



**Issue Date: 07 June 2017**

CASE NO.: 2017-SOX-00013

*In the Matter of:*

DAVID HOPTMAN,  
Complainant,

v.

HEALTH NET OF CALIFORNIA,  
Respondent.

**ORDER GRANTING SUMMARY DECISION**

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley Act (“SOX”)), 18 U.S.C. § 1514A, and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1980. David Hoptman (“Complainant”) is a self-represented litigant. Health Net of California (“Respondent”) is represented by attorney Daniel Handman. On April 25, 2017, I vacated the hearing. No hearing date is currently scheduled.

On April 21, 2017, Complainant filed a Motion for Summary Decision (“Complainant’s Motion”) which was untimely under the pre-hearing order. On April 25, 2017, I issued an order noting that I would decide Complainant’s Motion and, in addition, under 29 C.F.R. § 18.72, invited motions for summary decision to address: 1) whether Complainant engaged in protected activity within the meaning of the SOX statute, 2) how and when Respondent received notice of Complainant’s alleged protected activity, and 3) if Complainant engaged in protected activity, what evidence demonstrates that the protected activity was a contributing factor to his termination. On May 3, 2017, Respondent filed its own Motion for Summary Decision<sup>1</sup> (“Respondent’s Motion”). On May 11, 2017, Respondent filed its Opposition to Complainant’s Motion for Summary Decision (“Respondent’s Opposition”). On May 18, 2017, Complainant filed his Response to the Motions for Summary Decision (“Complainant’s Response”).<sup>2</sup>

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<sup>1</sup> Respondent’s Motion constituted its own motion for summary decision and its response to my *sua sponte* motion for summary decision. Respondent’s Motion at 6.

<sup>2</sup> Included in Complainant’s Response were responses to the other pending motions in this case, which I held in abeyance until the resolution of the pending motions for summary decision (Respondent’s Motion to Quash a Third Party Subpoena, Respondent’s Motion for Sanctions, and Complainant’s Motion to Quash Respondent’s Exhibit 7). *See* Complainant’s Response at 9-10. Given that Complainant is self-represented, I reviewed the information for any arguments or facts relevant to the motions for summary decision, but found no relevant information.

For the following reasons, I deny Complainant's Motion for summary decision, but grant Respondent's Motion.<sup>3</sup>

I. Statement of Facts

All facts are drawn from the filings in this case, the submitted motions and from the exhibits attached to the motions, which are all admitted into evidence for the purposes of this ruling only.

Respondent, a health maintenance organization, employed Complainant until January 28, 2016, when it terminated his employment. Respondent's Motion at 2. Complainant filed a complaint under SOX with the Occupational Safety and Health Administration ("OSHA") alleging that Respondent terminated his employment because it suspected Complainant was about to file a complaint with a federal agency. Notice of Dismissal at 1; Respondent's Motion at 6. OSHA dismissed Complainant's complaint, finding insufficient evidence that he engaged in protected activity under SOX. *Id.* On January 17, 2017, Complainant filed his Objections to OSHA's Notice of Dismissal.

Complainant contends that Respondent had a practice of only processing refunds due to plan members after the members called to complain, which demonstrated how Respondent was "manipulating funds" and holding onto excess monies. Complainant's Response at 3. Complainant stated that he had seen numerous instances of this practice over his 16-year career with Respondent, and had also seen signs of possible Medicare fraud. *Id.* Complainant also learned from online articles that Respondent was being sued for unpaid claims, and that several health care companies each owed more than a billion dollars in back taxes to the IRS. *Id.* at 3, Ex. A. Complainant alleges that this information led him to believe that Respondent may be inflating the value of the company to deceive shareholders, that the alleged inflated value may have affected the company's buying price in a recent merger, and that Respondent engaged in possible insider trading. *Id.* Complainant had also filed a case with the California Department of Managed Health Care ("DMHC") alleging that other employees working for Respondent had improperly accessed his personal medical files. Respondent's Motion at 3; Respondent's Opposition, Hoptman Decl. Ex. A.

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<sup>3</sup> 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 order vacating the hearing and inviting motions for summary judgment, 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. I also note that Complainant filed his own motion for summary decision and was obviously familiar with the regulation. 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.

*Complainant's Text Messages*

In January 2016, Complainant was assigned to assist one of Respondent's members, V.M.,<sup>4</sup> to obtain a refund of an overpayment. Complainant's Response at 3. Complainant explained to V.M. about his suspicions regarding Respondent, and asked her to fill out a HIPAA<sup>5</sup> release form, authorizing him to access her health records for his personal use.<sup>6</sup> Complainant's Response at 3, 12; Respondent's Motion at 3, Krause Decl. Ex. A. Specifically, on the release form under "description of information to be released," Complainant instructed V.M. to check the box indicating "other information" and then write "all of the above for Health Net and DMHC case." Respondent's Motion at 3, Krause Decl. Ex. A. Complainant sent text messages to V.M. using his private phone, and Complainant stated in his Response that he communicated with V.M. for the primary purpose of presenting her case to the SEC "as just one example of thousands, perhaps millions of Health Net plan members who were owed money for over-payment of their annual deductibles and out of pocket maximums." Complainant's Response at 2. Three of these text messages read as follows:

Text message 1: "Lastly, I have another friend running for an office [*sic*] as a U.S. Senator, who can issue a fraud report on Health Net and get this to the press media. However, the cost for this is \$5,000, which I don't have right now. In fact, I'm really hurting for money, and if you are in any way able to help me get \$\$ payoff from [Respondent], I would gladly share some of the \$\$ with you. Thank you."<sup>7</sup>

Text message 2: "I will be contacting my friend at the DMHC to at least make them aware of your issues, and to see if my friend knows Maggie, it might be a good idea for you to open an official DMHC case that will hopefully warrant a full audit of Health Net that will uncover other similar cases."<sup>8</sup>

Text message 3: "I found the phone# for Maggie from the DMHC. I left her a message, but she hasn't called back. I can give you her ph# if you need it. I spoke with my friend at the DMHC who works in another division that only handles Medi-Cal fraud, and he confirmed that the DMHC is the wrong agency to help with my issues, possibly yours too, but I would suggest you file an official complaint to the DMHC."

Complainant's Response, Exhibits B, C, D.

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<sup>4</sup> This plan member is referred to as "V.M." to protect her privacy.

<sup>5</sup> "HIPAA" refers to the Health Insurance Portability and Accountability Act of 1996.

<sup>6</sup> In his Opposition to Respondent's Motion to Dismiss, which had been filed previously and denied, Complainant stated that he had previously consulted with an attorney who advised him he needed a HIPAA release "before [Complainant] could provide specific member examples in filing a whistleblower tip." Complainant's Opposition to Respondent's Motion to Dismiss at 3.

<sup>7</sup> Complainant alleges this text message, which he did not have access to and was provided by Respondent, may have been altered or tampered with because it is "barely legible." Complainant's Response at 4. While the text message is more difficult to read than the others provided, it is legible and there is no evidence of tampering.

<sup>8</sup> This appears to be part of "Text Message 1." See CX B.

At Complainant's suggestion, V.M. filed a case regarding her overpayment with DMHC. Complainant's Response at 4. Complainant suggested she file a case with the DMHC "due to the money V.M. was owed by [Respondent] since 2012" and that she request interest on the money she was owed. *Id.* at 5. While discussing her case with the DMHC, V.M. told the DMHC representative about her interactions with Complainant. *Id.* The DMHC representative asked V.M. to fax copies of the text messages between Complainant and V.M., as well as the HIPAA form Complainant asked V.M. to complete. *Id.* Complainant stated he was "quite surprised" V.M. "shared his intentions of taking action against [Respondent] with the DMHC" because he "fully explained [his] intentions to [V.M.] from the beginning, and she was willing to cooperate in helping me with my cause to stop [Respondent] from engaging in the alleged fraudulent activity." Complainant's Opposition to Respondent's Motion to Dismiss at 4.

On January 28, 2016, the DMHC representative provided the text messages and the HIPAA form to Amy Krause, an attorney for Respondent and the designated liaison for interfacing with DMHC, because of the allegedly "inappropriate" nature of the contact. *Id.*; Krause Decl. at 2. It is disputed what exactly the DMHC representative told Ms. Krause about V.M.'s concerns—whether V.M. was only concerned about the reimbursement issue, or whether she was concerned about Complainant's text messages and request for the HIPAA release. Respondent's Motion at 2; Complainant's Response at 11, Ex. E (email showing that V.M. complained regarding her reimbursement, and the issue related to Complainant came out of discussions).

Diane Rodes, the Human Resources Director for Respondent was then enlisted to handle the matter. Respondent's Motion at 3; Rodes Decl. at 2. After she reviewed the text messages and HIPAA form, Ms. Rodes called an emergency meeting to discuss the matter with two other executives—Andy Ortiz and Debra Taylor. *Id.* The group agreed that Complainant's actions warranted, at a minimum, his immediate suspension because 1) Complainant solicited assistance, and potentially financial assistance, from V.M. for his personal DMHC case, 2) he offered to share a financial award with V.M., 3) he appeared to have misled V.M. into signing the HIPAA release for his own personal use, and 4) he used a personal cell phone to communicate with V.M. that did not have proper security measures. Respondent's Motion at 4; Rodes Decl. at 3.

The same day, January 28, 2016, Ms. Rodes arranged for a conference call meeting with Complainant to discuss the situation.<sup>9</sup> Respondent's Motion at 4; Rodes Decl. at 3. Ms. Rodes informed Complainant that Respondent had learned he had been sending text messages to V.M., and appeared to have solicited money from V.M. *Id.* Complainant admitted to sending text messages to V.M., but denied he solicited money from her. Respondent's Motion at 4. At the conclusion of the meeting, Ms. Rodes placed Complainant on administrative leave and, after speaking with her colleagues, terminated Complainant later that day. *Id.* at 4-5.

#### *Complainant's January 25, 2016 Meeting with Respondent's Executives*

Previously, on January 25, 2016, Complainant met with Andy Ortiz, one of Respondent's Human Resources executives, regarding the investigation of employment-related complaints Complainant had previously made. Complainant's Response, Ex. F. In his Opposition to

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<sup>9</sup> Ms. Rodes' office is in Northern California, and Complainant worked in Southern California.

Respondent's Motion to Dismiss,<sup>10</sup> Complainant admitted that these complaints "have no direct relevance" to his SOX complaint. Complainant's Opposition to Motion to Dismiss at 5. During the meeting, Mr. Ortiz informed Complainant that his complaints and allegations that various employees had inappropriately accessed his private medical information had been investigated, found to be unsubstantiated, and were being closed. *Id.* Mr. Ortiz also informed Complainant that as the investigations were closed, any further communications related to the matter would be "unproductive and disruptive." *Id.* Complainant stated that he was upset that the cases were being closed, and that they "briefly touched upon" Complainant's DMHC complaint. Complainant's Opposition to Motion to Dismiss at 5.

Complainant then told Mr. Ortiz that he read on the Internet about Respondent owing a billion dollars in back taxes to the IRS. Complainant's Response at 6. Complainant said that Respondent was "going to be in a lot of trouble" and was "not going to like what happens next" due to a complaint he was in the process of filing. *Id.* at 7; Respondent's Motion at 5; Handman Decl. Ex. A at 96 (Complainant stated he had "another complaint in the works"). Complainant admitted that he did not mention his intention to report any fraud activity, nor that he intended to file a report with the SEC; however, he alleges that his mention of the taxes allegedly owed to the IRS "hinted" at his intentions to file an SEC complaint. Complainant's Opposition to Motion to Dismiss at 5; Complainant's Response at 6. Complainant also noted that he later informed Mr. Ortiz that he intended to file a "privacy" complaint against Mr. Ortiz for allegedly listening in on a private telephone conference Complainant had with Respondent's Director of Privacy. Complainant's Response at 6-7, Ex. F.

After his termination, Complainant filed a complaint with the SEC alleging "shareholder fraud including possible insider trading by Respondent." Respondent's Motion at 9, Handman Decl. Ex D. Specifically, Complainant claimed that Respondent engaged in "healthcare fraud including illegal healthcare insurance practices to inflate their revenues and deceive shareholders." *Id.* In his SEC complaint, Complainant listed March 17, 2016, as the date he became aware of the conduct. *Id.* Complainant claims this date is when he eventually obtained the "fraud report," but that he had "suspected [Respondent's] questionable business practices for many years."<sup>11</sup> Complainant's Response at 13.

## II. Legal Standard

### *Summary Decision*

The administrative law judge ("ALJ") may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. § 18.72(a); *see also* Fed. R. Civ. P. 56(c). The primary purpose of summary judgment is to isolate and promptly dispose of unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S.

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<sup>10</sup> I denied Respondent's Motion to Dismiss on April 3, 2017.

<sup>11</sup> Complainant also filed a complaint alleging discrimination, harassment, and retaliation with the California Department of Fair Employment and Housing, and the Equal Employment Opportunity Commission. Respondent's Motion at 10. Complainant later filed a complaint with the U.S. Department of Health and Human Services that referenced his claims about Respondent's employee accessing his private medical records. Respondent's Motion at 5-6. Neither of these complaints concerns violations related to SOX, and therefore cannot qualify as "protected activity" under the statute.

317, 323-24 (1986). In cases before this Office, the standard for summary decision is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB June 28, 2011).

In a motion for summary decision, the initial burden is on the moving party to demonstrate that there is no genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once this burden is met, the non-moving party must establish the existence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). “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 action.” *Fredrickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, ALJ No. 2007-SOX-13, slip op. at 5 (ARB May 27, 2010) (internal quotation marks deleted). A dispute of a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. “Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.* at 249.

In opposing a motion for summary decision, the non-moving party may not rest upon mere allegations or denials, but instead must cite to particular materials in the record or show that materials cited do not establish the absence of a genuine dispute.<sup>12</sup> 29 C.F.R. § 18.72(c); *see Anderson*, 477 U.S. at 250. In assessing a motion for summary decision, all evidence is viewed in a manner most favorable to the non-moving party. *Matsushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson*, 477 U.S. at 255; *Mara*, ARB No. 10-051, slip op. at 5. In addition, “all justifiable inferences are to be drawn in [the non-moving party’s] favor.” *Anderson*, 477 U.S. at 255. The Ninth Circuit has described a “justifiable inference” as “not necessarily the most likely inference or the most persuasive inference,” but rather a “rational” or “reasonable” inference. *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989) (citing *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987)).

### *Elements of SOX*

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

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<sup>12</sup> As noted previously, the ARB has held that pro se litigants are also 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; *Wallum v. Bell Helicopter Textron*, ARB No. 09-081, ALJ No. 2009-AIR-006, slip op. at 7 (ARB Sept. 2, 2011).

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).

### III. Analysis

#### a. Protected Activity

The issue before me is whether Complainant's alleged activities fall within the scope of conduct Congress intended to be protected by the SOX whistleblower provision.<sup>13</sup> Protected activities under SOX include any lawful act done by an employee:

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes [bank fraud, wire fraud, mail fraud, securities fraud, violation of an SEC rule or regulation or violation of a federal law related 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...alleged [bank fraud, wire fraud, mail fraud, securities fraud], 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).

*i. Did Complainant's text messages "cause information to be provided" to Respondent within the meaning of 18 U.S.C. § 1514A(a)(1)?*

Complainant contends the text messages being sent from DMHC to Diane Rodes, an executive who worked for Respondent, caused the information regarding his intention to generate a fraud report to be provided to Respondent, and that he therefore engaged in protected activity

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<sup>13</sup> There are factual disputes in this matter, but not about material matters. For example, the parties dispute whether Complainant was soliciting money from V.M. in his text message, and whether V.M. complained to DMHC about Complainant personally, or just her reimbursement issue. However, neither of these disputes are "material" to deciding the issue of whether Complainant engaged in protected activity (although they may be in a "contributing factor" analysis). See *Anderson*, 477 U.S. at 249.

under 18 U.S.C. § 1514A(a)(1)(C). Complainant's Motion at 2;<sup>14</sup> Complainant's Response at 3. He argues that his communications with V.M. were "primarily for the purpose of [his] intentions to report that [Respondent] allegedly engaged in fraudulent activity," and that he was "preparing a case to file" before Respondent terminated him. Complainant's Motion at 2. He argues his mention of a "fraud report" shows Respondent suspected his intentions. Complainant's Response at 3. Complainant avers that he did not solicit any money from V.M., but that even if he did, this solicitation would also be protected activity because it would have been related to the generation of the fraud report. Complainant's Motion at 3. Complainant also cites to cases under other whistleblower-protection statutes for the proposition that acts taken against an employee in anticipation of protected activity are prohibited. Complainant's Motion at 3 (citing cases examining Title VII of the Civil Rights Act and ERISA anti-retaliation statutes).

Respondent argues that Complainant did not engage in any type of protected activity.<sup>15</sup> Respondent's Motion at 8. Respondent asserts that protected activity under 18 U.S.C. § 1514A(a)(1) must be related an "investigation." Respondent's Motion at 8. However, as Complainant correctly asserts, protected activity under 18 U.S.C. § 1514A(a)(1) does not necessarily need to be in conjunction with an investigation. Complainant's Response at 12. In keeping with the purposes of SOX, protected activity under 18 U.S.C. § 1514A(a)(1) covers internal and external complaints, whether or not they lead to an investigation.

Respondent also cites *Platone v. FLYI, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27, slip op. at 17 (ARB Sept. 29, 2006), which states that a whistleblower's complaint under SOX must "definitively and specifically" relate to one of the enumerated categories of fraud or securities violations listed in the statutes. Respondent's Opposition at 3-4. However, the Administrative Review Board ("ARB") abrogated *Platone* in *Sylvester v. Parexel*, and instead adopted a reasonableness standard when evaluating an employee's complaint about a SOX violation. *Sylvester*, ARB No. 07-123, slip op. at 18. Therefore, Complainant is not required to refer "definitively and specifically" to a SOX violation in his communication.<sup>16</sup> Instead, the SOX whistleblower provision protects "all good faith and reasonable reporting of fraud." *Sylvester*, ARB No. 07-123, slip op. at 17, quoting S148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002).

Regardless of Respondent's citation to *Platone*, however, it argues that Complainant did not have an objectively reasonable belief that Respondent's conduct violated a provision listed in Section 806 because his belief was based on an "unverifiable" online news article. Respondent's Motion at 11-12. Respondent also argues that Complainant did not become aware of any potential violations until March 17, 2016, after his termination, a contention that Complainant disputes. Complainant's

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<sup>14</sup> Complainant's Motion for Summary Decision lacked page numbers; page numbers have been added for clarity.

<sup>15</sup> Respondent also argues that even assuming Complainant could prove each element of his case, it can prove by clear and convincing evidence that it would have terminated Complainant in the absence of any protected behavior. Respondent's Motion at 8. However, I need not reach this argument as I find summary decision should be granted in Respondent's favor because Complainant did not engage in protected activity under SOX.

<sup>16</sup> While the ARB's reasonableness standard as articulated in *Sylvester* has not been explicitly accepted by the Ninth Circuit, no other circuit has rejected the "reasonable belief" standard since the ARB's decision in *Sylvester*. *Erhart v. Bofi Holding, Inc.*, No. 15-CV-02287-BAS, 2016 WL 5369470, at \*9 (S.D. Cal. Sept. 26, 2016) (noting that the Second, Third, Sixth, and Eighth Circuits have all deferred to the *Sylvester* standard). In *Van Asdale*, 577 F.3d 989 (9th Cir. 2009), the Ninth Circuit adopted the ARB's ruling in *Platone* because it was the ARB's "reasonable interpretation of the statute." *Van Asdale*, 577 F.2d at 997. At least one district court has found that "the Ninth Circuit, consistent with its approach in *Van Asdale*, would 'similarly defer to the ARB's reasonable interpretation of the statute' that is now provided in *Sylvester*." *Erhart*, 2016 WL 5369470, at \*9.

Response at 13. Because there are genuine disputes of material facts regarding the reasonableness of Complainant's belief in a relevant violation as communicated in the text messages, this issue would be inappropriate to decide absent a hearing. *See Sylvester*, ARB No. 07-123, slip op. at 15. However, even assuming that Complainant's belief in a violation at the time he sent the text messages to V.M. was both subjectively and objectively reasonable, he did not engage in protected activity within the meaning of the statute because he did not communicate his belief to a proper entity.

Complainant's text message stated that he was going to contact his friend at DMHC to "make them aware of [V.M.'s] issues," and encouraged V.M. to "open an official DMHC case that will hopefully warrant a full audit of Health Net that will uncover other similar cases." Complainant's Response, Ex. C. Complainant went on to state, "...I have another friend running for an office [*sic*] as a U.S. Senator, who can issue a fraud report on Health Net and get this to the press media." Complainant's Response, Ex. B. There is no dispute that this is what his text message said, or that the text messages were sent to V.M. There is no dispute that the text message was not sent to one of the three enumerated entities in the statute, *i.e.*, a federal regulatory or law enforcement agency, a member of Congress or a committee of Congress, or a person with supervisory authority over the employee. Instead, the resolution of whether Complainant's text messages constitute protected activity depends on whether communications of alleged violations to private third parties are covered as protected activity and the meaning of the phrase "cause information to be provided" in Section 1514A(a)(1).

Section 1514A(a)(1) protects employees who "cause information to be provided" to one of three enumerated entities – a federal regulatory or law enforcement agency, a member or committee of Congress, or someone with supervisory authority over the employee or other such person working for the employer. Statutory interpretation begins with the statutory text, and only requires examination of the legislative history if the text is ambiguous. *Tides v. The Boeing Co.*, 644 F.3d 809, 814 (9th Cir. 2011) (citing *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183 (2004)). Other related statutes may also be helpful in determining congressional intent. *Id.* Because there is no clear definition of the phrase "cause information to be provided" in the statute an examination of the legislative history is necessary to determine congressional intent.

Congress passed SOX in response to the Enron scandal, which exposed "a culture, supported by law, that discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." S.Rep. No. 107-146, at 5 (2002). Congress determined legislation was needed to remedy the "corporate code of silence" that "hamper[ed] investigations" and "create[d] a climate where ongoing wrongdoing can occur with virtual impunity." *Id.* Section 806 of SOX provides protections for employee whistleblowers of publically traded companies. Congress stated it was specifically protecting whistleblowers "when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud." *Id.* at 13. The Senate Judiciary Committee repeatedly described whistleblower activity as "report[ing] acts of fraud," "disclos[ing] information," and assisting in "detecting and stopping actions...reasonably believe[d] to be fraudulent." *Id.* at 18-19. In addition, the Senate Judiciary Committee explained that the whistleblower provision protects reports of acts of fraud to "the proper authorities," specifically those with the authority to remedy the wrongdoing such as the FBI and the SEC, as well as to "supervisors or appropriate individuals within their company." *Id.*; *see also Tides*, 644 F.3d at 816.

While the legislative history does not provide much guidance on the phrase “cause information to be provided,” it does show that the SOX whistleblower provision emphasizes the “reporting” or “disclosure” of information to those with the power to rectify any corporate wrongdoing.

There is also little discussion in relevant case law on the meaning of “cause information to be provided” in Section 1514A(a)(1). The ARB has recognized that a whistleblower protection statute “should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived . . . violations without fear of retaliation.” *Fields v. Fl. Power Corp.*, USDOL/OALJ Reporter (HTML) ARB No. 97-070 , ALJ No. 96-ERA-22 (ARB Mar. 13, 1998) at 10 (decision under the Energy Reorganization Act, 42 U.S.C. § 5851, citing *English v. General Elec. Co.*, 496 U.S. 72 (1990) and *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) (“it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws”)). However, a review of whistleblower case law reveals that the ARB has found protected activity where the aggrieved employee reported information to third, non-governmental party in only a limited number of cases. While these cases relate more directly to the issue of when disclosures to a third, non-governmental parties constitutes protected activities, the discussions are useful for determining the level of causation required by Section 1514A(a)(1).

In *Simon v. Simmons Indus., Inc.*, 87-TSC-2, 1994 WL 897258 (Sec’y April 4, 1994), the complainant filed a whistleblower complaint under four of the environmental whistleblower protection provisions. The complainant worked at a chicken processing plant and reported seeing burning chicken feed on his employer’s property to the U.S. Department of Agriculture, which asked the complainant to assist in its investigation by preparing a map of the location of the fire. *Simon*, WL 897258, at \*1. In order to prepare the map, the complainant asked a local scrap dealer who was picking up material from the plant about his estimate of distances between various landmarks on the property. *Id.* The scrap dealer alleged that the complainant told him there were thousands of tons of contaminated chicken feed buried on the property, and that the employer’s chickens had been fed contaminated feed and had been shipped. *Id.* The scrap dealer later informed the complainant’s employer of the conversation. *Id.* The complainant argued that his statements to the scrap dealer were protected because they demonstrated an employee may be “about to” make a complaint to the government. *Id.* at \*2. The Secretary noted that in cases under the Occupational Safety and Health Act, courts have found “making safety and health complaints to one’s union, to a newspaper reporter, and to a legal services organization” protected. *Id.* However, the Secretary held “that making health and safety complaints to the general public, without more demonstrating that the employee is about to file a complaint or participate or assist in a proceeding. . . is too remote from the purposes of the Acts to be a protected activity.” *Simon*, 1994 WL 897258, at \*2.

In *Scott v. Alyeska Pipeline Serv. Co.*, No. 92-TSC-2 (Sec’y, Jul. 25, 1995), the complainant had worked for a consortium of seven major oil companies that operated the Trans-Alaska oil pipeline. The complainant contacted “an individual involved in a number of disputes with Alyeska including complaints before government agencies about Alyeska’s alleged violation of environmental regulations.” *Scott*, slip op. at 2. The complainant spoke with the individual a number of times and provided him with documents; the individual then “turned over or showed many of these documents to Alaska state officials and U.S. Environmental Protection Agency officials.” *Id.* While the ARB did not analyze whether this constituted protected activity, it noted it agreed with the ALJ

“that providing information to a private person *for* transmission to responsible government agencies, or *for use* in environmental lawsuits against one’s employer, is protected activity under the statutes involved in this case.” *Id.*

In *Wedderspoon v. City of Cedar Rapids, Iowa*, 80-WPC-1, 1980 WL 129159 (Sec’y July 28, 1980), the complainant, who was employed as a water pollution control operator, reported discharge of sludge into a river to a friend who was an “environmental activist,” who then notified a newspaper reporter of the discharge. *Wedderspoon*, WL 129159 at \*4. The reporter then contacted the complainant and wrote an article based on information received from the complainant regarding the discharge. *Id.* at \*5. The newspaper article triggered an investigation by the Iowa Department of Environmental Quality, and the complainant was subsequently suspended from work due to his failure to notify his supervisors of the sludge discharge. *Id.* at \*3, \*5. The Secretary adopted the ALJ’s conclusion that there was a “causal nexus” between the complainant’s communication with the reporter and the subsequent investigation of the discharge by the state, which qualified as “a proceeding resulting from the administration or enforcement of the provisions of” the relevant environmental act. The ALJ specifically noted that:

Complainant’s contribution to the institution of these investigations was twofold: (1) to bring the sludge discharge information to the attention of a friend who was an “environmental activist” and *could be expected to act on the information* as, indeed, he did; (2) to state the information which he had together with this views and charges against the City to a reporter of the Des Moines Register (the state’s premier newspaper) *whom he could expect to publish them* (as the Register did over the reporter's by-line) and to bring about a full public airing of the matter.

*Id.* at \*7 (emphasis added).

In *Tides v. The Boeing Co.*, 644 F.3d 809, 815 (9th Cir. 2011), the Ninth Circuit examined the whistleblower provision of SOX and determined that it only protects employees who disclose relevant violations to “those authorized or required to act on the information,” specifically: 1) a federal regulatory or law enforcement agency, 2) a member or committee of Congress, or 3) a supervisor or other individual who has the authority to investigate, discover, or terminate such misconduct. In *Tides*, two former auditors working for Boeing spoke with a reporter regarding perceived SOX violations, with one employee forwarding emails regarding concerns he previously raised with Boeing management regarding alleged problems with auditing practices. *Id.* at 812. The reporter published an article that revealed “a threatening company culture perceived by employees involved in SOX compliance, a record of poor internal audit results indicating that many of the company’s computer system controls were failing, and an internal allegation that audit results were being manipulated.” *Id.* The two employees were later terminated for violating Boeing’s policies regarding contacts with the media. *Id.* at 813. The employees filed whistleblower complaints under SOX arguing that their disclosures to the reporter were protected under § 1514A(a)(1) because “reports to the media may eventually ‘cause information to be provided’ to members of Congress or federal law enforcement or regulatory agencies.” *Id.* at 815.

The Ninth Circuit “decline[d] to adopt such a boundless interpretation of the statute,” noting that if Congress intended to protect the disclosure of any information to any entity, it could

have made “any disclosure” protected. *Tides*, 644 F.3d at 815 (noting that the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), prohibits retaliations for “any disclosure of information” while SOX only protects disclosure to the three enumerated entities in 18 U.S.C. § 1514A(a)(1)(A), (B), & (C)). The Ninth Circuit rested its conclusion on the plain meaning of the statute, but bolstered its reasoning by examining the legislative history of Section 1514A. This legislative history indicated that “Congress intended to protect disclosures only to individuals and entities with the capacity or authority to act effectively on the information provided” and that there was no support in the legislative history for the conclusion that Section 1514A(a)(1) should “be interpreted so broadly as to protect employee disclosures to members of the media.” *Id.*

Initially, I find that Complainant’s communications with V.M. in and of themselves are not protected because they were not directed at one of the three enumerated entities. *Tides*, 644 F.3d at 815. Complainant’s argument that he engaged in protected activities rests on the presumption that by texting V.M., he “caused information to be provided” to Respondent; Complainant does not argue that his texts with V.M. *themselves* were protected.

The difference between causation and proximate causation is vital to the resolution of this case. Proximate causation “creates legal liability, ‘proximate’ denoting in law a relation that has legal significance.” *Kozjara v. BNSF Ry. Co.*, 840 F.3d 873, 877 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1449 (2017). The cases discussed above indicate that a proximate cause analysis incorporating the concept of foreseeability is appropriate in this situation. For example, in *Scott*, the complainant provided information *for* transmission or *for use* in environmental lawsuits. *Scott*, slip op. at 2. Similarly, in *Wedderspoon*, the ALJ noted that the complainant *could expect* his friend to act on the information, and *could expect* the reporter to publish his allegations. *Wedderspoon*, WL 129159 at \*7. Additionally, the Ninth Circuit’s rejection of the plaintiff’s argument in *Tides* that any disclosure is covered because it may possibly result in information to be provided to one of the three enumerated entities supports the applicability of a proximate cause analysis. *Tides*, 644 F.3d at 815. And while the ARB’s statement in *Simon* does indicate what level of connection between a complaint to the general public and the purposes of a whistleblower provision is required, it noted that without some sort of demonstration that the employee is about to file a complaint or participate in a proceeding, the connection is too remote. *Simon*, 1994 WL 897258, at \*2.

Here, Complainant communicated with V.M. regarding his hope of getting a “fraud report” issued to the media. Even assuming, as I must for purposes of summary decision, that Complainant’s communications with V.M. were primarily in support his intention to report Respondent’s allegedly fraudulent activity to the SEC, and that he enlisted her help to “stop [Respondent] from engaging in the alleged fraudulent activity,” there is no indication that Complainant provided information to V.M. with the expectation that she would inform an appropriate federal agency, a member of Congress, or his employer. He only mentioned that he had a friend who was *running* for office who would be able to get a fraud report to the media, and asked for V.M.’s help. Complainant admitted that he took steps to ensure Respondent did not find out about the fraud report, and that he was “quite surprised” that V.M. had informed DMHC of his intentions. It is thus unreasonable to infer from the undisputed evidence that Complainant intended or could expect V.M. to act on the information he provided in a manner contemplated by the SOX whistleblower protections. His text messages to V.M. are not properly characterized as “reports” or “disclosures,” and he did not intend or expect V.M. to make any “reports” or “disclosures” as a result of his communications, beyond filing her own case with the DMHC, a state regulatory

agency.<sup>17</sup> Thus, there is no evidence that Complainant's text messages caused information to be provided to Respondent within the meaning of 18 U.S.C. § 1514A(a)(1).

*ii. Did Complainant's text messages qualify as protected activity under 18 U.S.C. § 1514A(a)(2)?*

Respondent argues that Complainant cannot rely on his allegation that he was preparing a fraud report as protected activity because Respondent had no knowledge of that decision. Respondent's Motion at 11. Complainant responds that his mention of a "fraud report" in text message number 1 shows Respondent "suspected [his] intentions." Complainant's Response at 4. In response, Respondent notes that Complainant "took great steps to keep his actions from [Respondent]" by using his personal cell phone, and then only "offsite." Respondent's Motion at 11. Complainant admitted in his Opposition to Respondent's Motion to Dismiss that he used his personal phone so he would "not arouse suspicion from management in regards to my plans of reporting [Respondent's] alleged fraud activity."

Section 1514A(a)(2) protects employees who "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...alleged [bank fraud, wire fraud, mail fraud, securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." (emphasis added). For the purposes of summary decision, I must view the evidence in the manner most favorable to the non-movant and make all *justifiable* inferences in his favor. However, I find that no reasonable fact-finder could find that Complainant's text messages provided "any knowledge" that Complainant was planning to file a complaint with the SEC, or any other proceeding regarding one of the anti-fraud laws covered by SOX.

First, his text message to V.M. stated his intentions to have his friend, who was running for Congress, issue a fraud report and "get this to the press media." He also indicated his hope that if V.M. opened a case with DMHC, it would "warrant a full audit of [Respondent] that [would] uncover other similar cases." However, there is no evidence that any proceeding or complaint had been filed or was about to be filed related to corporate fraud. In addition, the HIPAA release form stated that the information provided to Complainant was "for Health Net and DMHC case." The most that can be reasonably inferred from the text messages to V.M. regarding any proceeding is that Complainant hoped to trigger a "full audit" to uncover similar cases of delayed reimbursements due to plan members. However, hoping that V.M.'s case would trigger a larger audit is too speculative to qualify as a proceeding "about to be filed."

In a case arising under a different whistleblower statute, the ARB found that a pilot's threat to file a complaint with the FAA qualified as protected activity because as long as a whistleblower has a reasonable belief that he or she is "about to provide" a federal agency with information relating to a covered violation, communications about the intent to file a complaint are protected.

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<sup>17</sup> Complainant did not make this argument, but I note that Complainant could expect V.M. to file a complaint with the DMHC regarding her reimbursement issue since he encouraged her to do so. However, the DMHC is not a federal agency, and Complainant produced no evidence or assertions that V.M.'s complaints to the DMHC related to any of the six categories of violations covered by SOX. While he did state in a text message that V.M.'s complaint would "hopefully warrant a full audit of Health Net that will uncover other similar cases," there is no indication that any potential "full audit" would relate to alleged fraud. In addition, any potential "full audit" triggered by V.M.'s complaint was too speculative to qualify for protected activity under SOX.

*Ocbione v. PSA Airlines, Inc.*, ARB No. 13-061, ALJ No. 2011-AIR-012, slip op. at 7 (ARB Nov. 26, 2014). The ARB noted in *Ocbione* that SOX has been similarly interpreted to protect an employee's anticipated testimony before the SEC, even if the employee did not disclose the nature of the testimony. *Id.* at 7-8.

However, here, Complainant did not communicate his intent to file a complaint with a federal agency. He merely alluded to a "complaint in the works." Once again, even making all reasonable inferences in favor of Complainant, there was no way Respondent had "any knowledge" that would have alerted them he was "about to file" a complaint with the SEC. Mentioning "fraud" is not enough, especially given the context that he intended to have a friend issue the report to the media, and I find no reasonable person could find Complainant intended to or was preparing to file a report to a federal agency, member or committee of Congress, or his employer, based on the information in the text messages.

iii. *Did Complainant engage in protected activity when he "hinted" at his SEC complaint to Mr. Ortiz?*

Complainant also alleges that his statements to Mr. Ortiz regarding an article he read on the Internet that Respondent owed money to the IRS and that Respondent was "not going to like what happens next" due to a complaint he was filing may qualify as protected activity.

In order to be protected by Section 1514A(a)(1), "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." *Sylvester*, slip op. at 14. A "reasonable belief" includes both a subjective and objective component. *Id.* The subjective component is satisfied if the employee actually believed that the conduct complained of constituted a violation of relevant law. *Id.*, citing *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009). The ARB noted that the SOX whistleblower provision protects "all good faith and reasonable reporting of fraud." *Id.* at 17, quoting S148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002). A "lack of knowledge of certain facts that pertain to an element of one of the anti-fraud laws would be relevant to, but not dispositive of, whether the employee did have an objectively reasonable belief that a listed anti-fraud law had been violated." *Wiest v. Lynch*, 710 F.3d 121, 132-33 (3d Cir. 2013). "Objective reasonableness" often involves factual issues that cannot be decided on summary decision, and it "should be decided as a matter of law only when no reasonable person could have believed that the facts amounted to a violation." *Sylvester*, slip op. at 15, quoting *Livingston v. Wyeth Inc.*, 520 F.3d 344, 361 (4th Cir. 2008) (Judge Michael, dissenting) (citations omitted). "Objective reasonableness" should be judged "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Id.*, citing *Harp*, 558 F.3d at 723. In *Sylvester*, the ARB noted that "a complainant need not actually convey reasonable belief to his or her employer," and then cited *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1377-78 (N.D. Ga. 2004), for the proposition that "it is sufficient that the recipients of the whistleblower's disclosures understood the seriousness of the disclosures." *Sylvester*, slip op. at 15.

Here, 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 hinting at it with Mr. Ortiz. 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 he read an article alleging Respondent may owe money to the IRS that he therefore had a

reasonable belief that Respondent had violated one of SOX's six anti-fraud provisions. First, Complainant nowhere alleges that his SEC complaint related to money owed to the IRS. His complaint with the SEC instead referred to shareholder fraud, including possible insider trading, and specifically healthcare fraud that allegedly inflated Respondent's revenues to deceive shareholders. Second, SOX does not cover violations of tax laws. 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 owed taxes implicated one of SOX's six anti-fraud provisions, Complainant's "hinting" at an online article and then mentioning an unspecified complaint is not within the scope of the "good faith and reasonable reporting of fraud" envisioned by the statute. Further, I note that the ARB cited *Collins*, in which the district court held that vague complaints may be protected where the recipients of the disclosures understood the seriousness of the complaint. *Collins*, 334 F. Supp. 2d at 1377-78. Here, no reasonable person could find that Complainant's "hinting" could lead Mr. Ortiz to understand the seriousness related to an allegation of potential corporate fraud.

Furthermore, Complainant's statements to Mr. Ortiz do not qualify for protection under Section 1514A(a)(2) because there was no way Mr. Ortiz could have known that Complainant's allegation to a "complaint in the works" related to one of the listed anti-fraud laws in SOX. Merely mentioning that he read that Respondent owed money to the IRS and then mentioning that he had a "complaint in the works" is insufficient to support a rational inference that Mr. Ortiz had "any knowledge" about a proceeding "about to be filed" within the meaning of SOX. *See Occhione*, slip op. at 7. In addition, the Third Circuit noted the importance for a whistleblower's communications to "relate in an understandable way to one of the stated provisions of federal law." *Wiest*, 710 F.3d at 134. Here, Complainant's statements regarding the article and about a complaint in the works did not relate in an understandable way to SOX.

## CONCLUSION

For the reasons discussed above, I find that Complainant did not engage in protected activity within the meaning of SOX. Considering the evidence and potential justifiable inferences in the light most favorable to Complainant, I find that no reasonable person could find that Complainant engaged in protected activity within the meaning of the SOX statute as a matter of law. Accordingly, Complainant's case under the SOX fails and his request for summary decision is dismissed. Respondent's motion for summary decision is granted.

Because I find that Complainant did not engage in protected activity under Section 1514A of SOX, I need not reach the parties' arguments concerning the contributing factor analysis.

All pending motions are dismissed as moot. All dates are vacated. This matter is dismissed.

SO ORDERED.

RICHARD M. CLARK  
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](mailto: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).