



**Issue Date: 04 January 2019**

Case No.: 2018-SOX-00006

In the Matter of:

**CHRISTIAN RONNIE**  
Complainant

v.

**OFFICE DEPOT, INC.**  
Respondent

**DECISION AND ORDER**  
**GRANTING RESPONDENT'S MOTION SUMMARY DECISION**

The above-captioned matter arises from a complaint of unlawful retaliation filed by Christian Ronnie (“Complainant”) against Office Depot, Incorporated (“Respondent” or “Office Depot”) under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1524A, and its procedural regulations found at 29 C.F.R. Part 1980.

On or around November 30, 2017, the Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), acting as agent for the Secretary of Labor (“Secretary”), issued a letter outlining the Secretary’s findings post-OSHA investigation and dismissing Complainant’s complaint.

In a letter dated December 19, 2017, Complainant objected to the Secretary’s findings and requested a hearing pursuant to 29 C.F.R. § 1980.106.

The matter was then referred to the Office of Administrative Law Judges (“OALJ”) and assigned to the undersigned who, on January 17, 2018, issued an Initial Prehearing Order and Notice of Hearing, setting a hearing for July 26 and 27, 2018 and outlining various prehearing directives for the parties.

The hearing scheduled for July 26-27, 2018 was rescheduled for October 30-31, 2018 to allow for the parties to engage in discovery.<sup>1</sup>

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<sup>1</sup> Specifically, Respondent’s motion was granted, compelling Complainant to appear for deposition as Employer requested per an Order issued on June 28, 2018.

Pending currently is Respondent's Motion for Summary Decision received on September 28, 2018. After reviewing the evidence and arguments presented by the parties, it must be concluded that Respondent has demonstrated there is no genuine issue of material fact as to an essential element of Complainant's claim – whether Complainant engaged in protected activity. Accordingly, this Decision and Order grants Respondent's Motion for Summary Decision for the reasons set forth below.

#### Relevant procedural history

Under cover letter dated September 27, 2018, Respondent filed its Motion For Summary Decision ("Respondent's Motion"), received on September 28, 2018, with Exhibits A through K attached. Complainant, acting pro se, filed a pleading entitled "Complainant's Request of a Hearing Rather than a Summary Judgement [sic] (Declaration)," dated October 22, 2019, with Exhibits A through M, attached, which is constructed as his response in opposition to Respondent's Motion for Summary Decision (referred to herein as "Complainant's Opposition"). *See* 29 C.F.R. § 18.40.

With prior leave from the undersigned, Respondent filed its Reply to Complainant's Opposition by facsimile transmission received on November 8, 2018 (referred to herein as Respondent's Reply).

In Respondent's Motion, Respondent argues (1) Complainant cannot establish a *prima facie* case because he did not engage in protected activity under SOX, i.e., none of the Complainant's communications about sales data discrepancies in Respondent's financial reports constitute the type of conduct SOX protects; (2) even if Complainant's conduct were protected, Respondent was not aware of such activity; and (3) Complainant's employment would have been terminated notwithstanding Complainant's allegedly protected activity.

Complainant's Opposition appears to include a request summary disposition on the merits in his favor. His response also appears to incorporate by reference and attachment the "Pre-Hearing Statement" which Complainant previously filed in this matter on October 3, 2018. Complainant's Opposition includes the assertion that "Respondent ignored all correspondences and requests from [him], including a request of deposition transcripts[.]" He describes multiple events and emails occurring during the period from January through April of 2016 which he offers as evidence of retaliation.

Respondent's Reply to Complainant's Opposition contends that Complainant has failed to present affirmative evidence of record which demonstrates any material factual dispute.<sup>2</sup> Instead, according to Respondent, Complainant has proffered "conclusory allegations" which are insufficient to defeat its request for summary disposition in this matter. Respondent's Reply at 4.

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<sup>2</sup> Respondent's Reply correctly notes that to the extent Complainant's opposition includes Complainant's own request for summary decision in his favor, it must be denied as untimely filed. *See* Status Conference Summary And Order; Second Prehearing Order And Notice Of Hearing issued in this matter on June 22, 2018 which scheduled a hearing for October 30-31, 2018 and directed submission of motions for summary decision at least 30 days prior to the scheduled hearing.

### Standard of Review – Summary Decision

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

In determining if there is a genuine issue for trial, the court must view all the evidence and factual inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the non-moving party produces enough evidence to create a genuine issue of material fact, it defeats the motion for summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). However, if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial, there is no genuine issue of material fact and the moving party is entitled to summary decision. *Id.* at 322-23. The nonmoving party must go beyond the pleadings, by either his or her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, to establish that there is a genuine issue for trial. *Id.* at 324.

### Undisputed Facts

Construing any factual disputes in favor of Complainant as the non-moving party, the following facts are deemed applicable in this matter as undisputed:

1. Respondent hired Complainant on April 20, 2015 as a Senior Financial Analyst. Respondent’s Motion, Ex. D.
2. Complainant reported to Tiffany Schlotter, then Senior Finance Manager. *Id.* at Ex. C (Complainant’s Deposition or “Dep.” at 49).
3. Complainant’s employment with Respondent was terminated on April 19, 2016. *Id.* (Complainant’s Dep. at 8-9).
4. Complainant’s responsibilities as a Senior Financial Analyst for Respondent included conducting financial and operational analysis, supporting management with financial ad-hoc requests, and reporting sales figures to senior management. *Id.* (Complainant’s Dep. at 21-22).
5. As part of his reporting duties, Complainant worked with Applied Predictive Technologies (“APT”), a 3<sup>rd</sup> party vendor Respondent retained, to interpret sales figures, analyze sales data and generate a report containing U.S. retail store optimization rates which Complainant would then report to Respondent’s regional vice presidents; he also had responsibility for reporting sales results to sales teams in the form of monthly score cards. *Id.* (Complainant’s Dep. at 22-24).

6. In 2016, Complainant received a “meets expectation” rating in his first performance evaluation for the year 2015: his manager noted areas of performance concern including Complainant’s difficulties completing assigned tasks and producing accurate and complete data and analysis. Respondent’s Motion, Ex. F and Ex. G; see also Ex. C (Complainant’s Dep. at 41; 103-104).
7. In his 2015 performance self-evaluation, Complainant noted that he had reported technical flaws and recommended changes to increase sales reporting accuracy in his weekly meetings, in addition to his “identifying and correcting a mechanical issue...that was causing a significant increase in results.” Respondent’s Motion, Ex. E.
8. In late February 2016, Complainant disclosed to Respondent’s senior management that he had discovered a discrepancy in sales data he was required to report. Respondent’s Motion, Ex. C (Complainant’s Dep. at 67); Ex. H.
9. The discrepancy Complainant identified as existing between two sets of data Respondent used to analyze sales: APT numbers, i.e., sales data provided to APT for analysis and returned and “GSC” numbers obtained internally for Respondent’s IT department. Respondent’s Motion, Ex. C (Complainant’s Dep. at 71-72; 75-76).
10. Complainant’s recommended solution to the sales data discrepancies was to disregard the GSC data and instead rely solely on the APT data. *Id.* (Complainant’s Dep. at 77); Ex. H.
11. By email dated March 3, 2016, Complainant was asked to research the issue to determine the cause of the discrepancy and to report his findings. Respondent’s Motion, Ex. I.
12. In March 2016 email exchanges involving Complainant and other Respondent staff indicate Complainant did not provide a reason for the data discrepancy he reported and continued to assert his recommended solution. Respondent’s Motion, Ex. H; Ex. J.
13. In document entitled “Performance Correction Document” citing an occurrence date of April 7, 2016 and Tiffany Schlotter as manager, Complainant was given a “Final Warning” as to his failure to complete the task of looking into “the root cause of differences between GSC sales and APT sales” as directed to do on March 3, 2016 and noted the performance expectation was that Complainant “[p]erform the expected requests/tasks asked by his manager without resistance or repeated reminders/follow up by his manager” and that [a]ll conduct and communications should be professional and respectful.” Respondent’s Motion, Ex. K.
14. Complainant received this final warning and understood that his employment could be terminated if he were to fail to improve his performance. Respondent’s Motion, Ex. C (Complainant’s Dep. at 52; 55).
15. At an individual meeting with Ms. Schlotter held after a team meeting on April 19, 2016, Complainant was informed that he was terminated from his position with Respondent. *Id.* (Complainant’s Dep. at 60).
16. At the time of his deposition taken in this matter, Complainant did not why Respondent’s IT function structured the data it reported in the way that it did. *Id.* (Complainant’s Dep. at 89-90).

### Conclusions of Law

At the summary decision stage in a SOX claim, a complainant need only demonstrate “that a rationale factfinder could determine that the [complainant] has made his prima facie case.” *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432 (S.D.N.Y. May 1, 2013).

To establish a *prima facie* case, a complainant must allege the existence of facts and evidence establishing: (1) the employee engaged in a protected activity; (2) the respondent knew or suspected that the employee engaged in the protected activity; (3) the employee suffered an adverse action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1980.104(e)(2). A complainant on summary decision must show the existence of a material issue of fact on an essential element of the SOX cause of action. *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).

Respondent seeks summary decision on two bases: Complainant did not engage in protected activity and it had a legitimate reason for its terminating Complainant’s employment.

### Protected Activity

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

- (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-
  - (A) a Federal regulatory or law enforcement agency;
  - (B) any Member of Congress or any committee of Congress; or
  - (C) a person with supervisory authority over the employee (or such other person working for the Respondent who has the authority to investigate, discover, or terminate misconduct); or
  
- (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the Respondent) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

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

The plain, unambiguous text of Section 1514A(a)(1) establishes six categories of respondent conduct against which an employee is protected from retaliation for reporting: violations of 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), § 1344 (bank fraud), § 1348 (securities fraud), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. *Lockheed Martin Corp. v. ARB, USDOL*, 717 F.3d 1121, 1130 (10th Cir. 2013).

A complainant must demonstrate that he or she provided information regarding conduct that he or she reasonably believed violated one of the six enumerated provisions of U.S. law; the complainant need not establish an actual violation. *Lockheed*, 717 F.3d at 1132; *see also Sylvester v. Parexel International LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-00039,-42, PDF at 15 (ARB May 25, 2011) (stating that the complainant need not actually communicate the reasonableness of his or her beliefs to management or the authorities).

In order to have a “reasonable belief” that a violation occurred, a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the listed categories of law. *Lockheed Martin*, 743 F.3d at 1132; *Sylvester*, ARB No. 07-123 at 14-16 (ARB May 25, 2011). A subjective reasonable belief requires that “the employee ‘actually believed the conduct complained of constituted a violation of pertinent law.’” *Sylvester*, ARB No. 07-123 at 14 (citations omitted). An objective reasonable belief “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* at 15 (citations omitted). “[B]ecause the analysis for determining whether an employee reasonably believes a practice is unlawful is an objective one, the issue may be resolved as a matter of law.” *David Welch v. Cardinal Bankshares Corp.*, ARB No. 05-064, ALJ No. 2003-SOX-00015, PDF - 9 - at 10 (ARB May 31, 2007) (citations omitted); *see also Sylvester*, ARB No. 07-123 at 15 (“[O]bjective reasonableness is a mixed question of law and fact’ and thus subject to resolution as a matter of law ‘if the facts cannot support a verdict for the non-moving party.’”) (citations omitted).

Complainant’s reporting of the discrepancy in sales data in March 2016 does not constitute protected activity under SOX as such reporting does not implicate any of the six enumerated categories of protected activity under SOX. When asked during his deposition what specific law, rule or regulation Respondent violated, Complainant generally averred that the sales date discrepancy he reported constituted of “SEC fraud.” Respondent’s Motion, Ex. C (Complainant’s Dep. at 42). Therefore, it can be concluded Complainant had subjective belief that Respondent violated some unspecified SEC rule or regulation or engaged in securities fraud.

Considering the facts in the light more favorable to Complainant, it cannot be concluded that he held an *objectively* reasonable belief Respondent violated any SEC rule or regulation or otherwise engaged in securities fraud. Suspicion and speculation cannot be deemed objectively reasonable belief that Respondent engaged in conduct enumerated under the relevant SOX provisions.

The record, i.e., email exchanges proffered by both Complainant and Respondent in their respective pleadings, shows Complainant disclosed to Office Depot management discrepancies

in sales data he was required to report as part of his responsibilities as Senior Financial Analyst in early 2016. The record also shows once made aware of the discrepancies, Respondent requested Complainant research the source of such discrepancies. Therefore, Complainant's insistence that the sales data discrepancies constitute Respondent's fraud must be deemed objectively unreasonable, in light of Respondent's expressed interest in wanting to learn the cause of such discrepancies. *See e.g., Day v. Staples, Inc.* 555 F.3d 42, 58 (1<sup>st</sup> Cir. 2009)(finding an employee's complaints ceased to be objectively reasonable after the employer provided explanations for the challenged conduct and assured employee no fraud was being committed).

To the extent that he contends Respondent intentionally manipulated sales data in order to mislead or deceive, Complainant has offered no more than his own suspicion and speculation. *See Feldman v. Law Enforcement Associates, Corp.*, 955 F. Supp. 2d 528, 551 (EDNC June 28, 2013) (finding that the complainants did not have an objectively reasonable belief because they had very little information on which to base their insider trading allegation); *Reed v. MCI, Inc.*, ARB No. 06- 126 at 5 (stating that speculation and mere possibility do not satisfy the reasonable belief requirement); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 353-55 (4th Cir. 2008) (concluding that a chain of speculation and hypotheticals requiring multi-step reasoning cannot establish a reasonable belief that the employer was engaged in violations covered under SOX); *see Riedell v. Verizon Communications*, 2005-SOX-77, PDF at 10 (ALJ Aug. 14, 2006) (finding "the [c]omplainant has not submitted any kind of evidence that would support a conclusion that he ever had enough information . . . to allow him to form a reasonable belief" and "although the Complainant's knowledge . . . might have led him to develop a suspicion . . . a suspicion is simply speculation and cannot logically be regarded as reasonable belief").

Complainant relies on his repeated assertions via email to Respondent's management about "issues related to the accuracy of calculating sales lift." Complainant's Opposition at 4. Such assertions, however, do not constitute objectively reasonable belief of fraud. *See, e.g., Day*, 55 F.3d at 56 (disagreement with management about internal tracking systems which are not reported to shareholders without evidence of fraudulent intent deemed insufficient to show reasonable belief in shareholder fraud or any of the other laws listed in Section 1514A).

While *pro se* litigants are to be given some leeway and their pleadings should be liberally construed, a *pro se* litigant cannot shift the burden of litigating a case to the adjudicator and ultimately has "the same burdens of providing the necessary elements of [his] case." *See Pik v. Credit Suisse AG*, ARB No. 11-034, ALJ No. 2011-SOX-2006, PDF at 4-5 (ARB May 31, 2012). In this matter, Complainant has not offered evidence sufficient to generate a genuine issue of material fact that he communicated a reasonable belief Respondent violated any of the categories of protected activity enumerated under the SOX whistleblower provision.<sup>3</sup>

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<sup>3</sup> Because Complainant has not presented a genuine issue of material fact that could establish he engaged in protected activity, there is no need to consider in any depth Respondent's second basis for summary decision, i.e., that it had a legitimate reason to terminate Complainant's employment, or as raised in Respondent's Reply, that Respondent had no knowledge of the alleged protected activity. However, it must be noted that the standard applicable here is not if Respondent has a legitimate non-discriminatory explanation for its personnel action, but rather if clear and convincing evidence supports finding Respondent would have taken that same action notwithstanding the alleged protected activity. *See Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005 (ARB September 13, 2011)("[SOX] Section 806 complaints filed are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and

Conclusion

Viewing all the evidence and factual inferences in the light most favorable to Complainant, the non-moving party, it must be concluded that Respondent has established there is no genuine issue of material fact as to an essential element of Complainant's claim, i.e., whether Complainant engaged in protected activity.

**ORDER**

Accordingly, it is hereby ORDERED that Respondent's Motion for Summary Decision be GRANTED and Complainant's claim be DISMISSED WITH PREJUDICE.

SO ORDERED.

**LYSTRA A. HARRIS**  
Administrative Law Judge

Cherry Hill, New Jersey

**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

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Reform Act for the 21st Century (AIR 21)" and not the burden-shifting applicable under *McDonnell Douglas* test used in Title VII cases of discrimination).

(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).