



Issue Date: 27 March 2017

Case No.: 2015-SOX-00022

In the Matter of:

ROBERT CLEGHORN,
Complainant,

v.

GENERAL MOTORS COMPANY,
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY
DECISION AND DISMISSING THE CLAIM WITH PREJUDICE**

The above-captioned case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“the Act”), as amended, 18 U.S.C. § 1514A, and the implementing regulations at 29 C.F.R. Part 1980. Section 806 complaints are governed by the procedures and burdens of proof under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), codified at 49 U.S.C. § 42121.

Relevant Procedural History

On January 23, 2014, Respondent, General Motors Company, informed Complainant, Robert Cleghorn, that his job position was being eliminated due to corporate restructuring. Complainant filed a complaint under the Act with the Occupational Safety and Health Administration (hereinafter “OSHA”) on July 11, 2014. OSHA conducted an investigation and subsequently dismissed the complaint on June 1, 2015, finding that Complainant did not engage in protected activity and that Complainant’s complaint was not made in good faith. CX 29.¹ Specifically, OSHA determined that Complainant’s belief regarding the concerns he raised did not extend to protected activity under SOX, and that Complainant’s complaint was filed 11 days after an investigation by Respondent which substantiated fraudulent expense reports submitted by Complainant. *OSHA Findings* at 1. Complainant timely appealed to the Office of Administrative Law Judges on June 26, 2015.

¹ In this Decision and Order, “CX” refers to Complainant’s Exhibits submitted with *Complainant’s Motion for Summary Decision* (CX 1-66) and “EX” refers to Respondent’s Exhibits submitted with *Respondent’s Motion for Summary Decision* (EX 1-18) and *Respondent’s Response and Reply Brief* (EX A-N).

On January 4, 2017, Respondent filed *Respondent's Motion for Summary Decision* along with 17 exhibits in support.² Respondent seeks summary decision on the grounds that Complainant's claim is deficient as a matter of law and barred by the statute of limitations. *Respondent's Motion for Summary Decision* at 13-19.

On January 10, 2017, Complainant filed a letter stating he opposes Respondent's Motion for Summary Decision and is also filing a motion for summary decision. Complainant's letter is accompanied by a *Memorandum of the Points and Authorities Supporting My Position* (hereinafter "Complainant's Motion for Summary Decision") and 66 exhibits in support of his position. Complainant's Motion for Summary Decision sets forth Complainant's factual allegations and the relief sought under The Act.

On January 23, 2017, this Court issued an *Order to Show Cause Why Respondent's Motion for Summary Decision Should Not be Granted and Order to Show Cause why Complainant's Motion for Summary Decision Should Not be Granted and Order Cancelling Hearing*, providing the parties 30 days to respond.³

On January 24, 2017, Respondent filed *Response to Complainant's Motion for Summary Decision / Reply Brief in Support of Respondent's Motion for Summary Decision* (hereinafter "Respondent's Response and Reply Brief").

On January 31, 2017, Complainant filed *Response to GM's Response to Complainant's Motion for Summary Decision/Reply Brief in Support of Respondent's Motion for Summary Decision dated January 23, 2017; and Cleghorn's Reply Brief in Support of Cleghorn's Motion for a Summary Decision in Cleghorn's Favor on all or any Part of the Proceedings dated January 6, 2017* (hereinafter "Complainant's Response").

On February 16, 2017, Respondent filed *Reply Brief in Support of Respondent's Motion for Summary Decision* and Exhibit 18 which Respondent inadvertently failed to attach to Respondent's original brief in support of its motion for summary decision.

On February 22, 2017, Complainant filed a response to this Court's Order to Show Cause why Respondent's Motion for Summary Decision Should Not Be Granted (hereinafter "Complainant's Response to Order to Show Cause").

On February 27, 2017, Complainant filed a letter stating that GM failed to timely file its February 16, 2017 *Reply Brief in Support of Respondent's Motion for Summary Decision*. Complainant states that "[o]n January 23, 2017 you specifically granted an extension for GM to reply to my previously-submitted motion dated January 6, 2017. However, I do not believe that

² Respondent later filed a *Reply Brief in Support of Respondent's Motion for Summary Decision*, including Exhibit 18 which was inadvertently left out of *Respondent's Motion for Summary Decision*.

³ In this Order, the undersigned gave the *pro se* Complainant notice of the requirements of the summary decision rule and the right to file affidavits or other responsive materials when confronted with a respondent's motion for summary decision. The undersigned also encouraged Complainant to strongly consider obtaining representation from a qualified attorney who is experienced in litigation concerning the Act.

this 30-day extension applied to all GM responses. . . . If GM’s February 15, 2017 brief is not totally disregarded based on procedural rules, I have attached affidavits, declarations and other evidence, and a memorandum of the points and authorities supporting my position to respond to GM’s brief dated February 15, 2017.⁴

Standard of Review for Summary Decision

Under the Rules of Practice and Procedure before the Office of Administrative Law Judges (“Rule of Procedure”) codified at 29 C.F.R. Part 18, Subpart A, “[a] party may move for summary decision, identifying each claim or defense—or the part of each claim or defense—on which summary decision is sought. Dismissal of whistleblower complaints without a hearing may be appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law.” 29 C.F.R. § 18.72(a).

The primary purpose of summary decision is to isolate and promptly dispose of unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986). The Administrative Review Board (“the Board”) has offered guidance on the issue of summary decision. In *Reddy*, the Board announced the following procedure for adjudicating such motions:⁵

Once the moving party has demonstrated an absence of evidence supporting the nonmoving party’s position, the burden shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation. The nonmoving party may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. If the nonmoving party fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.

Id. at 4-5.

In considering a motion for summary decision, the Court must look at the record in the light most favorable to the nonmoving party and must draw all inferences in favor of the nonmoving party. *Saporito v. Cent. Locating Servs, Ltd.*, ARB No. 05-004, slip op. at 6 (Feb. 28, 2006) (citing *Friday v. Northwest Airlines, Inc.*, ARB No. 03-132, ALJ Nos. 03-AIR-19, 03-AIR-20, slip op at 3 (ARB July 29, 2005)). Further, the Court must accept the nonmoving party’s evidence without making credibility determinations or weighing the evidence. *Webb v. Caroline Power & Light Co.*, 93-ERA-42 slip op. at 3 (Sec’y July 14, 1995).

⁴ Complainant is mistaken; this Court did not grant an extension. On January 23, 2017, this Court issued an *Order to Show Cause* providing both parties 30 days to respond. Therefore, Respondent’s filing of *Reply Brief in Support of Respondent’s Motion for Summary Decision*, dated February 15, 2017, and filed with this Court on February 16, 2017, is timely.

⁵ The Board noted that, because it reviews issues of law *de novo*, its procedure for reviewing a grant of summary decision is the same as the Administrative Law Judge would follow in ruling on the motion.

The Board further emphasized that, in a summary decision ruling, the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* at 5. Additionally, the summary decision ruling shall not include a weighing of the evidence or determination of the truth of the matters asserted. *Id.*

A material fact is one whose existence affects the outcome of the case. *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005). 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). 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).

Summary of Pertinent Facts

GM is a publicly traded company. The Union Automobile Workers (“UAW”) Center for Human Resources (“CHR”) is GM’s national training center for UAW-represented GM workers; it is a separate legal entity and a 501(c) tax-exempt public charity. *Complainant’s Motion for Summary Decision.* at 4; *Respondent’s Motion for Summary Decision* at 1; EX 2 at 1.

Complainant was employed by GM for 15 years as an occupational health and safety professional. *Complainant’s Motion for Summary Decision* at 1. In his role as GM Program Manager for Health and Safety Training, Complainant worked with the UAW-GM CHR to procure computer equipment and health and safety training support services; he provided “CHR Purchasing” with computer equipment specifications, determined the number of units required, outlined vendor training support service deliverables, participated in evaluating vendor quotes, and provided his supervisor and other GM leaders with periodic updates on the status of his activities. *Id.* at 2-3.

Complainant’s 2010 Complaint

In 2010, in his role as Health and Safety Program Manager at CHR, Complainant was assigned to develop and deliver computer training for health and safety representatives in support of a new computer software package purchased by GM. *Complainant’s Motion for Summary Decision* at 4. The training program required procurement of 15 laptop computers. *Id.*

Complainant noticed that the quotes from the approved vendors for the laptop computers were 50-100% higher than the retail prices and raised his concern about the inflated bids to his supervisor, Edwina Patterson. Complainant stated that “[a]s a result, the final cost for these laptop computers was ultimately reduced, but I believed was still higher than retail. This was my first suspicion of bid-rigging fraud against GM shareholders by the CHR Purchasing Department.” *Id.* at 4.

Complainant's 2012 Complaint

In June of 2012, Complainant was tasked with procuring roughly 500 desktop computers to be used by health and safety trainers to deliver health and safety training in classrooms within plants and facilities. *Complainant's Motion for Summary Decision* at 4. Complainant suspected fraud and asked his supervisor, Edwina Patterson, for a meeting with Mike White, the Global Director of Health and Safety, to present a cost-avoidance proposal. *Id.* at 5.

On September 18, 2012, Complainant met with Mike White and other GM directors and proposed adding another vendor to the CHR bid list for procuring the 500 desktop computers at a competitive cost. *Id.* According to Complainant, GM Director, Jeff McGuire, explained to him that an abrupt change in procurement practices at the CHR was not feasible at the time. *Id.* Complainant alleges that at this meeting, Mr. McGuire also described the purchasing practice at CHR to Complainant: that the UAW required vendors to donate money to UAW leadership charities in exchange for contract consideration – a “pay-to-play” scheme. *Id.*

On July 20, 2012, Complainant emailed three colleagues, attaching a “revised recommendation for computer equipment,” based on a meeting held the day before. CX 28; *Complainant's Motion for Summary Decision* at 8. A UAW Coordinator, Kris Owen, expressed in an email dated July 20, 2012, to Complainant and others, that “once again Health and safety has decided to not follow proper procedure[.] I will call and talk to Jeff and on Tuesday I will go over this with Joe and proceed from there[.] [D]o not order anything till I have spoken with them and see what action Jeff wants to take if any thanks.” CX 28.⁶

Investigation of Complainant's Expense Reports

Between September 7, 2012, and February 12, 2013, GM conducted an internal investigation of Complainant for expense report violations, timecard violations, and vacation day violations. *Complainant's Motion for Summary Decision* at 10-11; CX 30; CX 42. On February 12, 2013, Complainant was formally penalized for accepting commuting mileage reimbursement compensation from false mileage reports. EX 6. Complainant's supervisor, Edwina Patterson, was also penalized for approving his mileage reimbursement expense reports. EX 5.

On March 4, 2013, Complainant filed an “open door appeal” with GM's third party service provider “JustUs,” which provides salaried employees with access to an independent review of their concerns.⁷ *Id.* at 11-12; CX 42. The appeal was based on Complainant's contention that he should not have been issued a Memorandum to File regarding the submission

⁶ Complainant alleges that this exhibit outlines a plan to review retaliation alternatives with Jeff Pietrzyk and Joe Ashton. “These meetings were held to discuss how to remove me from my position of influence at the CHR so that the fraud against GM shareholders could continue without interference.” *Complainant's Motion for Summary Decision* at 8.

⁷ In his appeal, Complainant noted that one of his general concerns was that someone may be targeting him in retaliation for questioning purchasing irregularities at the CHR shortly before his expense report investigation began. CX 42 at 4f.

of inaccurate expense reports for gas mileage during his commute.⁸ CX 43. JustUs concluded, based on its independent investigation, that Complainant's conduct was indeed in violation of the GM policy. CX 43.

Departmental Restructuring

On August 28, 2013, and again on November 18, 2013, Gregg Clark, a Department Leader, held Department-wide conference calls describing an upcoming restructuring plan and notifying employees that 10 people would be eliminated from the department. *Id.*; EX 7. The reduction of employees was estimated to be completed by March 1, 2014. CX 52. Effective September 1, 2013, Complainant was placed on a two-man SWAT team and no longer reported to Edwina Patterson. *Complainant's Motion for Summary Decision* at 15.⁹ Effective January 23, 2014, Complainant's position was eliminated and he was terminated from GM. On February 24, 2014, Complainant signed a GM Severance Program Release Agreement, acknowledging that, in consideration for the increased Plan benefits available to him because of his execution of the release agreement, he would release and forever discharge Respondent and its subsidiaries and affiliates. CX 65.

The Parties' Contentions

Complainant's SOX claim alleges that his termination was related to "bid-rigging fraud" concerns he raised on September 18, 2012, about the failure of the Union Automobile Workers General Motors ("UAW-GM") Center for Human Resources ("CHR") to use GM's vendors.¹⁰

⁸ In the letter attached to his appeal, Complainant states:

I don't know how this investigation [into his mileage reimbursement forms] began, but I am concerned that someone may be targeting me in retaliation for me questioning purchasing irregularities at the CHR shortly before this expense report investigation began. I encourage someone who has knowledge regarding the source of this investigation to determine why it was initiated. It may be an attempt to silence further investigation of purchasing irregularities at the CHR.

CX 42 (Complainant's letter attached to the JustUs appeal at 4f).

⁹ Complainant asserts that this move was due to Edwina Patterson's plan to "distance herself from me and then simply eliminate the position when it was convenient to do so, such as during the upcoming planned Department restructuring." *Complainant's Motion for Summary Decision* at 14. In an interview with Edwina Patterson, conducted by a Global Investigations investigator, on February 26, 2014, Ms. Patterson was asked how the two-man SWAT team came to be. CX 18. Ms. Patterson stated that it was part of "the whole restructuring process with the new leadership and the new direction for our organization, the Safety and Hygiene group. It was my idea to have the SWAT, and I got Greg[g] Clark's approval for the team. The SWAT team was begun in September 2013, I believe." *Id.* Ms. Patterson also stated that she did not have any idea that that the team would be eliminated down the road. *Id.*

¹⁰ Complainant's claim is based on what he believes he observed as improper spending by the CHR, not General Motors. *See* January 14, 2016 Deposition Transcript of Robert Cleghorn at 51 (EX 1).

Respondent seeks summary decision based on the grounds that Complainant's claim is deficient as a matter of law and barred by the statute of limitations.¹¹ *Respondent's Motion for Summary Decision* at 13-19. Specifically, Respondent alleges that:

In this case, [Complainant] attempts to expand his SOX claim beyond the termination of his employment on 1/23/14. Specifically, [Complainant] is now claiming that he was retaliated against when he: (a) failed to be selected for the Safety Manager Canada job he interviewed for on 10/17/12; (b) received a discipline on 2/12/13 for submitting his false expense reports; and (c) failed to be selected for the Safety Manager for Customer care and Aftermarket Sales he interviewed for in February 2013 (CI, 96, 103, 105-106). However, his attempt in this regard must fail because any alleged retaliatory action that occurred more than 180 days before he filed his SOX claim on 7/11/14 is barred by the applicable statute of limitations. [internal citations omitted].

Even assuming *arguendo* that these claims were not time barred, which [Respondent] adamantly denies, dismissal is still warranted because they are also deficient as a matter of law on the merits. First, as noted above, [Complainant] did not engage in any protected activity under SOX, an essential element of his claim. Again, it is not mail fraud, wire fraud, bank fraud, security fraud, a violation of a SEC rule or regulation or a violation of Federal law for a company to use its own approved vendors. Moreover, [Complainant] is not alleging that GM engaged in any fraud or that its financial statements are misleading in any way. Finally, [Complainant] lacks any evidence that his discipline and/or his failure to be selected for those two jobs were related in any way to his alleged concerns about the CHR's purchasing practices. Rather, his claim is based solely on his unsupported subjective beliefs.

Id. at 18-19.

According to Respondent, Complainant lacks evidence showing that his termination was related, in any way, to the concerns he allegedly raised about CHR's purchasing practices over 16 months before his termination. *Respondent's Motion for Summary Decision* at 2. Respondent also asserts that Complainant "never attempts to explain why anyone at GM would be motivated to terminate his employment for asking the CHR to do something that it ended up doing on its own after he was no longer involved with the computer procurement project." *Respondent's Response and Reply Brief* at 6, 9.

Complainant, who is proceeding *pro se*, alleges that the adverse personnel action taken against him "was a direct result of [him] reporting observed criminal conduct to [his] supervisor Edwina Patterson and other GM employees including GM Director Jeff McGuire, as well as GM's contract investigator JustUs." *Complainant's Motion for Summary Decision* at 18. Specifically, Complainant alleges that there was a decision "by UAW leadership [] to fabricate false expense report allegations against [Complainant] and to use political pressure to encourage

¹¹ In this Decision and Order, I find that Complainant's claim is deficient as a matter of law and, therefore, the issue of the statute of limitations will not be addressed.

GM Director Jeff McGuire to act upon these false allegations. These false expense report allegations would ultimately result in [Complainant] being removed from [his] position of influence at the CHR and to end [his] interference with abating UAW-GM fraud against shareholders.” *Complainant’s Motion for Summary Decision* at 8-9.

Applicable Law

To prevail in a SOX complaint before an administrative law judge, a complainant must prove by a preponderance of the evidence that:

- (1) Complainant engaged in activity or conduct that SOX protects;
- (2) Respondent took some adverse personnel action against him; and
- (3) Complainant’s protected activity was a contributing factor in respondent’s adverse personnel action.

See Stewart v. Lockheed Martin Aeronautics, Co., ARB No. 14-033, ALJ No. 2013-SOX-019, slip op. at 2 (ARB Sept. 10, 2015); 49 U.S.C. § 4121(b)(2)(B)(iii).

A contributing factor need not be significant, motivating, substantial, or predominant; and can be any factor which alone, or in connection with other factors, tends to affect in any way the outcome of the decision. *Collins v. Beazer Homes U.S.A., Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004). Ordinarily, temporal proximity between the protected activity and unfavorable personnel action will satisfy the burden of making a *prima facie* showing of employer knowledge and that the protected activity was a contributing factor. *Id.* Even if a complainant establishes by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint, “relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.” 29 C.F.R. § 1980.109(a)(b); *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, (ARB January 31, 2006); *Allen*, 514 F.3d at 476.

Protected activity under SOX includes “any lawful act” by an 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, 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, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

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

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

18 U.S.C. § 1514A. *See also* 29 C.F.R. § 1980.102(b).

The plain, unambiguous text of Section 1514A(a)(1) establishes six categories of respondent conduct against which an employee is protected from retaliation for reporting: violations of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against the shareholders. 29 C.F.R. § 1980.100; 18 U.S.C. § 1514A(1); *Lockheed Martin Corp. v. ARB, USDOL*, 717 F.3d 1121, 1130 (10th Cir. 2013). A complainant must demonstrate that he or she provided information regarding conduct that he or she reasonably believed violated one of the six enumerated provisions of U.S. law; the complainant need not establish an actual violation. *Lockheed*, 717 F.3d at 1132; *see also Sylvester v. Parexel International LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-00039 (ARB May 25, 2011) (stating that complainant need not actually communicate the reasonableness of his or her beliefs to management or the authorities).

In order to have a “reasonable belief” that a violation occurred, a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the listed categories of law. *Lockheed Martin Corp. v. ARB, USDOL*, 717 F.3d 1121, 1132 (10th Cir. 2013); *Sylvester*, ARB No. 07-123 at 14-16 (ARB May 25, 2011). A subjective reasonable belief requires that “the employee ‘actually believed the conduct complained of constituted a violation of pertinent law.’” *Sylvester*, ARB No. 07-123 at 14 (citations omitted). An objective reasonable belief “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.* at 15 (citations omitted). “[B]ecause the analysis for determining whether an employee reasonably believes a practice is unlawful is an objective one, the issue may be resolved as a matter of law.” *David Welch v. Cardinal Bankshares Corp.*, ARB No. 05-064, ALJ No. 2003-SOX-00015 at 10 (ARB May 31, 2007 (citations omitted); *see also Sylvester*, ARB No. 07-123 at 15 (“[O]bjective reasonableness is a mixed question of law and fact’ and thus subject to resolution as a matter of law ‘if the facts cannot support a verdict for the non-moving party.’”) (citations omitted).

DISCUSSION

Complainant’s alleged protected activity

Complainant’s first suspicion of fraudulent activity occurred in 2010 when he brought to the attention of his supervisor what he believed to be an inflated bid for the purchase of 15 laptop computers. *Complainant’s Response to Order to Show Cause* at 5. Complainant testified that he showed his supervisor, Edwina Patterson, the initial quote and that she said, “whoa . . . let me

take it back and see what I can do, okay?” EX A at 86. According to Complainant, as a result of raising his concern about inflated bids to his supervisor, “the final cost for these laptop computers was ultimately reduced,” however Complainant believed the final cost was still higher than retail. *Complainant’s Motion for Summary Decision* at 4. The various quotes for the laptops are as follows:

February 1, 2010: \$1,574 per laptop;
February 11, 2010: \$843 per laptop;
August 26, 2010 final invoice: \$670 per laptop.

CX 17.

The last page of Complainant’s Exhibit 17 shows a screen shot of a Walmart ad for laptops under \$500. CX 17. This screen shot is undated and shows an HP laptop, not a Gateway laptop which is what the CHR chose to purchase.¹²

The 2010 incident does not qualify as protected activity under the Act because there was no objective reasonable belief that the quotes were an indication of fraudulent activity. While Complainant may have had a subjective, good faith belief that inflated bidding occurred at this stage, a reasonable person in Complainant’s position could not automatically come to the same conclusion, based on the same factual circumstances. Here, Complainant was tasked with reviewing vendor quotes for the computers and noticed that they were high; there is no indication in the record to suggest that at that time, the high bids were received due to “bid-rigging fraud against GM shareholders by the CHR Purchasing Department.” *Complainant’s Motion for Summary Decision* at 4. Upon viewing the February 1, 2010 vendor quotes, a reasonable person might conclude that the quotes were high; however, I do not find that a reasonable person would believe that the high quotes were due to any violation of the law. CX 17. Additionally, Complainant did not communicate to anyone that Respondent’s conduct might be fraudulent or illegal. Finally, I find that Respondent responded to Complainant’s concerns in an appropriate manner and I note that Complainant’s concerns were ultimately alleviated when the final invoice was greatly reduced.

Two years later, in June of 2012, Complainant was tasked with procuring roughly 500 desktop computers. Complainant states that his initial suspicion of “bid-rigging” was reinforced on August 1, 2012, when he saw the initial quote for the desktop computers at \$1,878 each. *Complainant’s Response to Order to Show Cause* at 5; CX 7. Based on what Complainant believes is prior knowledge of CHR inflated bids for goods and services (the 2010 quotes), Complainant “attempted to seek alternative methods to procure the required computer equipment and training support services at a competitive cost.” *Complainant’s Motion for Summary Decision* at 5. Complainant requested a meeting with Mike White, GM Global Director of Health and Safety, to discuss his concerns. This meeting was scheduled for September 18, 2012. Present at the meeting with Complainant was Mike White, Edwina Patterson (Complainant’s direct supervisor at the time), and Jeff McGuire. Complainant states that at the meeting, he “discussed [his] suspicion of bid-rigging with top GM leadership” and “proposed adding a legitimate vendor

¹² The screen shot has a handwritten note on the bottom stating that it is a Walmart ad from an online image archive from roughly October through December, 2010.

to the CHR bid list to obtain training support services and to leverage the purchasing power of GM Purchasing to procure 500 desktop computers at a competitive cost.” *Complainant’s Motion for Summary Decision* at 5; *Complainant’s Response to Order to Show Cause* at 1.

According to Complainant, at the September 18, 2012 meeting, Jeff McGuire,

. . . spoke up and explained that an abrupt change in procurement practices at the CHR was not feasible at this time. Jeff McGuire described the existing purchasing practice at the CHR where the UAW required vendors to “donate” money to UAW leadership charities in exchange for contract consideration. Mike White compared this practice to the pay-to-play scheme of then Detroit Mayor Kwame Kilpatrick who was being prosecuted by U.S. Attorneys in Detroit at that time.

Complainant’s Motion for Summary Decision at 5-6. Complainant states that “[t]his fraud scheme required vendors to provide kick-backs to UAW executive charities either directly or laundered through the CHR in exchange for exclusive contract consideration, thus avoiding competitive bids.” *Id.* at 7.

In support of this allegation, Complainant provided the following: a statement that his meeting with Mr. McGuire took place (CX 18);¹³ a 5-year history of donations made by a company called Creative Solutions Group (“CSG”) to various charity funds including UAW-GM donations (CX 19); a cancelled check for \$1,250.00 from CSG to UAW-GM CHR (CX 20); and various IRS forms which include CSG donations to the CHR. (CX 22, 23, 24, 25). Complainant also provided a CSG invoice for “CSG to support and convert UAW-GM CHR “Rigging” JCATS Program into an Adobe Air Program File.” CX 26.¹⁴ Handwritten on the first page of the invoice says “no po as per single source agreement” which Complainant stated means “[n]o purchase order required, single-source supplier.”¹⁵ *Complainant’s Response to Order to Show Cause* at 46.

¹³ CX 18 is typed notes from an interview on February 26, 2014, of Edwina Patterson, Senior Manager, Global Safety and Hygiene, Center for Human Resources. With regard to the meeting during which Complainant alleges that Mr. McGuire admitted to bid-rigging, Ms. Patterson stated:

That meeting was my regular scheduled meeting that I had with Jeff McGuire and Mike White to keep them up to date on everything that was going on that I had responsibility for. . . I had invited Cleghorn to this meeting to give an update to my leadership on his project. He mentioned that he felt we should be using GM Online computers for the training and during that conversation, I don’t think anybody disputed the use [of] GM Online computers. McGuire mentioned that he was already working on using GM Online more for the CHR and meeting with the CHR IT to do so. Cleghorn said that we shouldn’t just be looking at the CHR vendors, but also at the GM Online vendors. He also kept pushing some vendor he had for the training upgrade.

CX 18 at 3.

¹⁴ No explanation is provided as to what this program is or its connection to the purchase of the computers.

¹⁵ Complainant’s email to Respondent’s counsel attaching this invoice states that the invoice for training support services “shows that UAW vendors who provide kickbacks to UAW leadership receive the work. This one is a single source agreement for a relatively small job.” CX 26.

Complainant believes that the above-summarized exhibits provide evidence of reasonable suspicion of existing criminal enterprises in violation of various federal offenses. *Complainant's Response to Order to Show Cause* at 46. The evidence, however, does not support Complainant's assertion.

First, while CSG makes a number of donations to charities, including the CHR, there is no evidence that GM provides CSG with any special treatment as a vendor that would raise suspicions of fraudulent activity. Even though the CHR appears to maintain at least one single-source agreement with CSG (CX 26), there is no evidence that (1) the agreement is in violation of any provision covered by SOX; (2) the single source agreement was given to CSG as a "kickback" for donating to the CHR; or (3) the agreement has any connection to the purchase of the roughly 500 computers which Complainant expressed concerns about. Complainant has not provided evidence to show that the CHR only entertained quotes from vendors, such as CSG, that made donations to charity funds.

Furthermore, there is no evidence in the record that CSG, or any other vendor that also made donations to CHR, provided the computers that were ultimately purchased. In fact, Complainant states that "GM ultimately took my advice as a result of me escalating my suspicion of fraud to GM leaders . . . Evidence shows that had we purchased the equipment from the CHR vendor, it would have cost the company 55% more money (i.e. \$320,894 extra)." *Complainant's Motion for Summary Decision* at 7; CX 27. Complainant also recognized in an email that "the computers were never purchased by the CHR. It was simply a quote for the computers in August, 2012." EX G at 2. According to Respondent, "seven months after [Complainant] allegedly raised his concerns, the CHR used GM Purchasing to purchase 481 computers for the CHR (EX 18), which is exactly what [Complainant] wanted the CHR to do." *Respondent's Motion for Summary Decision* at 16. An invoice from April 11, 2013, shows that GM purchased 481 computers for a total of \$582,337. EX F; CX 27.

As discussed above, in order for Complainant's allegations to be considered "protected activity" under the Act, he must have had both a subjective good faith belief and objective reasonable belief that the complained-of conduct violates one of the listed categories of law. *Lockheed Martin Corp.* (F.3d 1121, 2232 (10th Cir. 2013)); *Sylvester*, ARB No. 07-123 at 14-16 (ARB May 25, 2011). Complainant's statements in his extensive and detailed motions establish that he had a subjective belief that he observed and knew of illegal conduct. However, I do not find that he also had an objective reasonable belief of illegal conduct, "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.* at 15.

Complainant's allegations of "bid-rigging" and a "pay-to-play" scheme are unsupported by the evidence in the record. The various invoices, purchase agreements, charity donations, and other exhibits provided do not demonstrate any fraudulent activity. Nor does the evidence provided by Complainant demonstrate that an aggrieved employee in a similar position of knowledge, training, and experience, would reasonably conclude that the evidence demonstrated fraudulent activity was occurring. In fact, many of the purchase orders that Complainant provided do not appear to have any connection to the two purchases he was involved with and about which he complained. While I find it reasonable for Complainant to have pointed out the

high quotes from vendors to his superiors, I do not find that Complainant has sufficiently shown that he could have had a reasonable belief that there was fraudulent vendor activity occurring, such that it violated one of the listed categories of law under the Act.

Viewing the evidence in the light most favorable to the nonmoving party and assuming, arguendo, that Complainant's beliefs were in fact corroborated during his discussion with Jeff McGuire on September 18, 2012, this would provide Complainant with an objective belief in addition to his subjective belief. However that would also mean that he would have had to report this knowledge on September 18, 2012 or any date thereafter, in order to trigger protected activity under the Act.

In his motion, Complainant alleges that he reported "observed criminal purchasing practices at the CHR" to JustUs on March 4, 2013. (*Complainant's Response* at 3). The evidence provided does not support this statement. In his appeal letter written to JustUs, Complainant does *not* mention "observed criminal purchasing practices." CX 42. Instead, he states in the letter that he is "concerned that someone may be targeting [him] in retaliation for [] questioning purchasing irregularities at the CHR shortly before this expense report investigation began." *Id.* I do not find that the statement Complainant made to JustUs amounts to the definition of protected activity under the Act: "to provide information . . . regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . ." 18 U.S.C. § 1514A.

Since I cannot weigh credibility under the summary decision standard, and because I must view the evidence in the light most favorable to the nonmoving party, I find that there is an issue of material fact as to whether Complainant engaged in protected activity. Therefore, summary decision based on the protected activity prong of SOX is **DENIED**.

Nonetheless, even assuming arguendo that Complainant's disclosure of his concerns regarding the CHR's purchasing practices did qualify as protected activity under SOX, his claim would still fall short of SOX protection because the alleged protected activity was not a contributing factor in Respondent's adverse personnel action.

Protected activity was not a contributing factor in Respondent's adverse personnel action

It is undisputed that Complainant was terminated on January 23, 2014, and signed a GM Severance Program Release Agreement on February 24, 2014. CX 65. However, Complainant alleges that his termination was in retaliation for his protected activity, and Respondent alleges that his termination was due to a corporate restructuring. Specifically, Complainant alleges that in July and August of 2012, the UAW became aware of his attempts to contain costs and, as a result, "certain individuals in leadership positions within the UAW were very upset with [him] for interfering with their criminal enterprise." *Complainant's Motion for Summary Decision* at 8. Complainant also states that "[Respondent] cannot prove that it would have taken the same adverse action in the absence of the alleged protected activity." *Complainant's Response* at 1. Respondent, on the other hand, claims that, "if GM truly was upset with [Complainant] over his alleged concerns, GM would have terminated his employment when it had the chance, i.e., when

his dishonest behavior was detected. But GM did not terminate his employment at that time.”
Respondent’s Motion for Summary Decision at 2-3.

In order to analyze whether Complainant’s alleged protected activity was a contributing factor in his ultimate termination, it is necessary to examine the timeline of events leading up to his termination:

July/August 2012: Complainant alleges that UAW became aware of his attempts to contain costs. *Complainant’s Motion for Summary Decision* at 8; CX 28. CX 28 is an email exchange dated July 20, 2012, in which Complainant provides revised recommendations for computer equipment. The responses to Complainant’s recommendations show that testing needed to be completed before anything was purchased. *Id.*

September 7, 2012: Susan Richardson (HR Rep) began investigating Complainant’s expense reports. EX 5. Her investigation was prompted by Jeff McGuire (GM Director at the CHR) who provided Ms. Richardson with copies of Complainant’s 5/15/12 – 8/31/12 expense reports that he thought looked out of policy. *Id.*

September 18, 2012: Complainant raised his concerns regarding potential fraud.

October 17, 2012: Complainant interviewed for a promotional opportunity for a Safety Manager position in Canada. EX 8 at attachment #1 page 3.

February 12, 2013: Complainant was formally disciplined for violating GM’s expense guidelines. EX 6. Complainant’s supervisor, Edwina Patterson, was also disciplined for approving Complainant’s false expense reports. EX 5.

March 4, 2013: Complainant files complaint with JustUs, through an Open Door Appeal, stating that he believes that the accusations against him have adversely impacted his career opportunities at GM. CX 42.

May 22, 2013: Complainant’s Open Door Appeal is denied. CX 43.

January and June of 2013: Complainant received positive year end and mid-year performance reviews. CX 48; CX 49.

February 2013: Complainant interviewed for a Safety Manager for Customer care and Aftermarket Sales position. EX 1 at 96, 103, 105-106.

August 28, 2013: Gregg Clark, Global Safety and Hygiene Director, hosts a conference call with staff members indicating that there will be 5-person headcount reduction following a 60-day review period. EX 7.

September 1, 2013: As part of the reorganization, Complainant was assigned to a two-person SWAT team and reported to John Marcum. EX 8 at attachment #1 page 5; *Complainant’s*

Motion for Summary Decision at 15.¹⁶ According to Edwina Patterson, the SWAT team was her idea and she suggested the idea to Complainant who was interested. EX 9 at 1-2. During the restructure, Complainant's Program Manager position was eliminated and Ms. Patterson assigned him to the SWAT team. *Id.*

November 13, 2013: Gregg Clark held another conference call to report that the staff would be reduced by 10 people. *Respondent's Motion for Summary Decision* at 11; EX 11-13. According to Complainant, Gregg Clark indicated that if the 10-person reduction objective was not reached by volunteers, non-volunteers would be selected.

January 23, 2014: Gregg Clark and management staff ultimately eliminated 12 positions and Complainant and Patrick Scanlon were involuntarily terminated. According to Edwina Patterson, when the SWAT team went away, there were no other positions for Complainant that he had the qualifications for.

January 24, 2014: Complainant signed the GM Severance Agreement. CX 65.

After a thorough review of the timeline discussed above, as well as other information contained in the record, and even under the Act's broad construction of "contributing factor," I find that Complainant has failed to establish evidence beyond mere speculation that his ultimate termination from GM was a result of his alleged protected activity, let alone a contributing factor. First, Complainant draws a connection between an email he forwarded with revised recommendations as to computer equipment and the investigation into his expense reports. Complainant alleges that UAW leadership fabricated false expense report allegations against him after becoming aware of his "attempts to contain costs by interfering with their criminal enterprise." *Complainant's Response to Order to Show Cause* at 48. Complainant's allegation that UAW became aware of his attempts to contain costs is only supported by an email he forwarded from someone else with revisions to the recommended computer equipment. CX 28. Yet Complainant alleges that this prompted UAW to falsify his expense reports.

Complainant also draws a connection between his alleged protected activity on September 18, 2012 and the instigation of the investigation into his expense reports. The timeline cited above shows that Complainant's expense reports were investigated 11 days prior to the date of his alleged protected activity – yet Complainant draw a connection between the two, stating that "[i]t appears that was decided by UAW leadership was to fabricate false expense report allegations against me and to use political pressure to encourage GM Director Jeff McGuire to act upon these false allegations. These false expense report allegations would ultimately result in

¹⁶ Complainant asserts that this move was due to Edwina Patterson's plan to "distance herself from me and then simply eliminate the position when it was convenient to do so, such as during the upcoming planned Department restructuring." *Complainant's Motion for Summary Decision* at 14. In an interview with Edwina Patterson, conducted by a Global Investigations investigator, James Lally, on February 26, 2014, Ms. Patterson was asked how the two-man SWAT team came to be. CX 18. Ms. Patterson stated that it was part of "the whole restructuring process with the new leadership and the new direction for our organization, the Safety and Hygiene group. It was my idea to have the SWAT, and I got Greg Clark's approval for the team. The SWAT team was begun in September 2013, I believe." *Id.* Ms. Patterson also stated that she did not have any idea that that the team would be eliminated down the road. *Id.*

me being removed from my position of influence at the CHR and to end my interference with abating UAW-GM fraud against GM shareholders.” *Complainant’s Response to Order to Show Cause* at 48. Complainant’s speculation that his expense reports were falsified is unsupported.

Complainant also draws a connection between his transfer to the SWAT team and his ultimate termination. However, declarations by both Edwina Patterson and Gregg Clark refute this allegation. EX 10; EX 15. Ms. Patterson stated that Complainant had been looking for a new opportunity at GM, and that when the SWAT team was formed, Complainant said he was interested.¹⁷ EX 10. Viewing the facts in the light most favorable to the Complainant, even if Ms. Patterson moved Complainant to the SWAT team because she was upset that she was reprimanded for approving his expense reports, there is no evidence that she would have known about the ultimate corporate restructuring and the elimination of Complainant’s future position.

Given the timeline of events and the evidence in the record, I find that Complainant has failed to establish an essential element of his case – that his alleged protected activity was a contributing factor in his ultimate termination. As the nonmoving party, Complainant may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. *Reddy v. Medquist, Inc.* (ARB Sept. 30, 2005) at 4-5. Complainant has not produced affidavits, sworn statements, or any other affirmative evidence, beyond his own unsupported allegations, which would substantiate his claims and demonstrate that his alleged protected activity was a contributing factor in Respondent’s decision to terminate his employment. Accordingly, I find that Complainant has not demonstrated that a genuine issue of material fact exists with regard to his alleged protected activity being a contributing factor to his termination.

CONCLUSION

Although Complainant contends that there is evidence that his termination is a result of retaliation for engaging in protected activity, he has failed to provide evidence beyond his own speculation. I find no circumstances exist that would be sufficient to raise an issue that Complainant’s alleged protected activity was a contributing factor in the alleged unfavorable personnel action.

¹⁷ Ms. Patterson also set forth reasons why she did not believe that Complainant possessed the appropriate qualifications to perform the job of a recently deceased employee, Dan Onyskin:

Gregg Clark, Mike Douglas, Ken Glass, Barry Johnson and I believed that [Complainant] would not have been a good replacement for Dan Onyskin for the following reasons: (a) to our knowledge he did not possess the professional levels of lead fatality/incident investigative experience considered to be a subject matter expert in this discipline, to replace those lost when Mr. Onyskin passed away; and (b) we believed, Mr. Onyskin had a better ability to consistently build and maintain cross-functional alliances through constructive collaboration with those he worked with and supported.

EX 14.

ORDER

Accordingly, **IT IS HEREBY ORDERED** that *Respondent's Motion for Summary Decision* **IS GRANTED**.¹⁸ **IT IS FURTHER ORDERED** that Complainant's complaint under the Sarbanes-Oxley Act **IS DISMISSED** with prejudice.

LARRY S. MERCK
Administrative Law Judge

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).

¹⁸ Because I have granted Respondent's Motion for Summary Decision, Complainant's Motion for Summary Decision is **MOOT**.

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).