

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 23 January 2020

CASE NO.: 2019-SOX-00028

In the Matter of:

ERIK LECKNER,
Complainant,

v.

**GENERAL DYNAMICS INFORMATION
TECHNOLOGY, INC. (formerly CSRA),**
Respondent,

and

APEX SYSTEMS, LLC,
Respondent.

Appearances: Christopher A. Olsen, Esq.
for Complainant

Andrew F. Merrick, Esq.
for General Dynamics IT Information
Technology

Laura D. Windsor, Esq.
Amanda M. Weaver, Esq.
for Apex Systems, LLC

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER GRANTING SUMMARY DECISION

This is a whistleblower retaliation claim brought under the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, and six different environmental protection statutes. The environmental statutes are: the Energy Reorganization Act, 42 U.S.C. § 5851; the Federal Water Pollution Control Act, 33 U.S.C. § 1367; the Clean Air Act, 42 U.S.C. § 7622; the Toxic Substances Control Act, 15 U.S.C. § 2622; the Solid Waste Disposal Act, 42 U.S.C. § 6971; and the Comprehensive

Environmental Response Compensation and Liability Act, 42 U.S.C. § 9610.¹ Respondents General Dynamics Information Technology and Apex Systems, LLC each move for summary decision. I will grant the motions.

Undisputed Material Facts²

Respondent parties. Apex Systems is a staffing agency. G.D.Ex. 4 ¶ 3.³ General Dynamics Information Technology, Inc. is a wholly-owned subsidiary of General Dynamics Corporation. It provides information technology services to government contractors for purposes such as defense, intelligence, and other government requirements. CSRA was a publicly-traded corporation, listed on the New York Stock Exchange. On or about April 2, 2018, General Dynamics Corporation acquired CSRA and placed it within General Dynamics Information Technology, Inc. CSRA was then delisted from the New York Stock Exchange. General Dynamics Information Technology, Inc. does not dispute for present purposes that it is liable for any adverse decision. At times in this Order, I therefore refer to CSRA and General Dynamics Information Technology, Inc. together as “General Dynamics.”

In 2017, the U.S. Environmental Protection Agency contracted with CSRA for certain work on an “Emergency Management Portal.” CSRA contacted staffing agency Apex Systems to provide a lead Java developer for the project. G.D.Ex. 4 ¶ 6.

The legal technicalities of the relationship between CSRA (and then General Dynamics Information Technology) and Apex are vague, but not in a way that affects summary decision. It appears that, when Apex received a request from a client, it would find someone whom it believed was a good candidate. *See* G.D.Ex. 1 at 162. It would refer that person to the client for an interview. *Id.* at 163. If the client approved, Apex hired the applicant and assigned him or her to the client’s project. *See id.* The person performed all work under the direction and supervision of Apex’ client, but Apex also had an “account executive” with whom the hired person communicated about the employment. *See* G.D.Ex. 4 ¶ 4. The client paid Apex under a contract, and Apex paid the employee. The employee was hired to work on the client’s particular project; if the client no longer required the employee’s work, Apex would terminate

¹ The implementing regulations for the Sarbanes-Oxley Act are at 29 C.F.R. Part 1980. The implementing regulations for the environmental statutes are at 29 C.F.R. Part 24.

² As I recite the facts for purposes of summary decision in the light most favorable to the non-moving party (Complainant), drawing all reasonable inferences in his favor, making no credibility determinations adverse to him, and without weighing the evidence, this factfinding is for purposes of this motion only.

³ “A.Ex.” refers to Apex Systems’ exhibits. “G.D.Ex.” refers to General Dynamics’s exhibits. Complainant did not submit any exhibits.

Each Respondent submitted a copy of Dominique Reed’s declaration. *See* A.Ex. C; G.D.Ex. 4. I will cite throughout only the copy that General Dynamics submitted (G.D.Ex. 4). Each Respondent also submitted a copy of Alison Page’s deposition transcript. *See* A.Ex. D; G.D.Ex. 3. I will cite throughout only the copy that General Dynamics submitted (G.D.Ex. 3).

General Dynamics’s Exhibit 1 is a draft transcript of Edward Campbell’s deposition testimony. A certified court reporter did not certify this draft transcript. As no party disputes the authenticity of the draft, I admit it for purposes of this motion.

the employment. G.D.Ex. 4 ¶ 5. In some cases, after about six months, the client would hire the person as its own employee. *See* A.Ex. D at 23; G.D. Ex. 1 at 163-64.

For purposes of this motion, I avoid delving into the intricacies of the relationship between Apex and its clients by inferring that Apex and General Dynamics Information Technology were joint employers. As such, each is responsible for compliance with all applicable employment law requirements.

Apex' hire of Complainant to work at CSRA. Apex referred Complainant to CSRA for an interview for the Java development position; CSRA approved Complainant for the job; and Apex hired complainant. A.Ex. A at 3; A.Ex. D at 72; G.D.Ex. 4 ¶ 6. Complainant began to work at CSRA in January 2018. A.Ex. A at 3-4; G.D.Ex. 3 at 72-73; G.D.Ex. 4 ¶ 6. He reported to CSRA supervisors Alison Page and Ed Campbell. G.D.Ex. 4 ¶ 7. He also communicated about his employment with Apex account executive Dominique Reed. G.D.Ex. 4 ¶ 7.

Complainant was to write Java code for the Emergency Management Portal project; modify, enhance, and debug the software; communicate technical information to non-technical people; and mentor a junior Java developer. G.D.Ex. 3 at 21-22; G.D.Ex. 1 at 46, 158, 165. He soon discovered that he did not have access to all of the Portal project's source code repository. The repository provides a history of all of the revisions in the development of the source code. A.Ex. A at 6; G.D.Ex. 1 at 65, 73, 155-56.

Access to source code repository. Complainant asked CSRA supervisor Ed Campbell for access to the full repository. G.D.Ex. 1 at 61-62. Campbell was unable to provide the access. The Environmental Protection Agency owned the repository, but it was stored in the servers of Salient, which had worked on the project before CSRA. G.D.Ex. 1 at 67-68; G.D.Ex. 3 at 60.

The "EPA had asked Salient to provide [CSRA with] everything that they had with regards to the source code" early on during Complainant's employment. G.D.Ex. 1 at 76-77. This should have occurred during a 90-day transition period, during which Salient would transfer its contract-related information. G.Ex. 1 at 29-30, 79-80. But no formal transition had occurred; CSRA got only limited information, which included a "limited code base and only access to the production server"; it did not have the complete source code. A.Ex. D at 19, 37; G.D.Ex. 1 at 30, 64, 67-68; G.D.Ex. 3 at 19, 37.

When Complainant asked for the complete source code repository, CSRA Supervisor Campbell tried to get it from another source, but that source too had never received it from Salient. G.D.Ex. 1 at 63. The best he could get was a "snapshot" of the code, which would show the code on a single day and not throughout its history. G.D.Ex. 1 at 157. Campbell gave that to Complainant and directed Complainant to recreate the repository from the "snapshot." G.D.Ex. 1 at 63, 97-98. Campbell made this assignment at the direction of the EPA. G.D.Ex. 3 at 42.

Within a week or two, Complainant again requested the complete source code repository. G.D.Ex. 1 at 63-64. Campbell contacted a manager at Salient and asked for "a more complete version" of the source code repository "if it existed," but Salient did not provide it. *Id.* at 64.

Complainant soon asked Campbell for the complete repository yet again. *Id.* at 69. Campbell again emailed the Salient manager without success. *Id.* at 72. Each time Campbell made a request to Salient for the repository, he copied the CSRA’s contact at the EPA, Rob Thomas. G.D.Ex. 1 at 72, 75, 98; G.D.Ex. 3 at 40.

Although, as directed, Complainant was using the “snapshot” to recreate the source code repository, he persisted in making weekly requests for the complete repository. A.Ex. A at 6; G.D.Ex. 3 at 26, 42-43. Nothing on the record states specifically why Complainant believed he needed access to the complete repository; it would seem that Complainant believed it would increase his efficiency for code development and was needed for cybersecurity. *See* A.Ex. A at 1; G.D.Ex. 1 at 74.

Complainant’s CSRA supervisors later testified that they did not believe Complainant needed the repository. As Complainant’s other CSRA manager, Alison Page, testified, “We had access to the production application, so it was just a matter of taking additional time to re-create what we needed.” G.D.Ex. 3 at 40-41. She added, “I don’t think [Rob Thomas of the EPA] was concerned enough about [access to the source code repository] to pursue it any further than he did. He was willing to fund us to re-create what we needed.” *Id.* at 41.

Campbell also believed that CSRA didn’t need the complete repository. G.D.Ex. 1 at 72-73. He acknowledged that it would be useful but thought the snapshot was sufficient. As he testified: “[C]ertainly if there was a source code with version history, it would have given some context to where the applications were. It was a nice to have at most, though. It was certainly not required.” *Id.* at 73.

Mentoring duties with junior developer. Meanwhile, Complainant was expressing frustration with the junior Java developer whom he was supposed to mentor, Rakhi Madhavan Nair. He seemed uncertain what his role was supposed to be. In a February 23, 2018 email to CSRA supervisor Page, Complainant stated:

The types of questions [she is] asking are very junior – almost as if she has no relevant engineering experience. [Nair] is having difficulty finding things like basic jars even though every project always has files in different places – first thing an engineering learns in any programming environment from day one, be it C, C++, or Java. She considered it “wrong” location.

We both have the same emails from others, same source code, same access, yet she needed help with even what FTP, files, setup (although exclaiming it was junior developer knowledge out of the blue when I wanted to trace her steps when she said she was commenting out code – no developer ever in history of working with at least 50,000+ engineers has ever commented out production level code to make their own environment work). [¶] [Nair] also makes requests for things which are obvious in nature (not anything complex).

I saw a discussion from Ed in Lead role and I thought that was somewhat odd considering I was placed as a Lead from the start and then downgraded and replying to [Nair's] requests on very simple things.

G.D.Ex. 5.

Page discussed the email with Complainant's other supervisor, Ed Campbell. They "were kind of taken aback to [Complainant's] inclusion of the reference to the 50,000-plus engineers." G.D.Ex. 3 at 78. They thought Complainant this was an exaggeration and was unprofessional. G.D.Ex. 3 at 78. The two of them spoke, first with Complainant, and then with Complainant and Nair together. *Id.* They reminded Complainant that he was in a mentor role and that Nair was early in her career and at the beginning of her employment. *Id.* But the reminder brought about no change in Complainant's behavior toward Nair.

As Campbell observed during teleconferences he had with Complainant and Nair,

Frequently . . . [Nair] would begin to answer a question and [Complainant] would cut her off stating that she was giving an incorrect status and that she needed to . . . wait her turn and that she would be explained by him the details of something down the road.

G.D.Ex. 1 at 174-75. Campbell testified that Complainant "struggled from the outset to communicate effectively with his colleagues" and that Complainant "was at times monopolizing on phone calls, cutting folks off abruptly, raising his voice periodically to talk over individuals and at times corresponding via email in a manner that did not lend itself to productivity and a good work environment." *Id.* at 173. Similarly, Page thought that during team meetings, Complainant "acted as if his concerns were the most important and would speak over others and . . . not follow the agenda that was laid out." G.D.Ex. 3 at 81.

Two weeks later, on March 9, 2018, Complainant again complained about Nair in an email to Campbell and Page:

I wouldn't have brought this up again as I had to several weeks ago, but it hasn't changed – in fact, it's been happening regularly on calls, emails, and so forth. So I would like for it to stop so I can focus on the tasks I am working on. [¶] Even in discussions with Nair, I am hearing very junior levels of knowledge [giving an example].

G.D.Ex. 6.

Around March 2018, Nair called Campbell and Page; she was "highly upset" and "in tears." G.D.Ex. 3 at 79, 82; G.D.Ex. 1 at 175. She said that Complainant had been "quite hostile" toward her over the phone. She requested that Campbell and Page take her off the Portal project. G.D.Ex. 1 at 175. Page contacted account executive Reed at Apex and related Nair's complaint. G.D.Ex. 3 at 82; G.D.Ex. 4 ¶ 8. Reed counseled Complainant. G.D.Ex. 4 ¶ 8.

Complainant's interactions with other co-workers. In addition to Nair, two of Complainant's team members (Jennifer Morgan and Colleen McCarthy) complained to Campbell that Complainant "was difficult to correspond with, sometimes difficult to feel that it was an even playing field conversation where there would be a, you know, statement and a response and that he was at times assertive, bordering on aggressive when spoke to them." G.D.Ex. 1 at 173, 176-77. Page stated that everyone on the team⁴ had communication problems with Complainant. G.D.Ex. 3 at 73-75. Campbell himself observed or received reports from others that Complainant had communication issues with other colleagues outside of his immediate team, including Paula Childers, Jay Waldo, and LeAnn Spradling. G.D.Ex. 1 at 173.

Complainant next complained that security administrator Paula Childers took too long to retrieve passwords for him. Campbell emailed Complainant:

I received the following reply from Paula [Childers] this morning in regards to your punch-list requests from last night. Just so you know; my assessment of this reply is not that [Childers] is blocking or silo-ing. She appears to be doing what she can to help us within the confines of the NCC procedures she has to adhere to.

G.D.Ex. 7. Complainant replied:

Thanks about the [passwords] list. *She can make it up* to me by sending the passwords right away without me having to find them. Please ask her to do this or I can directly to her. Nice talk below [referring to an email by Childers] but no passwords as of yet.

I want access to those directions if it means zipping it all up in one package from each machine. I do not want her explanations any longer – just the zipped packages. I have gone enough with her filtering of what I need. I care less of what she thinks I need.

Id. Campbell responded: "I am not understanding this nastiness I'm sensing from you towards Paula. I'm not seeing anything that warrants it." *Id.*

Complainant resumed his complaints about Childers a couple weeks later. Starting in the middle of the night, he wrote three emails to Campbell, questioning her decision-making and management skills. G.D.Ex. 2. In the first, sent at 3:14 a.m., he wrote:

For [Childers] today, to spend 30 minutes of a one hour meeting explaining development processes at EPA which she deliberately and intentionally obstructs access for developers is beyond my comprehension. . . . That is why I realized in our meeting aht she could just go on and talk for an hour over nothing that really what the intent of the meeting was. This is not the first time and I am really concerned about this repetitive Paula obstructive actions for silo purposes. . . .

⁴ Swetha Chilivery, Cindy Fan, Lawanna Goods, and Colleen McCarthy.

G.D.Ex. 2. In the second email, sent eight minutes later, at 3:22 a.m., Complainant wrote:

Just one other note is what really is disturbing is the fact that in the meeting she said looked at those . . . directories and said some directories are missing yet she is the one who blocked read access to those files that were missing . . . Its not the fact that they were 100% restrictive, it's the fact that she knew because she those permissions that they were the same directories/files that had their read permissions revoked. That is beyond comprehension.

Example as provided earlier circled in red as one example in one directory for fr application. They are all like that in the other directories too with some permissions with no read access. Anyways, I think you should address this with her up. . . . Anyways.

Id. In the third email, sent at 7:46 a.m., Complainant wrote:

For tomorrow then with Rob, we should say that Paula should provide the first install while I watch all the steps. She refused in a previous meeting to discuss this in the past [¶] We also need to ensure [Childers] doesn't hijack meetings giving a lecture about dev processes

*Id.*⁵

Termination of employment. On April 9, 2018, Page and Campbell notified Apex (through account executive Reed) that the General Dynamics was removing Complainant from the Portal project and wanted Apex to find a replacement. G.D.Ex. 3 at 66, 82; G.D.Ex. 4 ¶ 9.⁶ They gave as reasons that Complainant was:

(1) disruptive, domineering and aggressive demeanor during team calls and other meetings; (2) [had] defensive and aggressive interactions with team members and management; and (3) [was] perceived [as] “overstepping” such as repeated and escalating requests and demands for access to servers and information.

⁵ Complainant's grievances with Childers continued as long as he remained at the Company. For example, on May 18, 2018, he emailed Campbell: “Not even a single thank you from Paula's team for 5 emails of advice and research. Waste of time so in the future I will not provide them any advice or recommendations.” G.D.Ex. 8.

⁶ Complainant questions the date of this notice to Apex, asserting that there should be an Outlook calendar invitation for the date and that General Dynamics did not produce that kind of Outlook entry during discovery. On November 6, 2019, General Dynamics moved for leave to file a reply brief because it had just received a copy of the Microsoft Outlook calendar invitation through a Freedom of Information Act request to the EPA; the Outlook invitation was on the EPA's server. I allowed General Dynamics to file the reply.

On November 7, 2019, General Dynamics submitted a copy of the Outlook invitation from Page to Campbell and Reed for the meeting on April 9, 2018. The subject of the meeting was: “Java Dev's discussion.” Complainant was a Java Developer. I therefore find, as confirmed in the Outlook entry, that the undisputed facts show that the meeting described in the text above did occur on April 9, 2018.

G.D.Ex. 4 ¶ 9. Page and Campbell gave additional details at their depositions; the details are consistent with the reasons recited in the quote above.⁷

On April 13, 2018, four days after General Dynamics notified Apex that it was removing Complainant from the job, Complainant emailed Rob Thomas at the EPA. Request for a Hearing at 18.⁸ He reported that the Salient development team still had access to portions of the Portal project code, when instead the development team at General Dynamics IT needed that access:

[I]f you look at the bottom right of the **BEFORE** image inserted here, you will see that prior to the change, I ran a group info linux command and saw that salient development team was still on the group (but new dev wasn't). That was one of the issues. So if you recall, you, I, and Ed all requested to the NCC that we needed access. . . .”

Id. EPA’s Thomas replied ten minutes later. He advised Complainant to tell Campbell about this so the Salient employees’ access could be removed as soon as possible. *Id.* He stated that leaving the names of the Salient team with access violated security controls. *Id.* Complainant answered that he would notify Campbell immediately. *Id.* at 17. Thomas commented, “This is something I need to speak to Ed about and then go up their chain of command. This makes EPA looks more than bad . . . they’re burning federal resources and what is the result.” *Id.*

On April 16, 2018, Campbell told Apex’s Reed that Complainant had discussed “alleged project inefficiency and other project matters” with the EPA on April 13, 2018. G.D.Ex. 4 ¶ 11. Reed stated in a declaration that Apex’s employees are expected to raise their concerns with Apex; in some cases, they can discuss concerns with their supervisor at the client. *Id.* Campbell requested that Reed counsel Complainant about speaking directly with EPA. *Id.* Reed complied: she told Complainant to bring any project management concerns to Campbell and Reed. *Id.*

Later that afternoon, Complainant wrote four emails to Reed. At the outset (12:26 p.m.), he thanked Reed “for the update” and said that he “definitely prefer[red] not to be in the cross fires of this,” and “I prefer to stay out of politics.” A.Ex. C1. But then he continued over the next six hours to send Reed complaints about Campbell and others. *Id.*

On May 29, 2018, after Apex found a replacement for Complainant, Page told Apex (through Reed) that Complainant was off the project. G.D.Ex. 4 ¶ 13. On the same day, Reed notified

⁷ Page testified that they decided to remove Complainant because of “[t]he issues with meshing with the team, the consistent requests for access that he didn’t need, and then—the issues with Rakhi, the other developer.” G.D.Ex. 3 at 83. Campbell testified that Complainant “had some real issues communicating and collaborating productively with his immediate colleagues and extended colleagues at General Dynamics.” G.D.Ex. 1 at 198. He explained that Complainant “was a poor fit for the team. He did not communicate well. He was hostile to his immediate and extended colleagues and did not represent a good fit for the project moving forward.” *Id.* at 202-03.

⁸ Although Complainant’s email to Thomas is not on the record of this motion, it appears to be the communication to a government agency that Complainant contends was protected under the various statutes on which he relies. Complainant’s failure (through counsel) to put the email on the record and cite to it is a basis to disregard it. *See* 29 C.F.R. § 18.72(c)(1)(i), (3). Nonetheless, as the applicable rule allows the ALJ to “consider other material in the record,” *see* 29 C.F.R. § 18.72(c)(3), (e), and I found a copy of the email in Complainant’s request for hearing before an ALJ, I will consider the email for purposes of these motions.

Complainant that his employment was terminated and that he must return his badge and laptop. A.Ex. A at 6; A.Ex. C2 ; G.D.Ex. 4 ¶ 13. Complainant filed a complaint with OSHA on July 18, 2018. A.Ex. A; A.Ex. B.⁹

Discussion

Legal requirements for summary decision. On summary decision, I must determine if, based on the evidence in the record, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. See 29 C.F.R. § 18.72. I consider the facts in the light most favorable to the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under FED. R. CIV. P. 50 and 56).

A moving party without the ultimate burden of persuasion at trial . . . has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact.

If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything.

Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000) (citations omitted).¹⁰

I. Certain Of Complainant's Environmental Whistleblower Complaints Are Time-Barred.

“[W]ithin 30 days after an alleged violation . . . , an employee who believes that he or she has been retaliated against . . . may file, or have filed by any person on the employee's behalf, a

⁹ There are indications on the record that Complainant did not file his OSHA complaint until September 8, 2018. But an OSHA cover letter dated September 11, 2018, referred to a SOX complaint that Complainant filed with OSHA on July 18, 2018. A.Ex. A. For purposes of summary decision, I accept as undisputed that Complainant filed the SOX complaint on July 18, 2018; that he amended the complaint to assert claims under the other statutes; and that the amendments relate back to the July 18, 2018 filing date.

¹⁰ As the court further explains: “If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense. If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment. But if the nonmoving party produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats the motion.” *Nissan Fire & Marine Ins. Co.*, 210 F.3d at 1103 (citations omitted).

complaint alleging such retaliation” with OSHA. 29 C.F.R. § 24.103(d)(1) (implementing the timeliness provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1367(b); the Clean Air Act, 42 U.S.C. § 7622(b)(1); the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1); the Solid Waste Disposal Act, 42 U.S.C. § 6971(b); and the CERCLA (Superfund Act), 42 U.S.C. § 9610(b)).

Here, Apex Systems notified Complainant of his termination from employment on May 29, 2018. The 30-day limitations period ran on Thursday, June 28, 2018. At the earliest, Complainant filed a complaint with OSHA on July 18, 2018. Because Complainant failed to file his OSHA complaint within 30 days after he was notified of the termination, Complainant’s complaint under these several statutes was untimely.

Complainant misplaces his reliance on *Passaic Valley Sewerage Comm. v. U.S. Dep’t of Labor*, 992 F.2d 474 (3d Cir. 1993). That case concerns the entities and persons to whom a person may blow the whistle and be protected under the statute. The issue here is not what activity is protected; the issue is whether Complainant timely filed with OSHA a complaint that his rights as a whistleblower had been violated.

I therefore find time-barred Complainant’s claims under the Federal Water Pollution Control Act, the Clean Air Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, and CERCLA.¹¹

II. Respondents Are Not Employers Within The Energy Reorganization Act.

The obligation to protect whistleblowers under the Energy Reorganization Act applies only to certain entities or persons to which the Act refers as an “employer.” *See* 42 U.S.C. §§ 5851(a)(1) (“No employer may discharge any employee or otherwise discriminate against any employee . . . because [he has engaged in protected activity]”). “Employer” is defined as:

(A) a licensee of the [Nuclear Regulatory] Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);

(B) an applicant for a license from the Commission or such an agreement State;

(C) a contractor or subcontractor of such a licensee or applicant;

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344;

(E) a contractor or subcontractor of the Commission;

¹¹ Represented by counsel, Complainant offers no facts or argument to demonstrate an entitlement to equitable tolling.

(F) the Commission; and

(G) the Department of Energy.

42 U.S.C. §§ 5851(a)(2)(A)-(G).

Both Apex Systems and General Dynamics argue that they are not employers within the statutory definition. Complainant does not dispute this. The record is devoid of any evidence that would bring either Respondent within the ERA's coverage. Complainant's claim under the Energy Reorganization Act therefore must be denied.¹²

III. Complainant's SOX Claim Fails.

The Sarbanes-Oxley Act protects employees of publicly traded companies and their contractors and agents. The Act prohibits these companies from retaliating against employees who report certain specified forms of fraud or violations of rules or regulations of the Securities and Exchange Commission. To be protected activity, the reports must be made to federal regulatory or enforcement agencies, members of Congress, or supervisors or other company officials who can address the reported concerns. *See* 18 U.S.C. § 1514A(a)(1); 29 C.F.R. § 1980.102(b)(1). The Act incorporates the procedures and burden-shifting framework of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR-21"). *See* 18 U.S.C. § 1514A(b)(2).

Under the AIR-21 framework, a complainant must demonstrate by a preponderance of the evidence that:

(1) he engaged in protected activity or conduct; (2) his employer knew or suspected, actually or constructively, that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable action.

Tides v. Boeing Co., 644 F.3d 809, 814 (9th Cir. 2011).¹³ If the complainant meets his burden, then "the employer assumes the burden of demonstrating by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the [complainant's] protected activity." *Id.* (quoting *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989 (9th Cir. 2009)).

A. Complainant Did Not Engage in Protected Activity before the Termination.

¹² Complainant's claims under the ERA also fail for the same reasons as does his claim under Sarbanes-Oxley. *See* text below. In the alternative, I therefore also deny this claim on that basis.

¹³ Ninth Circuit law is controlling. AIR-21 rules and procedures apply to SOX. *See* text, *supra*. Under AIR-21, an appeal from a final order of the U.S. Department of Labor is to the U.S. Court of Appeals for the circuit in which the violation allegedly occurred or where the complainant resided on the date of the violation. 49 U.S.C. § 42121(b)(4)(A). Complainant resided in California at the relevant time, and he received notice of the termination in California. This places any appeal in the Ninth Circuit.

Protected activity. To be protected activity, the employee need not make a report that “definitively and specifically” states how the company’s actions are fraud (within the statute) or a violation of the securities rules and regulations. *Sylvester v. Paraxel Int’l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-29, 2007-SOX-42, PDF at 17 (ARB May 25, 2011).¹⁴ The crux of the inquiry is “whether the employee reported conduct that he or she *reasonably believes*” is a SOX violation. *Id.* at 19.

“Reasonable belief” of a violation requires a complainant to hold (1) “a subjective belief that the complained-of conduct constitutes a violation of relevant law” and (2) an “objectively reasonable” belief. *Id.* at 14. Under the subjective component of this “reasonable belief” test, “the employee must actually have believed that the conduct he complained of constituted a violation of relevant law.” *Id.* “In this regard, ‘the plaintiff’s particular educational background and sophistication [is] relevant.’” *Id.* at 14-15 (citation omitted). The objective component “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* at 15. “Often the issue of ‘objective reasonableness’ involves factual issues and cannot be decided in the absence of an adjudicatory hearing.” *Id.*

Here, Complainant asserts as protected activity his contact with Rob Thomas at EPA on April 13, 2018. Complainant’s Brief at 4 (citing an exhibit not on the record). He argues that his communications with Thomas on that day reported a cybersecurity risk and also again discussed how a lack of access to the source code repository was wasting federal funds because the repository had to be recreated. But SOX whistleblower protection does not extend to cybersecurity risks or a waste of government funds.

¹⁴ There is no requirement that the employee’s communication “definitively and specifically” relate to one of the listed categories of fraud or securities violations. See *Sylvester v. Paraxel Int’l LLC*, ARB Case No. 07-123 (May 25, 2011), slip. op. at 14-15, 2011 WL 165854 (2011). In *Sylvester*, the Administrative Review Board overruled its previous decision in *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27 (Sept. 29, 2006). As the Board explained, *Platone* erroneously imported the “definitively and specifically” requirement from the Energy Reorganization Act, 42 U.S.C.A. § 5851, where certain broad, ill-defined language necessitated a more specific showing to link the subject of the employee’s complaint to the purposes of the statute. In the Board’s view, Sarbanes-Oxley’s language is better defined and does not require further specific or definitive connection to the statutory purpose.

In the only available post-*Sylvester* decision to address the issue in the Courts of Appeals, the Third Circuit accorded *Sylvester* deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), and no longer requires a showing that the communication relate “definitively and specifically” to a listed category of fraud or securities violations. See *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013) (“We conclude that the ARB’s rejection of *Platone*’s “definitive and specific” standard is entitled to *Chevron* deference”).

I am aware that, before *Sylvester*, the Ninth Circuit, which is controlling here, joined other Circuits in according deference to the ARB’s holding in *Platone*. See *Van Asdale, supra*, 577 F.3d at 996. I conclude that, as did the Third Circuit, the Ninth Circuit, if addressing this issue post-*Sylvester*, would continue to follow the Supreme Court’s deference doctrine, would defer to the Administrative Review Board’s more recent *Sylvester* decision, and would reject any requirement that a complainant must show that her complaint relates “definitively and specifically” to one of the six listed categories of fraud or securities violations.

In this case, however, if I am in error about the Ninth Circuit’s view of *Sylvester*, the error is harmless. My error would advantage Complainant because the *Sylvester* analysis lessens the burden for complainants. As I am granting summary decision, the result would be the same under *Van Asdale* and *Platone*.

As the First Circuit explained:

The plain language of SOX does not provide protection for any type of information provided by an employee but restricts the employee's protection to information only about certain types of conduct. Those types of conduct fall into three broad categories: (1) a violation of [certain] specified federal criminal fraud statutes . . . ; (2) a violation of any rule or regulation of the SEC; and/or (3) a violation of any provision of federal law relating to fraud against shareholders. The first and third categories share a common denominator: that the conduct involves "fraud," and many of the second category claims (violations of SEC rules or regulations) will also involve fraud.

* * *

"Fraud" itself has defined legal meanings and is not, in the context of SOX, a colloquial term. "The hallmarks of fraud are misrepresentation or deceit." That is the dictionary definition, as well. *See* Black's Law Dictionary 685 (8th ed. 2004) (defining fraud as the "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment").

Day v. Staples, Inc., 555 F.3d 42, 54-55 (1st Cir. 2009) (citations omitted).

Complainant did not need to use words such as "securities fraud" or "mail fraud" or "wire fraud." He did not need to say he thought this was a violation of "SEC Rule 10b-5" or of "17 C.F.R. § 240.10b-5" or of any other enumerated regulation or statute. *See Sylvester, supra*. But, as the emails establish, Complainant wrote to the EPA only about a cybersecurity concern and perhaps about government waste. He alleged nothing about those concerns that is suggestive or fraud or a violation of securities laws. Indeed, the EPA's Thomas knew about and directed CSRA to reconstruct the repository despite the cost; he was not deceived.¹⁵

Complainant offers no evidence and does not argue in his opposition to summary decision that he engaged in any other protected activity. Indeed, Complainant did not submit any evidence whatever with his opposition to summary decision.¹⁶ He did not even submit a declaration, reciting his account of the relevant events.

¹⁵ EPA's Thomas was kept informed throughout about the difficulty CSRA was having in getting the complete repository from Salient. Campbell copied Thomas on emails. It was Thomas who requested of CSRA that Complainant be assigned to reconstruct the repository; *i.e.*, the government knew what it was paying for and why, but it chose to pay anyway. Even if that was wasteful, there was no fraud in which CSRA or anyone could be involved.

¹⁶ In his brief, Complainant cites evidence which Respondents submitted. He also cites exhibits that neither he nor any other party put on the record. On summary decision, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact," the ALJ may "[g]rant summary decision if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it . . ." 29 C.F.R. ¶ 18.72(e)(3).

B. If Complainant Engaged in Protected Activity, That Activity Was Not a Contributing Factor in the Termination.

There is no dispute that General Dynamics decided by April 9, 2018, that it would remove Complainant from the Portal project. It informed Apex of the decision on that date. It asked Apex to find a replacement. Under Apex's policies, the effect of Complainant's removal from the Portal project was the termination of his employment with Apex: As a staffing agency, Apex hired people to work on a particular project for a particular client, and when the client removed the person from the project, that ended the employment. G.D.Ex. 4 ¶ 5. The termination was not effectuated until May 29, 2018, when Apex found a replacement. But General Dynamics conclusively communicated the decision to Apex on April 9, 2018.

Complainant offers no evidence or argument to show protected activity before April 13, 2018.¹⁷ Thus, even if Complainant engaged in protected activity, the activity was *after* the decision to terminate and could not have contributed to that decision. As it is Complainant's burden to establish by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action and Complainant has failed to offer any evidence to raise a genuine issue of fact in this regard, his SOX-based claim fails.

Conclusion and Order

For the foregoing reasons, Respondents' motions for summary decision each are GRANTED. Complainant's complaint is DENIED in its entirety.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS AS TO SOX: 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,

¹⁷ The record also includes Complainant's continuing complaints after his actual termination on May 29, 2018. These complaints even more obviously could not have contributed to the decision to terminate, a decision that had already been made *and implemented*.

receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within

such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).

NOTICE OF APPEAL RIGHTS AS TO ENVIRONMENTAL STATUTES: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this 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

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.