



Issue Date: 05 June 2018

CASE NO.: 2017-SOX-00048

IN THE MATTER OF:

JOHN D. HARTLEY, JR.
Complainant

v.

CHEVRON PHILLIPS CHEMICAL COMPANY
Respondent

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

This proceeding arises under the Sarbanes-Oxley Act of 2002, technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 U.S.C. § 1514A et seq., (herein SOX or the Act), and the regulations promulgated hereunder at 29 C.F.R. Part 1980, which are employee protective provisions.

On October 11, 2016, John D. Hartley (Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging his termination by Chevron Phillips Chemical Company (Respondent) violated the SOX employee protection provision. On June 30, 2017, OSHA dismissed the complaint. Thereafter, Complainant requested a hearing with the Office of Administrative Law Judges (OALJ), and the matter was assigned to the undersigned for hearing.

On April 9, 2018, the undersigned received Respondent's Motion for Summary Decision. On April 10, 2018, I granted Complainant's Motion for Continuance and vacated the May 8-9, 2018 hearing date, pending a resolution of Respondent's Motion for Summary Decision. No hearing date is currently scheduled.

In addition, I also issued an Order to Show Cause Why Complainant's Claim Should Not Be Dismissed on April 10, 2018. In this Order, I provided instructions to Complainant on how to respond to Respondent's Motion and ordered him to submit evidence in response to evidence offered by Respondent in support of its Motion. Thereafter, Complainant timely filed a response

in opposition to Respondent's Motion pursuant to the April 10, 2018 Order to Show Cause. For the following reasons, Respondent's Motion for Summary Decision is granted.¹

BACKGROUND

In mid-2014, Complainant was hired by Respondent² as part of the Information Security team and was assigned to implement a security information management system. (Resp. Mtn., p. 2; EX-A). The system, known as QRadar, tracked log-ins and log-offs on Respondent's computer network. (Resp. Mtn., p. 2; EX-A). Complainant's primary responsibility was to manage PingFederate, a single sign-on solution Respondent had purchased. (Resp. Mtn., p. 2; EX-A).

In 2015, Respondent began upgrading its network firewall software to Palo Alto, a network firewall configuration system. (Resp. Mtn., p. 3; EX-A). Thereafter, in December 2015, Complainant raised a concern regarding Respondent's network firewall configurations to his supervisor and to two co-workers. (Resp. Mtn., p. 3; EX-A; EX-D; Comp. Resp., p. 2). In his email, Complainant expressed his concern that Respondent's network firewalls were not configured in accordance with the "least access principle" and were not in compliance with Respondent's internal internet security policies. (Resp. Mtn., p. 3; EX-D). Complainant also felt Respondent's outbound traffic settings should also "default deny" access, i.e. deny all access and permit access only as needed. (Resp. Mtn., p. 3; EX-A). Further, Complainant alleges he reported a breach into Respondent's protected network. (Comp. Resp., p. 2).

Mohit Chanana, Complainant's supervisor, scheduled a team meeting with Complainant, the two co-workers, and himself to discuss Complainant's concerns. Chanana and the co-workers disagreed with Complainant's approach and decided not to implement Complainant's ideas. After this meeting, Complainant continued to express his concerns to co-workers in the office, and ultimately, was told by Chanana "to drop the issue." (Resp. Mtn., p. 4; EX-A; EX-B).

¹ The ARB has held that all *pro se* litigants are entitled to "sufficiently understandable" notice of the requirements for opposing a motion for summary decision and the consequences of failing to adequately respond to such a motion. *Zavelata v. Alaska Airlines, Inc.*, ARB No. 15-080, ALJ No. 2015-AIR-016, slip op. at 11, *citing Wallum v. Bell Helicopter Textron*, ARB No. 09-081, ALJ No. 2009-AIR-006, slip op. at 7 (ARB Sept. 2, 2011). In my April 10, 2018 Order to Show Cause, I informed Complainant of the requirements and consequences of a motion for summary decision, provided the citation to the rule governing summary decisions, and noted that Complainant may file affidavits or declarations in support of his contentions. In ruling on a motion for summary decision involving a *pro se* litigant, I am mindful of my duty to both remain impartial and refrain from becoming an advocate for the *pro se* litigant, while also "constru[ing] complaints and papers filed by *pro se* litigants liberally in deference to their lack of training in the law and with a degree of adjudicative latitude." *Zavelata v. Alaska Airlines, Inc.*, ARB No. 15-080, ALJ No. 2015-AIR-016, slip op. at 11, *citing Wallum v. Bell Helicopter Textron*, ARB No. 09-081, ALJ No. 2009-AIR-006, slip op. at 7 (ARB Sept. 2, 2011). In keeping with these duties, I liberally interpreted Complainant's complaint, motions, and responses, and held him to a lesser standard in procedural matters. However, even given the ARB's disfavored view of granting summary decision against a *pro se* litigant, Complainant is unable to show that there is a genuine issue of material fact precluding summary decision in Respondent's favor.

² Specifically, Complainant was hired by CPChem, a wholly owned subsidiary of Chevron Phillips Chemical Company, LLC, which in turn is owned by Chevron USA, Inc. and Phillips 66 Company. (Resp. Mtn., p. 2; EX-M).

On August 23, 2016, Allison Martinez, Chanana's supervisor, spoke to Complainant and a co-worker about an audit that had been conducted by Respondent's internal compliance organization in its IT systems. During this meeting, Complainant again repeated his concerns about the firewall that he had expressed in the meeting with Chanana and two co-workers. In turn, Martinez expressed interest in discussing these concerns with Complainant and scheduled a meeting to discuss these issues with him. (Resp. Mtn., p. 5; EX-A).

On August 30, 2016, David Cagney, an analyst in Respondent's telecommunications department, sent an email to his supervisor regarding his "increasingly strange and uncomfortable" interactions with Complainant. Cagney's email also states that Complainant told him Chanana was not speaking to him during these interactions. Cagney also discussed an incident wherein Complainant locked and flipped his computer screen. (Resp. Mtn., p. 5; EX-F). Complainant also alleges Chanana encouraged other people to report any other similar experiences like Cagney's to human resources. (Comp. Resp., p. 7). The following day, a human resources manager began an investigation into Cagney's complaint. (Resp. Mtn., p. 5; EX-G). The manager conducted an interview with Cagney, who repeated his statements in his email. (Resp. Mtn., p. 5; EX-H).

After meeting with Cagney, human resources met with Complainant, who admitted to showing pictures of whips and dildos to several employees and acknowledged he had "issues with boundaries." (Resp. Mtn., p. 6; EX-A; EX-H). As a result, Complainant was suspended with pay pending the outcome of the human resources investigation. (Resp. Mtn., p. 6; EX-A; EX-G; EX-H).

Two days after his suspension, on September 2, 2016, Complainant submitted a memorandum to human resources wherein he claims Chanana's and Martinez's treatment of him, as well as his suspension, constituted retaliation for expressing his concerns about Respondent's network firewall settings. (Resp. Mtn., p. 6; EX-L).

While the human resources investigation was ongoing, Senior Counsel Shannon Richards also conducted a separate and independent investigation into Complainant's claim that he had been subjected to a hostile work environment and retaliated against. Richards also investigated whether Cagney's sexual harassment complaint against Complainant was a pretense for retaliating against him. Richards found no evidence that Chanana had intimidated or threatened Complainant or that Cagney had filed his complaint due to Complainant expressing his opinion about the firewall settings. (Resp. Mtn., pp. 6-7; EX-M).

The human resources investigation concluded Complainant had violated Respondent's harassment policy and recommended Complainant be terminated. (Resp. Mtn., p. 7; EX-G; EX-J). Thereafter, Complainant was terminated on September 30, 2016. (Resp. Mtn., p. 7; EX-G).

On October 11, 2016, Complainant filed a whistleblower complaint with OSHA, alleging he was retaliated against for raising a problem with Respondent's network firewall systems to his manager. (Resp. Mtn., p. 7; EX-N). On June 30, 2017, OSHA found no reasonable cause to believe or support that a violation under SOX had occurred and dismissed the complaint. (Resp. Mtn., p. 7). In accordance with the regulations, Complainant timely objected to OSHA's findings

and requested a hearing before an administrative law judge. The matter was assigned to the undersigned, and a Notice of Hearing & Pre-Hearing Order was issued on October 25, 2017.

On April 9, 2018, the undersigned received Respondent's Motion for Summary Decision. Thereafter, the undersigned timely received Complainant's Response to Respondent's Motion for Summary Decision ("Comp. Resp.").

ISSUES PRESENTED

Respondent's Motion for Summary Decision presents the following issues for resolution:

1. Whether genuine issues of material fact exist as to whether Complainant engaged in protected activity under SOX?
2. Whether genuine issues of material fact exist as to whether Complainant's alleged protected activity was a contributing factor in his termination?

LEGAL STANDARDS

A. Motion to Dismiss

Under 29 C.F.R. § 18.70(c), any party may move for disposition of the pending proceeding when consistent with statute, regulation, or executive order. A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.

B. Summary Decision Standard

The standard for granting summary judgment or decision is set forth at 29 C.F.R. § 18.72 (2015), which is derived from Federal Rule of Civil Procedure (FRCP) 56. Under Section 18.72, a party may move for summary decision, identifying each claim or defense on which summary decision is sought. An administrative law judge shall grant summary decision if the movant shows that there is no genuine issue of material fact and the movant is entitled to decision as a matter of law. 29 C.F.R. § 18.72(a); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB Jun. 28, 2011). "A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The primary purpose of summary decision is to isolate and promptly dispose of unsupported claims or defenses. *Id.*

If movant meets the initial burden of showing no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate facts showing the existence of genuine issue(s) for trial with doubts and reasonable inferences resolved in favor of the non-moving party. *Reves v. Sanderson Plumbing Products Inc.*, 120 S. Ct. 2097, 2110

(2000); *Matsushita Elec. Indus. Co. Ltd., v. Zenith Radio Corp.*, 475 U.S. 574 587 (1986). *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 278 (5th Cir. 2004). An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. A fact is material and precludes a grant of a summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

When a motion for summary judgment or decision is made and supported by appropriate evidence, the non-movant or party opposing the motion may not rest upon mere allegations or denials of such pleading, but must set forth specific factors showing there is a genuine issue of material facts. As the Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), the non-movant must present affirmative evidence in order to defeat a properly supported motion for summary decision, even where the evidence is within the possession of the moving party, as long as the non-movant had a full opportunity to conduct discovery. In reviewing a request for summary decision, all evidence and inferences must be viewed in the light most favorable to the nonmoving party. *Id.* at 262.

The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. The non-movant's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. Where the non-movant presents admissible direct evidence such as affidavits, answers to interrogatories or depositions, the judge must accept the truth of the evidence set forth without making credibility or plausibility determinations. *T.W. Electric Service v. Pacific Electric Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). If the non-movant fails to sufficiently show an essential element of his case, there can be "no genuine issue as to any material fact," entitling the movant is entitled to summary judgment, since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Id.* at 322-323; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323.

The ALJ cannot summarily try the facts. Rather, the ALJ must apply the law to the facts that have been established by the parties. *See 10 A. Wright and Miller, Federal Practice and Procedure*, § 2725, at 104 (1983). A motion cannot be granted merely because the movant's position appears more plausible or because the opponent is not likely to prevail at trial. *Id.* at 104-5. In short, the trier of fact has no discretion to resolve factual disputes on a summary decision motion. *Id.* at § 2728, at 186. Accordingly, "if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men might differ on its significance, summary judgment is improper." *Id.* § 2725, at 106, 109. Once it is determined that a triable issue exists, the inquiry is at an end and summary decision must be denied. *Id.* at 187.

C. Elements of a SOX Claim

Section 806 of SOX, codified at 18 U.S.C. § 1514A³, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. Section 1514A(a) states, in relevant part:

(a) 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 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, 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, 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, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a); *see also Hendrix v. American Airlines, Inc.*, 2004-AIR-00010, 2004-SOX-00023 (A.L.J. Dec. 9, 2004) (unpublished).

³ VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio and television fraud), 1344 (bank fraud) or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

Congress enacted SOX “as part of a comprehensive effort to address corporate fraud.” *Sylvester v. Parexel*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 8 (ARB May 25, 2011). The Senate Judiciary Committee concluded that SOX was necessary in part because “unlike bank fraud, health care fraud, and bankruptcy fraud, there [was] no specific ‘securities fraud’ provision in the criminal code to outlaw the breadth of schemes and artifices to defraud investors in publicly traded companies.” S.Rep. No. 107–146, at 4 (2002). Section 806, SOX’s employee-protection provision, prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain fraudulent acts. *Sylvester*, ARB No. 07-123, slip op. at 8. “The purpose of Section 806, and the SOX in general, is to protect and encourage greater disclosure.” *Id.* at 22.

To prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that he or she engaged in protected activity and that the protected activity was a contributing factor in an unfavorable personnel action against him or her. 18 U.S.C. § 1514A(b)(2)(C) (incorporating 49 U.S.C. § 42121(b)); 29 C.F.R. § 1980.109(a); *Vannoy v. Celanese Corp.*, ARB no. 09-118, ALJ No. 2008-SOX-064, slip op. at 9 (ARB Sept. 28, 2011). The burden then shifts to the employer to show by clear and convincing evidence that it would have taken then same unfavorable personnel action absent the protected activity. *Id.*; 29 C.F.R. § 1980.109(b).

DISCUSSION

A. Protected Activity

A complainant’s allegations related to “protected activity” under SOX must set forth facts that he provided definitive and specific information to his employer about conduct that he reasonably believed constituted one of six violation types enumerated in 18 U.S.C.A. § 1514A(a). Though the employee need not cite a code section the employee believes was violated or being violated, “the reported information must have a certain degree of specificity [and] must state particular concerns, which, at the very least, reasonably identify a respondent’s conduct that the complainant believes to be illegal.” *Bozeman v Per-Se Technologies*, 456 F. Supp. 2d 1282 (N.D. GA, 2006) citing *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). “[The] protected activity must implicate the substantive law protected in Sarbanes-Oxley ...” *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D. NY, 2006) and cases cited therein. The communication made by the employee must identify the specific conduct that the employee reasonably believes to be illegal, even if it is a mistaken belief. General inquires do not constitute protected activity. When the communications are “barren of any allegations that would alert [a respondent] that [the complainant] believed the company was violating any federal rule or law related to fraud” the communication is not protected activity under SOX. *Livingston v. Wyeth*, 2006WL2129794 at *10 (M.D. NC, Jul 28, 2006) *aff’d* 520 F.3d 344 (4th Cir. 2004); *Skidmore v. ACI Worldwide, Inc.*, 2008WL2497442 (D. Neb, Jun. 18, 2008); *Portes v. Wyeth Pharmaceuticals, Inc.*, 2007 WL 2363356 (S.D. NY, Aug. 20, 2007) Under SOX, the communications which may be considered as “protected activity” only involves what is actually communicated to the covered employer prior to the unfavorable employment action and not what is alleged in the complaint filed with OSHA. *Welch v. Chao, supra*, citing *Platone v. FLYi, Inc.*,

ARB Case No. 04-154 (ARB, Sept. 29, 2006); *aff'd* 548 F.3d 322 (4th Cir. 2008); *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D.N.Y, 2006).

In order for an activity to be “protected activity” under the Act, there must be not only subjective/objective reasonable belief of activity that would violate one or more of the six protected areas of the Act, but there must also be a definitive and specific expression of concern to the employer over the perceived violation(s). Without both factors, there is no “protected activity” under the Act. *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008); *Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006) at page 11 and 15.

Therefore, in order to establish the first element of a *prima facie* case, Complainant must allege that the activity he engaged in is protected under the whistleblower provisions of SOX. Unless Complainant blew the whistle by providing information related to his reasonable belief that Respondent engaged in mail fraud, wire fraud, bank fraud, securities fraud, or violated a rule or regulation of the SEC or a provision of federal law relating to fraud against shareholders, Complainant’s activity is not protected by SOX’s whistleblower provision. 18 U.S.C. § 1514A(a)(1). SOX’s whistleblower provision does not protect employees that blow the whistle on corporate fraud in general. Rather, in order to constitute protected activity under the Act, the information that Complainant provided must concern a violation of one of the federal statutes or regulations specifically articulated in the SOX whistleblower provision. As the Administrative Review Board has held:

Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX. To bring [oneself] under the protection of the act, an employee’s complaint must be directly related to the listed categories of fraud or securities violations. 18 U.S.C.A. § 1514A(a); 29 C.F.R. §§1980.104(b), 1980.109(a). *See Getman*, slip op. at 9-10 (requiring that the employee articulate the nature of her concern). A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough.

Harvey v. Home Depot, U.S.A., Inc., ARB Nos. 04-114, 115; ALJ Nos. 2004-SOX-020, 36, slip op. at 14 (ARB June 2, 2006). Therefore, any information that Complainant has provided related to his belief that Respondent violated Title VII is not, standing alone, protected activity under SOX.

Protected activity under SOX is thus essentially comprised of three elements: (1) report or action that involves a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders; (2) complainant’s belief concerning the activity must be subjectively and objectively reasonable; and (3) complainant must communicate his concern to either his

employer, the federal government or a member of Congress who has the requisite reviewing ability. *See Harvey v. Safeway, Inc.*, 2004-SOX-00021 at 29 (ALJ Feb. 11, 2005).

In the instant matter, the facts alleged in Complainant's OALJ complaint and in his Response to the Respondent's Motion for Summary Decision do not "definitively and specifically" relate Respondent's conduct to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1). Rather, it is not clear here which of the six enumerated categories of violations under SOX Complainant contends that Respondent violated. While a complaint need not definitively or specifically relate to one of the enumerated categories of violations, need not approximate every element of the fraud, and need not reference shareholder or investor (securities) fraud to establish protected activity under SOX, the complaint must still generally address or relate to one of the enumerated categories of corporate fraud set forth in Section 806 of the Act. *Sylvester v. Parexel Int.*, ARB No. 07-123, at 19-21, 23.

Here, Complainant alleges he raised concerns that Respondent knowingly and willful operated its information security systems in noncompliance with security mechanisms required by SOX, its own internal policies, and standard practices. Complainant also contends he reported that Respondent falsified reports to senior leadership regarding the state and compliance of its information security controls and failed to exercise due care to protect critical information systems and confidential employee information. (OALJ Compl., pp. 1-2). Even if read broadly, it is undisputed that none of the alleged violations appear to fall into the six general categories of fraud covered under SOX. 18 U.S.C. § 1514A(a)(1).

In his email and memorandum, Complainant reported that he complained to Chanana, Martinez, and his co-workers that the internet firewalls were not configured to comply with the "least access principle" and that the firewall settings were configured and managed by the wrong department. He also reported the firewall configurations and documentation practices did not conform to Respondent's internal information security policies. (Resp. Mtn., EX-D; EX-L).

After reviewing Respondent's Motion and Complainant's response, it is undisputed Complainant never reported fraud or violations of SEC rules or regulations. Rather, his reports of internet firewall configuration internet security settings are unrelated to the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1) (mail, wire, bank, securities, or shareholder fraud or violations of SEC rules or regulations). Indeed, it is undisputed his concerns related to his supervisors did not definitively and specifically relate to fraud or violations of SEC rules and regulations. (Resp. Mtn., EX-A). In fact, in his deposition testimony, Complainant stated he did not believe any of Respondent's actions were related to any kind of mail, wire, bank, or securities fraud or any fraud perpetrated against any shareholders. (Resp. Mtn., EX-A, pp. 65-66, 85-87). Moreover, it is clear that these concerns regarding Respondent's network firewall settings do not constitute protected activity under SOX, since they are in no way related to any alleged fraud or violation of SEC rules or regulations. In addition, it is clear Respondent's internal firewall policies are unrelated to fraud or SEC rules and regulations. As such, I find summary decision in favor of Respondent is appropriate as a matter of law.

Even if we assume, for the sake of argument, that Complainant's violations fell near the bounds of the listed categories of fraud under SOX, to constitute protected activity and trigger

SOX's protections, Complainant must "reasonably [believe]" that the complained-upon "fraud" constitutes a violation of Sarbanes Oxley by satisfying the two part-test reasonableness test set forth in *Sylvester*. 18 U.S.C. 1514A(a)(1); *Sylvester*, ARB No. 07-123, at 14-15.

In regards to the subjective component of the reasonable test, an employee must actually believe that the conduct complained of constituted a violation of relevant law. *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009). Respondent contends in its Motion that Complainant acknowledged he did not believe at the time he made the reports to his managers that Respondent had committed fraud of any kind or violated any SEC rules or regulations. (Resp. Mtn., p. 13; EX-A). However, in his response to Respondent's Motion, Complainant asserts he had an actual, good faith belief that the conduct he complained of was a violation of SOX. (Comp. Resp., pp. 2-3). As such, I find Complainant has demonstrated that a genuine issue of material fact exists as to whether he held a subjectively reasonable belief of fraud or SEC violations.

In addition, Respondent argues that Complainant's belief that the complained-upon "fraud" constitutes a SOX violation is not objectively reasonable. (Resp. Mtn., pp. 13-17). To satisfy the objective component of this test, complainant must have an objectively reasonable belief that the conduct complained of constituted a violation of the law set forth in 18 U.S.C. § 1514A. The objective component is evaluated using a reasonable person standard, "based on the knowledge available to a person in the same factual circumstances with the same training and experience as the aggrieved employee." *Sylvester*, ARB No. 07-123, at 15. The complainant need not provide a citation to the precise legal provision in question and need not show there was an actual violation of the provision at issue. Rather, he must show that belief of the purported violation was reasonable given the most general elements of the fraud. *Sylvester*, ARB No. 07-123, at 15 ("a complainant can have an objectively reasonable belief of a violation of the laws in Section 806 . . . even if the complainant fails to allege, prove, or approximate specific elements of fraud . . . [i]n other words, a complainant can engage in protected activity under Section 806 even if he or she fails to allege or prove materiality, scienter, reliance, economic loss, or loss causation"). This is a mixed question of law and fact. If there is a genuine issue of material fact, it cannot be decided as a matter of law, but if no reasonable person could have believed the facts amounted to a violation, it may be decided as a matter of law. *Welch v. Chao*, 536 F.3d 269, 277-78 n.4 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008); see *Sylvester*, ARB No. 07-123, at 15.

Although Complainant is not a lawyer, I note his considerable years of experience and training as an IT security analyst are considered in this analysis. *Sylvester*, ARB No. 07-123, at 15. After a thorough review of Complainant's complaint, I find no fact finder could find that a person of like training and experience could have an objective, reasonable belief that the complained-of conduct was a violation of SOX. Indeed, I find Complainant has failed to draw even a generalized connection from the alleged forgery and theft to the six enumerated categories of violations in Section 806 of SOX.

In his complaint, Complainant asserts he complained that Respondent operated its IT systems in violation of the security mechanisms legally required by SOX and in violation of standard practices and its own internal policies. In addition, Complainant alleges he reported that

Respondent (1) disregarded standard practices that were essential to protecting publicly-listed corporations and critical infrastructures and (2) falsified reports to senior management regarding the state and compliance of its IT controls. (OALJ Compl., pp. 1-3). However, Complainant's belief that Respondent failed to maintain safeguards to prevent data tampering and to track data access and that this alleged practice could materially affect Respondent's finances, and in turn mislead shareholders or violate SEC rules, is not objectively reasonable.

I find that no reasonable person could conclude that Complainant actually believed that he was reporting conduct that related to one of the listed anti-fraud violations by reporting his concerns regarding Respondent's IT systems to his supervisors. Even with the forgiving standard applied to whistleblower cases generally and *pro se* whistleblowers specifically, it is too great a leap of reason to infer from Complainant's statements that Respondent failed to maintain safeguards to prevent data tampering and to track data access and that this alleged practice could materially affect Respondent's finances and therefore had a reasonable belief that Respondent had violated one of SOX's six anti-fraud provisions.

First, Complainant acknowledged in his deposition testimony that he did not believe any of Respondent's actions were related to any kind of mail, wire, bank, or securities fraud or any fraud perpetrated against any shareholders. (Resp. Mtn., EX-A, pp. 65-66, 85-87). Second, SOX does not cover violations of internet and network security settings. Third, while it may be objectively reasonable for someone in the same factual circumstances with the same training and experience as Complainant to believe that allegations that Respondent's network firewall settings were deficient, Complainant's reports are not within the scope of the good faith and reasonable reporting of fraud envisioned by SOX. Further, no reasonable person could find that Complainant's reports could lead management to understand the relation of network firewall settings to an allegation of potential corporate fraud. Furthermore, Complainant's statements do not qualify for protection under Section 1514A(a)(2) because there was no way management could have known that Complainant's allegations were related to one of the listed anti-fraud laws in SOX.

As such, no similarly situated person would find it objectively reasonable to believe that Respondent's network firewall settings is a violation of one of the six enumerated categories of violations in Section 806 of SOX. *See Day v. Staples, Inc.*, 555 F.3d 42, 57 (1st Cir. 2009) (general or conclusory accusations of accounting violations insufficient to survive summary judgment); *Welch*, 536 F.3d at 279 (conclusory, general statements insufficient to establish objective belief of protected activity). To assume that the conduct complained of violated one of six provisions of Section 1514(a) to constitute a SOX violation is wildly speculative and not objectively reasonable. Indeed, Complainant did not put forth any evidence or "specific facts" further explaining this allegation of "fraud" in his complaint, and there is no indication from Complainant that Respondent intended to engage in this type of "fraud." Unlike the complainant in *Sylvester*, Complainant has failed to draw even a generalized connection in his complaint between this alleged "fraud" and the six enumerated categories of violations in Section 806 of SOX. 18 U.S.C. § 1514A; *see Sylvester*, ARB No. 07-123, slip op. at 6, 23.

Thus, it is undisputed that Complainant's belief concerning the activity is not objectively reasonable to meet the second requirement of SOX's test of engaging in protected activity. Accordingly, I find summary decision in favor of Respondent is appropriate as a matter of law.

CONCLUSION

Respondent has shown no dispute of material fact regarding whether Complainant engaged in protected activity and whether he held an objectively reasonable belief that Respondent had engaged in fraud or violations of SEC rules and regulations. Because Complainant failed to state a claim for relief that his complaints were generally the type of fraud covered by SOX or were objectively reasonable with plausible factual content, summary decision in favor of Respondent is appropriate. Accordingly, I conclude as a matter of law, viewing the evidence in a light most favorable to Complainant, that Complainant did not engage in any protected activity under SOX. Therefore, Respondent is entitled to summary decision pursuant to 29 C.F.R. § 18.72(a).

ORDER

For the reasons stated above, **IT IS HEREBY ORDERED** that Respondent's Motion for Summary Decision is **GRANTED**.

IT IS FURTHER ORDERED that the claim in the above-captioned matter is **DISMISSED** with prejudice and Complainant's request for a hearing is **WITHDRAWN**. Complainant's Motion to Compel Production of Documents is hereby **DISMISSED AS MOOT** in light of the above.

SO ORDERED this 5th day of June, 2018, at Covington, Louisiana.

CLEMENT J. KENNINGTON
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. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time 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, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).