

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 July 2017

Case No. 2016-SOX-2

In the Matter of:

MICHAEL LAQUEY,
Claimant,

v.

UNITED HEALTH GROUP, INC., dba OPTUM
Respondent.

Appearances:

Michael LaQuey
Crystal Bay, Minnesota
Claimant

Sandra Jezierski, Esq.
Jeremy Robb, Esq.
Nilan Johnson Lewis PA
Minneapolis, Minnesota
Attorneys for Respondent

Before: Steven D. Bell
Administrative Law Judge

DECISION AND ORDER

This case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“SOX”), 18 U.S.C. §1514A, as amended by §922(c) of the Dodd-Frank Act of 2010, Public Law 111-203 (July 21, 2010) and the implementing regulations found at 29 C.F.R. §1980.

PROCEDURAL HISTORY

Michael LaQuey (“Claimant”) was terminated from his employment with UnitedHealth Group, Inc, dba Optum (“Respondent”) on January 31, 2014. He filed a complaint with the Occupational Health and Safety Administration (“OSHA”) of the United States Department of

Labor on September 9, 2014.¹ Claimant's submission to OSHA does not specifically allege a violation of SOX, nor does it allege that shareholders or members of the investing public might possibly have been misled concerning Respondent's financial condition because of any specific act or omission known to Claimant. On September 17, 2015, OSHA dismissed the complaint. Claimant requested a hearing on October 16, 2015.² The case was assigned to me on November 17, 2015.

Pursuant to a written agreement he had with Employer, Claimant also commenced an arbitration proceeding challenging his termination before the American Arbitration Association ("AAA")(referred to hereafter as the "AAA whistleblower arbitration case"). In the AAA whistleblower arbitration case, Claimant asserted, among other things, that he had been retaliated against by Respondent in violation of the Minnesota whistleblower protection statute, Minnesota Statute §181.932 (2015).³

¹ The parties have stipulated that Claimant's OSHA complaint was timely. Tr. 19.

² The parties have stipulated that Claimant's request for hearing was timely. Tr. 19-20.

³ The Minnesota whistleblower statute provides:

An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(1) the employee, or a person acting on behalf of an employee, in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official;

(2) the employee is requested by a public body or office to participate in an investigation, hearing, inquiry;

(3) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason;

(4) the employee, in good faith, reports a situation in which the quality of health care services provided by a health care facility, organization, or health care provider violates a standard established by federal or state law or a professionally recognized national clinical or ethical standard and potentially places the public at risk of harm;

(5) a public employee communicates the findings of a scientific or technical study that the employee, in good faith, believes to be truthful and accurate, including reports to a governmental body or law enforcement official; or

(6) an employee in the classified service of state government communicates information that the employee, in good faith, believes to be truthful and accurate, and that relates to state services, including the financing of state services, to:

(i) a legislator or the legislative auditor; or

(ii) a constitutional officer.

I had originally set the SOX whistleblower case for formal hearing beginning on July 21, 2016. However, on approximately June 15, 2016, I learned that the AAA whistleblower case was going to proceed to hearing beginning on June 21, 2016. I cancelled the hearing of the SOX whistleblower case and stayed further proceedings in my SOX matter pending the outcome of the AAA case.

The AAA whistleblower case proceeded to arbitration from June 21 to 24 and on June 29, 2016. Claimant testified in that hearing, as did 9 other witnesses. In mid-September 2016, an award was issued in the AAA arbitration case, bringing that matter to a conclusion.⁴ I established a briefing schedule on the question whether the issuance of the AAA award deprived me of jurisdiction to proceed with the SOX whistleblower case. On November 2, 2016, following briefing by the parties, I issued an Order denying Employer's Motion to Dismiss on *res judicata* grounds. Shortly thereafter, I issued an Order denying Respondent's Motion for Summary Decision.

I sought to provide enhanced pre-hearing management of the SOX case assigned to me. I believed such enhanced management was appropriate because: (1) the case involved technical issues which I believed would likely require testimony from a number of expert witnesses⁵; (2) I believed it would be necessary to address and resolve a number of difficult discovery issues, and (3) Claimant was not represented by counsel. After the case was assigned to me on November 18, 2015, I conducted telephone status conferences with Claimant and counsel for Respondent on December 15, 2015, January 13, 2016, February 15, 2016, April 15, 2016, September 21, 2016, December 15, 2016, January 20, 2017, February 3, 2017 and February 13, 2017. Many of these conferences lasted more than an hour.

In recognition of the fact that Claimant was not represented by counsel, and in order to have a clearly-defined path towards the hearing, I issued a series of Pre-Hearing Orders. Pre-Hearing Order Number 1 was issued on December 15, 2016, and memorialized procedures which had been discussed earlier that same day during a lengthy telephone conference. Pre-Hearing Order Number 1 established the date and location of the formal hearing, and also established procedures for the orderly stipulation of facts, exchange of exhibits and identification of witnesses.

I issued Pre-Hearing Order Number 2 on January 25, 2016. That Order established dates for the submission and briefing of Motions in Limine.

I issued Pre-Hearing Order Number 3 on February 6, 2017. That Order resolved all of the Motions in Limine that were filed by the parties. I also announced these decisions orally to the parties during a telephone conference held that day.

The disclosures protected pursuant to this section do not authorize the disclosure of data otherwise protected by law.

⁴ The parties have not waived confidentiality as to the Award of the AAA arbitrator. I am thus unaware of the decision reached in the whistleblower arbitration case.

⁵ Neither party wound up calling an expert at the hearing.

I issued Pre-Hearing Order Number 4 on February 6, 2017. That Order described the procedures that would be followed during the hearing of the case.

Two weeks before the commencement of the hearing (February 13, 2017), I held a 70-minute telephone conference with Claimant and counsel for Respondent in which we discussed Pre-Hearing Order Number 4, and during which I addressed questions about how this hearing would proceed. My goal was to make certain that Claimant (who was not represented by counsel) understood what to expect once the hearing began.

I ruled on two pre-hearing dispositive motions: Respondent's Motion to Dismiss and Respondent's Motion for Summary Decision. In my written decisions on these motions, I identified factual issues that would need to be addressed at the hearing.

At the outset of the hearing, I reminded the parties about the factual issues that were of greatest importance to me⁶:

1. The specific duties assigned to Claimant during his employment with Respondent;
2. The dates on which Claimant believed he engaged in activity protected by Sarbanes-Oxley;
3. A clear description of the act or conversation which Claimant believes was activity protected by Sarbanes-Oxley;
4. Whether there is a document or some other exhibit which substantiates Claimant's assertion that he engaged in protected activity;
5. How exactly did the matter about which Claimant complained affect Respondent's duties to its shareholders or to the investing community?
6. Is there a document or other direct evidence which shows a relationship between Claimant's participation in protected activity and his discharge from employment?
7. Why does Claimant believe that his participation in protected activity is related to his discharge?
8. A thorough explanation of Claimant's claimed remedies and damages;
9. A thorough explanation of Respondent's claimed damages.

PREHEARING DISCOVERY ISSUES

While Claimant's SOX complaint was being investigated by OSHA, Claimant's AAA whistleblower arbitration case was moving forward. By the time the SOX case was assigned to

⁶ Tr. 11-13.

me, Claimant and Respondent had already engaged in substantial discovery in the AAA whistleblower arbitration case including the production of thousands of pages of documents, and taking more than a dozen depositions of persons who were likely to be witnesses in both the AAA whistleblower arbitration case and in the SOX case before me. Claimant wished to depose in the SOX case many of the persons whose depositions had already been taken in the AAA whistleblower arbitration case. Some of these persons had already been deposed twice by Claimant. Respondent objected to any further depositions being taken by Claimant. The question was thus presented to me whether the persons already deposed in the AAA whistleblower arbitration would be required to sit for an entirely new deposition in the SOX case. A similar issue arose with respect to the production of documents.

Two Rules were reviewed for guidance. Section 18.10(a) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (“ALJ Rules”) acts as somewhat of a preamble to the ALJ Rules:

These rules govern the procedure in proceedings before the United States Department of Labor, Office of Administrative Law Judges. *They should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.* To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation. The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.

29 C.F.R. §18.10(a) (emphasis added).

Rule 26 of the Federal Rules of Civil Procedure was also consulted. Of particular note was the recent amendment of Rule 26(b)(1), which requires that an inquiry be made as to “whether the burden or expense of the proposed discovery outweighs its likely benefit.” I believe I was required by Civil Rule 26(b)(2)(C)(i) to limit the frequency or extent of discovery in the SOX case if I found that “the discovery sought is unreasonably cumulative or duplicative” of discovery already performed in the AAA whistleblower arbitration case, but only if the AAA case presented substantially the same issues that are presented to me in this SOX case. Rule 26(b)(2)(C)(ii) similarly required me to limit discovery if “the party seeking discovery has had ample opportunity to obtain the information.” Although not strictly applicable to the situation before me, I was also cognizant that ALJ Rule 18.64(2)(i)(A) limits a party to taking no more than 10 depositions in a matter without leave of the presiding judge, while ALJ Rule 18.64(a)(2)(B) prohibits a person from being deposed more than once in a proceeding without leave of the presiding judge.

With the consent of the parties, I reviewed the transcripts of all of the depositions that had already been taken by Claimant in the AAA case for the limited and specific purpose of determining whether Claimant had been afforded a fair opportunity to obtain discovery from the witnesses. I found that the following depositions had already been taken by Claimant in the AAA whistleblower arbitration case:

Witness⁷	Date of Deposition(s)	Length of Deposition (Minutes) (approx.)	Pages of Transcript
<i>Alex Sentryz</i>	7/25/2015	30	39
	11/30/2015	35	24
<i>Scott Johnson</i>	7/23/2015	180	127
	11/30/2015	90	63
<i>Laura Crandon</i>	7/24/2015	120	66
	11/23/2015	30	22
<i>John Beacham</i>	7/29/2015	90	64
	12/14/2015	60	55
<i>Glen Blenkush</i>	7/22/2015	180	137
	11/23/2015	30	40
<i>Brian Murray</i>	7/22/2015	55	46
<i>Maureen Shurson</i>	7/22/2015	15	18
<i>Jason Bornholt</i>	7/22/2015	90	87
<i>Margaret Kershner</i>	7/22/2015	35	37

With the consent of the parties, I also reviewed the summary judgment briefs filed by both parties before the AAA arbitrator so that I might understand the extent to which the issues in the AAA whistleblower arbitration case may have overlapped the issues in the SOX whistleblower case.

I invited the parties to submit to me their written positions explaining why (or why not) additional deposition testimony was thought to be necessary. For example, Claimant argued that he had been limited to a finite amount of time to conduct the AAA arbitration depositions, and that he was unable to ask all of the questions he wished because of those time limits. I directed Claimant to give me detailed information about what subject areas he needed to cover with these witnesses in a subsequent deposition, but I did not receive any detailed answers from him. I also conducted several hours of telephone conferences with the parties discussing whether additional discovery was appropriate or necessary.

On February 10, 2016, I issued a Discovery Order, which found there to be “substantial similarity” between the AAA and SOX cases. I found that Claimant had done a workmanlike job of asking questions and obtaining answers in the 15 depositions that had already been taken in the AAA whistleblower arbitration case. I found that Respondent did not interpose improper objections in order to “run out the clock” on Claimant. I concluded that Claimant had actually obtained substantially complete discovery of the facts underlying his claims in the SOX case,

⁷ The witnesses whose names are italicized appeared as witnesses in the SOX whistleblower case which I tried in Minnesota in February and March 2017.

and that he had obtained adequate discovery of the facts underlying the defenses of Respondent in the SOX case. I found:

When balancing the burden or expense of additional deposition discovery against the likely benefit of Claimant taking additional depositions, I find the balance to tip strongly against allowing additional depositions to be taken. Taking the deposition of a witness twice in a proceeding is extraordinary – yet it has already happened 5 times in the AAA case. Allowing a second or third oral deposition of the witnesses has not been justified by Claimant, and such depositions will not be allowed.

I then entered the following Discovery Order:

1. Claimant shall not be permitted in this Sarbanes-Oxley case to take additional oral depositions;
2. Claimant may seek leave to take up to 3 depositions by written questions in the Sarbanes-Oxley case in the manner described by ALJ Rule 18.65(a)(2). Any request for leave to conduct such a deposition must be submitted by Claimant on or before March 1, 2016, and all such depositions must be completed by April 1, 2016. Claimant must attach to his Motion seeking leave complete copies of all of the questions he proposes to propound. I reserve the right to deny Claimant the opportunity to ask any questions which, in my judgment, would be cumulative of questions previously asked and answered in the AAA case;
3. In this Sarbanes-Oxley case, Claimant shall be permitted to make use of the depositions taken in the AAA case for all purposes described in ALJ Rule 18.55;
4. Within 30 days of the date of this Order, Employer shall produce to Claimant the following documents:
 - a. A complete copy of Claimant's personnel file; and
 - b. Copies of all performance evaluations performed for Claimant for the final 3 years of Claimant's employment with Employer; and
 - c. Copies of all unprivileged documents discussing or describing any discipline of Claimant by Employer;
 - d. Copies of all unprivileged documents discussing Claimant's termination by Employer;

- e. Copies of all documents evidencing any complaint or report made by Claimant that Employer was violating any federal or state law. If the documents described above have already been produced, Employer shall so certify to me in writing.
5. Claimant may only seek the production of documents from Employer with my leave. Any request for leave to seek the production of documents must be submitted by Claimant on or before March 1, 2016, and all requested documents are to be produced by April 1, 2016. Claimant must attach to his Motion seeking leave complete copies of all of the documents he seeks to have produced.

Discovery proceeded according to my Order. Claimant did not take the depositions allowed in paragraph (2) of my Order, nor did he seek the production of documents allowed by paragraph (5).

RESPONDENT'S MOTION TO DISMISS

The AAA whistleblower arbitration case was tried to the arbitrator from June 21 to 24 and on June 29, 2016, and an award was issued by the arbitrator in September 2016. After being advised of the issuance of the award, I asked the parties to submit briefs on the question whether the issuance of the AAA award should deprive me of jurisdiction to proceed with the SOX whistleblower case.⁸ Respondent filed a motion to dismiss on of *res judicata* grounds. Claimant opposed the Motion to Dismiss. On November 2, 2016, I issued an Order denying Respondent's Motion to Dismiss on *res judicata* grounds. In denying the Motion, I noted the relevant considerations of the ARB:

Our jurisprudence holds that collateral estoppel applies when: 1) the same issue has been actually litigated and submitted for adjudication; 2) the issue was necessary to the outcome of the first case; and 3) precluding litigation of the contested second matter does not constitute a basic unfairness to the party sought to be bound by the first determination.

Hasan v. Sargent & Lundy, ARB No. 05-099, ALJ No. 2002-ERA-032 (ARB August 31, 2007).

In analyzing element (3) of the *Hasan* test, I found that the burden of proof applicable in cases brought under the Minnesota state whistleblower statute was this:

Whistleblower claims [under the Minnesota statute] are analyzed by applying the *McDonnell-Douglas* burden shifting test. Under

⁸ I do not know what decision was reached by the arbitrator, although I have drawn an inference as to the result. Presumably, only the party prevailing in the arbitration would ask me to give *res judicata* effect to the arbitrator's award.

this test, the burden is on the employee to make a *prima facie* case by showing (1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two. Once the plaintiff makes a *prima facie* case, the burden shifts to the employer to articulate a legitimate, non-retaliatory basis for its action against the employee. Finally, the burden then shifts to the employee to show that the proffered legitimate non-discriminatory reason is pre-textual.

Chubboy v. Best Buy Co., 2012 Minn. Dist. LEXIS 203 at *28 (Hennepin County Dist. Ct., 2012)(internal citations omitted).

I found that the burden of proof in Claimant's SOX case is quite different:

We apply a burden-shifting framework to SOX whistleblower claims incorporated from the Whistleblower Protection Program of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). The plaintiff must first establish a *prima facie* case by proving, by a preponderance of the evidence, that: (1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. If the employee meets this burden, the defendant must then 'rebut the employer's *prima facie* case by demonstrating by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity.

Feldman v. Law Enforcement Assocs. Corp., 752 F.3d 339, 344-345 (4th Cir. 2014)(internal citations omitted). See also *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005 (ARB September 13, 2011)("[SOX] Section 806 complaints filed are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (**AIR 21**)").

The Administrative Review Board has recently made it clear that the burdens of proof under the *McDonnell Douglas* and AIR 21 standards are quite different:

From the discussion in the text, we hope it is clear that the AIR-21 two-step test is **not** *McDonnell-Douglas*, but out of an abundance of caution we take this opportunity to state unequivocally that *McDonnell-Douglas* and any cases applying a *McDonnell-Douglas* structured burden-shifting approach, are inapplicable to the burden-of-proof provisions of the ERA or AIR-21 or of any of the other DOL-administered whistleblower statutes incorporating the AIR-21 burden of proof provision.

Palmer v. Canadian National Railway, ARB No. 16-035, 2016 WL 5868560 at footnote 113 (September 30, 2016)(emphasis in original).

I found that although the evidence adduced during the AAA whistleblower arbitration proceedings would be very similar to the evidence that I would need to hear in order to adjudicate Claimant's SOX claim, the difference in the burdens of proof applied by the AAA arbitrator (the *McDonnell-Douglas* test), and what I would need to apply in the SOX case (the AIR-21 standard) are significantly and, perhaps, materially different. While the same issues may be involved in the two cases, the manner by which a decision is made in each of the tribunals is not the same. I found that if I were to dismiss the SOX case on *res judicata* grounds, I would effectively, and impermissibly, be applying a *McDonnell-Douglas* burden of proof in the SOX case. I found that to be legally inappropriate, and I found that doing so would constitute basic unfairness to Claimant in violation of the *Hasan* test.

RESPONDENT'S MOTION FOR SUMMARY DECISION

Respondent filed a motion for Summary Decision. Claimant opposed the motion.

While Respondent's Motion for Summary Decision was pending before me, the United States Court of Appeals for the 8th Circuit (the Circuit in which this case arises) issued a decision in a SOX whistleblower case, *Beacom v. Oracle America, Inc.*, 825 F.3d 376 (8th Cir. 2016). I invited the parties to supplement their briefs to discuss any impact they believed *Beacom* may have had on the case before me.

On November 8, 2016, I issued an Order denying Respondent's Motion for Summary Decision. In analyzing Respondent's argument, I noted the caution which I was required to demonstrate at the summary decision stage of the case: "[Claimant] must establish that a reasonable person in his position, with the same training and experience, would have believed [Employer] was committing a securities violation. This fact-dependent inquiry is typically inappropriate for summary judgment." *Beacom* at p. 380 (emphasis added).

In my order denying the Summary Decision motion, I said that I could not grant summary decision because I did not know enough about the following topics in order to be able to intelligently evaluate Employer's arguments: (1) the interaction, if any, between the LaunchPad project and Employer's accounting and/or financial reporting systems; (2) Claimant's level of education and his experience (or lack thereof) in working on systems that perform accounting and/or financial reporting functions; (3) whether any problems reported by Claimant to Scott Johnson and/or Jason Bornholdt were of such magnitude that they could actually have had a material impact on the reporting of Employer's financial performance to Employer's shareholders.

THE HEARING

The formal hearing was held in Courtroom 444 of the Warren E. Burger Federal Building and United States Courthouse in St. Paul, Minnesota. The hearing began on Monday, February 27, 2017 and concluded on Thursday, March 2. The following witnesses were called:

Jason Bornholdt

Glen Blenkush

Michael LaQuey

Ann Carlson

Margaret Kershner

Scott Johnson

John Beacham

In addition, the parties stipulated that the testimony of the following witnesses would be admitted by introducing the testimony of these witnesses given at the AAA hearing:

Exhibit ZZZZ is the transcript of Kerry Tessling,

Exhibit AAAAA is the transcript of Laura Crandon,

Exhibit BBBBB is the transcript of Alex Sentyrz,

Exhibit CCCCC is the transcript of Doug Trott.

The parties stipulated to the admission of Claimant's Exhibits 1 through 268. Respondent's Exhibits B through CCCCC were also admitted by stipulation.⁹

I advised the parties at the outset the hearing:

I'll be asking questions during the hearing, and I'm asking questions because I have to gather all the information I need to write my decision while we're all here. And you all have lived with this disagreement and this case for a long time. I practiced law for a long time, and I'm aware that counsel can often see the cases differently because of their long history of working on the case and their familiarity with the facts and the terminology and who's who and what's what. The Judge hearing the case for the first time really has a very small appreciation for what the case is about and who the players are and what is at stake. So I will ask questions not to get in anybody's way, not to interrupt, not to be difficult, but because I need to make sure that I have the information that I'll need in order to make a decision.

Tr. 9-10.

⁹ Tr. 904.

As the hearing went along, I became concerned that I may not be fully understanding the technical jargon being used by Claimant and the witnesses to describe their activities. I became particularly concerned that Claimant was attempting to describe some protected activity in which he believed he had engaged, and that I was not able to discern that protected activity because it was shrouded in jargon. I therefore asked many questions of Claimant during his testimony in his case-in-chief. My sole motivation in asking these questions was to make certain that I was not missing something of significance in the evidence presented to me. I have reproduced some of my question-and-answer sessions with Claimant in this Decision and Order.

I eventually became concerned that by asking my many questions of Claimant that I had disrupted the “flow” of his presentation of evidence. I became concerned that this might have been prejudicial to Claimant’s ability to present his case. I therefore gave Claimant an opportunity to conclude the hearing with a 30-minute period for him to present a summary of his case with no interruptions. I had the following exchange with the parties about this admittedly unusual procedure:

JUDGE BELL: So as long as it’s relevant and so long as it relates to the claims, I’m giving you -- as I explained this morning off the record and as I’ll now explain on the record, in thinking about this proceeding last night and the night before, I wanted to make sure that I give you a little bit of extra time because I feel like I perhaps dominated your examination. And I want to make sure that you have the opportunity, one final opportunity, to present me with what you want me to take away from this.

MR. LAQUEY: Yes.

JUDGE BELL: So I am going to grant that to you. And you indicated off the record this morning that you thought 30 minutes was fully sufficient.

MR. LAQUEY: Yes.

Tr. 901.

Respondent objected to allowing Claimant this additional time:

MS. JEZIERSKI: Your Honor?

JUDGE BELL: Yes?

MS. JEZIERSKI: I feel like -- this is just for the record, but that we would like to enter an objection to the rebuttal simply because we don’t think that he’s entitled to it.

JUDGE BELL: Noted.

MS. JEZIERSKI: Thank you.

JUDGE BELL: Overruled, for the reasons I stated earlier. It's an odd situation. Mr. LaQuey, this time is not counting against yours.

It's an odd situation because of the way the witnesses were presented and because of the fact that we have testimony from non-appearing witnesses. It doesn't fit neatly into any box, as to whether rebuttal is appropriate or not appropriate. I'm really allowing it for the reasons stated earlier, which is that I feel like I asked so many questions during Mr. LaQuey's direct examination that I feel like I didn't give him an appropriately uninterrupted period of time within which to present his views of things. And I want to give him that opportunity. And I think it's within my discretion under whatever my equivalent of evidence Rule 611 is to be in control of the mode, order, and interrogation of witnesses.

So I understand your objection, I overrule the objection, and for the reasons stated I'm going to allow Mr. LaQuey, at my discretion, this half hour. And certainly I'm allowing you the opportunity to cross-examine him at the conclusion.

Tr. 908-9.

Claimant took advantage of the opportunity I had given him to present one final narrative description of his case. Respondent had the opportunity to cross-examine Claimant as to the statement made during that final 30 minutes of testimony.

I received the transcript of the hearing on April 7, 2017. I received the post-hearing briefs of the parties on May 8, 2017.

STIPULATED FACTS

The parties have stipulated,¹⁰ and I so find:

1. Mr. LaQuey started working at UnitedHealth on 12/7/2009 as a Senior IT Business Analyst.
2. Laura Bice was a project manager in eGrowth.
3. In November 2011, LaQuey began working on the ICD-10 project after he was rolled off LaunchPad.

¹⁰ The stipulations in paragraphs 1-19 are contained in the pre-hearing briefs of the parties, and they are reproduced here just as they were presented by the parties. I do not consider all of the information in stipulations 1-19 to be relevant. The stipulations in paragraphs 20 - 24 were entered into at the hearing. Tr. 15-17.

4. In August 2011, LaQuey was assigned to work on a project called LaunchPad. Sentryz was the project manager, and the client was OptumHealth.
5. LaQuey worked on ICD-10 until the summer of 2012, at which time he requested to be rolled off because the project was getting technical and LaQuey preferred to do lead business analyst work.
6. Trott conducted a review of LaQuey's performance on June 17, 2012, in which he gave LaQuey a score of 3 out of 5.
7. In September 2012, LaQuey was assigned to work on the Gateway project.
8. On or around February 24, 2013, Johnson gave LaQuey a performance review, which rated LaQuey's performance for 2012. LaQuey received an overall score of 3 out of 5, meaning that he met expectations.
9. Mr. LaQuey received an evaluation summary score of 3 out of 5 on his February 27, 2013 Common Review.
10. LaQuey performed a self-review for this same period and rated himself a 5 out of 5, meaning that he believed he exceeded all expectations.
11. After being rolled off Gateway, LaQuey was not engaged on a billable project for approximately one month.
12. LaQuey began working on the Medicare Secondary Payer Project in or around May 2013, approximately one month after he was rolled off Gateway.
13. On his self-evaluation around the same time, LaQuey rated himself a 4 out of 5.
14. LaQuey disagrees with the overall rating of 2 and believed Johnson did not have personal knowledge of his performance.
15. There are three levels of corrective actions: initial warning, elevated warning and final warning.
16. In September 2013, LaQuey was rolled off the Medicare Secondary Payer Project.
17. LaQuey acknowledges he was told he was removed from that project in part because he was "too slow."
18. Regarding Mr. LaQuey, Messrs. Beacham and Johnson told Human Capital personnel that they had a "desire to see him successful." Mr. LaQuey believes Messrs. Beacham and Johnson were misleading Human Capital.
19. Beacham and Johnson terminated LaQuey's employment on January 31, 2014.

20. Prior to February 1, 2014, Claimant was an “employee” of Respondent as that word is used in the Sarbanes-Oxley Act, 18 U.S.C. §1514A(a), and as the word “employee” is defined in 29 CFR §1980.101(g).
21. Respondent is a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §78 small L). Respondent is a “company” as that word is defined by 29 CFR §1980.101(d).
22. Claimant was fired from his job by Respondent on January 31, 2014.
23. Claimant made a timely complaint about his firing to the Occupational Health and Safety Administration of the United States Department of Labor.
24. Claimant’s request for a hearing before the Office of Administrative Law Judges of the Department of Labor was timely.

ISSUES PRESENTED

The issues that will be decided in this Decision and Order are these:

1. Did Claimant engage in activity protected by SOX?
2. Was Respondent aware, or did Respondent suspect, that Claimant was engaging in activity protected by SOX?
3. Did Claimant suffer an adverse employment action?
4. Is there a causal relationship between Claimant’s protected activity and any adverse employment action suffered by him?
5. Has Claimant suffered damages compensable under SOX?
6. Has Respondent demonstrated by clear and convincing evidence that it would have taken the same employment action against Claimant in the absence of any protected activity?

STATEMENT OF FACTS

Claimant has a Bachelor of Science degree in Computer Science from the University of California, Santa Barbara.¹¹ He began working for UnitedHealth Group in 2009 as a “Senior IT¹²

¹¹ Some information about Claimant’s education, experience and work history with Respondent has been gathered from Respondent Exhibits B and QQQ.

¹² Information Technology.

Business Analyst.” Claimant received performance evaluations on August 1, 2010¹³ and February 27, 2011.¹⁴ Both of these evaluations concluded that Claimant “meets expectations.”

In August 2011, Claimant transferred from UnitedHealth Group to a related corporation, Optuminsight.¹⁵ At the time of this transfer, he received a pay raise. He also began reporting to a new manager, Jason Bornholdt.¹⁶

It was understood at the time Claimant transferred to Optuminsight that he would immediately¹⁷ begin working on a project called LaunchPad.¹⁸ Alex Sentryz was the manager of the project.¹⁹ Claimant served as the Business Analyst on that project. Claimant describes LaunchPad as follows:

LaunchPad users entered input parameters that determined the report results from reporting systems that included financial reports, operational reports, and asset reports.

Claimant’s *Post-Hearing Brief* at 5. Respondent describes it in this manner:

The LaunchPad team’s goal was to develop a custom internal tool to support Optum Healthcare Solutions’ reporting team: according to Sentryz, ‘the LaunchPad project was to be an order intake tool . . . like driving out to McDonald’s or Starbucks, placing an order, and someone fulfills it on the back end. So it was just the front end taking portion of it. In other words, LaunchPad created or documented a request that a reporting team within OptumHealth then used to generate a report. The reporting team would then analyze the request and ultimately create and deliver the report. *Notably, LaunchPad had nothing to do with financial information or reporting financial information, and LaunchPad did not impact UnitedHealth’s financial or accounting practices.*

Respondent’s *Post-Hearing Brief* at 3-4 (internal citations omitted)(emphasis added). Claimant’s involvement with the LaunchPad project ended in approximately November 2011.²⁰

According to his supervisors, Claimant had difficulty with co-workers while working on the LaunchPad project. Claimant believed it was important to use a tool called HP Quality Center, which he describes as “a method for creating test requirements”²¹ or as “a tool that could

¹³ Exhibit K.

¹⁴ Exhibit L.

¹⁵ Optuminsight is a part of UnitedHealth Group. See Respondent Exhibit I.

¹⁶ Exhibit I.

¹⁷ Tr. 63.

¹⁸ Exhibit 13-2 contains a timeline showing that Claimant was working on LaunchPad as early as August 23, 2011.

¹⁹ Respondent’s *Post-Hearing Brief* at 3.

²⁰ Stipulation #3; Tr. 293-4.

²¹ Tr. 62.

be used to manage the process of requirements, the process of quality assurance.”²² HP Quality Center was not being used on the LaunchPad project. Bornholdt invited Claimant “to create a formal presentation with the pros and cons [of using HP Quality Center], what it is, what is the functionalities of it, how it is used to help a project.”²³ Claimant never prepared the requested presentation.²⁴

Claimant says that on September 8, 2011, he had conversations with Scott Johnson and Jason Bornholdt about the LaunchPad project. Claimant says that during these conversations, he said “there’s not enough process management and there’s not enough processes.”²⁵ Claimant believes he engaged in activity protected by Sarbanes-Oxley when he made these statements:

JUDGE BELL: Based on what you’ve said, it’s just as likely that -
- well, I’ll strike my own question. So, you know, we talked yesterday about the burden of proof, okay.

MR. LAQUEY: Um-hum.

JUDGE BELL: Number one, that you engaged in activity protected by Sarbanes-Oxley and the Regulations; and, number two, that Respondent knew or suspected that Complainant had engaged in the protective activity.

MR. LAQUEY: Um-hum. All right. So my claim is that was protected activity and –

JUDGE BELL: What was protected activity? Saying “Not enough process”?

MR. LAQUEY: Not enough process and not enough process management resources.

JUDGE BELL: And you think from that Mr. Bornholdt actually understood what you were saying to mean that you were complaining about the potential for a Securit[ies] and Exchange [Act] violation?

MR. LAQUEY: Yes.

JUDGE BELL: You believe Bornholdt actually understood that?

MR. LAQUEY: Absolutely.

²² *Id.*

²³ Tr. 72-3.

²⁴ Tr. 73.

²⁵ Tr. 285.

Tr. 287-8. At the hearing, Bornholdt denied that he ever understood Claimant to be complaining about illegal activity:

Q. Did Mr. LaQuey ever express to you that he thought the LaunchPad Project or the people who were working on that project were committing some sort of securities violation?

A. Not that I recall.

Q. Or mail fraud or bank fraud, anything like that?

A. No.

Q. Or how about that the LaunchPad Project was violating SEC rules?

A. No.

Q. How about that something about the project was creating a fraud against United Health's shareholders?

A. No.

Q. Or that the LaunchPad Project was generating some sort of false reports?

A. Only from if he had an issue and he reported the issue, but legal standpoint, no.

Q. Okay. Did he ever claim that Optum or United Health or any division in United Health was committing some sort of fraud or illegal activity of any kind when he was your direct report?

A. No.

Tr. 113-4. Scott Johnson testified similarly:

Q. During any of your conversations with Mr. LaQuey about LaunchPad, did he ever express that he felt the project was violating some sort of law, whether state or federal, any sort of law?

MR. LAQUEY: Objection.

JUDGE BELL: Are you done with your question?

MR. ROBB: Yes.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. Did he ever say that he felt that the LaunchPad project or UnitedHealth was committing a securities violation?

A. No.

Q. Did he ever use the words "securities violation" in any of your conversations?

A. No.

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. Did he ever tell you that he felt that UnitedHealth or the LaunchPad project was committing some sort of fraud?

A. No.

Q. Did he ever use the words "fraud"?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. Did he ever communicate to you that he felt UnitedHealth or the LaunchPad project was violating SEC rules?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. Did he ever use the word "SEC"?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. Did he ever say that he felt the LaunchPad project or UnitedHealth was committing a fraud against shareholders?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled.

THE WITNESS: No.

BY MR. ROBB:

Q. Do you remember him using the word "shareholder"?

A. No.

Q. Did he ever use the words "Sarbanes-Oxley" in any conversation with you?

MR. LAQUEY: Objection.

JUDGE BELL: Overruled.

THE WITNESS: No.

BY MR. ROBB:

Q. How about "Dodd-Frank"?

A. No.

Q. How about “Securities Exchange Act”?

MR. LAQUEY: Objection: conclusion of the law.

JUDGE BELL: Overruled.

THE WITNESS: No.

BY MR. ROBB:

Q. At any time when Mr. LaQuey was working on that LaunchPad project, did you at any time consider him to have engaged in protected activity?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. At any time while Mr. LaQuey was working on LaunchPad did you understand him to have blown the whistle?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Do you know what that means?

Did he bring to your attention or, to your knowledge, did he bring to the attention of others, any claim that the company was violating any kind of law?

THE WITNESS: No. Not at all.

Tr. 650-653.

Claimant received a performance evaluation on November 17, 2011,²⁶ about 2 months after Claimant says he engaged in protected activity by complaining about the “lack of processes” on the LaunchPad project. This review was prepared by Alex Sentryz, the manager of the LaunchPad project. Sentryz gave Claimant scores of “marginal” (a numeric score of 1 on a 1 (lowest) to 5 (highest) scale) in the areas of “Act[ing] as a Team Player” and “Support[ing] Change and Innovation.” Scores of 2 were awarded in the following categories: “Focus on Customers,” “Make Fact-Based Decisions” and “Communicate Effectively.” The following written comments appear at the end of this performance evaluation:

²⁶ Exhibit M.

Mike presented a number of negative experiences when working together on our project. Mike has business analysis skills, but overall he has a number of areas that need improving to be an effective business analyst. At the current time, unless he drastically improves those additional skills, I would not select Mike for future engagements.

Exhibit M-2. Other narrative comments can be found on page 3 of Exhibit M. Many of these comments are critical of Claimant's work performance.

On February 12, 2012, Claimant's manager became Doug Trott.²⁷ Jason Bornholdt performed an evaluation of Claimant on February 26, 2012.²⁸ Claimant received an overall score of 3 out of 5, or "Meets Expectations." He received scores of 2 in the areas "Act as a Team Player" and "Communicate Effectively."²⁹ He received a score of 4 in the areas "Make Fact-Based Decisions" and "Deliver Quality Results." Bornholdt provided several narrative comments at the end of the review. These narrative comments reflect on "issues" which arose between Claimant and his co-workers, and that he was referred to take a class on relationship building. Bornholdt concludes: "If Mike is able to grow from the opportunities identified on this first project, I think he has the potential to become a highly successful consultant and leverage the UHG-IT knowledge, IT best practices, and business analysis expertise that he possesses."³⁰

Claimant wrote extensive comments as to his February 12, 2012 evaluation.³¹ There is nothing in the comments written by Claimant which indicate: (1) that he believed the "meets expectations" performance evaluation was retaliatory; or (2) that he believed he was working in an environment hostile to him because he was a whistleblower; or (3) that he had raised to his supervisors any concern that Respondent was generating inaccurate information about the financial performance of the company; or (4) that he then believed that Respondent was failing to appropriately account for its assets; or (5) that Claimant viewed himself to be a whistleblower.

In September 2012, Claimant began working as a Business Analyst on the Gateway Project.³² Glen Blenkush was the program manager.³³ At the hearing, Blenkush described the Gateway project as follows:

Q. Can you describe to us -- let's start with Gateway Phase 1. Can you describe what that project was about and what it was attempting to accomplish?

A. Gateway was, if you think of it like Amazon, when you go to Amazon, you will see that they will present offers to you. So

²⁷ Exhibit QQQ.

²⁸ Exhibit N.

²⁹ Exhibit N.

³⁰ Exhibit N-4.

³¹ *Id.*

³² Tr. 139.

³³ Tr. 150.

Gateway Phase 1 was intended to simply ask the question of a member, 'Do you want to see offerings? Yes or no?' And if you selected a radio dial on the web page, you've indicated that you want to see it or not see them. And that's the essence of Gateway Phase 1.

Q. Okay.

JUDGE BELL: And, I'm sorry, so offers for what?

THE WITNESS: In this case, the notion was -- the big idea was that the company was testing for if people were interested in seeing health-related offerings, like a Fitbit or information about weight plans.

JUDGE BELL: So if I'm an individual member of UnitedHealthcare and I go onto the website, I will get this query as to whether I want to see offerings --

THE WITNESS: Yes, if you would -- I don't think it's there anymore; I think they sunsetted the program, but at the time, if you would have gone to their web page as a member, you would have selected "yes" or "no." And then based on that selection -- we didn't get to Phase 2 in order to make those offerings from my understanding. It was sunsetted before it was actually delivered.

Tr. 193-4. Gateway did not "w" to the financial reporting systems of Respondent.³⁴ In the view of Respondent's management, any errors in the operation of the Gateway program would have no impact on Respondent's reports of financial information.³⁵

In October 2012, Claimant says he told Blenkush that they should not be putting untested computer code into production on the Gateway project.³⁶ Blenkush denies having any conversation with Claimant on this topic.³⁷

On November 16, 2012, Claimant's supervisor became Scott Johnson.³⁸ Johnson performed an evaluation of Claimant on February 24, 2013. Johnson gave Complainant no scores lower than 3 out of 5, and rated him overall as "meets expectations."³⁹ Johnson's narrative comments at the end of the review are generally positive, and end with this sentence: "Mike -- thank you for your continued efforts in supporting your clients and bringing added value to your projects."⁴⁰ Claimant provided no comments of his own, which I interpret to mean that Claimant

³⁴ Tr. 198.

³⁵ *Id.* 402-3.

³⁶ *Id.* 523.

³⁷ *Id.* 225.

³⁸ Exhibit QQQ.

³⁹ Exhibit O.

⁴⁰ Exhibit O-6.

did not believe as of February 24, 2013: (1) that the “meets expectations” performance evaluation was retaliatory; or (2) that he was working in an environment hostile to him because he was a whistleblower; or (3) that he had raised to his supervisors a concern that Respondent was generating inaccurate information about the financial performance of the company (4) that Respondent was failing to account properly for its assets; or (5) that Claimant viewed himself to be a whistleblower.

Claimant’s involvement in the Gateway project ended in April, 2013.⁴¹

Johnson reviewed Claimant a few months later. By the time of Johnson’s July 28, 2013, evaluation,⁴² Johnson was documenting what he perceived to be a substantial decline in Claimant’s performance. Claimant’s overall score fell to 2 out of 5.⁴³ Johnson supplied copious notes documenting his views of Claimant’s performance over the preceding 5 months. Johnson summarizes his comments as follows:

The consensus of Payer Consulting leadership is that Mike is not meeting expectations in terms of client engagement. His interpersonal skills and inability to effectively interact with others as well as a misalignment between Mike’s behavior and the values set forth in Our United Culture indicate a substantial cultural deficit. As a result, Mike will be placed on a Corrective Action Plan to address these shortcomings. Please refer to the CAP for specific corrective actions and corresponding timeline.

Exhibit R-6.

John Beacham described the decline in Claimant’s performance using a metric which compared Claimant to the other Business Analysts working at Claimant’s same paygrade:

But he was 29th, in position 29 out of the 54, at the Common Review in 2011. At midyear, so essentially 6 months later, he was -- he went from 29th to 24th from the bottom. And by Common of 2012, he was 13th from the bottom. So he was progressively getting closer to the bottom.

Q. And then if you go down to the bottom, I see an entry “8/8/13”. Was this entry added later?

A. Yes, it was.

Q. Okay. And what is that entry telling us?

⁴¹ Tr. 203.

⁴² Exhibit R.

⁴³ Exhibit R-6.

A. It's indicating that at midyear of 2013 he was, out of a class of 55 grade level 28's, ranked at the number 1, at the lowest slot in the entire class of grade level 28's.

Tr. 849-50.

Scott Johnson was asked at the hearing about the comments he received from other managers as he began to prepare Claimant's July 28, 2013 performance evaluation:

Q. And what was the feedback that you received from Mr. Blenkush?

A. So Glen shared with me that Mike again was experiencing conflict with the team. He shared with me that the client -- so he shared some direct client feedback with me as well, specifically around Mike's inability to kind of relate with the client. He shared with me that Mike was a good kind-of-in-the-box BA but they really needed more of a utility-player-type BA on the project and so he wasn't really meeting those expectations.

But, more significantly, it was Glen's interaction with Mike around kind of the challenging of authority again, kind of like what happened on LaunchPad, where Mike would challenge Glen's authority. The team -- one example of this is the team was in a crunch time at the end of the delivery of the Gateway project. They were in user acceptance testing and production acceptance testing, and the team was scrambling just to try to get this project done. And Mike chose to focus on activities that weren't helping the project move forward. He was focusing on trying to get copies of the Statement of Work and things of that nature instead of focusing on trying to help the team to move the project across the finish line.

So it was the lack -- it was, you know, not being a team player; it was the conflict, challenging of authority. He refused to take notes, which is standard practice within a client meeting for a business analyst, a grade level 28. Mike flat out refused to take notes when Glen asked him to. So there were numerous examples of kind of that behavior and that lack of collaboration.

Q. Were you involved in the decision to remove Mr. LaQuey from the project?

A. It was really Glen's decision ultimately, and the client's, and they informed me that that would be taking place.

Q. And did Mr. Blenkush ever communicate to you that he -- that Mr. LaQuey had reported any legal concerns about the Gateway project?

A. No.

Q. And did Mr. LaQuey express any concerns to you about the Gateway project?

A. You know, Mr. LaQuey mentioned, not concerns from a legal standpoint, but more concerns about Glen and not getting along with Glen. And, you know, he definitely had a lot of conflict with Glen and went into that in great detail.

Q. And what sort of conflict did he describe?

A. Well, it goes back to the statement of work. I wasn't involved in the conversations, but, you know, Glen [sic] was making some pretty serious claims about Glen's mental state. He thought that Glen should be on medication. He was definitely not a proponent of Glen.

Q. So did Mr. LaQuey ever express to you that he felt the Gateway project was violating Sarbanes-Oxley, Dodd-Frank, the SEC, or any sort of related law?

A. No.

MR. LAQUEY: Objection: requires conclusion of law.

JUDGE BELL: Overruled, on that basis. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. All right. Could you turn to Exhibit T, please? And if you could go to the third page of that document after you've had a chance to look at it? Do you recognize this set of e-mails?

A. Yes.

Q. And was this when you were first informed that Mr. Blenkush didn't want Mr. LaQuey on the project?

A. No. Glen and I had a phone conversation prior to this where Glen was letting me know that Mike would be rolling off.

Q. Okay. If you go to the second page of this exhibit, T-02, Mr. Blenkush says that Mr. LaQuey is belligerent, disrespectful, demanding. Did you consider Mr. Blenkush's input in assessing Mr. LaQuey's performance?

A. I did.

Q. And why did you do that? Why did you trust Mr. Blenkush's input?

A. Well, Glen has been with Consulting for a number of years. He has a very good reputation, from both clients, from consulting leadership as a whole. I had no reason to believe that Glen was not telling the truth here or not sharing an accurate portrayal of the events.

Q. And could you turn to Exhibit EEEE? Four E's. Do you recognize this set of e-mails?

A. Yes.

Q. And why did you ask Mr. Blenkush for specific examples of growth opportunities in this instance?

A. So this would be part of what I described earlier in how we in Consulting assess feedback. So this would've just been an activity that I would've been performing to try to assess Mike's performance relative to the Gateway project. So whether it's phone conversations or e-mail, we try to document that performance.

Q. And how did you ultimately use this feedback from Mr. Blenkush?

A. This would've been used in performance reviews, corrective action plans. It would've been used in one-on-one conversations that Mike and I would've had, trying to share performance feedback and ultimately trying to make sure that he has the input that he needs to improve his performance.

Tr. 655-9.

Claimant supplied more than a page of comments on the July 28, 2013 performance evaluation.⁴⁴ Claimant noted his sharp disagreements with Johnson's evaluation. Claimant asserted that the review was "discriminatory"⁴⁵ and "retaliatory,"⁴⁶ but he provided no explanation or factual basis for those conclusions. He clearly does not say that he's being retaliated or discriminated against because of any protected activity in which he may have engaged. Claimant does not state that he had raised to his supervisors a concern that Respondent was generating inaccurate information about the financial performance of the company, or that Respondent was not accurately accounting for its assets or that Claimant viewed himself to be a whistleblower.

Claimant was issued a Corrective Action Form on August 8, 2013.⁴⁷ The Corrective Action Form⁴⁸ contains an extensive discussion of the performance shortcomings perceived by Johnson.⁴⁹ It also contains a lengthy series of corrective actions prescribed for Claimant with associated deadlines.⁵⁰ Claimant provided comments on the Corrective Action document.⁵¹ Claimant states that the CAP was "retaliatory,"⁵² but he does not explain why he holds that belief. Claimant does not state in his comments on the Corrective Action plan: (1) that he had raised to his supervisors a concern that Respondent was generating inaccurate information about the financial performance of the company; or (2) that Respondent was failing to account for its assets, or (3) that Claimant viewed himself to be a whistleblower. He does not say that he's being retaliated or discriminated against because of any protected activity in which he may have engaged.

Claimant appealed the corrective action through Respondent's internal dispute resolution process.⁵³ A further appeal was initiated by Claimant a few weeks later.⁵⁴ In the appeal filed on September 12, 2013,⁵⁵ Claimant gave the first detailed description of his claim of workplace retaliation. Nothing in Claimant's narrative suggests that he had ever raised concerns that Respondent had engaged in securities fraud, or was not generating accurate information about its financial performance, or that Respondent was not accurately accounting for assets held by the company, or that Claimant believed he was suffering retaliation because he was a whistleblower.⁵⁶

A Final Corrective Action was issued to Claimant by Johnson on October 1, 2013.⁵⁷ This document alleges that Claimant had not made sufficient progress on the goals established in the

⁴⁴ Exhibit R-7-8.

⁴⁵ Exhibit R-8.

⁴⁶ *Id.*

⁴⁷ The issuance of this Corrective Action Form marks the beginning of the process which ultimately ended in Claimant being fired on January 31, 2014.

⁴⁸ Exhibit V.

⁴⁹ Exhibit V-1-2.

⁵⁰ Exhibit V-2.

⁵¹ Exhibit V-5.

⁵² *Id.*

⁵³ Exhibit X.

⁵⁴ Exhibit Y.

⁵⁵ *Id.*

⁵⁶ Exhibit Y-2.

⁵⁷ Exhibit DD.

Corrective Action Plan of August 8, 2013 (“Mike’s inappropriate behavior has continued since his Elevated CAP”).⁵⁸ A series of tasks were again prescribed for Claimant, including a new item not contained in the August 8 CAP: “Get on a billable engagement within 30 days.”⁵⁹ Beacham testified that this requirement to “get billable” was not intended to doom Claimant’s employment:

BY MR. LAQUEY:

Q. Okay. So when I was on a CAP and you put me -- you gave me a requirement to get billable in 30 days, what’s the likelihood that I would get billable when you had this process of notifying clients?

A. We have consultants all the time that are on CAPs that get billable.

Q. Sure. I understand.

A. So –

Q. But I’m asking for a likelihood of someone –

A. It’s highly likely. It’s a corrective action plan. It’s not a destructive action plan. I mean, it serves no one to see people fail. The corrective action is to help people become successful. So we have folks that are on CAPs and have had folks on CAPs that do get on billable projects.

Q. Sure. I understand. But I’m talking about my situation. What was the likelihood of me finding a project that I could roll onto when I was on that CAP in January of 2014?

MS. JEZIERSKI: Objection. Calls for speculation.

JUDGE BELL: Were you giving Mr. LaQuey a requirement to get billable knowing that there was no way in the world he was going to get billable in January of 2014 and therefore you were setting him up to be able to terminate him?

THE WITNESS: No.

Tr. 816-7.

⁵⁸ Exhibit DD-2.

⁵⁹ *Id.*

A lengthy and detailed list of the efforts of Claimant's managers to work on performance improvement is contained in the Final CAP.⁶⁰ Claimant supplied comments to the Final CAP. Nothing in Claimant's comments suggests that he had raised concerns that Respondent was not generating accurate information about its financial performance, or that Respondent was not accurately accounting for assets held by the company, or that Claimant believed he was suffering retaliation because he was a whistleblower.⁶¹

Claimant's internal dispute resolution appeals were denied in two separate letters dated November 18, 2013.⁶² The letters denying the appeals generally conclude that the observations of Claimant's supervisors as to Claimant's performance shortcomings had been documented and supported. The denial letter in the record as Exhibit FF offers more detail as to Claimant's allegations of "retaliation" and "discrimination."⁶³ There is no discussion in these appeal decisions that Claimant had ever suggested that Claimant had raised concerns that Respondent was engaged in securities fraud, or was not generating accurate information about its financial performance, or that Respondent was not accurately accounting for assets held by the company, or that Claimant believed he was suffering retaliation because he was a whistleblower.

Beacham did not think Claimant had made a substantial effort to improve his performance:

Q. To your knowledge, did Mr. LaQuey take any steps to improve his performance after the final CAP?

A. No.

Q. Then he went out on a leave for a while after that. Is that right?

A. We delivered the final CAP on October 1st, and he went out on FMLA on or about the 10th. I want to say the 10th or the 15th. Something like -- something like that. So there was a period of time where he was gone, from middle of October to almost the 20th -- I think it was around the 20th of December.

Q. And then was he still on the CAP when he returned?

A. He was. We suspended the CAP while he was gone and then reinitiated the CAP when he came back and were clear about the actions that needed to occur.

Q. And did he meet the action items in the CAP?

⁶⁰ Exhibit DD-3-5.

⁶¹ Exhibit DD-7.

⁶² Exhibits CC and FF.

⁶³ Exhibit FF suggests that Claimant's "discrimination" claim was related to Johnson's denial of Claimant's request to work from home.

A. It didn't appear to me that Mike was taking the actions of the CAP seriously, particularly as it related to getting on a billable project, meeting with the appropriate people to help influence that, meaning account managers or anybody else that had ability to sell work to a client. We asked him to create a networking plan. Middle of January, it was clear to me that there was almost nothing done in that regard, and it didn't appear that much in the way of networking was being done. I can tell you by comparison to others that are in similar situations, they network extensively if they're in a turnaround situation.

Tr. 874-5.

Claimant's employment was terminated on January 31, 2014. A reason was given for his termination: "Unable to Meet Job Standards."⁶⁴ Scott Johnson recorded: "John Beacham and I met with Mike LaQuey and notified him that he has been terminated effective immediately. We collected his laptop and badge and walked him out of the building."⁶⁵

John Beacham testified succinctly as to the reasons for Claimant's termination:

Q. And what was the reason that Mr. LaQuey was terminated, ultimately?

A. It was related to inability to collaborate well, communicate well, and respect authority and leadership. He also, by the way, wasn't able to get on a billable role.

Q. He what?

A. He wasn't able to get on a billable role either, which was an aspect of the turnaround.

Tr. 875.

Claimant appealed his termination through the Respondent's internal dispute resolution process. In his post-termination appeal, dated February 18, 2014, Claimant makes the following statements:

I have entered employee comments to my Interim MAP review and previous Corrective Action Form(s). I have filed IDR's⁶⁶ regarding the MAP and CAFs. In those comments, IDR's, project conversations and notifications to managers I have identified

⁶⁴ Exhibit II.

⁶⁵ Exhibit TTT.

⁶⁶ Internal Dispute Resolution appeals.

compliance issues with Sarbanes-Oxley (SOX). The actions of the company leading up to my termination are a pretext for termination and retaliation. Therefore the termination is a violation of SOX.

Exhibit JJ. In the box where Claimant is asked to describe his proposed remedy, Claimant states:

Per SOX the remedies for retaliation are reinstatement, back pay, redaction of retaliatory actions and comments, and compensatory damages of \$1 Million (One million dollars).⁶⁷

So far as I can tell, this is the only time Claimant ever specifically referenced SOX in any of his internal appeals or comments on his performance evaluations. This sole reference to SOX came two weeks *after* Claimant was fired. Claimant met with a dispute resolution specialist from Respondent's Human Resources Department on March 20, 2014 to discuss his appeal.⁶⁸ During that meeting, Claimant apparently told the HR specialist that he had been terminated "in retaliation for confronting management around untested code being put into production."⁶⁹ Earlier in the conversation, Claimant had apparently described a

[c]onfrontation with Glen Blenkush, Associate Director, during the Gateway Project, wherein [Claimant] contended that technical code was put into a production environment without first undergoing user acceptance testing ('UAT').

Exhibit KK. Claimant's appeal was denied.

Despite Claimant's post-termination claims, the record does not support Claimant's assertion that he had ever "identified compliance issues with Sarbanes-Oxley" at any time during his employment with Respondent. During the hearing, I asked Claimant on a number of occasions to point me to any instance where he had raised any questions of securities fraud, financial reporting inaccuracies or SOX compliance. Despite my persistent prodding, Claimant was never able to identify any such evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant alleges that he was discharged from his employment in violation of the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. That statute provides:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section

⁶⁷ Exhibit JJ.

⁶⁸ Exhibit KK.

⁶⁹ *Id.*

15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348 [18 U.S.C. § 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 violation of section 1341, 1343, 1344, or 1348 [18 U.S.C. § 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.

Congress enacted SOX on July 30, 2002, as part of a comprehensive effort to combat corporate fraud. *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, slip op. at 8 (ARB May 25, 2011). Included in the Act were whistleblower protection provisions, which were intended to

respond to a “culture, supported by law, that discourage[d] employees from reporting fraudulent behavior not only to the proper authorities . . . but even internally.” S. Rep. No. 107-146, at 5 (2002). Section 806 of SOX extends these whistleblower protections to “employees of publicly traded companies.” 18 U.S.C. §1514A(a); 29 C.F.R. §1980. It prohibits covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information or otherwise assist their supervisors, Congress, or a federal agency in an investigation regarding conduct that the employee reasonably believes is a violation of 18 U.S.C. §§1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), 1348 (securities fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law related to fraud against shareholders. 18 U.S.C. §1514A; 29 C.F.R. §1980.100.

Respondent is one of the largest corporations in the United States, with revenue in 2016 in excess of \$153 billion.⁷⁰ The stock of UnitedHealth Group, Inc. is traded on the New York Stock Exchange under the ticker symbol “UNH”. Employer does not contest that it is a “company” within the meaning of SOX, 18 U.S.C. §1514A and 29 C.F.R. §1980.101(d). As an individual who formerly worked for Employer, Claimant is a covered employee under SOX. 29 C.F.R. §1980.101(g).

A SOX whistleblower claim employs a burden-shifting scheme. Claimant has the burden to prove by a preponderance of the evidence that: (1) he engaged in protected activity under the Act, (2) Respondent knew or suspected that the Claimant engaged in the protected activity, (3) Claimant suffered an adverse personnel action, and (4) the protected activity was a contributing factor in the adverse personnel action against Claimant. The burden then shifts to Respondent to prove by clear and convincing evidence that it would have taken the same adverse action even if Claimant had not engaged in the protected activity. *Beacom*, at pp. 379-80. Complainant’s case fails if he does not prove each of these elements by a preponderance of the evidence.

If Complainant proves the foregoing elements by a preponderance of the evidence, Respondent may still prevail if Respondent proves by clear and convincing evidence that its decision to terminate Complainant was the result of events or decisions independent of Complainant’s protected activity.

ASSESSING THE CLAIMANT’S CREDIBILITY

Claimant testified episodically throughout the hearing. I had an excellent opportunity to observe him and to listen carefully to his testimony as it was being presented. I asked many questions of Claimant while he was testifying so I could be certain I understood the evidence that was being presented to me. I had the opportunity to ask Claimant about the documentary evidence contained in the numerous exhibits admitted during the hearing.

Claimant is well-educated and very intelligent. He had significant IT experience before becoming involved the LaunchPad and Gateway projects, and it was believed by his management that he would succeed on those projects.

⁷⁰ Respondent’s *Post-Hearing Brief* at 25.

As discussed below, I believe Claimant developed a subjective belief that there were errors in the LaunchPad and Gateway programs that could impact financial reports generated by Respondent. I cannot determine when Claimant actually developed this belief. I conclude that Claimant's belief in this regard was mistaken – no evidence was presented at the hearing to show that any inaccuracies ever existed in any financial statement compiled or distributed by Respondent. There is absolutely no evidence anywhere in the record which even remotely suggests that Respondent committed any kind of fraud, or that Respondent violated any provision of SOX.

Claimant maintained extensive handwritten notes of his work activities. He also participated in electronic conversations (such as email) with his supervisors and co-workers. Respondent provided regular performance evaluations in which Claimant participated by performing his own performance evaluations, and by supplying extensive written comments on the performance evaluations prepared by his supervisors. I have had the opportunity to review all of those writings which were made a part of the record. There is no contemporaneous document in the record which corroborates Claimant's allegation that he engaged in activity protected by SOX at any time during his employment with Respondent. Given the volume of writings produced during Claimant's employment with Respondent, and given the extensive amount of process which attended his termination from employment with Respondent, it defies common sense that not a single mention would be made by him in a contemporaneous document if he believed he was then participating in whistleblowing-type activities. There is no evidence that he made any oral statement during his employment in which he raised concerns about securities fraud or financial irregularity.

I believe Claimant was purposefully evasive on many occasions when I asked him direct questions during the hearing. Some of my conversations with Claimant are quoted at length in this Decision and Order, and some of these transcript excerpts illustrate Claimant's evasions. I initially considered whether Claimant's inability to answer many of my questions in a straightforward manner was caused by the technical nature of the language being used to describe the work performed by Claimant, but those concerns faded as I became somewhat more familiar with the jargon being used. I also considered whether Claimant's persistent inability to point me to any documents corroborating his claims might have been due to Claimant's unfamiliarity with the evidence. However, the AAA whistleblower arbitration hearing involved many of the same witnesses and much of the same evidence. The AAA whistleblower arbitration case had been tried by Claimant for a week and extensively briefed in the summer of 2016. The trial of the AAA whistleblower arbitration case should have served as a "dry run" for the SOX case, and should have allowed Claimant to be fully conversant with the record by the time the SOX case was heard in February and March of 2017. After carefully reviewing all of the exhibits in the record, I have concluded that Claimant did not provide straightforward answers during the hearing because he was attempting to hide the substantial deficiencies of his proof.

By contrast, Respondent has numerous documents in the record supporting the arguments it makes in this case. In those circumstances where there is a direct conflict between Claimant's version of events and that offered by Respondent, I have generally sided with Respondent's well-documented presentation. This is particularly true of the evidence surrounding Respondent's decision to terminate Claimant from his employment. Respondent maintained meticulous records

of its decision making, which I deem to be far more reliable than the uncorroborated claims made by Claimant.

I am unable to credit much of Claimant's testimony. After considering all of the evidence, Claimant's claims do not hold together. A person of Claimant's education and work background who truly believed his employer was about to commit securities fraud would not fail to raise those concerns loudly, clearly and repeatedly with his supervisors. Ultimately, there is no unambiguous evidence in the record by which Claimant has proven by a preponderance of the evidence that he raised such concerns.

APPLICABLE STANDARDS – ADVERSE EMPLOYMENT ACTION

In *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB adopted the "materially adverse" deterrence standard of *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The majority for the ARB wrote: "*Burlington Northern* held that for the employer action to be deemed 'materially adverse,' it must be such that it 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" The majority further stated that the purpose of the employee protections that the Labor Department administers "is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or securities concern effectively promotes the purpose of the anti-retaliation statutes." *Melton*, slip op. at 20. Moreover, the majority believed that both ARB and federal case law demonstrated that the terms "tangible consequences" and "materially adverse" are "used interchangeably to describe the level of severity an employer's action must reach before it is actionable adverse employment action. *Id.* The majority summarized:

The Board has consistently recognized that not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action....Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment. Therefore, the fact that the *Burlington Northern* test is phrased in terms of "materially adverse" rather than "tangible consequence," or "significant change," or "materially disadvantaged," or the like, is of no consequence. Applying this test would not deviate from past precedent.

Id. at 23.

Consequently, the finding of an adverse action in an AIR-21 statute will be based on the standards set forth in *Burlington Northern. Hirst v. Southeast Airlines, Inc.*, ARB No. 04-116, 04-160, ALJ No. 2003-AIR-0004, slip op. at 7 (ARB January 31, 2007). Suspensions and transfers have been found to constitute an adverse employment action under the *Burlington Northern* standard. See, e.g., *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021 slip op. at 6-7 (ARB December 30, 2004). The ARB has held that a warning letter issued to an employee does

not constitute adverse action. *Simpson v. United Parcel Service*, ARB No. 06-065 (ARB: Mar. 14, 2008).

The parties have stipulated that Claimant was discharged from his employment on January 31, 2014, and that he has thus suffered an adverse employment action.

APPLICABLE STANDARDS -- PROTECTED ACTIVITY

Under 18 U.S.C. §1514A(a)(1), protected activity is defined as:

any lawful act done by the employee – (1) to provide information . . . regarding any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C. §§] 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to . . . a person with supervisory authority over the employee. . . .

“Sarbanes-Oxley prohibits a publicly traded company from discharging an employee in retaliation for providing information to a supervisor . . . about ‘any conduct which the employee reasonably believes constitutes a violation’” of the types listed in Section 806 of SOX. *Beacom*, 825 F.3d at 379.

Claimant asserts that he had subjectively- and objectively-reasonable belief that Respondent was violating SOX. The ARB has explained the “belief” standards as follows:

The SOX's plain language provides the proper standard for establishing protected activity. To sustain a complaint of having engaged in SOX-protected activity, where the complainant's asserted protected conduct involves providing information to one's employer, the complainant need only show that he or she "reasonably believes" that the conduct complained of constitutes a violation of the laws listed at Section 1514. 18 U.S.C.A. § 1514A(a)(1). The Act does not define "reasonable belief," but the legislative history establishes Congress's intention in adopting this standard. Senate Report 107-146, which accompanied the adoption of Section 806, provides that "a reasonableness test is also provided . . . which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts (*See generally, Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478)." S. Rep. 107-146 at 19 (May 6, 2002).

Both before and since Congress enacted the SOX, the ARB [*32] has interpreted the concept of "reasonable belief" to

require a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and also that the belief is objectively reasonable, "i.e. he must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the employee's] circumstances having his training and experience." *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 28 (ARB July 14, 2000); see also, *Brown v. Wilson Trucking Corp.*, ARB No. 96-164, ALJ No. 1994-STA-054, slip op. at 2 (ARB Oct. 25, 1996)(citing *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 82 (2d Cir. 1994)).

To satisfy the subjective component of the "reasonable belief" test, the employee must actually have believed that the conduct he complained of constituted a violation of relevant law. *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009). "[T]he legislative history of Sarbanes-Oxley makes clear that its protections were 'intended to include all good faith and reasonable reporting [*33] of fraud, and there should be no presumption that reporting is otherwise.'" *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1002 (9th Cir. 2009)(citing 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002)). "Subjective reasonableness requires that the employee 'actually believed the conduct complained of constituted a violation of pertinent law.'" *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10 (quoting *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008)). In this regard, "the plaintiff's particular educational background and sophistication [is] relevant." *Id.*

The second element of the "reasonable belief" standard, the objective component, "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp*, 558 F.3d at 723. "The 'objective reasonableness' standard applicable in SOX whistleblower claims is similar to the 'objective reasonableness' standard applicable to Title VII retaliation claims." *Allen v. Admin. Rev. Board*, 514 F.3d 468, 477 (5th Cir. 2008) [*34] (citing *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007)). Accordingly, in *Parexel Int'l Corp. v. Feliciano*, 2008 WL 5467609 (E.D. Pa. 2008), the court found the complainant's reliance upon the employer's representations reasonable in light of the complainant's limited education, noting that had the complainant been, for example, a legal expert, a higher standard might be appropriate. See also *Sequeira v. KB Home*, 2009 WL 6567043, at 10 (S.D. Tx. 2009) ("The statute does not require, as Defendants suggest, that the whistleblower have a specific expertise.").

Sylvester v. Parexel, Inc., slip opinion at 14-15 (ARB May 25, 2011). SOX thus “requires the employee to hold a reasonable belief that the employer’s conduct amounts to fraud against shareholders, and the employee’s belief must be objectively reasonable.” *Beacom* at 380; *Sylvester* at 14. A reasonable but mistaken belief that respondent’s conduct constitutes a violation of the applicable law can constitute protected activity. *Van Asdale v. Int’l Game Tech.*, 557 F.3d 989, 1002 (9th Cir. 2009); *Sylvester* at 16.

CLAIMANT HAS PROVEN BY A PREPONDERANCE OF EVIDENCE THAT HE SUBJECTIVELY BELIEVED THERE WERE PROBLEMS WITH THE LAUNCHPAD AND GATEWAY PROJECTS THAT MIGHT AFFECT RESPONDENT’S FINANCIAL STATEMENTS.

Claimant has the burden to prove by a preponderance of the evidence that he engaged in one or more activities protected by SOX. During the course of the hearing, I occasionally provided Claimant with my view that I was not seeing proof of such protected activity. A typical example of such a colloquy is this:

JUDGE BELL: Okay, I hear what you’re saying. I have to be -- you know, I want to make myself clear for the twentieth time. I am still looking for a document somewhere or a description of a conversation in which you said to a supervisor or to someone involved in taking disciplinary action against you that you were concerned that ultimately, the financial information being released by the company to shareholders of the investing public is not accurate. And I want you to continue with your narrative, but I -- please, if somewhere in these thousands of pages of documents, there is anything that talks about shareholders or the accuracy of financial information or 10-Qs or 10-Ks or consolidated financial reports or anything like that, please let’s start talking about it.

MR. LAQUEY: Well, I have identified where these projects involved financial reporting.

JUDGE BELL: So I’m not sold. I mean, so far, I’m not sold that you have tied together that what you were doing had any impact or any potential to impact the financial reports of the company. So, again, I just -- I feel I’m being fair by identifying for you that I’m not seeing that evidence. So if it’s in here or if it’s something that you could point me to, I want you to get there, please.

I think what these conversations are about is developing software, developing programs, executable programs, which can be used by people to obtain information from a data base or a group of data bases maintained by the company; and they are accessing that information for purposes of making business decisions about how to maximize the revenue and decrease the expenses or whatever -- whatever competent managers at any company do to try to manage

the operations of the entity and to try to position it to be more profitable in the future. That's in my experience -- and if my experience in this case is contradicted, I want you to contradict me -- but my experience in these kinds of cases is that the business people who are making the kinds of decisions reliant upon what you're doing, your computer programs, applications, processes -- the business people who are making those decisions are a very different group of people from those who are responsible for the financial reporting of the company, which is required by the Securities and Exchange Act. And that -- again, this is my experience, and if my experience is wrong, please give me the evidence, but the people who are reporting financial performance to shareholders, I don't believe would be using your programs and processes, because that's not what they are doing. They are not running the business on a day-to-day basis. They are dealing with a mountain of compliance issues for generating the financial reports of the company. And although there has to be an intersection at some point between the financial information at a very high level for the company, I don't think that the people either in-house or out-house, who are ultimately responsible for pressing the button and releasing the 10-Q to the Securities and Exchange Commission, I don't think they are running the Gateway project or the Gateway program. And if I'm wrong about that, I want you to tell me I'm wrong about that. But if I'm not wrong about that, I am having trouble understanding however flawed the Gateway system was, I am having trouble understanding how those flaws ultimately result in inaccurate information going to shareholders, the investing public, others interested in the financial performance of that company.

And, again, you know, I don't want to say you've got to prove Enron, you don't have to prove Tyco. What I do want to say is that the whistleblower protection provisions of the Sarbanes-Oxley Act come out of such incidents such as Tyco and Enron and other situations where investors were intentionally misled about the performance of the company; and where the thought of Congress, in enacting the Sarbanes-Oxley Act was, we want to make sure that people are empowered to loudly and persistently yell from the roof top that there is something going on here, which is going to cause Jane and Joe in Keokuk, Iowa, to invest their life savings in Enron and watch it disappear, when it turns out that that company was involved in the manufacture of various colors of smoke and nothing else.

And I -- so we -- you need to help me understand whether you think the financial reporting people are using the Gateway

program, and whether you think -- whether you have a reasonable belief that the people -- I don't know about UnitedHealthcare. A lot of large companies, you know, they have a whole separate website for investors and those interested in becoming investors of the company. To me, the fact that they have separated those websites is sometimes a good indication that the people who are responsible for investor relations and giving shareholder information are a very different group of people from those who are deciding what we want to charge for the lipid panel that we talked about before the break, or, you know, how much would you want to pay for pencils in the accounting department.

So if there's a way for you to help me understand how even the most flawed, messed up Gateway program did or could have lead investors to draw inaccurate conclusions about the performance of this company, this is your opportunity.

MR. LAQUEY: Okay, so if you -- I believe the process at the highest level is that Mr. Hemsley signs off on the audit of the financial reporting and, therefore, he's ultimately responsible as the CEO.

MS. JEZIERSKI: Your Honor, I'd move to strike based on speculation.

JUDGE BELL: Well, I've asked him to puncture my preconceived notion. The weight of the evidence will be considered by me, but I have invited him to give me his view of this, so I'm going to let him give me his view.

MR. LAQUEY: So I believe that financial audit report that he signs off on comes from what's called the "audit committee." And those numbers come from various executives of like the business segments, and financial people, like CFOs. And then the next layer is you have presidents and vice-presidents that are reporting how their organizations performed financially. And so, eventually -- like you said, this is a huge company. At the time I worked there, there was 110,000 employees. I believe we had just crossed the \$100 billion mark, and had crossed into Fortune 20, beating out Wells Fargo and Target at that -- in that time period.

JUDGE BELL: But -- pardon my interruption, but Gateway is not generating financial reports, correct?

MR. LAQUEY: Well, I'm trying to get at the level of financial reports.

JUDGE BELL: Can you answer that question though? Gateway is not generating a financial report?

MR. LAQUEY: If you're talking about the sign-off for the 10-K and the audit committee and that level of -- no, it is not generating those.

JUDGE BELL: Gateway is not telling someone in the chain of command how profitable or not profitable any particular aspect of the company's business has been over the preceding month, week, calendar, quarter, for a year, correct?

MR. LAQUEY: No, I would say yes, because, for example, these intersegment reports I talked about in LaunchPad, they are sending over financial reports from Optum Health providing services that UnitedHealthcare is billing for. So it's telling UnitedHealthcare how much cost they are incurring; and they know how much claim money they are getting and how much money is revenue from member payments of their premiums.

Tr. 314-20. I continued to inquire of Claimant whether he had subjective beliefs that the work he was doing on the Gateway and LaunchPad programs might affect Respondent's financial reporting. I again quote at length from Claimant's testimony (1) to illustrate what Claimant subjectively believed to be the issues involving the LaunchPad and Gateway projects, and (2) to illustrate what Claimant believed to have been his dissemination to his supervisors of his concerns:

JUDGE BELL: Right, but I think the testimony has established that neither LaunchPad nor Gateway are financial reporting programs. That's not what they're designed to do. They are not designed to report to the business side of the operation what the activity -- what the business activities are. Am I misunderstood that?

MR. LAQUEY: Yeah. I'm sorry. Maybe I didn't explain that clearly. The LaunchPad project made reports about assets and --

JUDGE BELL: What assets? I've asked you this three times now.

MR. LAQUEY: Oh. Yeah.

JUDGE BELL: What assets?

MR. LAQUEY: Well, for example, the assets of the performance of the nurse line, which also generated revenue, because they provided a service.

JUDGE BELL: Okay. Well, okay.

MR. LAQUEY: They provided a service; for example, the nurse line. Then that asset performed, did some performance.

JUDGE BELL: Okay. So I --

MR. LAQUEY: Then they billed -- if I may, please, Your Honor? They billed, intersegment, a charge, a transaction for that service that OptumHealth was providing.

JUDGE BELL: Okay.

MR. LAQUEY: And that's what that reported on. LaunchPad reported that.

JUDGE BELL: To whom?

MR. LAQUEY: To the requester in the segment that wanted that, needed that information, that financial transaction information.

JUDGE BELL: And do you have any reason to believe that whoever it is at UnitedHealthcare who is producing the 10-Qs and the 10-Ks and other documents required by the Securities and Exchange Commission used LaunchPad to get financial information? Do you have any reason to believe that?

MR. LAQUEY: The audit committee or Mr. Hemsley? No. But that's -- like we said, this is -- or we realize this is a huge company. And I had an understanding that these type of numbers rolled up, because I worked on PGFA and UCRT and I was told specifically that these numbers roll up to Hemsley. So --

JUDGE BELL: That the CFO or -- is sitting there making queries about the participation or the time charges of the nurses?

MR. LAQUEY: No, the service. The service, Your Honor. They're providing -- OptumHealth is providing a service called the nurse line, okay? I'm talking about two different things.

JUDGE BELL: This, to me, is like saying that the CFO is interested in how many paperclips were in your desk drawer. Because those are assets too, okay?

MR. LAQUEY: Um-hum.

JUDGE BELL: The paperclips in your desk drawer are assets of UnitedHealthcare.

MR. LAQUEY: Right, but they don't perform a financial transaction. The billing of the service -- nurse line is just an example. The billing of that service provided by OptumHealth is a financial transaction. The money that goes --

JUDGE BELL: And are you saying that because of the errors in the system, the actual performance of the nurse line -- the financial performance of the nurse line was \$3 and that it was reported somewhere in the financial system as being \$3 billion? Is that what we're saying?

MR. LAQUEY: There actually was a potential. I don't know that for sure. I --

JUDGE BELL: You think that potential existed.

MR. LAQUEY: Yes.

JUDGE BELL: You have a reasonable belief that that potential existed.

MR. LAQUEY: Yes, from my experience and skill.

JUDGE BELL: So, Mr. LaQuey, if you believed that that potential existed, show me what you did to bring that incredibly serious concern to the attention of those above you in the chain of command.

MR. LAQUEY: I produced evidence yesterday --

JUDGE BELL: Show me.

MR. LAQUEY: Okay. It was my handwritten notes. And I don't -- let me see. I think I have them.

JUDGE BELL: The handwritten notes we looked at yesterday?

MR. LAQUEY: Yes.

JUDGE BELL: Okay. Those do not indicate that you went to anyone in the chain of command and said "We have a serious problem." There's nothing in those notes that says "I had a reasonable, good-faith belief that if we continue to use this LaunchPad program that someone 37 layers of management above me who is sitting down to write the 10-Q for a company that has \$46 billion in profits in a quarter is" -- "there's going to be a discrepancy in what we report to the investing community." This is the *Beacom* case, translated.

MR. LAQUEY: Right. And I interjected at the first day that Mr. Beacom was somebody that should have known that what he reported was irrelevant, because of his high level of vice president and --

JUDGE BELL: But, Mr. LaQuey, if you thought it was relevant, I would expect to see someone of your education, experience, and station in the company to have been standing on your desk, screaming down the hall, "We have a serious problem." And I don't see it.

MR. LAQUEY: I -- as I explained, I identified that they weren't using enough process. He knew or should've known that I was working on in the reporting group and that --

JUDGE BELL: Are you talking about Mr. Bornholdt?

MR. LAQUEY: Yes.

JUDGE BELL: Okay. Well, Mr. Bornholdt has already testified. And if you were trying to convey to Mr. Bornholdt the message that there was a serious problem with the quality of information getting to the shareholders and the investing public, Mr. Bornholdt didn't understand it.

MR. LAQUEY: That's today. I don't know that he understood what I was telling him. That wasn't --

JUDGE BELL: Well, so how do you prove element two of the four-part test? If he didn't understand it -- it's your burden to prove that he did or that somebody did.

MR. LAQUEY: I explained it to him. He should've --

JUDGE BELL: You explained to him that there was a potential for a massive fraud of Enron- or Tyco-type proportion against the investors of this company?

MR. LAQUEY: I explained to him that they weren't using the correct processes, they weren't using the enough testing and they weren't using the processes correctly, and that meant that these transactions were -- had a potential of being misreported. And therefore they had that. And he was required to know that those processes were required to be implemented, and that is by this law that -- that app policy is an implementation of maintaining financial accounting. That was my experience at the company, Your Honor.

JUDGE BELL: Well, okay. Well, but there's no document created during any time that you worked for the company that would indicate to me that you believed there was the potential for a violation of the Sarbanes-Oxley Act, Dodd-Frank, the Securities and Exchange Act, any regulation of the SEC, wire fraud, mail fraud. I don't see it.

MR. LAQUEY: Well, in the -- I believe when the Respondent asked me about Woodrum's review of me, it said there were issues with quality assurance. And so I became well aware of that. And William D. Davis explained that if we don't follow these policies that Hemsley could go to jail. So my experience was maintenance of these systems that do asset management or report financial transactions roll up to Hemsley. You know, I don't think it matters that a hundred thousand people don't have the same experience. I reported it to an agent.

JUDGE BELL: But what does matter is element two of the four-part test. You not only have to have your own subjective and objective beliefs about what's happening and you not only have to report those, but the person to whom you report them has to apprehend that you are acting as a whistleblower. And I'm -- I don't see anything in any of the documents or in any of the testimony that I've heard so far, so I am looking for you to again help me --

MR. LAQUEY: Sure.

JUDGE BELL: -- understand who above you in the chain of command you believe heard what you were saying and drew the

conclusion from what you were saying that the company was at risk of providing inaccurate financial information.

MR. LAQUEY: I believe that Bornholdt understood that, or should have. And I don't think I'm required to beat him over the head with "Are you sure you're getting this, Jason?" because -- especially since they were hostile and retaliated against me. They discouraged me from reporting this information. I wasn't able to -- I was in fear of --

JUDGE BELL: Okay. So I've looked at your comments to the performance evaluations that you've gotten and the corrective action plans that you've gotten. I just don't see that story being told.

MR. LAQUEY: Maybe it'll become clearer in my brief.

Tr. 543 – 549.

After carefully reviewing all of the evidence, I find that Claimant did have a subjective belief that the Gateway and LaunchPad programs contained process errors, and that Claimant subjectively believed at the time he told his supervisors that there "was not enough process" that process errors might lead to mistakes being made in Respondent's financial reports or reporting of assets. I find that Claimant subjectively believed that his supervisors refused to use the HP Quality Center because they were uninterested in making certain that Respondent's financial and asset reports were accurate. I find that Claimant subjectively believed that he was reporting possible financial reporting problems when he told his supervisors that "not enough process" was being used.

Claimant is not a lawyer. He is not an accountant. Claimant did not prove by a preponderance of evidence that he was even aware in 2011 that SOX existed. He did not prove that in 2011 he was aware of any federal statute which would have prohibited or punished Respondent's publication of inaccurate or false financial information. I believe the whistleblower protection provision of SOX should be read generously to encourage one without a sophisticated knowledge of the law or accounting to report what he believes in good faith to be conduct which may result in the dissemination of inaccurate financial information. Taking into account Claimant's sophistication and education, and on the specific facts of this case, I find that Claimant had a reasonable subjective belief that the lack of "process" in the programs he helped to write might lead to inaccurate financial information being released to Respondent's shareholders or to the investing public. I find he has satisfied the subjective component of the "reasonable belief" test.

CLAIMANT HAS FAILED TO PROVE BY A PREPONDERANCE OF EVIDENCE THAT HE HELD AN OBJECTIVELY REASONABLE BELIEF THAT ANY PROCESS ERRORS IN THE GATEWAY OR LAUNCHPAD PROGRAMS AFFECTED THE ACCURACY OF RESPONDENT'S FINANCIAL REPORTS

I have found that Claimant satisfied the first element of the “reasonable belief” standard. I turn now to a discussion of the second element of that same test.

When assessing whether it was objectively reasonable for Claimant to believe that the “lack of process” in the Gateway and LaunchPad programs might cause or allow for violations of law to occur, I must evaluate what a reasonable person of the Claimant’s training and experience would believe when encountering the same factual circumstances. I am also mindful of the analysis performed by the Eight Circuit in *Beacom v. Oracle Am., Inc*, 825 F.3d 376 (8th Cir. 2016), which rolls into the test of “objective reasonableness” a further requirement that a SOX claimant also know that he is reporting to his supervisors something more than a “minor[financial] discrepancy.”⁷¹ During the hearing, I occasionally referred to this test in the *Beacom* decision as one of “materiality.” I attempted to probe Claimant concerning objective reasonableness while he was testifying:

JUDGE BELL: Okay. Assuming that it is, assuming that you figured out what no one else figured out, which is that errors in the execution of this program may have a material impact -- or may have any impact, doesn't even have to be material -- may have any impact on the information being provided to the -- I don't know how many shareholders there are of UnitedHealthcare -- there are a lot -- that those people were at risk of being defrauded --

MR. LAQUEY: Yes. And --

JUDGE BELL: -- and that the investing public was at risk of being defrauded --

MR. LAQUEY: Yes. And here --

JUDGE BELL: -- had you come to that conclusion, I would expect to see some contemporaneous document saying that you had come to that conclusion. And I don't see it.

Help me.

MR. LAQUEY: I produced the UDP document that was the authorization for or the operational authorization to put in that WESB and UPM code, and the last line said “Loss of revenue”. And Laura Crandon conveyed in meetings that she wanted to have

⁷¹ *Beacom*, 825 F.3d at 381.

the revenue-generating part up by June. And I was in her -- she considered me a staff member. So I went to her staff meetings. I was one of the attendees.

JUDGE BELL: And did you ever say to her, "Ms. Crandon, we got a serious problem here"?

MR. LAQUEY: No. I believe what I --

JUDGE BELL: No.

MR. LAQUEY: No. Not to Crandon. No.

JUDGE BELL: Well, if you have in your mind that this is a freight train about to drive off the bridge, that we are now involved in the first steps of a scandal, why didn't you communicate that to anybody?

MR. LAQUEY: I thought --

JUDGE BELL: I have to understand this.

MR. LAQUEY: Right. Based on my reasonableness, objective and subjective, my identifying the problems with putting code into production without testing was my way of explaining that. Because they -- "they" meaning Crandon and Bornholdt -- Bornholdt is an agent, a director, and he was also the program manger -- knew that this was intended to generate revenue. From attending Laura's meetings, I knew that the purpose of this was because M&R -- Medicare is such a low-margin business that they were trying to establish nonregulated income, because of the highly regulated business of Medicare. That was the whole purpose.

So the terminology of "pilot," they're trying to establish that now as fact, which may be true after I was there. It was not called a pilot there. It was a revenue-generating --

JUDGE BELL: No, it wasn't. Phase 1 was not revenue-generating.

MR. LAQUEY: It was maintaining assets. They didn't maintain the assets.

JUDGE BELL: But it wasn't generating revenue.

MR. LAQUEY: It was on -- it was in progress, the whole project of generating revenue.

JUDGE BELL: During the time that you worked on Gateway, would you agree with me that it never generated one nickel of revenue?

MR. LAQUEY: That's my understanding --

JUDGE BELL: Okay.

MR. LAQUEY: -- but it generated assets. So they needed to, according to the law --

JUDGE BELL: Well, it generated what you're calling assets.

MR. LAQUEY: Yeah. Intellectual property assets. Customer list. Highly valuable.

JUDGE BELL: No. Not a customer list. You're working off a customer list. You already have the customer list. You are querying the customer list. So what you're getting is a list of a subset of the customer base who want to buy a Fitbit. And what I'm suggesting is, given the size of UnitedHealthcare, the value of that asset -- that is, the customer list of those persons whose identity is already known to you who then, in addition, want to buy a Fitbit -- is miniscule.

MR. LAQUEY: Your Honor, there were reports involved with Phase 1 that would query and list the members that opted in. That's --

JUDGE BELL: Opted. So --

MR. LAQUEY: Yes. So that's an asset. That list of people that opted in is an asset.

JUDGE BELL: Okay. I understand this, Mr. LaQuey. What I just said to you though is the value of that asset is miniscule. It's --

MR. LAQUEY: I can't agree or deny.

Tr. 557-560.

I have quoted Claimant's testimony at length because I believe it illustrates the speculative nature of Claimant's objective belief that Respondent would be violating any law by

putting the LaunchPad or Gateway programs into operation. Claimant has not proven by a preponderance of evidence that either the Gateway or LaunchPad programs were ever actually used by Respondent for any purpose.⁷² More specifically, Claimant has failed to prove that those in accounting or financial reporting functions at Respondent ever actually used these programs when they were doing their work, and it consequently has not been proven that any “process errors” in these programs actually caused errors in financial reports. The evidence at the hearing leads me to conclude that neither the Gateway⁷³ nor the LaunchPad⁷⁴ programs performed any financial reporting processes. Claimant has not convinced me that there would be any financial consequences if these programs were actually used by Respondent. I am not convinced that Respondent’s revenues would rise or fall by even a penny if LaunchPad or Gateway was put into operation. I am not convinced that the value of Respondent’s assets were increased or decreased by virtue of these programs.

Claimant has the burden to demonstrate that he held an objectively reasonable belief that the conduct of Respondent amounted to fraud, or that Respondent was actually violating one of the predicate federal criminal statutes referenced in SOX (18 U.S.C. §§ 1341, 1343, 1344, or 1348), or that Respondent had violated any rule or regulation of the Securities and Exchange Commission, or that Respondent had run afoul of any provision of federal law relating to fraud against shareholders. I have carefully reviewed Claimant’s *Post-Hearing Brief*, and can find no place where Claimant ever argues that he actually believed Respondent was engaging in fraudulent or other improper conduct activity with regard to financial information being reported to UnitedHealth shareholders or to the investing public. During the hearing, Claimant admitted that he knew of no inaccurate information ever submitted to the Securities and Exchange Commission by Respondent.⁷⁵ Claimant’s assertion that Respondent might have provided inaccurate information about its finances is entirely speculative, and assumes a number of facts that were not proven by Claimant (such as proof that anyone ever even used the LaunchPad or Gateway programs). Claimant has not satisfied his burden to prove that his beliefs were objectively reasonable.

Under the *Beacom* test, Claimant has the burden to prove that any “process errors” in the LaunchPad or Gateway programs caused financial reporting errors amounting to more than a “minor[financial] discrepancy.” The plaintiff in the *Beacom* case reported a financial issue having a value of approximately \$10 million.⁷⁶ The Eighth Circuit determined that a possible \$10 million issue was a “minor discrepancy” when looking at “a company [Oracle] that annually generates billions of dollars” in revenue.⁷⁷ According to public reports, in 2014 (the year of Claimant’s termination), Oracle had net revenue in excess of \$38 billion, while United Healthcare had net revenue in excess of \$130 billion. Under the *Beacom* test, Claimant would be required to prove the existence of a financial issue having a value well in excess of \$10 million in order to be covered by SOX’ whistleblower protection provisions. Claimant has not offered any evidence that would allow me to estimate the value that could be ascribed to the “process

⁷² There is evidence that further work on these programs was eventually suspended. Tr. 134.

⁷³ Tr. 198.

⁷⁴ *Id.* 297.

⁷⁵ *Id.* 283.

⁷⁶ *Beacom*, 825 F.3d at 381.

⁷⁷ *Id.*

errors” he identified. I thus cannot determine that those process errors amount even to the level of a “minor discrepancy.”

Claimant certainly did not prove that Respondent violated any federal securities law or regulation. He did not prove that Respondent committed fraud of the type recognized in the whistleblower protection provisions of SOX. Nor did Claimant even prove that the LaunchPad or Gateway programs were put into operation, or that anyone ever used the LaunchPad or Gateway programs to evaluate or report the financial performance of Respondent. He failed to prove that any inaccurate financial information created by operation of the LaunchPad or Gateway programs was actually disseminated to anyone inside or outside of the company. He failed to prove that those employed by Respondent to report about the company’s finances actually used either the LaunchPad or Gateway programs, or that they actually used any data created by others’ use of the LaunchPad or Gateway programs.

Through my extensive questioning of Claimant at the hearing, and by also providing Claimant with ample opportunities to explain his proof, I believe Claimant was given more than sufficient opportunity to produce evidence showing that his concern about the lack of “process” in the Gateway and LaunchPad programs actually caused inaccurate financial information to be generated. After reviewing all of the evidence, I conclude that Claimant has failed to prove the actual existence of any financial reporting error.

CLAIMANT FAILED TO PROVE BY A PREPONDERANCE OF EVIDENCE THAT THOSE WHO WERE RESPONSIBLE FOR HIS TERMINATION KNEW OR SUSPECTED THAT CLAIMANT HAD ENGAGED IN PROTECTED ACTIVITY

Alternatively, I find that Claimant has failed to prove the second element of his claim: that his supervisors or the persons who made the decision to terminate Claimant’s employment knew or suspected that Claimant had engaged in protected activity.

The persons involved in making the decision to terminate Claimant’s employment were John Beacham and Scott Johnson. Both testified at the hearing, and I believe both to be credible witnesses. Beacham maintained very detailed contemporaneous notes of his interactions with Claimant, and Beacham’s notes (Exhibit PPP) corroborate Beacham’s testimony. Beacham did not understand that Claimant had ever complained about any activity protected by Beacham testified:

Q. And what are you describing here [on page 11 of Exhibit PPP], generally?

A. Well, at the top of the page there is discussion around -- he brought up discrimination. And I asked him, ‘What is that about? Why have you’ – ‘Why do you feel discriminated against?’ And that’s when he brought up that he had an accommodation, and to which Scott and I said, ‘What accommodation? Accommodation for what?’ And that’s where he shared he had these various

medical conditions here -- I've listed several of them in my handwritten notes -- to which Scott and I had no knowledge of, prior knowledge of. Scott did share that there was no accommodation for any illness on file. There was some dialog back and forth about that.

Q. It says also 'retaliation'. Did you ask him to explain what he meant by that?

A. He was talking about the CAP as a consequence of the conflict on Gateway. It was my understanding and interpretation that he felt that the CAP came as a direct result of the conflict on Gateway.

Q. Did he ever explain the basis for his -- him thinking he was retaliated against?

A. Not any further than what I've just showed.

Q. Okay. Did he at any time during this meeting mention or suggest that illegal activity was taking place on either Gateway or the LaunchPad projects?

A. No.

Tr. 859-60.

Scott Johnson testified at the hearing. Johnson's testimony was corroborated by the performance evaluations and Corrective Action documents created largely by Johnson during Claimant's employment. Johnson denied that Claimant ever told him that Respondent was violating SOX:

Q. During any of your conversations with Mr. LaQuey about LaunchPad, did he ever express that he felt the project was violating some sort of law, whether state or federal, any sort of law?

MR. LAQUEY: Objection.

JUDGE BELL: Are you done with your question?

MR. ROBB: Yes.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. Did he ever say that he felt that the LaunchPad project or UnitedHealth was committing a securities violation?

A. No.

Q. Did he ever use the words “securities violation” in any of your conversations?

A. No.

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. Did he ever tell you that he felt that UnitedHealth or the LaunchPad project was committing some sort of fraud?

A. No.

Q. Did he ever use the words “fraud”?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. Did he ever communicate to you that he felt UnitedHealth or the LaunchPad project was violating SEC rules?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. Did he ever use the word “SEC”?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. Did he ever say that he felt the LaunchPad project or UnitedHealth was committing a fraud against shareholders?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled.

THE WITNESS: No.

BY MR. ROBB:

Q. Do you remember him using the word “shareholder”?

A. No.

Q. Did he ever use the words “Sarbanes-Oxley” in any conversation with you?

MR. LAQUEY: Objection.

JUDGE BELL: Overruled.

THE WITNESS: No.

BY MR. ROBB:

Q. How about “Dodd-Frank”?

A. No.

Q. How about “Securities Exchange Act”?

MR. LAQUEY: Objection: conclusion of the law.

JUDGE BELL: Overruled.

THE WITNESS: No.

BY MR. ROBB:

Q. At any time when Mr. LaQuey was working on that LaunchPad project, did you at any time consider him to have engaged in protected activity?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: No.

BY MR. ROBB:

Q. At any time while Mr. LaQuey was working on LaunchPad did you understand him to have blown the whistle?

MR. LAQUEY: Objection: conclusion of law.

JUDGE BELL: Do you know what that means?

Did he bring to your attention or, to your knowledge, did he bring to the attention of others, any claim that the company was violating any kind of law?

THE WITNESS: No. Not at all.

Tr. 650-53.

Claimant's own testimony did not contradict the credible testimony of Beacham and Johnson. Nor did Claimant get any other employee of Respondent to acknowledge that they believed or suspected that Claimant was raising issues about the financial reports or assets of Respondent. I invited and encouraged Claimant to identify any evidence substantiating his claim that his superiors knew that Claimant was engaging in protected activity. I again quote at length from Claimant's testimony in order to demonstrate his inability to identify any evidence supporting his claims:

JUDGE BELL: Well, you appreciate the importance of that element of your case, in demonstrating not only that you blew air into the whistle but also that the whistle emitted a sound that was heard by another.

MR. LAQUEY: Yes. So I think what --

JUDGE BELL: For purposes of these questions, I'll assume that you think you blew the whistle, but I haven't heard any evidence yet and I haven't seen any document yet during the time of your employment there where I get the impression that anyone heard what you were saying as blowing the whistle about potential securities fraud.

MR. LAQUEY: Well, Bornholdt and Blenkush definitely heard what I was saying.

JUDGE BELL: Well --

MR. LAQUEY: Whether they understood that it was material or violated a specific law --

JUDGE BELL: Okay. Well, those two people have testified here this week. And --

MR. LAQUEY: Right.

JUDGE BELL: And neither of them --

MR. LAQUEY: And the Respondent asked them.

JUDGE BELL: I'm sorry?

MR. LAQUEY: The Respondent asked them, and they said no.

JUDGE BELL: They were asked whether they understood that you were complaining about the potential for securities fraud, and they said that's not -- they didn't understand that.

MR. LAQUEY: Right.

JUDGE BELL: Are you telling me now that you believe they were untruthful when they gave that testimony?

MR. LAQUEY: Yes.

JUDGE BELL: Do you think that they understood that you were saying the company is headed toward an Enron- or a Tyco-like situation where inaccurate information is going to be given out to shareholders? You think they understood that?

MR. LAQUEY: From what I explained -- no, I don't think they understood the magnitude being that big.

JUDGE BELL: Okay. So --

MR. LAQUEY: Nor do -- yeah.

JUDGE BELL: So how do you prove the element of your case, which is that they heard you blowing the whistle?

MR. LAQUEY: Because the documentation I presented from my notes that I explained to --

JUDGE BELL: But those are your notes.

MR. LAQUEY: Yes.

JUDGE BELL: Where is the documentation from their notes? Where are the notes from Bornholdt or Blenkush or somebody else where they're summarizing their meeting with you and they're saying "Holy smokes. LaQuey is raising a serious issue. We have got to wrap our arms around this and deal with it"?

MR. LAQUEY: Yeah. I wasn't provided in discovery any notes from Blenkush, nor Bornholdt --

JUDGE BELL: Okay. Well, we're not --

MR. LAQUEY: -- and I asked for everything --

JUDGE BELL: We're not going to refight the discovery wars.

MR. LAQUEY: Sure, but I'm just saying I asked for everything relevant regarding my employment. So --

JUDGE BELL: Well, but to say that you asked for it and didn't get it overlooks the fact that it doesn't exist.

MR. LAQUEY: I don't know if it exists, what they documented. I mean, I know --

JUDGE BELL: Well --

MR. LAQUEY: -- what they documented in retaliation.

JUDGE BELL: Did you hear the testimony? Did you -- you asked them questions. Did you hear their testimony, sitting in the same seat that you're sitting in?

MR. LAQUEY: No. I was sitting over there. They were sitting here. I'm sorry. I'm just confused with the question. I heard their testimony.

JUDGE BELL: You participated in their testimony.

MR. LAQUEY: Yes, by asking them questions.

JUDGE BELL: You had every opportunity to ask them whether they understood that what you were saying was the company is on the brink of committing securities fraud. Did you hear either of them say anything like that --

MR. LAQUEY: No.

JUDGE BELL: -- that that's what they

MR. LAQUEY: No.

JUDGE BELL: Okay. So if it's not those -- we have Mr. Johnson coming. We have others coming, apparently. Which one of these people is going to say that during the time Mike LaQuey worked at UnitedHealthcare, Mike LaQuey raised an issue that the errors in these computer programs posed a risk of the company committing securities fraud? Who is going to say that?

MR. LAQUEY: Well, I documented in general that I complained about UAT, code being --

JUDGE BELL: So, sir, respectfully --

MR. LAQUEY: Yes.

JUDGE BELL: -- you're not answering my question.

MR. LAQUEY: Well, I'm -- yeah.

JUDGE BELL: Who is going to say that they heard what you said and understood it as you blowing the whistle that the company was about to commit securities fraud or had committed securities fraud, or wire fraud or mail fraud?

MR. LAQUEY: Um-hum.

JUDGE BELL: Who's going to say that?

MR. LAQUEY: Well, not Beacham, because communication with him was indirect. So I didn't directly --

JUDGE BELL: Okay. So I think that leaves us with Mr. Johnson, as I understand the witness list.

MR. LAQUEY: Um-hum.

JUDGE BELL: Is he going to say that? Because I haven't seen anything. There's a lot of documentation between you and Mr. Johnson. I haven't seen anything --

MR. LAQUEY: Yeah. I didn't --

JUDGE BELL: -- like that.

MR. LAQUEY: I didn't depose him regarding this specific case. I deposed him regarding eight others. And I examined him in a certain arbitration regarding eight other claims. So --

JUDGE BELL: Well, but one of your claims in the arbitration was a whistleblower claim, right?

MR. LAQUEY: Yeah, it was --

JUDGE BELL: As I understand it, that was only claim that went to arbitration --

MR. LAQUEY: Right.

JUDGE BELL: -- was your whistleblower claim under Minnesota state law, correct?

MR. LAQUEY: Well, that finally got to arbitration, yes, but --

JUDGE BELL: So the hearing that you had before the AAA in Minneapolis sometime in 2016, the only issue in that case was a claim that you made under Minnesota state whistleblower law, correct?

MR. LAQUEY: Yes.

JUDGE BELL: Okay.

MR. LAQUEY: Which didn't require me even specifying a law at all. So there was no need to inquire about which law he understood or misunderstood.

JUDGE BELL: Okay. Well, I look forward to your inquiry when Mr. Johnson, who I believe is probably sitting out in the hall now, gets on the witness stand. And you now have the opportunity to ask him whether he understood that what you were talking about when you said the words "need more process," whether he understood that what those words were code for was "We are about to commit securities fraud."

Tr. 565-71.

Claimant's own testimony that he made reports about alleged protected activity is vague, unclear and uncorroborated by any contemporaneous document. Claimant introduced many pages of his handwritten notes into evidence. I have reviewed these notes to the best of my ability.⁷⁸ I am unable to identify any note(s) written by Claimant before his termination in which it can be said that he reported any protected activity to anyone.

The testimony of the witnesses at the hearing (many of whom were called to the stand by Claimant) failed to substantiate the assertion that Claimant had complained to them about any alleged protected activity. While Claimant has asserted that his own witnesses testified falsely in this regard, he did not impeach their testimony to the degree necessary for me to have doubts about their denials.

Weighing all of the above, I conclude that there is no credible evidence supporting Claimant's assertion that those responsible for his termination – or anyone else above him in the chain of command – ever knew or suspected that Claimant was engaged in protected activity. The evidence summarized above leads me to conclude that Claimant has failed to prove the second element of his claim.

CLAIMANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THERE IS ANY CAUSAL CONNECTION BETWEEN CLAIMANT'S ALLEGED PROTECTED ACTIVITY AND HIS DISCHARGE

Alternatively, I find that there is no contributing factor connection between Claimant's alleged protected activities and his eventual termination.

Claimant bears the burden to demonstrate that his protected activity was a contributing factor in the adverse employment actions taken against him.⁷⁹ His task is difficult in this case because the protected activity claimed by him occurred in 2011 and 2012, while his termination did not happen until January 2014. I asked Claimant about this temporal gulf:

⁷⁸ Claimant's handwriting can be difficult to decipher.

⁷⁹ *Palmer* at p. 17

JUDGE BELL: Why, if you believe that, quote, “Not enough process,” close quote, is shorthand for, “Holy Schnikes! We’re committing wholesale securities fraud, and this is another Tyco situation, this is another Enron situation, I am blowing the whistle and asking you to stop this wholesale fraudulent behavior”; if you think that’s what is meant by “Not enough process” -- and for purposes of this question, I’ll assume that’s so, and if Bornholdt -- I presume your position is that Bornholdt didn’t want to make any changes, didn’t believe what you were saying, didn’t credit them whatever. Why didn’t he fire you then, instead of waiting until January 31, 2014, when this conversation takes place in September 2011? If it’s as big a deal as you are making it out to be, and if you think that this is the trigger for a retaliatory act, why do we have a delay from September 2011 to January 31, 2014? Help me.

MR. LAQUEY: Okay. So also after that, I made more process complaints. And so my co-workers reacted badly and made accusations that I had behavioral and cultural deficits. And those, we went over in detail yesterday with his review of my performance. So he did rate me a 3, and he said I rolled off because of budgetary.

Now we go to the future, where Mr. Johnson is dealing -- so let me just back up. LaunchPad was August 2011 to November 2011. Then almost 2 years later, Mr. Bornholdt submits a CAP that says I was rolled off for conflict. So my contention is that the conflict he is talking about is my reporting of all these process issues that were causing errors.

Tr. 290-1.

Claimant stopped working on the LaunchPad project in November 2011.⁸⁰ He stopped working on the Gateway project on or about April 30, 2013.⁸¹ Claimant has failed to persuade me that there is any causal linkage between his alleged protected activities in 2011, 2012 or 2013 and his 2014 termination. Claimant raised concerns about “not enough process” in the Fall of 2011. On November 17, 2011, he received a very poor performance evaluation.⁸² An argument could be made that the November 2011 performance evaluation was issued in retaliation for Claimant raising concerns about the issues he had reported.⁸³

⁸⁰ Tr. 649.

⁸¹ *Id.* 203.

⁸² Exhibit M.

⁸³ There were no apparent consequences flowing from the issuance of this November 2011 performance evaluation. Claimant’s compensation was not affected, nor were the other terms and conditions of his employment changed. The issuance of this performance evaluation alone would not have given rise to a cognizable whistleblower action because there was no “materially adverse” employment action suffered. To the extent Claimant believed there were “materially adverse” consequences caused by the November 2011 performance, he would have needed to file a timely complaint with OSHA. He did not do so.

Claimant's performance evaluations issued in 2012⁸⁴ and 2013⁸⁵ concluded that Claimant "meets expectations." Assuming, for the sake of argument, that Respondent had retaliated against Claimant in 2011 through the issuance of a poor performance evaluation, the "chain" of any such retaliation was broken by the issuance of the "meets expectations" evaluations in February 2012 and February 2013.

There is no evidence in the record which causally connects Claimant's complaints about "not enough process" – or any other complaint made by Claimant -- to his 2014 discharge. There is overwhelming contemporaneous documentation discussing the reasons why Respondent initiated the long process which culminated in Claimant's termination. There is a lot of testimony in the record discussing the decision to terminate Claimant. There is no exhibit and there is no testimony from any witness other than Claimant which supports a claim that Claimant was fired in 2014 for anything related to the LaunchPad project, the Gateway project or any complaint that Claimant may have made about "not enough process." Claimant failed to impeach the testimony of Beacham and Johnson that they decided to fire Claimant for reasons wholly unrelated to any complaint Claimant may have made about financial reporting.

After reviewing the entire record, I find that Claimant has failed to prove by a preponderance of the evidence that there is any causal connection whatsoever between the complaints he made about possible "process" issues and his eventual termination. I cannot identify any even arguable acts of protected activity which might be said to have occurred within the final two years of Claimant's employment. Even assuming that Claimant had engaged in protected activity in 2011 when he reported there was "not enough process," that report was not a factor which contributed to Claimant's termination.

RESPONDENT HAS PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT IT WOULD HAVE TAKEN THE SAME ADVERSE EMPLOYMENT ACTION IN THE ABSENCE OF CLAIMANT'S ALLEGED PROTECTED ACTIVITY

Alternatively, I find that Respondent has proven by clear and convincing evidence that it would have taken the same disciplinary action in the absence of Claimant engaging in protected activity. Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Coryell v. Arkansas Energy Services, LLC.*, No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013) quoting *Warren v. Custom Organics*, No. 10-092, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2013 WL 143761 (ARB Jan. 9, 2013). As the ARB explained in *Palmer*:

The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to

⁸⁴ Exhibit N.

⁸⁵ Exhibit O.

rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.

The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

Slip opinion at 32.

Respondent may avoid SOX whistleblower liability in this case if it establishes by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the Claimant's alleged protected activity. I find Respondent has satisfied that burden of proof.

Respondent exhaustively documented the reasons why it issued Corrective Actions to Claimant beginning in 2013. There is no credible evidence to suggest that these Corrective Actions were issued in 2013 in order to retaliate against Claimant for any real or imagined act of protected activity. Nor is there any reason to believe that in 2013 Claimant perceived these Corrective Actions as retaliatory acts to punish him for being a SOX whistleblower. Claimant was invited to supply written comments to these Corrective Actions, and, on those occasions where he supplied comments, Claimant never said that any Corrective Action issued to him was in retaliation for SOX protected activity. Claimant appealed the Corrective Actions through Respondent's internal dispute resolution process. Not once in the pre-termination appeals did Claimant say that he was a SOX whistleblower.

Respondent has proven by clear and convincing evidence that Claimant was terminated from his employment in part because he was difficult to manage and had become someone with whom others in the company did not wish to work in a collaborative setting. Respondent has proven by clear and convincing evidence that Claimant failed to accomplish all of the mandatory goals set out in the Corrective Actions issued to him, and that he was terminated in part because of that failure. Respondent has proven by clear and convincing evidence that Claimant was terminated in part because he became a poor performer over time. Respondent has proven by clear and convincing evidence that it would have – and did – discharge Claimant from his employment only because of performance issues, and not because of any whistleblowing activities claimed by Claimant. I find that no part of Claimant's termination was due to Claimant's alleged protected activity.

I conclude that it is highly probable that Respondent fired Claimant for reasons having nothing to do with any claimed protected activity.

ORDER

For the foregoing reasons, Claimant's claims are **DENIED** and his case is **DISMISSED**.

Steven D. Bell
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).

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).