

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 19 October 2015

ALJ NO.: 2015-SOX-00013

KITTY GALLAS,
Complainant,

v.

THE MEDICAL CENTER OF AURORA,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This matter arises from a complaint of discrimination under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of The Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1524A (West 2004) and the procedural regulations found at 29 C.F.R. Part 1980 (2011). On March 5, 2015, the Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), acting as agent for the Secretary of Labor (“Secretary”), issued a letter dismissing Complainant’s claim. On April 6, 2015, the Complainant, Kitty Gallas (“Gallas”), objected to the Secretary’s preliminary order and requested a hearing pursuant to 29 C.F.R. § 1980.106. The hearing is currently scheduled for October 29, 2015.

Pending before me is Respondent’s Motion for Summary Decision. After reviewing the evidence and arguments presented by the parties, I find that Respondent has established that there is no genuine issue of material fact as to an essential element of Gallas’ claim— whether she engaged in protected activity. Accordingly, this Order grants the Respondent’s Motion for Summary Decision for the reasons set forth below.

I. Relevant Procedural History

The Respondent filed a Motion to Dismiss on May 8, 2015, and Gallas, acting *pro se*, filed a response to the motion on May 18, 2015. A telephonic conference call was held on the record with the parties on May 22, 2015. Given Gallas’ status as a *pro se* litigant, she was allowed until May 29, 2015 to file an amended complaint, and Respondent was given time thereafter to file a revised Motion to Dismiss. On May 27, 2015, Gallas filed a “Response to Respondent’s Motion to Dismiss,” which I treated as her amended complaint. Respondent filed a Renewed Motion to Dismiss on June 3, 2015, and Gallas filed a Response to the Renewed Motion to Dismiss on June 16, 2015.

On July 15, 2015, I issued an Order Denying the Respondent's Motion to Dismiss. While Gallas' allegations were vague and general in nature, considering her status as a *pro se* litigant, and the low threshold for surviving a motion to dismiss, I found dismissal was not appropriate at that stage of the litigation. See *Evans v. U.S. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, PDF at 9 (ARB July 31, 2012).

On September 14, 2015, Complainant filed a Motion to Compel Discovery Responses, to which the Respondent objected on September 22, 2015. A telephonic conference call was held on the record on September 29, 2015 ("9/29/15 Conf. Call"). The Respondent was directed to provide a more thorough explanation on how it covers costs in providing TeleMental Health services in response to Complainant's discovery requests; the remainder of the Complainant's Motion to Compel was denied for reasons stated on the record.

On September 18, 2015, the Respondent filed a Motion for Summary Decision, attaching supporting Exhibits ("EX") A-V. Gallas filed a "Motion to Deny Respondent's Motion for Summary Decision" on September 29, 2015, attaching as supporting evidence Exhibits ("CX") 1-28.¹ Respondent filed a Reply in Support of its Motion for Summary Decision on October 6, 2015, attaching additional exhibits, EX W-Z & AA-AD.

II. Standard of Review – Summary Decision

A motion for summary decision under the Act is governed by the regulations found at 29 C.F.R. § 18.72. Pursuant to Section 18.72, any 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." 29 C.F.R. § 18.72(a). Summary decision may be entered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." *Id.* A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In determining whether there is a genuine issue for trial, the court must view all the evidence and factual inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the non-moving party produces enough evidence to create a genuine issue of material fact, it defeats the motion for summary decision. *CelotEr. Ex.Corp. v. Catrett*, 477 U.S. 317, 322 (1986). However, if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, there is no genuine issue of material fact and the moving party is entitled to summary decision. *Id.* at 322-23. The non-moving party must go beyond the pleadings, by either his or her own affidavits, or by the

¹ Gallas' Motion to Deny Respondent's Motion for Summary Decision is her opposition to summary decision. In her opposition, Gallas also indicates her intent that her opposition "[which] states in more specificity the Complainant's allegations, facts, disputes and request for relief, shall serve as the Complainant's Amended Complaint and give Respondent 'Fair Notice' of all allegations and issues in dispute to be heard at hearing." Compl. Opp at 1. Although I have not treated Gallas' opposition as an amended complaint, I fully considered the explanations she offered in support of her SOX claim.

depositions, answers to interrogatories, and admissions on file, to establish that there is a genuine issue for trial. *Id.* at 324.

III. Findings of Fact and Conclusions of Law

A. Findings of Fact

Gallas was employed as a psychiatric evaluator with the Respondent commencing on April 17, 2000, and her job duties involved performing psychiatric emergency assessments for patients in emergency rooms at OneHealth hospitals. EX P; Mot. Deny Sum. Dec. 3.

In March 2013, the Respondent implemented the TeleMental Health Program, which involves conducting emergency psychiatric assessments through telecommunications technology, so that the assessments can be performed remotely rather than face-to-face. EX A. The Respondent also sought to reduce the length of psychiatric assessments by narrowing the objective of the assessments to a determination of the individual's need for psychiatric care, rather than making specific recommendations regarding medication and ongoing therapeutic treatment. EX A. The Respondent's stated goal was to reduce lengthy waiting times for emergency room patients needing a psychiatric assessment before a decision is made on further treatment for the patient. EX A.

In November 2013, Gallas and all other members of the Respondent's Crisis Assessment Team ("HCAT") were provided with an updated job description to reflect the more narrow scope of assessments as well the requirement that assessments be conducted via TeleMental Health when appropriate. EX A; CX 3; EX D. The Respondent's move to increase the use of TeleMental Health for psychiatric emergency assessments, rather than face-to-face evaluations, was a significant change in the manner in which Gallas' job duties would be performed. Gallas acknowledged the changes in the job description by signing the new job description. EX D.

1. Gallas' Reported Complaints

It is undisputed that Gallas made numerous complaints following the implementation of the TeleMental Health Program, starting in August 2013, and continuing through her termination on July 24, 2014. 9/29/15 Conf. Call Tr. 23. Gallas made complaints internally to Jennifer Meehan (her supervisor), Scott Williams (the Vice President of Behavioral Health), Carol Woodruff (the Respondent's Ethics and Compliance Officer), Paul Burgeson (Human Resources), and the Respondent's Ethics Hotline. *See* CX 6; CX 7; CX 8; CX 9; EX I; EX C. Gallas additionally contacted outside agencies, including the U.S. Department of Health & Human Services' Medicaid Fraud Control Unit ("MFCU"),² the Colorado State Department of

² In January 2014, the Chief Investigator at MFCU, Karen Peregoy, informed Gallas that Medicaid does not have its own rules on telehealth and that Colorado Medicaid does not restrict telehealth to rural areas. CX 24 at 179. She did note that hospitals are required to provide patients with written information about telehealth and their right to refuse such services. *Id.* Gallas responded that the Respondent did not provide any information to patients regarding telehealth. *Id.* at 181.

Behavioral Health, and the Colorado Department of Regulatory Agencies (“DORA”).³ CX 23; CX 24; EX N.

Specifically, Gallas made complaints that TeleMental Health was a substandard service, violated the Emergency Medical Treatment and Labor Act (“EMTALA”), the Health Insurance Portability and Accountability Act (“HIPAA”), state laws and ethical rules, and could cause her to lose her professional license. CX 6; CX 7; CX 8; CX 23; CX 24; CX 12. CX 8; EX R. She consistently asserted that the “best practice” according to the Board of Psychological Examiners was face-to-face evaluations and alleged that TeleMental Health was not legally recognized by the American Medical Association, Colorado Department of Regulatory Services (“DORA”), EMTALA, or the Centers for Medicare/Medicaid Services (“CMS”). CX 6 at 9, 21;⁴ CX 24. Gallas vocalized her intent to refuse to perform TeleMental Health evaluations commencing as early as 2013, due to her concerns about the legality and standard of care associated with the program. *See, e.g.*, CX 8 at 55, CX 9 at 68.⁵

Gallas also raised concerns that the TeleMental Health Program violated SOX. CX 12; EX I at 4. Gallas reported that CMS only allows reimbursement for telehealth services in rural circumstances, and therefore any billing or “up billing” of services using TeleMental Health would be fraudulent and illegal. CX 12; EX I at 42. She asserted that SOX prohibits a publically held company from defrauding its investors, and that she is an investor in the Respondent because she has a 401(k) plan. She stated that the Respondent was “committing illegal acts for profit, knowingly and willfully, risk[ing] my investment and defraud[ing] me and others.” CX 12. She also alleged that SEC regulations were being violated and there was “fraud to the shareholders.” CX 14; EX I at 25.

Lastly, Gallas reported to the Respondent two specific incidents involving emergency room physicians which she believed to be violations of EMTALA and/or HIPAA. Gallas reported that on October 31, 2013, a Dr. Kohn required pre-authorization from an insurance company before admitting a patient to the hospital. CX 6 at 12. Ultimately, the doctor accepted the patient without the pre-authorization. *Id.* Gallas also reported on November 10, 2013, a Dr. Rogers initially refused to treat a pregnant woman involved in a domestic violence dispute, before ultimately admitting the patient. CX 6 at 16.

2. Respondent’s Actions in Response to Gallas’ Complaints

In February 2014, a staff meeting was held, in which some of Gallas’ complaints were discussed, including the need for informed consent for TeleMental Health evaluations. EX J at 196. Staff was informed that a recent Site Review by the Colorado Department of Human

³ In May 2014, in response to inquiries from Gallas, Ms. Arcelin from DORA informed Gallas that the agency has no rules regarding telemental services, only policy guidelines. EX N. She stated an individual cannot be disciplined based on a violation of policy. EX N.

⁴ When referring to specific pages of Gallas’ exhibits, I cite to the “CP0000##” number at the bottom of each page.

⁵ Gallas also filed a complaint under the Affordable Care Act asserting these same alleged violations of EMTALA and HIPAA were also violations of the ACA. I issued a decision dismissing Complainant’s ACA claim for failure to state a claim on July 15, 2015.

Services, Office of Behavioral Health, concluded the facility was in full compliance with applicable rules and regulations. EX J at 194.

In April 2014, the Respondent prepared a document for its staff to address concerns raised by Gallas, including the validity and legality of the TeleMental Health evaluations. EX K. In the document, Respondent stated according to DORA, the only standard relating to telemental health was one that recommended initial contact be face to face, and there was nothing in the state standards that would prohibit the use of telemental health. EX K at 3-4. The Respondent also stated that the HealthOne hospitals “do not bill Medicare, Medicaid or any other insurance for any telemedicine or in person evaluations done by HCAT employees.” EX K at 4. The Respondent provided guidelines on the use of TeleMental Health and implemented a requirement that patients give informed consent to TeleMental Health. EX K at 4, 6; EX F; EX G. Staff was required to complete training on issues including TeleMental Health assessments. EX O.

The Respondent also held individual staff meetings in April 2014, to discuss recent changes involving the Telemental Health assessments. EX M. Gallas signed an acknowledgement that she received and understood various documents including the new Telemental Health Guidelines, her Job Description, the PRN Agreement (outlining requirements to be a PRN employee) and the Chain of Command for reporting ethical and quality concerns. EX M.

The Respondent also conducted an investigation based on Gallas’ reported complaints to the Ethics Hotline commencing in January 2014, and found that her complaints were unsubstantiated in July 2014. EX I at 13-22; CX 13.⁶ In an addendum report in August 2014, the Respondent concluded that Gallas’ reports to the Ethics Hotline that her termination and negative evaluation were in retaliation for her complaints, were also unsubstantiated. EX R; EX I at 25, 34-35, 37.

3. Gallas’ Employment and Ultimate Termination

Gallas’ supervisor, Ms. Meehan began raising concerns with Gallas’ performance in November 2013, concurrent with Gallas’ various complaints regarding the TeleMental Health program and EMTALA violations. On November 8, 2013, Ms. Meehan informed Gallas that she had received complaints from doctors during Gallas’ shifts, and directed Gallas not to sign up for any more shifts until they had a meeting. CX 6 at 13, 15. During the scheduled Performance Review on November 15, 2013, Ms. Meehan raised issues with Gallas’ performance, including not knowing how to conduct three-way calling, using outdated forms or not completing forms, not responding to emails, performing lengthy evaluations, whether she properly admitted

⁶ The Respondent also presents evidence that the Colorado Department of Human Services, Office of Behavioral Health conducted Site Reviews of the Respondent’s facilities in February 2014, April 2014, and March 2015, and found the Respondent to be in full compliance with all applicable rules and regulations. EX V; EX L; EX C; EX S. While Respondent included the Site Review report from 2015, I only considered evidence pertaining to events prior to Gallas’ termination on July 24, 2014.

patients, and concerns over the dress-code policy. EX E.

Ms. Meehan provided a written report of the Performance Review, and Gallas responded in writing, indicating that she did not agree with various characterizations of the conversation and stating that Ms. Meehan did not adequately address her EMTALA concerns. EX E. Ms. Meehan responded in writing, by stating “as there is now a discrepancy with what we both think occurred . . . and you were given several opportunities to address your concerns but did not until after the meeting, I am implementing a formal supervision that will occur weekly.” EX E at 138. Ms. Meehan also took away Gallas’ intake duties until she completed retraining, and directed Gallas to complete an EMTALA competency. CX 6 at 24, 26. She stated Scott Williams would address Gallas’ EMTALA concerns, and that Gallas’ other concerns that Telemental Health violated state and federal regulations were too global for her to respond without “specific guidelines, statutes, etc.” CX 6 at 23, 25. Ms. Meehan informed Gallas that she was expected to perform both face-to-face and TeleMental Health evaluations. CX 6 at 25.

Ms. Meehan held a second meeting with Gallas later in November and required weekly meetings for re-training and supervision. CX 6 at 29-30.

Gallas made complaints about how Ms. Meehan and Mr. Williams, the Vice President of Behavioral Health, handled her allegations of EMTALA violations, and alleged retaliation and the creation of a hostile work environment as a result of her complaints. CX 7; CX 8 at 39-40, 54, 58-59; CX 9 at 57, 59. After meeting with Gallas and reviewing Gallas’ complaints of retaliation and harassment, Mr. Bergerson in Human Resources informed Gallas on January 9, 2014, that he found there was insufficient evidence to support her allegations, noting there was no formal corrective actions on file and that Ms. Meehan and Mr. Williams stated that no action was taken against Gallas. EX H at 579.

On June 22, 2014, Gallas had a performance review with Brent Longtin, her interim supervisor, as Ms. Meehan had resigned. EX P; EX I at 6. In her self-evaluation, Gallas stated she would not perform TeleMental Health evaluations as they do not conform with accepted standards. EX P. In the evaluation, Mr. Longtin warned Gallas that a refusal to use TeleMental Health would result in performance management up to and including termination from employment. EX P at 18. Overall, Gallas received a “meets expectations” and a 1% merit increase. *Id.*

On July 17, 2014, Ms. Gallas volunteered to start her shift early if there was an evaluation needed; however the next evaluation was a TeleMental Health evaluation, which she refused to perform. CX 10 at 75. She stated she would do the next face-to-face evaluation, which she eventually performed during her shift. CX 10 at 75. Gallas was suspended as a result, but after considering the fact that Gallas was not yet on duty, the Respondent paid her for the hours she was placed on administrative leave.⁷ CX 10 at 73, 82.

On July 22, 2014, Mr. Longtin and Paul Burgeson from Human Resources met with Gallas to discuss her performance evaluation. CX 12 at 111. Mr. Longtin again informed Gallas

⁷ Management also expressed concerns in July 2014 about Gallas not commencing assessments when it was within 2 hours of the end of her shift. CX 10 at 73-74, 76-77, 83.

that if she refused to perform TeleMental Health evaluations, she would be terminated. CX 12 at 111; CX 10 at 79-80.

On July 23, 2014, Gallas refused to perform a TeleMental Health evaluation assigned to her, but stated she would perform a face-to-face evaluation. CX 10 at 78. There were no face to face evaluations needed and no other clinicians were available to perform the TeleMental Health evaluation, and therefore Gallas was allowed to do the evaluation face to face. CX 10 at 78. She was ultimately terminated, effective July 24, 2014, for refusing to perform the evaluation through TeleMental Health. EX Q at 21. Another employee was terminated the same day for refusing to perform a TeleMental Health evaluation. CX 16 at 113.

Gallas initiated a termination appeal through a Peer Review Panel Process. CX 15 at 112; CX 17; CX 19. The Peer Review Panel upheld the termination, and the Chief Executive Officer affirmed the decision. CX 20; CX 21.

B. Conclusions of Law

At the summary decision stage in a SOX claim, the complainant need only demonstrate “that a rationale factfinder could determine that the [complainant] has made his *prima facie* case.” *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432 (S.D.N.Y. May 1, 2013). To establish a *prima facie* case, a complainant must allege the existence of facts and evidence establishing: (1) the employee engaged in a protected activity; (2) the respondent knew or suspected that the employee engaged in the protected activity; (3) the employee suffered an adverse action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1980.104(e)(2). A complainant on summary decision must show the existence of a material issue of fact on an essential element of the SOX cause of action. *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).

The Respondent seeks Summary Decision on two bases: that the Complainant has not established there is a genuine issue of material fact that she engaged in protected activity or that protected activity was a contributory factor in the adverse action taken.

1. Protected Activity

Section 1514A states that no covered respondent “may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment” for engaging in protected activity under SOX. Protective 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 Respondent 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 Respondent) 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.

18 U.S.C. § 1514A; *see also* 29 C.F.R. § 1980.102.

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), § 1348 (securities fraud), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. *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. Parxel International LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-00039,-42, PDF at 15 (ARB May 25, 2011) (stating that the 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*, 743 F.3d at 1132; *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, PDF

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).

Gallas’ complaints of substandard care and violations of EMTALA, HIPAA, Colorado law, and ethical rules do not constitute protected activity under SOX as they do not implicate any of the six enumerated categories of protected activity under SOX. *See Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-00020, -36, PDF at 14, 16 (ARB June 2, 2006) (“Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX.”); *Fredrickson v. the Home Depot, U.S.A., Inc.*, ARB No. 07-100, ALJ No. 2007-SOX-00013 (ARB May 27, 2010) (*citing Harvey*, ARB Nos. 04-114); *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-00060,-62, PDF at 12 (ARB July 27, 2006) (“Providing information to management concerning violations of state law, standing alone, is not protected conduct under the SOX”); *Minkina v. Affiliated Physician’s Group*, 2005-SOX-00019, PDF at 6 (ALJ Feb. 22, 2005) (finding that the complainant’s reports concerning air quality were not protected activity under SOX).

While Gallas has alleged that the use of TeleMental Health and violations of other laws and regulations outside of SOX violated SOX because it had the effect of defrauding shareholders,⁸ I find this to be insufficient to trigger protection under the Act. Mot. Deny Sum. Dec. 7; 9/29/15 Conf. Call Tr. 7. The Board has held that merely asserting violations of other state or federal laws outside of SOX could adversely affect the employer’s financial condition and in turn, affect shareholders, is insufficient to establish protected activity under SOX. *See Harvey*, ARB No. 04-114 at 14-15 (“To bring himself under the protection of the act, an employee’s complaint must be directly related to the listed categories of fraud or securities violations. A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough.”) (internal citations omitted); *Fredrickson*, ARB No. 07-100 (*citing Harvey*, ARB No. 04-114); *Allen*, ARB No. 06-081 at 12 (“the mere possibility that an act or omission could adversely affect [the respondent’s] financial condition and thus affect shareholders is not enough to bring the Complainants’ concerns under the SOX’s protection.”);⁹ *Robinson v. Morgan Stanley*, ARB No. 07-070, ALJ No. 2005-SOX-00044 (ARB

⁸ Gallas has alleged that if the Respondent was sued by patients for using TeleMental Health, shareholders might lose money as a result of litigation. Mot. Deny Sum. Dec. 8; 9/29/15 Conf. Call Tr. 8, 10. She has also stated the Respondent’s “tactics” could result in regulatory fines or governmental actions possibly resulting in “massive financial loss.” Compl. Resp. Renewed Mot. Dismiss at 2. Based on the parties’ exhibits submitted with the motion for summary decision and opposition to the motion, it appears these theories of how the Respondent’s actions could lead to shareholder fraud were never relayed to Respondent during Gallas’ employment, and were first raised in the course of the present litigation.

⁹ In *Allen*, the complainants alleged that they reported refund delays allegedly in violation of state laws, which could result in the state’s revocation of the respondent’s license to operate and affect shareholders. The Board found this allegation to be too speculative to fall under SOX’s protection. ARB No. 06-081 at 12.

Jan. 10, 2010); *Reed v. MCI, Inc.*, ARB No. 06-126, ALJ No. 2006-SOX-00071 (ARB Apr. 30, 2008) (finding the complainant’s theory that the respondent’s use of stolen software could expose it to fines and loss of good will was only speculation and “[s]peculation or a mere possibility that shareholders would be defrauded . . . , does not satisfy the reasonable belief requirement.”);¹⁰ *see also Minkina*, 2005-SOX-00019 at 7 (finding that complaints of poor air quality are not covered under SOX, “even if there is a possibility that poor air quality might ultimately result in financial loss”).

Gallas also made complaints that the Respondent engaged in improper billing for the TeleMental Health Program. Specifically, she alleged that billing CMS or private insurance companies for the Telemental Health services would be improper and fraudulent because such services were not eligible for reimbursement and constituted substandard care. CX 12; EX I at 42; Mot. Deny Sum. Dec. 7. Gallas provided with her opposition to summary decision documentation from CMS that states that telehealth services cannot be billed to Medicare in non-rural circumstances.¹¹ Mot. Deny Sum. Dec. 2. She asserted the Respondent’s tactics could result in regulatory fines, settlements, or governmental actions possibly resulting in “massive financial loss.” Compl. Resp. Renewed Mot. Dismiss at 2; Mot. Deny Sum. Dec. 8.

Considering the facts in the light most favorable to Gallas, I find that she did not have an objectively reasonable belief that the Respondent violated SOX by engaging in improper or fraudulent billing practices. In her opposition to summary decision, Gallas stated that she knew the Respondent did not directly bill for Telemental Health services, but stated the Respondent was bundling the service with medical screening evaluations to avoid detection and bill private insurance companies and CMS for services that would otherwise not be allowed.¹² Mot. Deny Sum. Dec. 2. However, Gallas concedes that she did not know how the Respondent billed for or covered costs of TeleMental Health evaluations or whether the Respondent was billing at all for the services. 9/29/15 Conf. Call Tr. 29, 53. Gallas also conceded she did not know how the

¹⁰ In *Reed*, the *pro se* complainant alleged that his employer required him to use stolen software and because the employer’s profit reports to its shareholders were based partly on its use of stolen software, it defrauded shareholders. ARB No. 06-126 at 4. The complainant also stated that the use of stolen software could cause the employer to be subject to “huge fines and loss of good will, both of which might cause significant damage to the value of the company and thereby affect shareholders.” *Id.* The Board upheld the ALJ’s finding that the employer was entitled to summary decision because complainant did not prove he reasonably believed the employer violated SOX. *Id.* at 6.

¹¹ Gallas provided a CMS Fact Sheet from December 2014, a Medicare Carriers Manual dated May 16, 2003, and a Medicare Benefit Policy Manual revised as of February 13, 2015. CX 25; CX 26; CX 27. These materials state that Medicare will pay for only eligible telehealth services as a substitute for an in-person encounter. CX 25 at 120; CX 26. Eligible beneficiaries for telehealth services must be in a rural health professional shortage area or counties not classified as a metropolitan statistical area. *Id.*

¹² The Respondent informed Gallas, in response to her initial complaints about billing, that it does not bill for any emergency psychiatric assessments, either face-to-face or via TeleMental Health. CX 8 at 48. The Respondent continued to state this in the course of litigation. *See* Mot. Sum. Dec.; Reply in Supp. of Sum. Dec. In its Reply brief, and its discovery responses to Gallas on October 6, 2015, Respondent expanded upon its earlier statements by explaining that HCAT is an overhead department, which allocates the costs of each assessment to the hospital for which the assessment was provided and each hospital absorbs the costs as overhead. Reply in Supp. Sum. Dec. 2 & supporting exhibits. It stated that no HCAT services are billed or bundled. *Id.*

Respondent billed for her services prior to the implementation of the TeleMental Health Program. 9/29/15 Conf. Call Tr. 53.

Without any knowledge of whether or not the Respondent bundles TeleMental Health evaluations with other services as a way to bill for these services, or how the Respondent previously billed for face-to-face evaluations, Gallas' allegation of billing fraud is based purely on suspicion and speculation and does not have any factual foundation. *See Feldman v. Law Enforcement Associates, Corp.*, 955 F. Supp. 2d 528, 551 (EDNC June 28, 2013) (finding that the complainants did not have an objectively reasonable belief because they had very little information on which to base their insider trading allegation); *Reed v. MCI, Inc.*, ARB No. 06-126 at 5 (stating that speculation and mere possibility do not satisfy the reasonable belief requirement); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 353-55 (4th Cir. 2008) (concluding that a chain of speculation and hypotheticals requiring multi-step reasoning cannot establish a reasonable belief that the employer was violating SOX); *see Riedell v. Verizon Communications*, 2005-SOX-77, PDF at 10 (ALJ Aug. 14, 2006) (finding "the [c]omplainant has not submitted any kind of evidence that would support a conclusion that he ever had enough information . . . to allow him to form a reasonable belief" and "although the Complainant's knowledge . . . might have led him to develop a suspicion . . . a suspicion is simply speculation and cannot logically be regarded as reasonable belief").¹³

Lastly, Gallas alleges the Respondent's 10K annual form filed with SEC was false and fraudulent because the Respondent did not report the use TeleMental Health or EMTALA, CMS, HIPAA, and billing violations. Mot. Deny Sum. Dec. 7, 8; 9/29/15 Conf. Call Tr. 13. She admitted she did not know whether they were required to report this information in their filing, and only looked at the Respondent's 2011 10K Form, prior to the implementation of TeleMental Health and her complaints. 9/29/15 Conf. Call Tr. 13; CX 22. Like Gallas' complaints of billing fraud, I find she did not have enough knowledge or information to form an objectively reasonable belief that the Respondent filed a false or fraudulent 10K Form with SEC, and her allegations are speculative and insufficient to establish a genuine issue of material fact. *See Feldman*, 955 F. Supp. 2d at 551; *Riedell*, 2005-SOX-77 at 10.

While *pro se* litigants are to be given some leeway and their pleadings shall be liberally construed, a *pro se* litigant cannot shift the burden of litigating a case to the adjudicator and ultimately has "the same burdens of providing the necessary elements of [her] case." *See Pik v. Credit Suisse AG*, ARB No. 11-034, ALJ No. 2011-SOX-2006, PDF at 4-5 (ARB May 31, 2012). I find that Gallas had not offered evidence sufficient to generate a genuine issue of material fact that she communicated a reasonable belief that the Respondent violated any of the categories of protected activity enumerated under the SOX whistleblower provision.¹⁴

¹³ Additionally, even assuming Gallas had a reasonable belief Respondent was engaged in billing fraud by billing for TeleMental Health Program evaluations, once Respondent informed Complainant that it was not billing for Telemental Health Services, her continued insistence that Respondent was engaging in fraud by billing for Telemental Health services ceased to be objectively responsible. *See Day v. Staples, Inc.*, 555 F.3d 42, 58 (1st Cir. 2009) (finding that an employee's complaints ceased to be objectively reasonable after the employer provided explanations for the challenged practices and assured the employee no fraud was being committed).

¹⁴ Because I find Gallas has not presented a genuine issue of material fact that could establish she engaged in protected activity, I need not consider in any depth the Respondent's second basis for summary decision – that there

ORDER

Viewing all the evidence and factual inferences in the light most favorable to Gallas, the non-moving party, I find that Respondent has established that there is no genuine issue of material fact as to an essential element of Gallas' claim— whether she engaged in protected activity.

Accordingly, it is hereby **ORDERED** that Respondent's Motion for Summary Decision is **GRANTED**, Complainant's claim is **DISMISSED WITH PREJUDICE**, and the hearing scheduled for October 29, 2015 is **CANCELED**.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

is no genuine issue of material fact as to whether Gallas' protected activity contributed to adverse action taken against her, or whether the Respondent would have taken the same adverse action absent protected activity.

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).