in April 2009: Evans could not do his job. The “quantum and quality”¹⁶⁹ of the uncontradicted proof is sufficient for a fact finder to reach this conclusion by clear and convincing evidence.

The reason he was fired before the PIP ran its term was the proof T-Mobile received from Lai. It showed Evans had tried to buttress his FMLA discrimination claim dishonestly.

2. What T-Mobile Believed about Evans’ Honesty

There is some discrepancy about the extent that Evans lied to Human Resources about his conversation with James Lai. Evans admits he lied to James Lai by contacting him using a made-up name and under a fake Yahoo e-mail account.¹⁷⁰ He contends that when he spoke to Lai by phone, he immediately revealed his true identity.¹⁷¹ Evans own version his dealings with Lai involves some element of dishonesty.

James Lai told T-Mobile’s investigator three significant things. First, the conversation Evans described to Human Resources didn’t happen. Lai denied he ever told Evans not to return to T-Mobile because his managers at T-Mobile would retaliate against him.¹⁷² Second, the chronology Evans gave for any conversation was wrong too. Lai told Jones that he had changed his phone number when he moved to Hong Kong in early November 2008. It would have been impossible for Evans to call him. Third, Lai had not known Chawla and Martinek had been fired until later, when he met Chawla and Martinek at a conference in Barcelona. Lai could not have warned Evans to get out of the CDW department to avoid retribution for a role Evans may have had in firings Lai didn’t know happened.¹⁷³

Evans responded by alleging that it was Lai who was being untruthful, in order to protect his reputation in the industry.¹⁷⁴ Evans has shown no factual basis to know Lai’s motivations. But the real issue is not Lai’s truthfulness. Even if Lai’s statements to Jones were wholly untrue, Evans has offered no proof that T-Mobile knew any or all of Lai’s statements were untrue.

¹⁶⁹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254.

¹⁷⁰ Motion for Stay, Ex. 3.A. at 112 (Evans deposition).

¹⁷¹ Motion for Stay, Ex. 3.A. at 112 (Evans deposition).

¹⁷² Motion for Stay, Ex. 19 at ¶ 11-13 (Jones declaration).

¹⁷³ Motion for Stay, Ex. 19 at ¶¶ 11 & 12.

¹⁷⁴ The Complainant’s Opposition at ¶ 17.

James Lai told T-Mobile that Evans had been untruthful. In *Villiarimo v. Aloha Island Air*,¹⁷⁵ the Ninth Circuit found it made no difference in a Title VII action challenging a discharge whether the plaintiff lied when she told her employer she never left her post, or three witness lied when they told the employer that she had, because the plaintiff offered no proof that her employer did not honestly believe she left her post. The appellate court affirmed the summary judgment entered in the employer's favor.

In the same way, a dispute between Evans and Lai about the content of any conversation Evans says they had is immaterial. I could find after a trial that Evans' version of the conversation was true, and Lai was untruthful in what Lai told T-Mobile's investigator Jones. It would make no difference. Evans was fired because Lai told T-Mobile that Evans fabricated proof to support his discrimination claim. No evidence Evans has offered on summary judgment nothing to dispute what Human Resources investigator, C. Jones says Lai told her. Lai categorically he warned Evans that Evans would suffer discrimination if he returned to the CDW group at T-Mobile.

So Evans acknowledges he misrepresented himself to Lai, at least initially. Evans offers no proof to contradict the reason T-Mobile gave for firing him. Lai contradicted Evans' claims about an effort at T-Mobile to discriminate against Evans. What Lai said caused T-Mobile to lose faith in Evans' honesty. Lying to bolster a claim of workplace discrimination is a valid reason to fire an employee. "[C]ourts only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless."¹⁷⁶

A jury or a judge could find this uncontradicted evidence rises to clear and convincing proof that T-Mobile would have fired Evans for dishonesty. That proof gives T-Mobile a defense to Evans' claim for relief for employment discrimination.

IV. Conclusion and Order

After reviewing the proof offered to support the motion and the response, I am persuaded that there are no genuine disputes about material facts. T-Mobile investigated Evans' claim that after he returned from his second bout of medical leave (for stress), he suffered discrimination. I indulge the inference on summary decision that Evans made a protected disclosure to a T-Mobile Human Resources manager on April 2, shortly before he was fired, about something that

¹⁷⁵ *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (internal quotation marks omitted) (applying the pretext portion of the McDonnell Douglas framework in affirming the summary judgment the trial judge granted).

could have been wire fraud. T-Mobile has offered uncontradicted proof of an independent reasons to fire him: it had concluded he lied to bolster his discrimination claim. The only conclusion a reasonable fact finder could reach is that T-Mobile would have fired Evans when it did, for dishonesty.

This makes Evans' proof about substantive liability T-Mobile might have for SOX whistleblower discrimination immaterial. Lai's refutation was an intervening reason to terminate Evans for unethical conduct.

In addition, T-Mobile had concluded that Evans lacked the substantive skills to do his job as a Partner Relationship Manager, and that he would not return to the job he had at the CDW group working under Kevin Pazaski. The statements Evans repeatedly made, and the medical report he submitted while T-Mobile investigated his second FMLA discrimination claim, led T-Mobile to that conclusion. He would have been terminated in April 2009 at the close of the discrimination investigation for those reasons. T-Mobile's undisputed proof qualifies as clear and convincing evidence.

T-Mobile's motion for summary decision is granted. The claim is dismissed.

So Ordered.

William Dorsey
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 issuance of the administrative law judge's decision. 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(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived 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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1980.110(a).

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(e) and 1980.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).