



Issue Date: 09 June 2015

CASE NO.: 2014-SOX-00015

In the Matter of:

**DORETTE BROWNLEE,
Complainant,**

v.

**HOSPIRA, INC.,
Respondent.**

**DECISION AND ORDER GRANTING RESPONDENT’S MOTION FOR
SUMMARY DECISION AND DISMISSING COMPLAINT**

The instant case has been brought under the employee protection (whistleblower) provisions of the Sarbanes Oxley Act of 2002 (“SOX” or “the Act”), 18 U.S.C. §1514A, with implementing regulations appearing at 29 C.F.R Part 1980.¹ The Act generally prohibits retaliatory or discriminatory actions by publicly-traded companies (and their subsidiaries or agents) against employees who either (1) provide information to their supervisors, federal regulatory or law enforcement agencies, or Congress, relating to activities they reasonably believe to constitute violations of federal criminal statutes relating to fraud, any Securities and Exchange Commission regulations, or federal laws relating to fraud against shareholders, or (2) assist in investigations or proceedings relating to such activities. Complainant, Dorette Brownlee (“Complainant”), alleges that she was terminated by Hospira, Inc. (“Respondent”) for reporting to her supervisors that Respondent made inaccurate statements to the Occupational Safety and Health Administration (“OSHA”) in responding to the SOX complaint of a former employee.

The matter before me is Respondent’s Motion for Summary Decision filed on March 19, 2015. For the reasons set forth below, Respondent’s motion for summary judgment is granted. Accordingly, this action is dismissed with prejudice.

PROCEDURAL HISTORY

On October 4, 2013, Complainant filed a timely complaint with the United States Department of Labor’s Occupational Safety and Health Administration (“OSHA”) in Chicago,

¹ The whistleblower provisions appearing at title VIII of the Sarbanes-Oxley Act (the Corporate and Criminal Fraud Accountability Act of 2002) amended title 18 of the United States Code by adding a new section 1514A, *Civil action to protect against retaliation in fraud cases*. As used herein, “the Act” references those provisions.

Illinois. Complainant alleged that Respondent terminated her from her position as Manager of Human Resources in retaliation for reporting to her supervisors that Respondent made inaccurate statements to OSHA in responding to the SOX complaint of a former employee. OSHA investigated the complaint, and on January 15, 2014, concluded that Complainant failed to present a prima facie case showing that she engaged in protected activity that was a contributing factor in her termination, and therefore had no reasonable cause to believe that Complainant was terminated in violation of SOX. Specifically, OSHA determined that Complainant's complaint did not contain any specific information related to a protected activity under SOX. On February 14, 2015, Complainant filed a timely objection and request for a hearing.

The case was assigned to me for disposition on March 31, 2014 and I issued a Notice of Assignment and Order.² On September 23, 2014, Respondent indicated that it planned to file a summary decision motion and would be taking Complainant's deposition. On November 12, 2014, I issued an Order establishing a discovery and briefing schedule, including a date for the filing of dispositive motions. The parties subsequently agreed to adjustments of the schedule.

Respondent filed a Motion for Summary Judgment and Memorandum in Support of Its Motion for Summary Judgment on March 19, 2015, arguing that Complainant cannot establish that she engaged in protected activity under SOX. (Resp. Memorandum 2-3). Respondent's Motion is supported by the transcripts of the depositions of Dorette Brownlee, Mark Salisbury, and Abigail Roche, as well as corresponding deposition exhibits.³

Complainant subsequently filed a Memorandum in Opposition to Respondent's Motion for Summary Decision on April 16, 2015. Complainant contends that she met her prima facie burden of establishing a SOX regulation claim and argues that Respondent failed to prove by clear and convincing evidence that it would have terminated her employment even in the absence of her complaint. (Compl. Memorandum 2). Documentary support offered by Complainant consists of deposition transcript excerpts and selected deposition exhibits.

Respondent then filed a Reply Memorandum In Support of Its Motion for Summary Decision on May 5, 2015. Respondent reiterated that Complainant cannot show that she engaged

² Neither party responded to the Notice of Assignment and Order as directed. By letter dated May 8, 2014, counsel for Complainant filed a motion to withdraw as counsel. To address the issue of representation, by Order on June 19, 2014, proceedings were stayed for sixty days, during which time counsel for Complainant was directed to supplement his motion to withdraw and Complainant was urged to find new counsel. I also ordered the parties to respond to my previous Notice of Assignment and Order within 30 days after the expiration of the stay period. By letter dated July 31, 2014, counsel for Complainant clarified that he never agreed to represent Complainant in this proceeding and was retained solely "for the purpose of representing her for the investigatory proceedings..." Counsel's motion was granted on August 15, 2014. Complainant later retained different counsel.

³ Unless otherwise specified, Dorette Brownlee's Deposition is referenced herein as "Brownlee Dep.," and corresponding exhibits as "Brownlee Dep. Ex.;" Mark Salisbury's Deposition is referenced herein as "Salisbury Dep.," and corresponding exhibits as "Salisbury Dep. Ex.;" and Abigail Roche's Deposition is referenced as "Roche Dep.," and corresponding exhibits as "Roche Dep. Ex.;" Additionally, Complainant's Memorandum in Opposition to Respondent's Motion for Summary Judgment is referenced herein as "Compl. Memorandum;" Respondent's Motion for Summary Judgment is herein referenced as "Resp. Motion;" Respondent's Memorandum In Support of Its Motion for Summary Judgment is herein referenced as "Resp. Memorandum;" and Respondent's Reply Memorandum In Support of Its Motion for Summary Judgment is herein referenced as "Resp. Reply."

in protected activity and that Complainant cannot refute the evidence supporting Respondent's reasons for terminating Complainant's employment. (Resp. Reply 1-2).

FACTUAL BACKGROUND

Complainant's Employment with Respondent

Complainant began working for Respondent in May 2004. (Brownlee Dep. 21-22; Brownlee Dep. Ex. 1). Initially, Complainant was a manager in compensation administration, a "Grade 18" position. *Id.* In December 2008, Respondent laterally transferred Complainant to a manager position in the "HR Solutions Center." (Brownlee Dep. 23). In March 2010, Complainant was again laterally transferred to "HR Business Partner" or "HRBP," a Grade 18 HR manager position, working in global marketing, corporate development, and research and development. *Id.* at 31.

In May 2011, Respondent promoted Complainant to an "HR Manager" for Respondent's Information and Technology ("IT") department, a Grade 19 position. *Id.* at 32-33. In this position, Complainant was tasked with engaging with leaders of the IT organization, including Respondent's Chief Information Officer ("CIO") Daphne Jones, in developing its business strategy, and objectives to achieve that strategy. *Id.* at 34, 35, 40-41.

Complainant's Performance Reviews Prior to Alleged Protected Activity

Although in Complainant's 2011 year-end performance review (her first after her promotion to HR Manager), Complainant's supervisor, HR Director Tanya Hayes, included some positive comments with respect to certain job elements, she expressed persistent concerns as to Complainant's leadership abilities. (Brownlee Dep. 35; Brownlee Dep. Ex. 10). For instance, Hayes was concerned that Complainant was not sufficiently proactive; that at times she expressed "a tone of frustration" and an "attitude" that inhibited collaboration; and that she lacked receptivity to feedback on performance. (Brownlee Dep. Ex. 10). Hayes rated Complainant "SP," or Successful Performer, but also noted that "improvement is required in 2012." (Brownlee Dep. 115-117; Brownlee Dep. Ex. 10). In Complainant's 2012 mid-year performance review, Hayes again noted that Complainant lacked initiative and needed to be more proactive in helping the IT organization solve its "business problems." (Brownlee Dep. 119-20; Brownlee Dep. Ex. 11).

In July 2012, Complainant began reporting to Mark Salisbury, Respondent's HR Director for the enabling functions—which includes IT and Human Resources. (Brownlee Dep. 120; Salisbury Dep. 14-15; Salisbury Dep. Ex. 2). Salisbury initially considered Complainant's performance satisfactory, but within a month of his arrival, Salisbury became concerned with Complainant's performance. (Salisbury Dep. 94-96). In August 2012, Salisbury confronted Complainant after she compromised his investigation of another employee by divulging privileged information to the employee that the employee was under investigation. (Salisbury Dep. 94-97).

In Complainant's 2012 year-end performance review, Salisbury rated Complainant a "Successful Performer." (Brownlee Dep. 121-22; Brownlee Dep. Ex. 12; Salisbury Dep. 92-103). The review was conducted in early 2013 and Complainant signed it on March 26, 2013. (Salisbury Dep. 99; Brownlee Dep. Ex. 12). In his deposition, Salisbury testified that he considered "Successful Performer" to be an average rating. (Salisbury Dep. 92-103). As in prior reviews, Salisbury made positive comments but also expressed concerns over Complainant's performance, noting that he was frequently involved in day-to-day operations with IT, managing elements of Complainant's position. (Salisbury Dep. 99-102). Despite these issues, Salisbury remarked that he "had optimism that [Complainant] would be very successful." (Salisbury Dep. 101-102).

Termination of Pal and Investigation Regarding Termination

On September 10, 2012, business partner Leslie Wood, Director of Global IT Quality and Compliance met with Complainant to discuss performance issues with one of Wood's subordinates, Devashish Pal. (Brownlee Dep. 63-64; Brownlee Dep. Ex. 6). According to Respondent's general practice, a business partner is required to discuss performance problems with HR prior to termination. (Brownlee Dep. 64-66; Salisbury Dep. 32; Roche Dep. 39-40; Roche Dep. Ex. 3). Complainant recommended to Wood that she do more "due diligence" before terminating Pal. (Brownlee Dep. 64; Brownlee Dep. Ex. 6). Wood reported to Salisbury that she interpreted Complainant's response as permission to proceed with Pal's termination. (Salisbury Dep. 56, 60). Complainant, however, contends that she informed Wood that further review was necessary prior to termination. (Brownlee Dep. 64; see also Roche Dep. 83-84). Thereafter, Wood proceeded with Pal's termination. (Roche Dep. 81; Roche Dep. Ex. 5).

On September 13, 2012, Wood and Sylvia Bobbitt, the other manager at Pal's level who reported to Wood, met with Pal to terminate his employment.⁴ (Brownlee 68-69; Dep. Ex. 6). Pal refused to sign the termination paperwork and went to Complainant's office, stating that Wood could not fire him because she had not presented him with performance documentation prior to the meeting. (Brownlee Dep. 63; Brownlee Dep. Ex. 6). Coincidentally, Salisbury was meeting with Complainant in her office and also spoke with Pal. (Brownlee Dep. Ex. 6; Salisbury Dep. 46-47). Brownlee informed Salisbury that Wood terminated Pal without HR approval. (Brownlee Dep. 58).

After Brownlee explained to Salisbury that Wood terminated Pal without HR approval, Salisbury conferred with Abigail Roche, Respondent's in-house counsel, and Pettit, Director of Employee Relations, and decided to conduct an investigation into Pal's termination. (Salisbury Dep. 48-50, 54-55, 57-58).

During the investigation, Salisbury spoke to Brownlee regarding her expressed concerns. (Salisbury Dep. 50-53). On September 18, 2012, Brownlee emailed Salisbury, Pettit, and Roche a document containing her analysis of the events surrounding Pal's termination that occurred on September 10 and 13, 2012. (Salisbury Dep. 78-79; Brownlee Dep. 73-74; Brownlee Dep. Ex.

⁴ Salisbury subsequently acknowledged that Bobbitt's presence was not appropriate and that a representative from Human Resources should have been present; however, he did not focus on that issue during the investigation. (Salisbury Dep. 67-69).

3). In her analysis, Complainant noted that she had not authorized Pal's termination on September 10, 2012 and that Salisbury was not aware of Pal performance issues prior to his termination on September 13, 2012. (Brownlee Dep. 88). She also recommended that Wood and Bobbitt be reprimanded for allegedly mishandling Pal's termination. (Brownlee Dep. 67).

At the conclusion of the investigation, Salisbury determined that Pal's termination was proper due to performance and behavioral issues (including allegations from his staff that he was "almost abusive, restricting his employees from saying or doing things"). (Salisbury Dep. 58-62, 176). Salisbury could not conclusively determine whether Wood had received Brownlee's approval for the termination, as both Wood and Brownlee provided different versions of their communication and understandings of their communications. However, since Salisbury concluded Pal's termination was proper, he did not believe it was necessary to investigate further into whether the approval was granted by HR. (Salisbury Dep. 56-58, 146-48). Pal was told that his termination was upheld on September 29, 2012. (Roche Dep. Ex. 4).

After his termination, Pal filed a complaint with OSHA, alleging that he was retaliated against because he made internal complaints about alleged SOX violations. (Roche Dep. 74-75). Roche, Respondent's in-house counsel, prepared Respondent's position statement to OSHA. On February 27, 2013, Roche emailed the draft position statement to several employees including Wood, Salisbury, and Complainant, requesting that they review the statement for accuracy. (Brownlee Dep. 46; Brownlee Dep. Ex. 4; Salisbury Dep. 73, 76; Roche Dep. 71-77). Roche also requested Complainant and Salisbury to pay particular attention to the section related to Pal's lack of internal SOX-related complaints to HR. (Roche Dep. 78-81; Brownlee Dep. Ex. 8). By emails, on the same date, both Salisbury and Complainant confirmed that Pal had not made any complaints to HR about audits and agreed with the position statement discussion of the issue. (Brownlee Dep. Ex. 8).

Complainant's February 27, 2013 email to Roche contained the following:

Hi Abbie and Mark,
I am in agreement with Mark's statement, Dev Pal did not express any concerns related to Audits or Deloitte.

Abbie,
FYI here is the documents I completed after Dev's separation. Let me know if you have any questions.

(Brownlee Dep. Ex. 8). Complainant again forwarded the notes dated September 18, 2012, regarding Pal's termination. (Roche Dep. 80; 103-106; Brownlee Dep. Ex. 4; Brownlee Dep. 105-106). Roche claims she had previously received the notes and discussed them with Salisbury as part of his investigation into Pal's discharge. (Roche Dep. 103-106). Complainant had no further discussions with Roche regarding the notes she forwarded. (Brownlee Dep. 105-106).

Complainant's Performance on Project 89

In late 2012 to early 2013, the IT leadership team (“ITLT”) implemented a hiring initiative with the goal of adding 80 to 90 new employees in 2013. (Brownlee Dep. 40-41). Complainant was tasked with developing a plan for this project, called “Project 89” or “Project 80,” and making sure that position descriptions were drafted, and that candidates were vetted, interviewed, and hired by the end of 2013. *Id.*

According to Salisbury, problems with Complainant's role in Project 89 arose almost immediately. (Salisbury Dep. 110-111). In his deposition, Salisbury noted that Complainant's communications with Respondent's CIO Daphne Jones were untimely and inadequate, and that she failed to proactively manage the project, repeatedly missing deadlines and failing to meet project expectations. *Id.* Throughout January 2013, Jones emailed Complainant requesting updates on the status of the Project. On January 27, 2013, Jones sent an email, with a copy to Salisbury, expressing dissatisfaction in the lack of progress:

Marcy, please connect with [Complainant] as I'd like to present the HR topic around her recommended plan for how we will hire 89 people in 2013 into IT. It is now the end of January and I haven't heard anything about how this is being handled. This should be treated as a project—project goals, dates, process, key milestones, measure of progress, prioritization of roles to go after, accountabilities for the ITLT vs CIO vs HR, etc. so we can get this done. . . .

I'll cc Mark here (not [Complainant]) as I'm assuming Mark has discussed this with her--Mark you and I discussed [Complainant] owning what I will call “Project 89” strategy and execution at least 2 weeks ago in my H4 office, but I have not seen any aggressive movement. It should have taken some shape by now. . . .

(Brownlee Dep. Ex. 13).

By February 26, 2013, Complainant had made no significant progress. (Brownlee Dep. Ex. 14). In an email directed to Complainant, Jones wrote:

[Complainant] this needs to get started now. Pls stop w the uncertainty and let's go. We have waited and encountered numerous delays long enough. Exactly what is the question?

This is now going to impact our financials if this delay continues!

Id.

In her deposition, Complainant acknowledged receipt of this email and admitted that Jones was dissatisfied with delays in the hiring progress on Project 89. (Brownlee Dep. 130).

After receiving this email, Complainant involved Salisbury. *Id.* The following day, in an email to Complainant,⁵ Jones wrote:

As a reminder I'm looking for nimbleness across the IT landscape which included the speed that we demonstrate to keep things moving in the recruiting space. No excuses and no delays. Recruiting cannot be a bottleneck for the 7x people we must hire.

(Brownlee Dep. Ex. 15). Jones copied Salisbury, who replied that he wanted Complainant to respond. (Brownlee Dep. Ex. 15). In response, Jones commented that either Complainant needed help with the workload "or she had no sense of urgency." *Id.*

On March 7, 2013, Complainant emailed Jones (and others) pledging that the "hiring process is moving along and I will communicate a detailed plan by the end of the week summarizing next steps to ITLT." (Brownlee Dep. Ex. 17). In response, Jones demanded a complete update, stating "I need this done once and for all. I will escalate this to Ken Meyers [Chief Human Resources & Senior Vice President of HR] if we cannot be more clear on this." (Brownlee Dep. Ex. 17).

Despite her commitment, Complainant failed to provide a project plan by the end of the week. (Brownlee Dep. Ex. 18). On March 20, 2013, Jones once again requested a complete project plan, asking Complainant by email, "Can you please send your project plan to me?" (Brownlee Dep. Ex. 20). At that time, Complainant admitted to Salisbury that she had never completed a project plan and was unsure as to how to develop one. (Salisbury Dep. 111-112). Complainant and Salisbury then worked together to develop the project plan. (Salisbury Dep. 112). On March 22, 2013, Complainant responded to Jones, "IT's Project 80 Hiring Plan is in development and will be confirmed by me based on critical input from March and Allyssa today." (Brownlee Dep. Ex. 20). The plan for Project 89 was completed on March 22, 2013 or thereafter. (Brownlee Dep. 46-48).

Complainant's Termination

By April 2013, Salisbury estimated that he was spending about seventy percent of his time working with Complainant on elements of her position, because Complainant was not completing her work on a timely basis or meeting the expectations of the ITLT. (Salisbury Dep. 93-94). Consequently, Salisbury determined that he needed to hire a seasoned HR professional with more direct business partnering experience. (Salisbury Dep. 103-109, 108-113, 119-123). After consulting with his supervisor, Pettit, and Roche, Salisbury decided to upgrade Complainant's HRBP position to a Grade 20, senior manager position, in part to attract more experienced candidates. *Id.* A Grade 20 senior manager position has a greater salary and bonus compensation than a Grade 19 manager. (Salisbury Dep. 136). Additionally, senior managers receive stock grants. *Id.* Salisbury did not believe that Complainant would qualify for the upgraded position because they needed someone with more strategic HR leadership experience and abilities, and she was not operating at that level. (Salisbury Dep. 134-35.)

⁵ The email was sent on February 27, 2013, the same day as the emails transmitting and responding to the draft Position Statement concerning Pal's termination.

Complainant was terminated on April 13, 2013. (Salisbury Dep. 104-05). According to Salisbury, the decision to terminate her was made about two weeks before. *Id.* Salisbury ultimately hired Allison Ricci, who had over 10 years of business partner HR experience. (Salisbury Dep. 137-141).

Complainant filed a complaint with OSHA on October 4, 2013.⁶ (Brownlee Dep. Ex. 3). OSHA investigated the complaint, and issued its determination on January 15, 2014, finding that Complainant had failed to present a prima facie complaint showing that the alleged protected activity under SOX was a contributing factor in her termination. Thereafter, Complainant filed an objection and request for a hearing on February 14, 2015.

LEGAL BACKGROUND

Summary Judgment Standard

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges provide that an Administrative Law Judge (“ALJ”) “may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”⁷

No genuine issue of material fact exists when the “record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary decision has the burden of establishing the “absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

In reviewing a request for summary decision, I must view all of the evidence in the light most favorable to the non-moving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

⁶ In her OSHA complaint, prepared by her former counsel, Complainant alleged, by checking the appropriate box, that she “testified or provided statement in investigation or other proceeding.” In the next item, she elaborated that Hospira’s attorney had asked her to confirm facts were accurate in a position statement related to the *Pal v. Hospira, Inc.* charge and that she responded by re-forwarding notes she had sent in September 2012 describing irregularities in the handling of Pal’s termination and recommending that Wood and Bobbitt be reprimanded. She explained: “By resending my notes shortly after the February 27, 2013 request, I was opposing how Paul’s termination was handled, but also submission of inaccurate information to OSHA by Hospira.” (Complaint, Brownlee Dep. Ex. 3).

⁷ 29 CFR § 18.40(d); see also, Fed. R. Civ. P. 56(c), incorporated by reference into the OALJ Rules of Practice and Procedure by 29 CFR § 18.1(a) (“The Rules of Civil Procedure of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.”) The OALJ Rules have been amended effective June 18, 2015 and the amended rule appears at 29 CFR § 18.72 (2015). 80 Fed. Reg. 28767 *et seq.* (May 19, 2015).

Sarbanes-Oxley Act

The whistleblower provision of the Sarbanes-Oxley Act, set forth at 18 U.S.C. §1514A, states, in pertinent part:

(a) Whistleblower Protection for Employees of Publicly Traded Companies.-No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) . . . or any officer, employee, contractor, subcontractor, or agent of such company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee-

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [fraud and swindles], 1343 [fraud by wire, radio or television], 1344 [bank fraud], or 1348 [securities and commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-

...

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.⁸

18 U.S.C. §1514A.⁹

To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he or she engaged in protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew that the complainant engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-41 (ARB Sept. 30, 2009). *See also Halloum v. Intel Corp.*, ARB No. 04-068, 2003-SOX-7 (ARB Jan. 31, 2006), slip op. at 6, citing *Getman v. Southwest Securities, Inc.*,

⁸ Complainant has not argued that she “participate[d] in” Mr. Pal’s SOX case within the meaning of subsection (a)(2) of section 1514A; rather, both parties have focused upon subsection (a)(1). Inasmuch as Complainant’s involvement was confined to reviewing and internally commenting upon Respondent’s draft response to OSHA, I agree that her alleged protected activity is more appropriately assessed under subsection (a)(1).

⁹ Respondent has not disputed that it is a company within the meaning of the Sarbanes-Oxley Act or that Complainant is a covered employee under SOX. *See* 29 C.F.R. § 1980.101.

ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005), *recon. denied* (ARB March 7, 2006). “A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.” 29 C.F.R. § 1980.109(a).

If a complainant proves the elements of his or her case by a preponderance of the evidence, the respondent may still avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 29 C.F.R. § 1980.109(b); *Halloum*, slip op. at 6. While not defined in the statute, courts have characterized clear and convincing evidence as a heightened burden of proof – more than a mere preponderance of the evidence but less than evidence meeting the “beyond a reasonable doubt” standard. *Remusat v. Bartlett Nuclear, Inc.*, No. 1994-ERA-36 (Sec’y Feb. 26, 1996) *citing* *Yule v. Burns International Security Service*, No. 1993-ERA-12 (Sec’y, May 24, 1995). *See also* *White v. Turfway Park Racing Ass’n*, 909 F.2d 941, 944 (6th Cir. 1990), *citing* *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

DISCUSSION

Protected Activity

Respondent asserts that Hospira, Inc. is entitled to summary judgment because Complainant cannot establish that she engaged in protected activity. (Resp. Motion 2). “Protected activity,” as defined under the Act, includes providing to an employer information regarding any conduct which employee reasonably believes constitutes a violation of various fraud provision of Title 18 of the U.S. Code (§ 1341, 1343, 1344, or 1348), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. §1514A (a)(1); *see also* 29 C.F.R. §1980.102(a). Under this statute, it is only necessary to allege that the complainant “reasonably believed” the respondent violated one of the enumerated provisions.

The Administrative Review Board discussed this element in *Sylvester v. Parexel International LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42 (ARB May 25, 2011):

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 at Section 1514. 18 U.S.C.A. § 1514A(a)(1). The Act does not define “reasonable belief,” but the legislative history establishes Congress’s intention in adopting this standard. Senate Report 107-146, which accompanied the adoption of Section 806, provides that “a reasonableness test is also provided . . . which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts [Citation omitted].

Both before and since Congress enacted the SOX, the ARB has interpreted the concept of “reasonable belief” to require a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and also that the belief is objectively reasonable, “i.e. he must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the employee's] circumstances having his training and experience.” *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 28 (ARB July 14, 2000) [Citations omitted].

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. *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009). “[T]he legislative history of Sarbanes-Oxley makes clear that its protections were ‘intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise.’” *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1002 (9th Cir. 2009)(citing 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002)). “Subjective reasonableness requires that the employee ‘actually believed the conduct complained of constituted a violation of pertinent law.’” *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10 (quoting *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008)). In this regard, “the plaintiff's particular educational background and sophistication [is] relevant.” *Id.*

The second element of the “reasonable belief” standard, the objective component, “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Harp*, 558 F.3d at 723. “The ‘objective reasonableness’ standard applicable in SOX whistleblower claims is similar to the ‘objective reasonableness’ standard applicable to Title VII retaliation claims.” *Allen v. Admin. Rev. Board*, 514 F.3d 468, 477 (5th Cir. 2008) (citing *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007)). Accordingly, in *Parexel Int’l Corp. v. Feliciano*, 2008 WL 5467609 (E.D. Pa. 2008), the court found the complainant's reliance upon the employer's representations reasonable in light of the complainant's limited education, noting that had the complainant been, for example, a legal expert, a higher standard might be appropriate. *See also Sequeira v. KB Home*, 2009 WL 6567043, at 10 (S.D. Tx. 2009) (“The statute does not require, as Defendants suggest, that the whistleblower have a specific expertise.”) [Emphasis added].

Sylvester, slip op. at 14-15. The Board went on to note that it was not necessary for the complainant to convey the reasonableness of his or her belief to the management or the authorities. *Id.* at 15. It also was not necessary for a complainant to establish shareholder fraud. *Id.* Although the Board did not specifically overrule the “definitively and specifically” requirement set forth in prior Board decisions, it backed away from that standard, focusing

instead on the reasonableness of the complainant's belief that there was a violation of one of the specific categories of fraud or the SEC regulations.¹⁰ *Id.*

Here, Complainant bases her claim on a request by Respondent to verify facts in a draft position statement responding to a SOX complaint filed by a former employee. As stated above, on February 27, 2013, Roche emailed the draft position statement to several employees including Complainant, requesting that they review the statement for accuracy. (Roche Dep. 71-77). Roche also requested that Complainant pay particular attention to the section related to Pal's lack of internal SOX-related complaints to HR. (Roche Dep. 78-81; Brownlee Dep. Ex 8). By email, Complainant agreed with the statement and confirmed that Pal had not made any audit-related complaints to HR. (Brownlee Dep. Ex. 8). Complainant again forwarded the analysis regarding Pal's termination, dated September 18, 2012, that she had previously sent to Roche and Salisbury months earlier. (Roche Dep. 80; 103-106; Dep. Ex. 4; Brownlee Dep. 105-106). Now, Complainant alleges that by resubmitting this analysis, she was "placing Roche on notice that she was submitting inaccurate information to OSHA." (Compl. Memorandum 6).

However, these facts are not sufficient to support a plausible inference that Complainant reasonably believed that Respondent violated one of the provisions listed in the employee protection provisions of SOX. Where, as here, no alleged violation of SEC rules is involved, the protection of section 1514A depends upon the whistleblower identifying wrongdoing made illegal by federal laws targeting fraud, especially fraud against the holders of publicly traded securities. *See Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) (requiring that an employee's Section 1514A complaint "be measured against the basic elements of the laws specified in the statute"). A belief that a violation of company policy has occurred that does not relate to the matters specifically covered by the statute is insufficient to constitute protected activity under SOX. *See, e.g., Damper v. Jacobs Technology – Engineering and Science Group*, ARB No. 12-006, ALJ No. 2011-SOX-33 (ARB May 31, 2013); *Robinson v. Morgan Stanley*, ARB No. 07-070, ALJ No. 2005-SOX-44 (ARB Jan. 10, 2010). To establish a reasonable belief that such a violation has taken place, "an employee must show that he had both a subjective belief and an objectively reasonable belief that the conduct he complained of constituted a violation of relevant law." *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008); *see also Sylvester, supra*. Here, Complainant cannot satisfy either the subjective or the objective belief requirements.

Complainant's allegations do not fall within the scope of SOX because the concerns that Complainant has articulated reflect that she only subjectively believed that Respondent violated its own Human Resources policies, not the laws and regulations specified in the statute; likewise, there was no objectively reasonable belief that an actionable violation occurred. For instance, Complainant's allegations¹¹ (1) that Pal was terminated without HR approval; (2) that Bobbitt should not have been present in Pal's termination; (3) that Pal was escorted off the premises by security; and (4) that Wood should be disciplined for terminating Pal, are in no way related to a violation falling under the Act. As to Complainant's allegation that Respondent made inaccurate

¹⁰ *See, e.g., Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27(Admin. Review Bd. Sept. 29, 2006), *aff'd sub nom Platone v. United States Dept. of Labor*, 548 F.3d 322 (4th Cir. 2008), *cert. den.*, 130 S.Ct. 622, – U.S. – (2009) (requiring that the allegations must "definitively and specifically" relate to the listed categories of fraud or securities violations).

¹¹ (Compl. Memorandum 4-5; Brownlee Dep. Ex. 8).

statements in a draft position statement to OSHA, her email comments to Roche reflect her agreement with the position statement, inasmuch as she stated her “agreement with Mark’s statement,” and Mark (Salisbury) stated: “It is accurate.” (Brownlee Dep. Ex. 8). Likewise, in her deposition, Complainant admitted she did not have any SOX-related concerns regarding Pal’s termination or in the draft position statement in response to his SOX complaint. (Brownlee Dep. 113-114). As such, Complainant’s own email communication and testimony establish that Complainant did not report any conduct that she believed to be in violation of the Act. Therefore, I find that nothing in the communications between Complainant and Roche or Salisbury, or in the notes she forwarded to Roche, concerned an alleged violation of one of the listed statutes or of an SEC rule or regulation or other Federal law relating to fraud on shareholders. Rather, they related solely to her concerns that internal personnel policies, and her own recommendations, were not followed.

In view of the above, I find that there is no genuine issue of material fact and Respondent is entitled to judgment as a matter of law. In sum, I do not agree with Complainant that genuine issues of material fact remain in dispute on the issue of protected activity inasmuch as she cannot prevail based upon her own recitation of facts. Because Complainant proffered no evidence sufficient to generate a genuine issue of material fact that her complaints were generally the type of fraud or other activity covered by SOX, as opposed to complaints about internal personnel policies, she cannot demonstrate that she engaged in protected activity.

As I have found that Complainant did not engage in protected activity and cannot therefore establish a necessary element of a SOX claim, this claim must fail. It is therefore unnecessary to determine whether she can prove the other elements of her claim or whether Respondent has proven by clear and convincing evidence that Complainant would have been discharged notwithstanding her complaints. Summary decision is therefore appropriate for Respondent. *See, e.g., Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-3 (ARB July 21, 2011) (affirming grant of summary decision in SOX case where complainant could not show he engaged in protected activity).

ORDER

IT IS HEREBY ORDERED that Respondent’s Motion for Summary Judgment be, and hereby is, **GRANTED** and Complainant’s complaint be, and hereby is, **DISMISSED WITH PREJUDICE**.

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) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, 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).