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**Issue Date: 11 January 2016**

**CASE NOS.: 2012-SOX-00016, 2014-AIR-00003, 2014-CFP-00002**[1]

**In the Matter of:**

**PAUL SIMKUS,**
**Complainant,**

**v.**

**UNITED AIRLINES, INC.,**
**Respondent.**

# DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING COMPLAINT IN CASE NO. 2012-SOX-00016 AND ORDER TO SHOW CAUSE

These three cases have been consolidated for hearing purposes. The matter before me concerns a summary decision motion in the first of the three cases, Case No. 2012-SOX-00016.[2] However, based upon my resolution of the motion, I am requesting the parties to show cause within 30 days as to why the remaining two cases should not also be dismissed, or otherwise address the issue.

Case No. 2012-SOX-00016 involves a claim under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("SOX"). The SOX Act prohibits an employer from retaliating against an employee because the employee engaged in protected whistleblowing activity. Complainant, Paul Simkus ("Complainant"), whose previous SOX case was dismissed, alleges that United Airlines, Inc. ("Respondent" or "United") has subjected him to continuing retaliation due to his previous whistleblowing activity.

The matter before me is Respondent's Motion for Summary Decision, filed on November 12, 2013 to which Complainant responded on April 4, 2014 and August 6, 2015. Respondent

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[1] These three cases have been consolidated for hearing purposes; however, this decision and order only relates to Case No. 2012-SOX-00016, the case in which the motion for summary decision was filed. As is more fully discussed below, the facts and law discussed herein suggest that the other two cases should also be dismissed.
[2] See footnote 1 above.

filed a reply brief on December 5, 2014. For the reasons set forth below, I find that there are no genuine issues of material fact and that the motion for summary decision should be granted.

## PROCEDURAL HISTORY

### *Previous Whistleblower Claims Brought by Complainant*

On May 10, 2010, Complainant filed a previous complaint (not of record) with OSHA alleging that Respondent violated SOX. As with the current complaint, Complainant alleged that Respondent violated numerous federal labor and employment laws, including the Occupational Safety and Health Act, the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and the Family Medical Leave Act ("FMLA"). See Administrative Law Judge Steven L. Purcell's Order Dismissing Complaint of December 22, 2010. *Simkus v. United Airlines, Inc.*, ALJ No. 2010-SOX-00048 (ALJ, Dec. 22, 2010) (Order), *appeal dismissed*, ARB Case No. 11-022 (April 5, 2011).

On December 22, 2010, Judge Purcell issued an order dismissing this complaint under Rule 12(b)(6), Federal Rules of Civil Procedure, finding that Complainant failed to establish a prima facie case because he did not show that he blew the whistle by providing information that he reasonably believed showed Respondent engaged in mail, wire, bank, or securities fraud or violated a rule or regulation of the SEC.[3] He therefore found it unnecessary to determine whether the claim was untimely or whether Complainant should be permitted to amend his complaint.

On January 6, 2011, Complainant appealed Judge Purcell's decision to the Administrative Review Board. However, on April 1, 2011, he filed a motion to dismiss because he had filed a SOX complaint in the United States District Court for the Northern District of Illinois on March 29, 2011. Accordingly, the Administrative Review Board dismissed his petition for review.

In a Memorandum Opinion and Order of July 31, 2012, the United States District Court for the Northern District of Illinois, Eastern Division (Judge Feinerman) granted the motion to dismiss filed by United Air Lines, Inc. *Simkus v. United Airlines, Inc.*, No. 11 C2165 (USDC, ND Ill. July 31, 2012).[4] Complainant's complaint before the district court alleged violations of the Asbestos School Hazard Detection and Control Act ("ASHDCA"); the Toxic Substance Control Act ("TSCA"); the mail and wire fraud criminal statutes, 18 U.S.C. §§ 1341, 1343; the Racketeer Influenced and Corrupt Organizations Act ("RICO"); SOX; the ADA; Title VII of the

[3] Applying the "definitively and specifically" standard, Judge Purcell found the only claim even arguably relevant to SOX was Complainant's report of a corporate ethics violation by his manager in awarding a contract to his brother. Other allegations of alleged fraud included Complainant's failure to receive his equitable share of stock; "gross mismanagement, intentional deception, and inadequate reporting or inadequate accounting controls" which could result in class actions; management's failure to comply with the OSHA laws; exposing employees to asbestos creating the potential for future lawsuits, the cost of which would be passed on to shareholders in violation of SOX; and failure to maintain critical equipment (such as York Chillers) which put the company at risk for major lost revenue.

[4] Respondent filed a copy of the district court's decision with this tribunal on September 19, 2012 and also attached a copy as exhibit D to Respondent's Motion to Dismiss and/or Strike Mr. Simkus's Amended Complaint.

Civil Rights Act of 1964 ("Title VII"); the ADEA; and the FMLA. Complainant also raised state law claims of negligent and intentional infliction of emotional distress. In dismissing the complaint, the district court found that the Respondent was not covered under ASHDCA; Complainant did not exhaust administrative remedies with respect to the TSCA claim; and there is no private right of action under the criminal mail and wire fraud statutes. In addition, the district court dismissed the tort claims, finding that claims of negligent infliction of emotional distress are barred by the Illinois Workers' Compensation Act and that Complainant did not properly plead an intentional infliction of emotional distress claim. The district court also determined that Complainant failed to state a claim under RICO and that his claims under SOX and the FMLA were time-barred. Finally, the district court determined that Complainant's claims under the ADA, ADEA, and Title VII were duplicative of the claims pending in his other case before this district court, which was later dismissed on January 11, 2013 in Case No. CV 5274 (in accordance with the Magistrate Judge's Report and Recommendation of December 5, 2012 and Judge Feinerman's minute entry) for failure to prosecute.[5]

***Proceedings in Case No. 2012-SOX-00016 ("First Case" or "Instant Case")***

On March 15, 2011, Complainant filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") in Des Plaines, Illinois. (RX A).[6] The initial written complaint consisted of an email dated March 15, 2011 sent by Complainant to Shawn Hughes, the OSHA investigator from his previous SOX complaint. *Id.* In the email, he alleged that Respondent intentionally interfered with his vacation pay by refusing him 72 hours of vacation pay and illegally placing him on Extended Illness Status ("EIS') during a time for which he had been approved to take vacation. *Id.* In addition, he alleged that Respondent intentionally interfered with his pay to prevent him from obtaining his necessary medication. *Id.* OSHA investigated the complaint, and on March 13, 2012, it concluded that there was no reasonable cause to believe that Respondent violated SOX. (RX B). Specifically, the Regional Supervisory Investigator, on behalf of the Secretary, determined that the evidence supported Respondent's position that the Complainant did not have a reasonable belief that he engaged in activity protected under SOX, and that the evidence did not support a finding that a protected activity was a contributing factor in the alleged adverse action. *Id.* On April 6, 2012, Complainant filed a timely objection and request for a hearing.

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[5] The Orders were attached as exhibit C to Respondent's Motion to Dismiss and/or Strike Mr. Simkus's Amended Complaint.

[6] Complainant's and Respondent's exhibits will be referred to as "CX" and "RX," respectively. Complainant's exhibits consist of (1) Exhibits A through W [although there were no Exhibits O, P or U] which were attached to [and described in] "Complainant's Response and Objection to Respondent's Motion for Summary Decision and Complainant's Objection Over the Courts Decision Requiring Complainant to Respond Without Discovery or Review of Evidence in Support of Complainant's Dodd-Frank Complaint," which will be referenced as "CX" followed by the exhibit letter; (2) 200 numbered pages filed on May 2, 2013, which will be referenced as "CX X" followed by the page number (i.e., CX X at 1 through CX X at 200); and (3) Complainant's Declaration and incorporated Timeline, filed with his initial response of April 4, 2014 [entitled "Complainant's Declaration of Complainant's Timeline of Events and Damages that have Occurred Since Sept. 6, 2010 to Present"], which will be designated as "CX Y" and/or "Timeline." An additional declaration appears in the April 2014 response itself, which, inter alia, quotes Complainant's ADA complaint; it is not being cited herein. Respondent's Exhibits A through O were filed along with the summary decision motion and will be referenced as "RX" followed by the exhibit letter; subparts will be referenced parenthetically.

The case was assigned to the undersigned administrative law judge, who issued a Notice of Assignment and Scheduling Order on April 30, 2012. In an Order Staying the Proceedings, issued on July 9, 2012, the Complainant, who was appearing pro se, was urged to seek counsel and he was allowed additional time to do so. On June 20, 2012, Complainant filed a notice of appearance as a pro se litigant along with a motion to amend his complaint; however, he did not attach the amended complaint to the motion.

Thereafter, telephone conferences were conducted between the undersigned administrative law judge, the pro se complainant, and counsel for the Respondent on July 5, 2012, September 5, 2012, and November 19, 2012. [7] Complainant was advised that the initial written complaint was insufficient in that it did not specify the protected activity and he was permitted to file an amended complaint. *See, e.g.,* Transcript of November 19, 2012 Telephone Conference at 7-8. Although Complainant initially filed an amended complaint on December 26, 2012, the original submission was incomplete and included two partial versions of different complaints, so Complainant was asked to submit a new amended complaint that was complete.

Complainant filed his amended complaint on January 8, 2013 [hereafter "Amended Complaint" or "RX C"]. (RX C). The Amended Complaint was 75 pages long and references other statutes and claims besides SOX. *Id.*[8]

On February 13, 2012, Respondent filed a Motion to Dismiss and/or Strike Mr. Simkus's Amended Complaint with six exhibits designated as A through F.[9] In the motion, Respondent

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[7] An Order Staying Proceedings was issued on July 9, 2012, an Order Granting Extension and Setting Forth Pleading Requirements was issued on November 19, 2012, a Scheduling Order was issued on January 29, 2013, and an Order Withdrawing Scheduling Order was issued on May 28, 2013.

[8] The June 18, 2013 Order Denying Respondent's Motion to Dismiss and Granting Motion to Strike in Part provided:

> The Amended Complaint is rambling and contains allegations that relate to other potential claims or complaints as well as much extraneous information, some of which relates to events occurring years prior to any apparent protected activity. It also is not in any discernible order, chronological or otherwise, and it is not clear exactly what protected activity Complainant claims to have engaged in or what concerns he communicated to his superiors. In considering Complainant's allegations, I will also take into consideration the documentary support that he submitted with his response, which includes copies of two complaints that he filed with the SEC, on July 16, 2010 (CX 5-11) and on April 7-8, 2011 (CX 12-21).

The referenced exhibits appear in CX X at pages 5 to 21. These exhibits indicate that Complainant argued that management had engaged in fraud for willfully ignoring occupational health and safety standards relating to asbestos, deceiving shareholders into believing Respondent was in compliance with OSHA laws, and failing to disclose possible asbestos-related liabilities in their SEC filings. Likewise, the primary SOX-related allegation in the Amended Complainant is claimed retaliation based upon asbestos-related reports. Complainant also made allegations relating to maintenance and infrastructure issues, and he specifically alleged falsification of records during 2007 to 2009 "SOX federal audits of United Airlines facility maintenance inspection reports critical to the daily operations of United Airlines which may have resulted in numerous network outages which have occurred over the past three years and may also even include recent outages that occurred this past summer of 2012." Amended Complaint, RX C at 2-3. He further alleged that critical facilities were allowed to dwindle into a state of disrepair which "posed as a genuine risk to shareholders if the true condition of United's outdated and crumbling infrastructure was never properly disclosed in any past SOX audits." Amended Complaint at 45. Complainant also reasserted claims he made before Judge Purcell, including claims of nepotism in a renovation contract award and inaccurate distribution of Complainant's company stock allocation. Amended Complaint at 3, 47.

[9] These exhibits are different from the ones later submitted in support of Respondent's summary decision motion. They are not evidentiary in nature and consist of district court orders/opinions and OSHA determinations.

sought to dismiss the amended complaint or, in the alternative, strike claims that are not properly before me or are time barred. Complainant was deposed on April 23, 2013 and during the course of the deposition, the undersigned was contacted for a telephone conference.[10] (RX G).

As directed at the telephone conference, Complainant responded to the motion to dismiss on May 2, 2013 with a memorandum (entitled "Complainant's Motion to Dismiss Respondent's Motion to Dismiss and/or Strike Complainant's Amended Complaint") along with 200 pages of exhibits (CX X at 1 to 200). In that response, Complainant asserted that Respondent had essentially conceded that he made out a prima facie case, and he did not dispute that his other claims (such as those under the ADA and FMLA) cannot be revived, but he argued that they should give rise to equitable tolling. Complainant also asserted specific facts supporting his SOX claims in addition to those raised in the Amended Complaint.

Respondent filed a Reply in Support of Motion to Dismiss and/or Strike Complainant's Amended Complaint on May 31, 2013, which included a copy of the transcript of Complainant's deposition. In the Reply, Respondent asserted that Complainant still had not pleaded facts to establish that he engaged in protected activity and had not alleged that he suffered any action which could constitute a retaliatory or adverse action.

On June 18, 2013 I issued an Order Denying Respondent's Motion to Dismiss and Granting Motion to Strike in Part, which is incorporated by reference herein. First, I found that the Complainant's SOX complaint was timely with respect to retaliatory actions that preceded March 15, 2011 by 180 days or less but that any claims of equitable tolling with respect to Complainant's previous SOX claim was not properly before me and therefore would not be considered. Second, with regards to claims raised by the Complainant under other statutes, including RICO, the FMLA, ERISA, the ADEA, ADA, and Title VII, AIR 21, and OSHA, I found that they should be dismissed or stricken as I lacked jurisdiction over those claims. Lastly, I found that dismissal under Rule 12(b) of the Federal Rules of Civil Procedure was inappropriate, as further factual inquiry was necessary to fully understand Complainant's allegations and determine whether he engaged in protected activity and specifically whether he had an objectively reasonable belief that Respondent violated SOX under the criteria set forth in *Sylvester v. Parexel International LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42 (ARB May 25, 2011) (discussed below). After synthesizing the allegations made in the amended complaint, I determined that Complainant had alleged that he engaged in protected activity when (1) he reported concerns about asbestos to management and believed that Respondent acted fraudulently and violated SEC rules (and specifically Rule 10B-5 and staff accounting bulletins) by failing to disclose potential liability relating to asbestos in its financial documents filed with the SEC; (2) he reported maintenance and infrastructure issues and Respondent engaged in fraudulent, deceptive, and inaccurate reporting during the time of a "SOX audit"; and (3) Complainant reiterated other allegations he made before Judge Purcell, including the allegation that he reasonably believed a manager in his department improperly awarded a major contract to a company owned by his brother and Respondent engaged in mail and wire fraud in 2006 when it mailed him an inaccurate company stock allocation. In denying the motion to dismiss, I found

[10] The transcript of Mr. Simkus's deposition appears as RX G and the conference transcript is at pages 163 to 198. A copy of the transcript with a Transcript Word Index was attached to Respondent's "Reply in Support of Motion to Dismiss and/or Strike Complainant's Amended Complaint,' filed on May 31, 2013.

further factual inquiry was necessary, either through summary disposition or at a hearing on the merits, to determine whether Complainant had engaged in protected activity, and specifically whether he had an objectively reasonable belief that Respondent violated SOX under the *Sylvester* criteria, and to determine whether he sustained any actionable adverse action.

On November 13, 2013, Respondent filed a Motion for Summary Decision to which Complainant initially responded on April 4, 2014;[11] Respondent's reply brief was filed on December 5, 2014; and Complainant filed his final response on August 6, 2015. The August 6, 2015 response was faxed and the original with a box of supporting documents was mailed and filed on August 11, 2015.[12]

There were two telephone conferences that were held since the motion for summary decision was filed.

The first of these two conferences [not transcribed] was held on May 20, 2014 for the purpose of discussing discovery issues, and specifically Complainant's motions for sanctions and for discovery related to asbestos. At the conference, I advised the parties that I would prefer the parties to try to work out discovery disputes and asked Complainant to focus on what he absolutely needed to respond to the summary decision motion. In a post-conference Order, I ordered Respondent to conduct an additional search for records and directed both parties to provide additional documents. The post-conference Order also allowed Complainant 30 days to respond to the summary decision motion with supporting documentation and affidavits, accepted Complainant's previous document submission of March 22, 2013 (with 200 numbered pages) to be considered as part of his response, and allowed Respondent 15 days to reply to Complainant's response. An Order Compelling Responses and Protective Order was issued on August 8, 2014 and a Supplemental Protective Order was issued on September 12, 2014, which directed Complainant to cease direct communications with Respondent's managerial employees.

The second of the telephone conferences [transcribed] was held on October 21, 2014 in view of motions primarily filed by Complainant. At the conference, outstanding discovery issues (primarily relating to asbestos) were discussed, and I required Complainant to finally respond to the motion for summary decision within 30 days, regardless of whether he received the records. Upon receipt of relevant records, however, I agreed that he could supplement his response.

Additional motions were filed and resolved by the Interim Order on Pending Motions issued on July 6, 2015, which is incorporated by reference herein. That Order also provided that any additional briefing or evidentiary submission on the pending summary decision motion should be filed on or before July 30, 2015. As noted above, Complainant's final response was filed on August 6, 2015 (with supporting documents filed by mail) and is accepted as timely.

In the August 2015 response, Complainant also objected to certain matters. First, Complainant objected to my accepting as true OSHA's investigative findings, which is simply

[11] In his initial response, Complainant asserted that he required additional discovery to respond fully. He also included a Declaration and Timeline, as discussed in footnote 6 above.
[12] See footnote 6 above.

untrue. Proceedings before the Office of Administrative Law Judges are de novo. Second, Complainant objected to being required to respond without discovery, which is also untrue. Complainant has been provided with ample discovery responses and has been allowed to conduct discovery that is little more than a fishing expedition unrelated to the issues before me, as was explained to Complainant at the telephone conference of October 24, 2014. Respondent has made a good faith effort to obtain documents responsive to Complainant's discovery under the guidelines provided at the telephone conferences. Additional documents relating to these subsidiary matters (but not apparently bearing on the issues before me) were recently discovered by Respondent and will be provided to Complainant, and there is no need for additional discovery. Complainant's objections are overruled. SO ORDERED.

***Case Nos. 2014-AIR-00003 and 2014-CFP-00002***

Two additional cases have been consolidated with Case No. 2012-SOX-00016 ("first case" or "instant case") for hearing purposes:

(1) Case No. 2014-AIR-00003 involves the same parties but a different statutory basis (the AIR 21 Act). In May 27, 2011 and November 30, 2012 letters, following up on an April 14, 2011 oral complaint in that case, Complainant alleged that he reported safety concerns, and specifically a November 13, 2010 accident between an unmanned pickup truck and a jet plane that was on taxi; these reports were made to an SEC investigator (Jeff Horner), his supervisor manager (Bob Heatherington), senior executives at United Airlines (including Kevin Thomas), IBT union representatives, and an OSHA investigator (Shawn Hughes). As a result, he claimed that he was subjected to a hostile work environment with payroll interference and specifically that he was placed on EIS on January 17, 2011 and he lost a signing bonus. OSHA found the claim lacked merit on September 10, 2013.

(2) Case No. 2014-CFP-00002, which arises out of SOX, as well as CFPA, involves a February 12, 2013 email complaint, entitled "Dodd-Frank Complaint" (following up a January 25, 2013 telephone conversation), that was found to lack merit by OSHA on October 22, 2013. A different claimed retaliatory action is involved (in addition to reiteration of previous actions), specifically the treatment of his LTD (long term disability claim) in December 2011 and subsequently, and his being placed on EIS on September 13, 2013. OSHA found the adverse actions that occurred more than 180 days prior to the filing of the complaint to be time barred and, with respect to the September 13, 2013 placement on EIS, to have resulted from Complainant's own actions. Complainant alleged some of the same protected activity as in the OSHA case (e.g., reporting of asbestos and infrastructure defects), expanding on his SOX violation allegations, along with an additional allegation relating to retaliation for participation in the prior SOX cases.

As the summary decision motion relates only to the first case, this Decision and Order relates only to that case. However, in the interest of administrative judicial economy, I am asking the parties to advise within 30 days whether the same reasoning that requires dismissal of the first case also requires dismissal of the other two cases, in that the AIR 21 complaint alleges similar adverse action and the Dodd-Frank complaint alleges similar protected activity. The parties should provide their positions on that issue within thirty days of the date of this decision.

## FACTUAL BACKGROUND

***Complainant's Employment with Respondent and Alleged Protected Activities***

Complainant has worked at United for over 30 years, beginning in September 1983. (RX G, Transcript of April 23, 2013 Deposition of Paul Simkus, at 104-105). From 1998 to 2009, Complainant worked at United's World Headquarters in Elk Grove Village, Illinois. *Id*. at 105. During this period of employment, Complainant claims to have blown the whistle on various types of fraud, and he testified about those claims at his deposition. *Id.* at 104-05, 218-42. He claimed that there was a lack of adequate controls internally. *Id.* at 232-33.

Beginning in 1998, Complainant determined that there was vendor procurement fraud going on in the whole division but that nobody was willing to say anything about it. *Id.* at 223. It did not end until 2008 or 2009, after there was an internal investigation/audit before Barbara Forrest. *Id*. at 224. By the time the fraud ended, he claimed that "[t]hey were hot after [him]" and he "couldn't even go to the bathroom."[13] *Id.* at 224

From 2007 to 2009, Complainant also claims to have blown the whistle on various types of fraud in addition to the vendor procurement fraud, including network outages and falsification of the facilities maintenance inspection sheets in 2008. *Id.* at 225-27. He explained that there were daily mechanic inspection sheets that the mechanics had to complete daily and place in the logbooks; however, "people were pencil whipping them" and, when the SOX auditors were asking for the inspection sheets, management was "hand picking" the ones they wanted and filling in the ones that were incomplete. *Id*. at 225-26. He stated that 2008 was the time they had the first SOX audit, and it "came out" in a memo from his manager that the guys were not completing the inspection sheets. *Id.* at 225-26. The network outages occurred beginning in 2000, and the back-up power didn't kick in, because they were not doing their jobs. *Id.* at 227-28. He believed that the network outages had to do with critical infrastructure. *Id*. at 238. Complainant also complained of departmental embezzling, which involved managers taking money from a recyclable materials account and putting it in a credit union, and timecard falsification, whereby mechanics were allowed to charge for days when they were not working. *Id.* at 228-29.[14]

From 2006 to 2007, when Respondent came out of bankruptcy, Complainant claims that he did not get the proper amount of allocation of his stock. *Id*. at 229-32.

Complainant also asserts that he witnessed "all this asbestos stuff. . . falling out of the ceilings" that was never reported. *Id*. at 226.[15]

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[13] In his Declaration/Timeline, Complainant explained that he was not permitted to leave his work area to go to the bathroom without permission. (CX Y at 3.)

[14] In his amended complaint, Complainant claims that on August 18, 2008, he disclosed information relating to these matters to senior manager Barb Forrest during the time of the alleged SOX audit and to the EEOC in "over twenty lengthy emails." (RX C at 58). These allegations are accepted as true for purposes of the motion to dismiss.

[15] In his amended complaint, Complainant alleged that he shared his concerns with Respondent regarding asbestos in its facilities by writing it on a dry-erase board in 2007, 2008, and 2009 outside the office of Ken Weslander, the manager responsible for facilities. See RX C, Amended Complaint at 43. For purposes of the motion for summary decision, I will assume the truth of this assertion.

In 2008, at the time of the SOX audit, during a conversation with Nick Bordi, his supervisor at the time, concerning new time clock procedures, a "very detailed" "biometric system that everyone hated," Mr. Bordi threw the new time tracker regulation at Complainant and said, "you're to blame for all this." *Id.* at 220-22. He called Complainant a troublemaker in front of everybody. *Id.* Also in 2008, his two senior mechanics told him that there was a message from management to "hold back" because they had only two years prior to retirement. *Id.* at 222-23. He explained that they were the ones circumventing SOX controls. *Id.*

In April 2009, Complainant was transferred to O'Hare Airport in Schaumburg, Illinois. (*Id.* at 105). Complainant requested the transfer because he felt that he was a target of retaliation. (*Id.*; see also CX Y, Timeline at 3.) In 2010, while working at O'Hare, Complainant became a member of the Teamsters and became subject to the terms and conditions of employment of the collective bargaining agreement between United and The Airline Technicians and Related Employees of the Service of United Airlines, Inc., as represented by the Teamsters. (RX I(1)). Complainant acknowledged that he was required to call in if he was unable to make it to work. (RX G, Comp. Dep., at 106-07.) Complainant alleges that during his transfer, Headquarters failed to forward his FMLA approval paperwork to O'Hare and management falsified his attendance records resulting in him being written up for poor attendance on February 19, 2010 by Hope Kretekos ("Ms. Kretekos"). *See* CX Y, Timeline.[16]

***SEC Filings***

Initially, Complainant alleges that he filed two claims with the SEC on May 10, 2010 and March 15, 2011; however, the forms he provided list dates of July 16, 2010, April 7, 2011, and April 8, 2011. (RX C, Amended Complaint at 56; CX X at 5-21).

In the first of his SEC filings, Complainant generally addressed his alleged SOX claims in the context of complaints relating to labor law, occupational health and safety, and ethical violations. Specifically, in the 2010 filing, Complainant asserted retaliation for his sending to corporate executives an email in October 2007 informing them of labor law violations; for reporting ADA violations to the EEOC in April 2008; and for reporting fraud for willfully ignoring OSHA standards and administrative errors in the stock allocation program in May of 2010. (CX X at 5-11). Complainant did not explain how SOX was implicated, apart from arguing that the management had engaged in fraud for willfully ignoring occupational health and safety standards and therefore grossly deceiving shareholders to believe the corporation was in full compliance with OSHA laws. (CX X at 8).

In the second of these filings, filed in March or April of 2011, Complainant clarified that the occupational health issues that he believed to require reporting were asbestos-related. (CX X at 12-21). Specifically, he stated that he had "a reasonable belief that there were serious [discrepancies] over several SEC (8K and 8K "A") filings made by my employer" which "had to do with [his] personal disclosures over serious asbestos release episodes that [he] later learned were never reported nor did the company disclose these asbestos release episodes in any of [their] SEC reports and filings which represented fraud to the shareholders of United Airlines" in

[16] See footnote 6 above.

violation of SEC Rule 10b-5 and Standard Accountings Bulletin (SAB 92), (SAB99) and (SAF5). *Id*. at 13. He further asserted that, by not reporting the "Material" information concerning the asbestos releases and racketeering, Respondent inflated the market assessment of share value and failed to provide the required "Risk Capital" to fund any loss contingencies or risk exposures, which could result in civil lawsuits. *Id.* at 14.

Complainant testified that he mentioned his SEC complaints to the OSHA investigator; to his supervisor, Mark Yankowski; to his coworkers, including Mike Shimp [mistranscribed as Shemp], Chris Roc, and Larry Collins; to Stan Z, the day shift supervisor; to Kevin Reed, the safety officer; and to "a training guy" for his asbestos training class. (RX G at 242-51.)

Complainant's coworker, Mike T. Shimp, submitted an affidavit in which he stated that he was present with Complainant on September 23, 2010 during a meeting with their supervisor, Mark Yankowski, when Complainant disclosed details and elements of his SOX complaint and how "he had reason to believe United Airlines knowingly committed SOX violations relating to fraud and accountancy violations which may have been a violation of SEC and FSAB disclosure requirements relating to asbestos release incidents and because United Airlines knowingly falsified mechanics inspection reports during a federal (SOX) audit." CX X at 32. He further stated:

> Paul and I both personally witnessed what we believed was fraud due to the falsification of inspection reports which were critical to the entire operation of United Airlines because they directly related to equipment and infrastructure which supported the entire IT and ISD computer division. Paul explained in great detail to our supervisor that these failed disclosures could possibly represent shareholder fraud under Sarbanes Oxley.

Mr. Shimp also asserted that their workplace became a hostile work environment and, as the H.R. representative (Bill Byrnes) failed to take any action to correct it, he convinced Complainant to put in a transfer to get out of the department [apparently a reference to Complainant's transfer in 2009].

In his Declaration, Mark Yankowski, Complainant's supervisor from 2009 to 2011, verified that Complainant told him about complaints that he made to the SEC (concerning insider training and improper sale of stocks after United came out of bankruptcy) and that he stopped asbestos abating when he worked at United's World Headquarters and had alleged that SOX violations had occurred. (RX H, Yankowski Decl. at 1). Mr. Yankowski did not, however, convey those concerns to anyone else at United. *Id.* See also Declaration of Bob Hetherington, RX N at 2 (indicating he knew Complainant had a lawsuit pending against United but was unaware of his complaints about asbestos.)

***Procedure Regarding Vacation Bidding, Leave of Absence, and Placement on Extended Illness Status ("EIS")***

As a member of the International Brotherhood of Teamsters ("Teamsters"), the Complainant is subject to the terms and conditions of the Collective Bargaining agreement

between United and the Teamsters ("Teamster CBA"). (RX I(1)).[17] The relevant articles pertinent to this case are Article 9 sections (B)(5), (B)(6), and (B)(10) and Article 10 sections (A), (B), and (E)(2).

Article 9 generally pertains to the Vacation Policy. *Id.* Article 9, Sections B(5),(6) and (10), specifically address the procedure for vacation bidding. They state, in relevant part:

> (5) Once a year, generally in early November, employees will bid for available vacation in the succeeding year based on adjusted Company Service Date. The Company will post notice of where and when employees will bid their initial and subsequent rounds of vacation. Employees will at that specific time, have three (3) ways to notify management of their bid preferences. They may show up in person, or telephone in their preference, or submit a written pre-bid to the designated management representative prior to any particular vacation bid round. Written confirmation will be provided to employees submitting written pre-bids. Once the entire vacation bidding process is completed the vacation listings will be posted no later than December 15th.
>
> (6) Employees may bid one (1) continuous vacation period, which may include all or any portion of the vacation to which he is entitled….
>
> (10) An employee may also designate any or all days to be taken as vacation-day-at-a time[18]….

*Id.* at 9.3 – 9.4.

Article 10 generally pertains to Leaves of Absence. *Id.* Article 10, sections A to C state:

> (A) An employee who is unable to report for work for any reason must notify the Company in advance, whenever possible. The Company shall establish a designated absentee number for employees to use for contacting the Company when they are unable to report to work. An employee who does not have

[17] A copy of the "Tentative" Collective Bargaining Agreement appears as Exhibit 1 to the Declaration of Jennifer Dziepak, which is Respondent's Exhibit I; however, Ms. Dziepak attested that Exhibit 1 contains a true and correct copy of Articles 9 to 11 of the collective bargaining agreement regarding the EIS policy applicable to Complainant. RX I, Dziepak Decl. ¶ 5.

[18] Art. 9 Section C pertains to Vacation-Day-At-A-Time ("VAC-DAT"). Art. 9(C)(1)-(2) states:

> (1) An employee may elect to designate any or all of his vacation days to be take a day at a time. The employee must designate the number of VAC-DAT days during the vacation bidding in November.
>
> (2) During the year, subject to the needs of the service, the employee may request VAC-DAT for a specific day or sequence of days if the employee has VAC-DAT available. The employee will not be denied the request, if it is made no more than sixty (60) days and no less than eight (8) hours prior to the beginning of the shift of sequence of shifts in question if there are open weeks as set forth in B.4 of this Article….

RX I(1) at 94– 95.

prior written permission may not be absent except for sickness, injury, or other causes beyond the employee's control.

(B) An employee who must be absent, and who has not received prior written permission, must notify the Company or its designated representative at the designated absentee number before the starting time of the employee's shift on the first day and must give the reason for the employee's inability to report to work. Unless excused by the Company or its designee, the employee is required to notify the Company or its designee of the employee's absence with explanation each day the employee is absent. Proper notification occurs when the Company or its designee has been contacted at the designated absentee number by the employee and given the reason why the employee is unable to report to work.

(C) An employee is subject to discharge if absent from work two (2) consecutive days without notifying the Company of the reason for his inability to report to work, absent extenuating circumstances….

*Id.* at 10-1.

Article 10 Section E(2) pertains to Extended Illness Status ("EIS"). In relevant part, it states:

> An employee who exhausts his sick leave or who is off work because of illness or injury longer than sixteen (16) days without sick leave pay shall be placed on extended illness status up to a maximum of five (5) years from the first day placed on extended illness status…The Union will be notified by two (2) copies of a letter stating the employee's name, home address, work location, job title and the date he is placed on extended illness status.

*Id.* at 10-2.

***Employee Service Center Absence Management and MARS System***

Jennifer Dziepak, Director of the Employee Service Center (the "ESC"), is responsible for managing the shared services of absence management for United, including FMLA leave, occupational leave, and Extended Illness Status ("EIS"). (RX I, Dziepak Decl. at 1). According to Ms. Dziepak, the ESC stores records relating to United employees who require certain leave in an electronic database referred to as "Documentum." *Id.* at 1. The Documentum is maintained in the regular course of United's business and maintained by ESC employees. *Id.* Only ESC's absence management team, managers, and medical nurses have access to the Documentum. *Id.* The ESC also utilizes a case management system, "SM7", to track employee absences, which can only be accessed by the ESC's absence management team. *Id.*

Employee schedules are recorded in a system called "MARS" to which employees and their supervisors have access. *Id.* at 2. MARS reflects days in which United employees work;

take paid vacation, sick leave, unpaid sick leave, or FMLA leave; have a scheduled day off; or are on an extended leave of absence. *Id.* A software program called "Brio" regularly pulls information from the MARS system regarding employees who have been out of work for 16 consecutive days after an unpaid illness absence. *Id.* Any unpaid illness absence serves as a "trigger" date for Brio, and if an employee does not return to work after 16 consecutive days, the employee is included on a report sent to the ESC's absence management team. *Id.* at 2-3.

Once the ESC absence management team receives the report, the team investigates the employee's profile to ascertain whether the employee should be placed on EIS. *Id.* at 3. If it is determined that employee should be placed on EIS, a letter is sent to the employee notifying him/her of EIS status and requesting that the employee provide medical documentation to substantiate the absence. *Id.* However, despite the fact the employee is placed on EIS, the employee maintains some of the privileges of an active employee, but he/she no longer accrues sick leave or vacation pay, and is no longer entitled to holiday pay. *Id.* The employee must also pay premiums for benefits out of pocket. *Id.*

In her Declaration, Ms. Dziepak explained that whether an employee is placed on EIS is mainly based on a report generated by the two automated software systems, SM7 and Brio. (*Id.* at 1-2). Ms. Dziepak further stated that an employee's placement on EIS is determined solely by the employee's absences and that an employee's performance or disciplinary history has no bearing on the decision, nor is the employee's supervisor consulted on whether the employee should be placed on EIS. *Id.* at 3. See also the Declaration of Sandy Digioia, RX O.

***Complainant's Leave and Attendance***

On July 23, 2010, Complainant alleges that he contacted Ms. Kretekos to request a "reasonable accommodation" to extend his FMLA under the ADA. However, Ms. Kretekos and two representatives from ESC informed him that his FMLA could not be extended because he had not exhausted the remainder of his paid sick time. See CX Y, Complainant's Timeline at 4. Subsequently, the Complainant missed several days from work, allegedly due to United retaliating against him by interfering with his right to take FMLA, and he received a written notice on August 4, 2010, stating that he had been placed on EIS. *Id.* at 5.

Complainant was cleared to return to work on August 28, 2010, but was sent home after 3 hours of working because he had not submitted the required medical documentation from his doctor. *Id.* On September 3, 2010, Complainant received notice to return to work from EIS. *Id.* Following his return to work, Complainant met with and emailed several United employee, officials, and supervisors, including Mark Yankowski (supervisor) ("Mr. Yankowski"), Robert Hetherington ("Mr. Hetherington"), Terry Brady (Senior VP of Airport Operations) ("Mr. Brady"), Scott Dolan (Operations Manager) ("Mr. Dolan"), Gina Flaig (HR Senior Management) ("Ms. Flaig"), Diane Gist ("Ms. Gist"), William Brown ("Mr. Brown"), and Kevin Thomas (HR Investigator of the Harassment and Discrimination Team) ("Mr. Thomas"), regarding alleged hostile work environment, ADA discrimination, retaliation for whistleblowing activities, and interference with his paycheck. *Id.* at 5-12. On September 25, 2010, Complainant received a response from Mr. Dolan and Mr. Brady stating that they were going to have someone look into his complaints. *Id.* at 12.

On November 5, 2010, Complainant met with Mr. Thomas and Tim Fox (Union Shop Steward) ("Mr. Fox") for an hour to discuss his concerns about retaliation for reporting ADA discrimination in August of 2010 and for filing a SOX complaint on May 10, 2010. Complainant also informed Mr. Thomas and Mr. Fox that he had recently filed a complaint with the SEC and that he participated in an SOX investigation on September 28, 2010. *Id.* Also, during the month of November, Complainant submitted a vacation bid for the first week of January 2011. (RX G at 129-30).

Towards the end of the first week of January, Complainant testified that he requested and was approved by Dan Strytecki (senior mechanic) for extra vacation time up until the end of January. (RX G at 133-34). Complainant further stated that he was also subsequently approved for time off in February by Mr. Yankowski. *Id.* at 136-37. However, despite the alleged approval, on February 8, 2011 Complainant emailed Mr. Yankowski, requesting that Mr. Yankowski change his pay certification from ILNP ("illness leave no pay") or FMNP ("family medical leave no pay") to FMLD for January 31, 2011 to February 10, 2011. (RX H(1)). On February 9, 2011, Mr. Yankowski replied to Complainant's February 8th email stating that Complainant did not have any type of FMLD and asking what the Complainant would like for him to do. *Id.* On February 12, 2011, Complainant responded back requesting that Mr. Yankowski use whatever was left of his vacation time. *Id.* On February 14, 2011, Complainant sent another email to Mr. Yankowski, requesting a "reasonable accommodation" to extend his FMLA to cover the remaining missed days. *Id.* Mr. Yankowski responded the same day, stating that he lacked the authority to extend FMLA and informed Complainant that he should contact the Service Center. *Id.* In the same email Mr. Yankowski also stated that he could not retroactively make changes to MARS, but that Complainant had 15 vacation days and two floating holidays that he could use going forward. *Id.* Subsequently, on February 21, 2001, Complainant received notice that he had been placed on EIS effective January 17, 2011. (RX I(3)).

Based on her review of the company records, Ms. Dziepak indicated in her Declaration that Complainant was out sick from work on January 1, 2011 and that, although he had available sick leave, his leave was incorrectly listed as "INLP" (illness/no pay, indicating unpaid sick leave) in the MARS system, which triggered the countdown to placing him on EIS, for which he was eligible on January 17, 2011. (RX I, Dziepak Decl. at 3-4.)

On March 9, 2011, Complainant's former attorney sent a letter to United informing them the February 21st EIS notification mischaracterized Complainant's approved vacation time as EIS and that such a mischaracterization could be potentially unlawful. *See* CX Y, Complainant's Timeline at 23; CX X at 108. On March 14, 2011, Complainant's former attorney, through email, informed him that United admitted that the Complainant's placement on EIS was a mistake and that they would make the proper corrections. [19] *Id.* Subsequently, Complainant was taken off of EIS status and allowed to designate some of the days that were unpaid as paid vacation days. (RX G at 207; RX I at 3-4). See also Declaration of Bob Hetherington, RX N.

[19] On March 15, 2011, Complainant sent an email to OSHA investigator Shawn Hughes, alleging that United continued to commit retaliatory conduct against him. See CX Y, Timeline at 23; RX A.

Complainant was again placed on EIS on March 7, 2011 after he was out of work for more than 16 consecutive days after an unpaid absence. (RX I, Dziepak Decl. at 4.) On April 1, 2011, Complainant received another letter from United informing him that he had once again been placed in EIS status effective March 7, 2011.[20] As required on April 11, 2011, Complainant dropped off his City of Chicago badge and parking hangtag to Mr. Yankowski and notified him that he never received pay for at least seventy two (72) hours of vacation pay. (CX L). On April 25, 2011, Complainant contacted Mr. Yankowski for the second time regarding the continued failure to receive his 72 hours of vacation pay. *Id.* After receiving Complainant's email, Mr. Yankowski, along with Mr. Hetherington, Stan Zarudzki and Ms. Kretekos, worked to process Complainant's paycheck. On May 4, 2011 Ms. Kretekos emailed Complainant informing him that WHQ payroll had cut his check with 72 hours of vacation pay and possibly 8 hours of sick pay. (RX H(2)).

On May 3, 2011, Complainant received a letter from United's EIS administrator stating that the medical documentation provided by Complainant's medical provider was insufficient to support his Illness Leave of Absence and requesting that he provide the required information by May 13, 2011. (CX L). On May 17, 2011, however, Complainant had not submitted the required medical documentation and thus received another letter from United's EIS Administrator requiring that the Complainant submit the documentation by May 27, 2011. *Id.* Following this letter, Complainant attempted to submit the required medical documentation but each attempt was rendered insufficient on May 27, 2011, June 6, 2011, and June 8, 2011. *Id.* Finally on June 17, 2011, Complainant received a letter from United to return to work effective June 20, 2011. *Id.*

In July of 2011, Complainant filed a grievance over being placed on EIS status on January 17, 2011 and for continued harassment, discrimination, retaliation, and payroll interference from September 16, 2010 to March 6, 2011.[21] (CX Y, Timeline at 32-33). Complainant filed a long term disability claim under ERISA on December 19, 2011. (DX G, Comp. Dep. at 37-40.) Complainant believes that his home was foreclosed upon in part due to Respondent's delay in providing accurate information relating to his ERISA claim for disability benefits to Met Life and, although he does not recall the specific date, he received a letter from the bank in May of 2012.[22] (*Id.* at 37-50).

## LEGAL BACKGROUND

### *Summary Judgment Standard*

A party is entitled to summary decision or judgment if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there are no genuine issues as to any material fact and the party is entitled to judgment as a matter of law. 29 C.F.R. § 18.72(a); Fed. R. Civ. P. Rule 56. The moving party has the initial burden of demonstrating that the non-movant cannot make a showing sufficient to establish an essential element of his case.

[20] During his deposition, Complainant admitted that this second EIS notification was proper. (RX G at 203-204.)
[21] The grievance was dismissed because it was found to be without merit. (RX G at 213-16.)
[22] This case only includes retaliatory actions that preceded March 15, 2011 by 180 days or less. The June 18, 2013 Order, inter alia, dismissed Complainant's ERISA claim.

*Celotex Corp. Catrett*, 477 U.S. 317, 322, 325 (1986). The burden then shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At this stage, the non-movant may not rest upon mere allegations, speculation, or denials in his pleadings but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. *See* 29 C.F.R. 18.72(c). If the non-movant fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact; a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23. All evidence and reasonable inferences are considered in the light most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

***Sarbanes-Oxley Act***

The Sarbanes-Oxley Act provides whistleblower protection for employees of publicly traded companies who provide information or participate in an investigation relating to violations of certain criminal code provisions relating to fraud (including "fraud and swindles"; "fraud by wire, radio, or television"; bank fraud; and securities fraud), rules or regulations of the Securities and Exchange Commission ("SEC"), or any provisions of Federal law relating to fraud against shareholders, when the information is provided to the employee's superior, law enforcement or regulatory personnel, or members of Congress or when the employee has participated in proceedings relating to the violation. 18 U.S.C. § 1514A, 29 C.F.R. § 1980.102(b).

## DISCUSSION

***Elements of the Present Claim***

To prevail in a SOX case, a complainant must establish that (1) he engaged in protected activity or conduct (*i.e.*, provided information or participated in a proceeding); (2) the respondent knew he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor to the unfavorable personnel action. *See* 18 U.S.C.A. § 1514(b)(2); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008 (ARB July 29, 2005). However, even if the complainant meets the burden, the complainant cannot prevail if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action even absent the protected activity. 29 C.F. R. §1982.109(b).

***Protected Activity***

Respondent asserts that United is entitled to summary judgment because Complainant cannot prove that he engaged in a protected activity. "Protected activity," as defined under the Act, includes providing information alleging a violation of federal laws relating to mail, wire, or securities fraud or a violation of a Securities and Exchange Commission ("SEC") rule or regulation or provision of federal law relating to fraud against shareholders. 18 U.S.C. 1514(A)(a). The Complainant contends that the record supports the reasonable inference that he engaged in a protected activity when he: (1) reported asbestos exposure violations in 2007, 2008, and 2009; (2) "blew the whistle" from 2007 to 2009 on vendor procurement fraud (which allegedly started in 1998 and ended in 2009), network outages, the falsification of facilities

maintenance inspection sheets during a SOX audit, racketeering and embezzling activities when a supervisor and manager opened up an account at the United Credit Union (Alliant) and deposited money in that account from recyclable materials in 2007 through 2009, and falsification of timecards of mechanics who had knowledge of the embezzlement scheme; (3) reported inaccurate stock distributions in 2006; and (4) filed two SEC complaints in July 2010 and April 2011. (RX C at 57; RX G at 217-240, 253).

In *Harvey v. Home Depot U.S.A., Inc.*, ARB Case No. 04-114, ALJ Case No.2004-SOX-20 (ARB June 2, 2006)[23], the Administrative Review Board noted that: "Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX . . .." *Harvey*, slip op. at 14*; see also, Miller v. Stifel, Nicolaus & Co., Inc.*, 812 F. Supp. 2d. at 987-988 (2011).

In *Sylvester v. Parexel International LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42 (ARB May 25, 2011), the Administrative Review Board established that a complainant only needs to show that he reasonably believed that the conduct complained of violated one of the laws listed in Section 1514A. [24] Reasonable belief that conduct constitutes fraud or other activity set out in 18 U.S.C. § 1514A(a)(1), has both a subjective component and an objective component. *Day v. Staples, Inc.*, 555 F.3d 42, 92 (1st Cir. 2009). "To satisfy the subjective component of the 'reasonable belief' test, the employee must actually have believed that the conduct he complained of constituted a violation of relevant law." *Sylvester*, slip op. at 32 (citing *Harp v. Charter Communs, Inc.*, 558 F.3d 722, 723 (7th Cir. Ill. 2009); *see also Dampeer v. Jacobs Tech*, ARB No. 10-006, ALJ No. 2011-SOX-033 (ARB May 31, 2013) (citing *Melendez v. Exxon Chemicals Americas*, ARB 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000). "[T]he objective component, 'is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'" *Id.*

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[23] In *Harvey*, the employee complained about racial and employment discrimination to the Board of Directors and corporate executives. While recognizing that a company that tolerates discriminatory practices may not be acting in the best interests of its shareholders, the Department of Labor Administrative Review Board concluded that allegations of employment discrimination do not point to violations of the statutes concerning mail fraud, wire fraud, bank fraud, shareholder fraud or violations of SEC rules. *Harvey*, slip op. at 14.

[24] In *Sylvester*, the Administrative Review Board discussed the correct standard for establishing protected activity stating:

> The SOX's plain language provides the proper standard for establishing protected activity. To sustain a complaint of having engaged in SOX-protected activity, where the complainant's asserted protected conduct involves providing information to one's employer, the complainant need only show that he or she "reasonably believes" that the conduct complained of constitutes a violation of the laws listed in Section 1514. 18 U.S.C.A. § 1514A(a)(1). The Act does not define "reasonable belief," but the legislative history establishes Congress's intention in adopting this standard. Senate Report 107-146, which accompanied the adoption of Section 806, provides that "a reasonableness test is also provided. . . which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts."

*Sylvester*, slip op. at 14.

Applying these principles to the facts in the instant case, I find that Complainant cannot establish that he engaged in any SOX protected activity. I will address each alleged protected activity in turn, below.

**Reporting of Asbestos in 2007, 2008, and 2009**

Complainant alleges that he reported an asbestos release issue in 2007, 2008, and 2009, by writing complaints on a dry erase board outside the office of Ken Weslander, the manager responsible for facilities. (Amended Complaint, RX C at 43). Respondent, however, contends that such activity does not constitute a protected activity under SOX, as the Complainant "makes no claim that, in writing on the dry erase board, he intimated that United was acting in any manner violating mail fraud, wire fraud, bank fraud, securities fraud against shareholders, violations of SEC rules or other federal laws relating to fraud against shareholders." *See* Respondent's Motion for Summary Decision at 12. I agree.

Complainant has not presented any evidence to support a reasonable inference that at the time he reported these asbestos release issues he actually believed that United was violating one of the laws listed in Section 1514 or the SEC rules. In fact, in Complainant's second complaint to the SEC on April 8, 2011 and also during a telephone conference on April 23, 2013, Complainant expressly acknowledged that his connection between the asbestos release issues and SOX violations did not become apparent until he began looking into the filings on a database (the "Edgar database") and realized that the alleged release episodes had not been reported. (CX X at 11 to 17; RX G at 166). Specifically, in his SEC Complaint, Complainant stated:

> I provided Mr. Horner that I had a reasonable belief that there were serious discrepancies over several SEC (8k and 8k"A") filings made by my employer. This had to do with my personal disclosures over serious asbestos release episodes *that I later learned* were never reported nor did the company disclose these asbestos release episodes in any of [their] SEC reports and filings which represented fraud to the shareholders of United Airlines.

(CX X at 13) (emphasis added). Likewise, during the telephone conference Complainant states:

> Well, I file it under Sarbanes-Oxley specifically because I had a license under the air act. United put me through training at Moraine Valley College. So I recognized when there was a release, when there was asbestos abatement going on at the workplace where I worked. Then it comes into as I realized the amount of retaliation, I started realizing well, what's this all really all about. And I started looking at into the filings on the Edgar database for shareholder. And that's when I discovered what I believe is none of this was ever disclosed in their file—periodic filings….

(RX G at 166).

Thus, based on these statements, it is clear that the Complainant could not have held the belief that United was violating SOX when he made the asbestos reports as his allegation would require review of the SEC filing that would not have been available prior to him making such reports. Accordingly, because Complainant could not have reasonably believed that United had

violated any laws under 18 U.S.C. §1514(a)(1), when he reported asbestos release issue in 2007, 2008, and 2009, he cannot establish that his reports constituted a protected activity under SOX.

Alternatively, even if the Complainant had subjectively believed that the asbestos issues violated one of the laws under SOX, it is not an objectively reasonable belief. In that regard, after reportedly doing research and investigation into the SEC filings, Complainant has not and cannot point to any provision that would actually require the disclosure of asbestos release episodes or potential liability relating to such episodes in its financial documents filed with the SEC.[25] Thus, a reasonable person in similar circumstance as the Complainant would be unable to do so as well. Even at this point in time, Complainant has merely referenced general SEC filing requirements. Moreover, Complainant's assertion that failure to report asbestos release episodes constitutes a violation of SOX because it could result in civil litigation fails to qualify the reporting of asbestos release episodes as protected activity for the "mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors is not enough.'" *See Robinson v. Morgan Stanley*, ARB No. 07-070, ALJ No. 2005-SOX-044 (ARB Jan. 10, 2010). (citing *Smith v. Hewlett Packard,* ARB No. 06-064, ALJ No. 2005-SOX-088, -092, slip. op. at 9 (ARB Apr. 29, 2008)(citing *Harvey*, slip op. at 14-15)). Therefore, I find that a Complainant's belief that Respondent's failure to report asbestos release episodes in its financial statements constitutes a violation of SOX is not objectively reasonable and therefore does not constitute a protected activity.

**<u>Complaints Regarding Vendor Procurement Fraud, Network Outages, Falsification of Documents, and Embezzlement</u>**

From 2007 to 2009, Complainant also vaguely alleges that he blew the whistle on (1) vendor procurement fraud; (2) network outages, (3) the falsification of facilities maintenance inspection sheets during a SOX audit; (4) racketeering and embezzling activities; and (5) falsification of mechanics' timecards. Although he was questioned about these allegations at his deposition and he provided additional documentation, he did not provide any details concerning these alleged protected activities, nor did he provide supporting documentation that set forth facts explaining what exactly occurred.[26]

At the summary judgment stage, the non-movant party may not rest upon mere allegations, speculation, or denials in his pleading but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. *See* 29 C.F.R. 18.72(c). In my Order denying Respondent's motion to dismiss, I held that to fully understand Complainant's allegations and determine whether he engaged in protected activity, further factual inquiry was necessary. At the present juncture, I find that further inquiry has not supported Complainant's vague allegations about "a SOX audit" and the reporting of the aforementioned alleged

[25] Complainant has also failed to explain why a person without knowledge of the requirement of SEC filings or SOX, such as the Complainant at the time he made his report, would be concerned with potential SEC-reporting violations, as opposed to health related issues due to exposure to asbestos, which concerns fall outside SOX.

[26] Although Complainant has continued to allege that he requires additional discovery, he is currently seeking documents relating to the alleged asbestos releases which, as noted above, would not be relevant to my analysis of the protected activity issue.

violations. Indeed, Complainant has not explained what he means by a "SOX audit" or the specifics concerning the audit, such as who conducted it, when, where, and why. Likewise, Complainant has not explained what actions he took that he claims to be protected or provided any supporting documentation supporting these allegations. It is unclear why he believes these activities are protected under SOX.

Accordingly, because the Complainant rests his engagement in the aforementioned protected activities on nothing more than mere allegations, the Complainant has failed to set forth specific facts to support a finding that the Complainant engaged in protected activities.

**Inaccurate Stock Distribution**

Complainant also alleges that United violated SOX when it mailed him inaccurate stock distributions on September 22, 2006. (RX C at 3). Complainant contends that he had reasonable belief that this was occurring system-wide (thus constituting mail and wire fraud) and therefore reported the violation to the "stock plan administrator" Phillip Martin and to a payroll supervisor in December of 2008. *Id.* at 70. Respondent contends that the Complainant has not put forth any evidence indicating that he complained to Mr. Martin or expressed a reasonable belief that United committed mail or wire fraud and intentionally mailed incorrect stock distributions for the purpose of defrauding him. I agree.

Complainant has not put forth any evidence indicating the basis for his belief that the stock distribution he received in 2006 was inaccurate or how the receipt of the allegedly inaccurate distribution constitutes any type of fraud under SOX. Without such evidence, the Complainant cannot establish that his belief was subjectively or objectively reasonable. Additionally, Complainant has not provided evidence, other than his own statement, that he shared these concerns with Mr. Martin or the payroll supervisors; nor does he provide evidence that Mr. Martin and/or the payroll supervisor were persons with supervisory authority over him or such other persons working for the employer who had the authority to investigate, discover, or address misconduct. *See* 18 U.S.C. § 1514A(1)(c). Therefore, I find that Complainant did not engage in protected activity when he allegedly reported inaccurate stock distributions.

**Filing of SEC Complaints**

Complainant filed his first SEC Complaint on July 16, 2012. (RX K; CX X at 5-10). In this complaint, Complainant alleges that United retaliated against him when he (1) reported serious concerns and violations of employment labor law for discrimination and hostile work environment in October 2007 to corporate executives; (2) filed multiple charges with EEOC regarding retaliation due to his reporting of "serious concerns and violations of employment labor law for discrimination and a hostile work environment and his complaints in 2008 which included charges for discrimination of ADA, retaliation, and refusal of "reasonable accommodation" and overtime; (3) reported fraud and serious violation by management when it willfully ignored occupational health and safety standards under OSHA; and (4) reported concerns to United management over unethical business decisions and violation to OSHA laws. Complainant connects these reports to violations of SOX by alleging that the above acts "grossly deceived" United Airlines Shareholders to believe the Corporation was in full compliance with

"employment and labor" and "OSHA" laws. I find however, that none of these reports, even if true, constitute violations under SOX.

As noted above, in *Harvey* v. Home Depot U.S.A., Inc., ARB Case No. 04-114, ALJ Case No.2004-SOX-20 (ARB June 2, 2006), the ARB observed that: "Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX . . .." *Harvey*, slip op. at 14*; see also*, *Miller v. Stifel, Nicolaus & Co., Inc.*, 812 F. Supp. 2d. at 987-988 (2011). Complainant's SEC complaints do not allege any mail fraud, wire fraud, bank fraud, securities fraud against shareholders, violations of SEC rules (apart from failure to report asbestos hazards in financial statements), or any federal laws relating to fraud against shareholders.[27] *See Miller*, 812 F. Supp. 2d at 987. Rather, like *Harvey* and *Miller*, Complainant simply provides information regarding violations of other federal laws, discriminatory practices, and allegedly unethical management.

Moreover, in Complainant's second SEC complaint, Complainant admits that at the time he filed the first SEC Complaint he was only reporting what he thought to be unethical business decisions by the finance division of United Airlines.[28] (CX X at 12.) Such an admission establishes that the Complainant did not have a subjectively reasonable belief that United had violated SOX when he made his initial SEC complaint in July of 2010. Therefore, I find that Complainant's first SEC Complaint does not constitute a protected activity under SOX.

Complainant's second SEC Complaint was filed on April 8, 2011. (CX X at 11-17). In this second SEC complaint, Complainant alleged that United violated SEC Rule 10b-5 by failing to disclose material information regarding asbestos release episodes in any of their SEC reports and failing to disclose material information in its GAAP filings. (CX X at 13-14). I find that Complainant's second SEC Complainant does not constitute a protected activity in this case.

First, Complainant's second SEC complaint was filed after he filed this instant complaint. Accordingly, Complainant cannot assert that this second complaint is one of the protected activities the he alleged occurred in his March 15, 2011 complaint to OSHA.

Secondly, even if Complainant had filed his second SEC complaint prior to filing this complaint, the second SEC complaint does not constitute a protected activity as the failure to report asbestos release episodes does not reasonably constitute a violation of SOX. As previously mentioned, Complainant cannot point to any provision in SOX with requires the disclosure of asbestos release episodes in its SEC filings and Complainant's assertion that failure to report asbestos release episodes constitutes a violation of SOX because it could result in civil

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[27] *Miller* held that, "none of these reports—even if true—implicates any of the six categories of activities protected by SOX: mail fraud, wire fraud, bank fraud, securities fraud, or any SEC regulation or federal law related to shareholder fraud. As stated by the Department of Labor Administrative Review Board, and reiterated by courts in this Circuit, there is "no authority for the contention that the failure to address personnel matters in a manner satisfactory to the complaining party constitutes a violation of SOX." *Miller*, 812 F. Supp. 2d at 987.

[28] Complainant states: "I filed an initial SEC complaint on July 16, 2010 over numerous concerns over adverse employment acts of retaliation for my immediate involvement as a whistleb[l]ower over what I believed then to be simply unethical business decisions by the finance division of United Airlines." (CX X at 12).

litigation fails because the "mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investor is not enough.'" *See Robinson, supra*. Therefore, it is not objectively reasonable to conclude that a reasonable person under the same circumstances as the Complainant would have believed that reporting asbestos release episodes constitutes a violation under SOX.

***Knowledge of Protected Activity***

"In order for an employer to 'know or suspect that the whistleblower-plaintiff is engaged in protected conduct . . . the plaintiff's intra-corporate communications [must] relate in an understandable way to one of the stated provisions of federal law [in § 806].'" *Wiest v. Lynch*, 710 F.3d 121, 134 (3rd Cir. 2013). "But the whistleblower's communication need not ring the bell on each element of one of the stated provisions of federal law to support an inference that the employer knew or suspected that the plaintiff was blowing the whistle on conduct that may fall within the ample reach of the anti-fraud laws listed in § 806." *Id.* For purposes of its summary decision motion, United has not argued that it did not have knowledge of at least some of the Complainant's alleged protected activity, although it has contested that the persons involved in Complainant's alleged adverse actions were aware of his alleged protected activity prior to taking action. See Respondent's Motion at 19-20; Respondent's Reply Brief at 7 to 8. For purposes of addressing Respondent's motion, I will assume that United had knowledge of Complainant's alleged protected activities.

***Adverse Action***

Respondent asserts that Complainant's claim must ultimately fail because he has not suffered any adverse personnel action. The term "adverse action" refers to unfavorable employment actions that are more than trivial either as a single event or in combination with other deliberate employer actions alleged. *Menendez v. Halliburton, Inc.*, ARB No. 09-002, 09-003, ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011) (citing *Williams*, ARB No. 09-018, slip op. at 15). The Complainant contends that he suffered adverse actions when he was placed on EIS on January 17, 2011 while on approved vacation leave and denied 72 hours of vacation pay.[29] As noted above, Respondent concedes that Complainant's initial placement on EIS was due to improper coding of his absence on January 1, 2011; however, that error was corrected and it is undisputed that Complainant's subsequent placement on EIS was proper. Respondent argues that Complainant did not suffer any adverse actions because any complaints about being improperly placed on EIS and vacation pay issues were all fixed and insufficient to qualify as adverse actions under SOX. I agree.

The ARB held in *Menendez*, that rather than a limitation on what is considered adverse action under Section 806, the "terms and conditions of employment" are not significant limiting words and should be construed broadly within the remedial context of Section 806 and therefore,

[29] In the June 18, 2013, Order Denying Respondent's Motion to Dismiss and Granting Motion to Strike in Part (at page 9), I held that in determining whether Complainant suffered retaliation, I would only consider adverse actions that preceded March 15, 2011 by 180 days or less and that any claims based upon events occurring before that date would be stricken.. See 18 U.S.C. § 1514A(b)(2)(D).

not limited to only economic or employment-related actions. *Menendez*, ARB No. 09-002 slip op. at 18. Thus, when reviewing Section 806 adverse action allegations, the ARB found that the deterrence standard in the Supreme Court case *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006) provides a useful starting place. *Id.* The *Burlington's* deterrence standard only requires that the alleged adverse conduct would deter a reasonable employee from engaging in protected activity. *Id.* Accordingly, "[t]he employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." *Bozeman v. Per-Se Techs., Inc.*, 456 F. Supp. 2d 1282, 1340 (N.D. Ga. 2006) (citing *Burlington Northern, supra*); *see also Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1233-34 (11th Cir. 2006)). Applying the *Burlington* deterrence standard to this instant case, I find that the Complainant fails to prove that the adverse conduct, i.e. placement on EIS and delay in receiving 72 hours of vacation pay, would deter a reasonable person from engaging in protected activity.

The Complainant has not provided any evidence to refute Respondent's showing that his placement on EIS was a result of his own conduct of failing to return to work prior to accruing 16 consecutive days of unpaid sick leave. As explained in the Declaration by Jennifer Dziepak, Director of the Employee Service Center, Absence Management, whether an employee is placed on EIS is mainly based on a report generated by two automated software systems, SM7 and Brio. (RX I at 1-2). Ms. Dziepak further stated that an employee's placement on EIS is determined solely by the employee's absences and that an employee's performance or disciplinary history has no bearing on the decision, nor is the employee's supervisor consulted on whether the employee should be placed on EIS. (RX I at 3). Moreover, Complainant not only admits that placement on EIS is the proper procedure for accruing 16 consecutive unpaid sick leave days, but he himself was not deterred from engaging in more protected activity following his placement on EIS, as evidenced by him filing two new complainants with OSHA. *See* RX G at 203-204. Thus, because the placement on EIS is solely determined by an employee's absences and is a procedure applicable to all employees governed by the Teamsters' CBA regardless of whether the employee engages in protected activities, I find that the placement on EIS would not deter a reasonable person from engaging in a protected activity.

Furthermore, Complainant failed to establish that he suffered any adverse economic or employment-related action or that the placement on EIS and delay in receiving 72 hours of vacation pay was "more than trivial." Complainant admits that once he notified United of the inappropriate placement on EIS, United admitted its mistake and promptly changed his status to active. *(*RX G at 199, 207). Additionally, Complainant does not point to any negative effects his temporary placement on EIS had on his employment with United. In fact, despite receiving the EIS letter, Complainant never experienced any changes to his benefits or employee status effective January 17, 2011, nor was his seniority, sick leave accrual, and availability of vacation time affected. (RX I at 4.) Thus, I find that Complainant's placement on EIS was indeed trivial and does not constitute an adverse action.

Lastly, Complainant also alleges that he suffered economic harm when United failed to pay him 72 hours of vacation pay. Complainant asserts that because of the delay in receiving 72 hours of vacation pay he was unable to make the required payment to keep his house from being foreclosed on. I find that this assertion is merely speculative and does not constitute sufficient

economic harm to establish a more than trivial adverse action. First, Complainant has failed to set forth the chain of events leading to the foreclosure and his bald assertion of a causal link is insufficient. Secondly, Complainant's assertion that his house was foreclosed on because of the delay in receiving his off-cycle check is merely speculative. *See Bozeman*, 456 F.Supp. 2d at 1340 (stating, "…for purposes of showing an adverse employment action, the alleged impact on an employee must be more than speculative."). Complainant does not offer any evidence that he would have been able to make his house payment had he received the 72 hours of vacation when he earned it or that his house would not have been foreclosed but for the missing vacation pay. Third, Complainant admits that he was paid the missing 72 hours of vacation pay on May 4, 2011, less than a month after he notified United of the missing payment. (RX G at 200). He has failed to show how this short delay had any impact on his financial situation. Accordingly, I find that any economic harm alleged by the Complainant is merely speculative and trivial, and thus does not constitute an adverse action.

***Contributing Factor Analysis***

Even assuming Complainant's activities were protected under SOX, he cannot demonstrate that these activities were a contributory factor to his being placed on EIS and not receiving 72 hours of vacation pay. After reviewing Complainant's submissions, I find that he has failed to show that there are material factual issues relevant to the causation analysis.

To establish this element, it is unnecessary for a complainant to establish that the respondent had a retaliatory motive; rather, the issue is whether the protected activity contributed to the adverse personnel action. *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003, ALJ No. 2007-SOX-5 (ARB Sept. 13, 2011) slip op. at 31 to 32. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ 2010-SOX-051 (ARB Oct. 9, 2014). If a complainant shows that an employer's stated reasons for its actions are pretext, he or she may, through the inferences drawn from such pretext, meet the evidentiary standard of proving by a preponderance of the evidence that the protected activity was a contributing factor. *Id.* However, to prevail on a complaint, the employee need not necessarily prove pretext. *Bechtel v. Competitive Tech., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-33 (ARB Sept. 3, 2011). Contributing factor can also be proven, by a preponderance of the evidence, by circumstantial evidence. *Id.* Circumstantial evidence may include temporal proximity, inconsistent application of an employer's policies, shifting explanations for an employer's actions, and more. *Id.*

In the instant case, I find that Complainant has failed to establish that there is a material factual issue concerning whether the alleged protected activity contributed to the alleged adverse action or whether United's asserted reasons for its actions were pretextual. In that regard, United asserts that Complainant's placement on EIS was solely the result of the application of the Teamsters' CBA, which governs the terms and condition of Complainant's employment and mandates placement on EIS if an employee has been absent for 16 consecutive days after an unpaid illness absence. (RX I(1)). Complainant, however, contends that Respondent's explanation is pretext, as he was on preapproved vacation and therefore should have never been placed on EIS and that United was motivated to place him on EIS "because the longer you

remain on their EIS leave program the window to file a long term disability ('LTD') claims begins to quickly close." (RX C at 14). I disagree.

Complainant has failed to support these assertions. First, Complainant contradicted his own contention that he was on preapproved vacation during his deposition when he admitted that he had not in fact received preapproval for his vacation days from January 31, 2011 to February 10, 2011, as evidenced by an email he sent to Mr. Yankowski, his supervisor, on February 8, 2011. (RX G at 111-13, 140-44, 203-04; RX H(1)). Second, Complainant's contention that his placement on EIS was an attempt by United to prevent him from receiving long term disability is contradicted by the fact that Complainant admitted that United in fact removed him from EIS status, and thus had no effect on his eligibility for long term benefits. *Id.; see also* RX I at 4. Lastly, Complainant has failed to present evidence, circumstantial or otherwise, establishing that his protected activity was in any way a contributory factor to the alleged adverse action.

During his deposition, Complainant relied upon the following in support of a connection between his protected activities and his placement on EIS: (1) timing, (2) his treatment by other employees (including an assertion that in 2008, Nick Bordi [his supervisor at the time] threw a SOX-related document at him and other employees called him a whistleblower and dark penny and made jokes about his depression), and (3) evidence of a hostile work environment and further retaliation. (RX G at 253-259). I find Complainant's reliance upon these facts to be misplaced and his contributing factor argument to be unpersuasive.

Complainant's temporal proximity argument fails in regard to the protected activities the Complainant alleges took place in 2008. These activities, which occurred over two (2) years prior to filing his complaint on March 15, 2011, are too remote in time to have contributed to the Complainant's adverse action. *See e.g., Miller v. Stifel, Nicolaus & Co., Inc.*, 812 F.Supp. 2d 975, 988 (D. Minn. 2011) (holding that without additional evidence the eight-month gap between Plaintiff's last complaint and her discharge 'is not sufficiently proximate to permit the inference that protected activity was a contributing factor to her termination.'")(citing, *Sussberg v. K-Mart Holding Corp.*, 463 F. Supp. 2d 704, 713-14 (E.D. Mich. 2006)( granting summary judgment to the defendant where there was at least a five-month gap between protected activity and termination, and there was evidence of performance problems and inability to get along with co-workers)). Complainant's filing of his first SEC complaint on July 16, 2010, is also too remote in time as there is a six month gap between the protected activity and placement on EIS. *Id.*

With respect to his allegations concerning his treatment by a former supervisor and co-workers that evidenced hostility toward him as a whistleblower, he has not shown how those matters related at all to the claimed adverse actions (relating to his placement on EIS and his delay in receiving pay for 72 hours of leave in 2011). Specifically, Complainant has failed to indicate or provide evidence that any of the people identified by Complainant as those who retaliated against him[30] were members of the ESC absence management team who had access to the Documentum, otherwise participated in the investigation to determine whether Complainant should be placed on EIS, or were any way involved in the alleged adverse actions. *See Robinson*

[30] During his deposition Complainant alleged that Steve Rasher (law department), Bob Hetherington (manager), Hope Kretekos (labor supervisor), Steve Pearlman, and Barb Forest (senior manager), retaliated against him in connection with his protected activity. (RX G at 158-9, 162).

*v. Morgan Stanley, Discover Financial Services, Kelly McNarmara-Corley, and David Sutter*, ARB No. 07-070, ALJ 2005-SOX-044 at 15 (ARB January 10, 2010) (finding that "[a]lthough Robinson proved that she engaged in protected activity and was discharged, she failed to prove that her protected activity was a contributing factor in her discharge" and "[t]he record does not indicate that anyone at Morgan Stanley or Discover reacted to this initial complaint by retaliating against her.")

Likewise, his subjective view that he was subjected to a hostile work environment as a result of his protected activity begs the question and does nothing to establish a causal nexus. Furthermore, Complainant does not allege and has not provided any evidence suggesting that other employees were treated differently when they were absent for more than 16 consecutive days on unpaid leave.

Therefore, Complainant has failed to establish that there are material factual issues concerning the causal relationship issue, as he has failed to show that United's explanation was pretext and has failed to present sufficient circumstantial evidence that his protected activity was a contributing factor in his placement on EIS and delay in payment of 72 hours of vacation pay. I find that Complainant's protected activities were not a contributory factor to his alleged adverse actions.

***Clear and Convincing Evidence***

In view of my finding that the Complainant cannot establish the essential elements of his complaint, it is unnecessary to reach the issue of whether United has demonstrated by clear and convincing evidence that it would have taken the same adverse action even absent the protected activity. 29 C.F. R. §1982.109(b). I would note, however, that the evidence before me establishes that Complainant's placement on EIS and delay of 72 hours of pay was a result of a neutral application of Respondent's usual procedures coupled with Complainant's own admitted un-approved absences, and any errors were promptly corrected when reported.

## CONCLUSION

After carefully reviewing the parties' submission, I find that the Complainant failed to sufficiently show essential elements of his case, and thus there can be no genuine issue as to any material fact. As such, I am granting Respondent's Motion for Summary Judgment. Further, I am requiring the parties to show cause why the other two consolidated cases should not also be dismissed based on the above analysis.

## ORDER

**IT IS HEREBY ORDERED** that Respondent's Motion for Summary Judgment be, and hereby is, **GRANTED** and the complaint in Case No. 2012-SOX-00016 is **DISMISSED WITH PREJUDICE** and

**IT IS FURTHER ORDERED** that, within thirty (30) days of the date of this Order, the parties shall **SHOW CAUSE**, if there is any, or otherwise address the issue of (1) whether Case No. 2014-AIR-00003 should not also be dismissed, because it involves the same alleged adverse action as Case No. 2012-SOX-00016, and (2) whether Case No. 2014-CFP-00002 should also be dismissed, as it involves the same alleged protected activity as Case No. 2012-SOX-00016.

Digitally signed by Pamela Lakes
DN: CN=Pamela Lakes,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Washington, S=DC, C=US
Location: Washington DC

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 should identify the legal 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).

When 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, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).