

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 February 2020

Case No.: 2019-SOX-00019

In the Matter of:

BRADLEY MCKINNEY,
Complainant,

v.

MEDPACE HOLDINGS, INC.,
Respondent.

Appearances:

Mark J. Byrne
Jacobs, Kleinman, Seibel and McNally LPA
Cincinnati, OH
For the Complainant

Jeffrey P. McSherry
Bricker & Eckler LLP
Cincinnati, OH
For the Respondent

Before: Jason A. Golden
Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This claim arises under the employee-protection provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (SOX), and the regulations found at 29 C.F.R. Part 1980. Complainant, Bradley McKinney, alleges that Respondent Medpace Holdings, Inc. (Medpace), retaliated against him in violation of the SOX by terminating his employment because he reported deficiencies in internal controls to Medpace's management. Medpace contends that it terminated McKinney for poor conduct and performance.

This court conducted an on-the-record hearing in Cincinnati, Ohio on November 13, 2019. All parties were represented by counsel and afforded a full opportunity to present evidence and argument as provided in the Rules of Practice and Procedure for Administrative Hearings

Before the Office of Administrative Law Judges.¹ The court admitted in evidence, without objection, Administrative Law Judge Exhibit (ALJX) 1 and Exhibits (Ex.) 1-8, 10-14, 16-21, 25-27, 31-33, A, D, G, H, M, O, P,² Q, S, and T.³ (Transcript (Tr.) 6, 17, 21, 28-29, 32, 35, 38-39, 49-51, 55, 60, 66, 72, 83, 95, 101, 145-146, 149, 190-191, 205, 272, 337, 339.)⁴ The parties submitted closing briefs. The record is closed.

In reaching my decision, unless noted otherwise herein, I have reviewed and considered all testimony and exhibits admitted in evidence (and not stricken from the record) and the arguments of the parties.

I. PROCEDURAL HISTORY

On March 28, 2018, McKinney filed a complaint against Medpace with the Occupational Safety and Health Administration (OSHA). On November 30, 2018, OSHA issued a determination that it was unable to find reasonable cause to believe that Medpace violated the SOX. (OSHA's determination letter dated Nov. 30, 2018.) On December 31, 2018, McKinney requested a hearing before the Office of Administrative Law Judges (OALJ).

II. SARBANES-OXLEY ACT⁵

“Congress enacted the SOX on July 30, 2002, as part of a comprehensive effort to detect and punish corporate fraud.”⁶ The employee-protection provision, Section 806, of the Act (codified at 18 U.S.C. § 1514A) generally prohibits covered publically traded companies from retaliating against employees because they provide information or assist in investigations related to the categories listed in the SOX.⁷ Section 1514A provides:

¹ 29 C.F.R. Part 18, subpart A.

² Exhibit P is also referenced as Exhibit 36A in the Transcript.

³ ALJX 1 is a joint stipulation of the parties, which was accepted by the court. (Tr. 6.) Other than ALJX 1, the numbered exhibits were offered by McKinney and the lettered exhibits were offered by Medpace. Ex R was not admitted in evidence. (Tr. 194, 318.)

⁴ Although the court reporter indicated in the Transcript that ALJX 2 was received in evidence, it was not. (Tr. 118.) The court noticed other errors with the Transcript. For instance, on page 5, line 15, the court reporter typed “implemented regulations.” The transcript should read “implementing regulations.” On page 93, lines 16-17, the court reporter typed: “Former rules of evidence are applicable to this proceeding” The transcript should read: “Formal rules of evidence are not applicable to this proceeding.” On page 139, lines 4-5, the court reporter typed: “Even though the rules of evidence apply, I agree. . . .” The transcript should read: “Even though the rules of evidence don't apply, I agree. . . .” Moreover, in every, or almost every instance that the court admitted an exhibit in evidence, the court reporter typed “admitted into evidence.” The transcript should read “admitted in evidence.” However, the court did not notice any transcription errors, other than one or more noted above, that should effect an appellate authority's review of this Decision.

⁵ Federal appellate jurisdiction of SOX cases rests in the circuit in which the alleged violation occurred or in which the complainant resided on the date of the violation. 29 C.F.R. § 1980.112. Because the factual circumstances giving rise to the claim occurred within Ohio, I will apply the law of the United States Court of Appeals for the Sixth Circuit.

⁶ *Griffo v. Book Dog Books, LLC*, ARB No. 2018-0029, ALJ No. 2016-SOX-00041, slip op. at 3 (May 2, 2019).

⁷ *Perez v. Citigroup, Inc.*, ARB No. 2017-0031, ALJ No. 2015-SOX-00014, slip op. at 4 (ARB Sept. 30, 2019); *Griffo*, ARB No. 2018-0029, slip op. at 3.

(a) Whistleblower Protection for Employees of Publicly Traded Companies.-No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee-

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-

- (A) a Federal regulatory or law enforcement agency;
- (B) any Member of Congress or any committee of Congress; or
- (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

“[T]o prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that: (1) he or she engaged in activity or conduct that the SOX protects; (2) the respondent took unfavorable personnel action against him or her; and (3) the protected activity was a contributing factor in the adverse personnel action.”⁸ However, even “[i]f the employee proves these elements, the employer may avoid liability if it can prove ‘by clear and convincing

⁸ *Sylvester v. Parexel Int’l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039 and 045, 2011 DOL Ad. Rev. Bd. LEXIS 47, 2011 WL 2165854, PDF at 9-10 (ARB May 25, 2011) (*en banc*); see *Perez*, ARB No. 2017-0031, slip op. at 4 (citing *Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, ALJ No. 201-SOX-003, slip op. at 5 (ARB Nov. 9, 2011)); see *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 805 (6th Cir. 2015) (expressly including the following additional element of a claim: “the employer knew or suspected, either actually or constructively, that [the employee] engaged in the protected activity”). According to the Administrative Review Board, whether the employer had knowledge of the protected activity is part of the causation analysis. *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015) (claim under the employee-protection provision of the Federal Rail Safety Act, 49 U.S.C. § 20109).

evidence’ that it ‘would have taken the same unfavorable personnel action in the absence of the protected] [sic] behavior.’”⁹ “SOX complaints are decided using the legal burdens of proof set forth in the employee-protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121.”¹⁰

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW¹¹

A. Background

Medpace is a company within the meaning of 18 U.S.C. § 1514A in that it is a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) and is required to file reports under Section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78o(d)). (ALJX 1.)

At all relevant times, McKinney was an employee of Medpace within the meaning of 18 U.S.C. § 1514A. (ALJX 1.)

Medpace became a new public company on August 11, 2016. (ALJX 1.)

McKinney was hired as the Manager, IT Internal Audit by Medpace on September 6, 2016.¹² (ALJX 1; Transcript (Tr.) 14, 143.) As the Manager, IT Internal Audit, McKinney was responsible for assisting Medpace to implement and improve internal controls of its information technology so that Medpace could comply with the SOX. (Tr. 15-17, 22-23.) McKinney reported to Mark Adams, Director, Internal Audit at Medpace (Tr. 20, 136, 223.)

On numerous occasions throughout his employment with Medpace, McKinney reported various deficiencies in the company’s internal controls over information technology to Medpace’s management. (Ex. 2-8, 10, 16-19; Tr. 28, 35, 37, 46, 51, 53-54, 66, 72, 91-92.) The form of these reports included Internal Audit – Issue Notices, communications with Adams, monthly meetings with Adams and Medpace’s Chief Financial Officer (CFO), and communications with other managers at Medpace, including IT managers. (See Ex. 2-8, 10, 11-14, 16-21, 31, 32; Tr. 37,46, 51, 53-54, 66,91-92.)

Medpace terminated McKinney’s employment on September 29, 2017. (ALJX 1.)¹³

McKinney timely filed his complaint against Medpace with OSHA. (Tr. 7.)

⁹ *Zinn v. American Commercial Lines Inc.*, ARB No. 13-021, ALJ No. 2009-SOX-025, PDF at 5 (Dec. 17, 2013) (quoting 29 C.F.R. § 1980.104(c)).

¹⁰ *Id.*; 18 U.S.C. § 1514A(b)(2)(C).

¹¹ In accordance with *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, Slip Op. at 2, n. 3 (Mar. 11, 2019), I have attempted to make tightly focused findings of fact and conclusions of law without summarizing the evidence. The bases for my findings are provided by way of citations to the record and, where necessary, narrative explanation.

¹² “IT” is the abbreviation for “information technology.” (Tr. 12.)

¹³ Although not significant to my Decision, I also find that Medpace’s second annual report was filed with the Securities and Exchange Commission (SEC) for Medpace’s fiscal year ending December 31, 2017. (ALJX 1.)

McKinney timely appealed OSHA's determination by requesting a hearing before the OALJ. (Tr. 7.)

B. Protected Activity

For McKinney to demonstrate that he engaged in SOX-protected activity, he must show that he reasonably believed that the company's conduct of which he complained constituted a violation of one of the laws cited in Section 1514A.¹⁴ The concept of "reasonable belief" requires "a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and also that the belief is objectively reasonable."¹⁵ "To satisfy the subjective component of the 'reasonable belief' test, the employee must actually have believed that the conduct he complained of constituted a violation of relevant law."¹⁶ The objective component of the "reasonable belief" standard "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."¹⁷

Notwithstanding the above, a violation of a law cited in Section 1514A need not actually occur for a complainant's report to be SOX-protected activity.¹⁸

A whistleblower complaint concerning a violation about to be committed is protected as long as the employee reasonably believes that the violation is **likely to happen**. Such a belief must be grounded in facts known to the employee, but the employee need not wait until a law has actually been broken to safely register his or her concern. *See, e.g., Melendez*, ARB No. 96-051, slip op. at 21 ("It is also well established that the protection afforded whistleblowers who raise concerns regarding statutory violations is contingent on meeting the aforementioned 'reasonable belief' standard rather than proving that actual violations have occurred."); *Crosby v. Hughes Aircraft Co.*, 1985-TSC-002, slip op. at 14 (Sec'y Aug. 17, 1993) (required is reasonable belief that the employer "was violating or about to violate the environmental acts"). *Accord Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (protection under Surface Transportation Assistance Act not dependent upon whether complainant proves a safety violation); *Collins*, 334 F. Supp. 2d at 1376.

Consistent with this line of authority, the ARB has held that an employee's whistleblower communication is protected where based on a reasonable, but mistaken, belief that the employer's conduct constitutes a violation of one of the six enumerated categories of law under Section 806. *See, e.g., Halloum v. Intel Corp.*, ARB No. 04-068, ALJ No. 2003-SOX-007, slip op. at 6 (ARB Jan. 31, 2006).¹⁹

¹⁴ *Sylvester*, ARB No. 07-123, PDF at 14; *Rhinehimer*, 787 F.3d at 811.

¹⁵ *Sylvester*, ARB No. 07-123, PDF at 14; *Rhinehimer*, 787 F.3d at 811.

¹⁶ *Sylvester*, ARB No. 07-123, PDF at 14 (citing *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009)); *Rhinehimer*, 787 F.3d at 811.

¹⁷ *Sylvester*, ARB No. 07-123, PDF at 15 (quoting *Harp*, 558 F.3d at 723); *Rhinehimer*, 787 F.3d at 811.

¹⁸ *Sylvester*, ARB No. 07-123, PDF at 16.

¹⁹ *Id.* (emphasis added).

McKinney alleges that he engaged in protected activity by “report[ing] to his supervisor that he reasonably believed that Medpace was attempting to circumvent its internal controls in violation of federal law.” (Complainant’s Prehearing Statement filed Oct. 23, 2019, at 2; Complainant’s Br. filed Dec. 18, 2019, at 2.) McKinney argues that such action by Medpace violated “Section 13 of the Securities and Exchange Act and specifically 15 U.S.C. § 78m(b)(5).” (*Id.*)

Medpace argues that McKinney did not engage in protected activity because: (1) there is no evidence of suspected fraud or crime or harm or potential harm to investors; (2) identifying deficiencies in internal controls is not protected activity – there must be a concealment of a deficiency material to shareholders; (3) vulnerability is not a violation of the SOX; (4) hypothetical violations are not protected activity; and (5) he cannot meet the reasonable belief test. (Medpace’s Br. filed on Dec. 18, 2019, at 11-24.)

This court’s analysis of whether McKinney engaged in SOX-protected activity examines three issues: (1) Whether the deficiencies in Medpace’s internal controls that McKinney reported to Medpace’s management could somehow form the basis of a violation or prospective violation of a law, rule, or regulation enumerated in Section 1514A at the time he reported them; (2) whether McKinney actually believed that he was reporting a violation or likely prospective violation of a law cited in Section 1514A; and (3) whether McKinney’s purported belief that he was reporting a violation or likely prospective violation of a law cited in Section 1514A was reasonable. Although resolution of the first issue will not be dispositive of this court’s decision, it will help inform the court’s analysis of the third issue.

1. Whether the reported deficiencies could somehow form the basis of a violation or prospective violation of a law, rule, or regulation enumerated in Section 1514A.

McKinney argues that he reported a violation of 15 U.S.C. § 78m(b)(5). Section 78m(b) provides, in pertinent part:

- (2) Every issuer which has a class of securities registered pursuant to section 12 of this title [15 U.S.C. § 78l] and every issuer which is required to file reports pursuant to section 15(d) of this title [15 U.S.C. § 78o(d)] shall—
- (A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
 - (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—
 - (i) transactions are executed in accordance with management’s general or specific authorization;
 - (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

- (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
- (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and

* * *

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) **No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls** or knowingly falsify any book, record, or account described in paragraph (2).²⁰

Federal courts have regularly held that reporting a perceived violation of Section 78m(b)(5) is SOX-protected activity.²¹ Thus, I find that Section 78m(b)(5) is enumerated in Section 1514A

²⁰ (Emphasis added).

²¹ *Zulfer v. Playboy Enterprises, Inc.*, No. CV 12-08263-MMM (SHx), 2013 WL 12132075, *6 (C.D. Cal. 2013) (unpub). In *Zulfer*, the court stated:

Federal courts have consistently held that disclosures concerning perceived circumvention of internal control standards are SOX-protected disclosures. *See, e.g., Feldman v. Law Enforcement Associates Corp.*, 779 F.Supp.2d 472, 492 (E.D.N.C. 2011) (“Disclosures made by employees concerning reasonably perceived violations of SEC rules governing internal control standards can constitute protected conduct under SOX”); *Smith v. Corning, Inc.*, 496 F.Supp.2d 244, 248-50 (W.D.N.Y. 2007) (the disclosure that a company was implementing a financial reporting program that was not GAAP-compliant was protected under SOX); *see also Leznik v. Nektar Therapeutics, Inc.*, 2006-SOX-93, 2007 WL 5596626, *6-7 (Dept. of Labor SAROX Nov. 16, 2007) (“employee disclosures about efforts to circumvent ... internal controls are protected activities, because they address violations of SEC rules”).

* * *

[F]ederal courts regularly hold that disclosure of a perceived violation of 15 U.S.C. § 78m(b)(5) is SOX-protected as a disclosure related to a violation of a “rule or regulation of the SEC,” *Hemphill v. Celanese Corp.*, 430 Fed. Appx. 341, 344 n. 3 (5th Cir. June 23, 2011) (Unpub. Disp.) (“Hemphill testified in his deposition that he had a reasonable belief that the accounting issues he discovered may have constituted violations of 15 U.S.C. § 78m(b)(5).... Thus, viewed in a favorable light, the facts show that Hemphill engaged in protected activity”); *Collins [v. Beazer Homes USA, Inc.]*, 334 F.Supp.2d [1376,] 1377 [(N.D. Ga. 2004)] (plaintiff’s disclosures were protected by SOX because “they allege[d] attempts to circumvent the company’s system of internal accounting controls and therefore state[d] a violation of Section 13 of the Exchange Act”), and/or a violation of “a federal law related to shareholder fraud,” *see, e.g., Sequiera v. KB Home*, 716 F.Supp.2d 539, 551-54 (S.D. Tex. 2009) (plaintiff reasonably believed that there was a legal requirement that publicly held companies should have effective internal controls in place, and his disclosure relating to company’s failure to maintain internal controls was SOX-protected, in light of the fact that “section 13 of the Securities Exchange Act of 1934 ... states that ‘No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls’”); *Smith*, 496 F.Supp.2d at 248-49 (complaint adequately alleged SOX-protected activity because it pled that “plaintiff reasonably believed that defendant was violating 15 U.S.C. § 78m(b)(2)(B)(ii)

such that reporting a perceived violation of Section 78m(b)(5) can constitute SOX-protected activity.

During his employment with Medpace, McKinney provided its management with Internal Audit – Issue Notices. (See Ex. 2-10, 16, 19.) McKinney testified that such Notices are “formalized notice that provides management with documentation on an area or a process not being in compliance with either the internal controls or . . . [SOX].” (Tr. 25.) The Internal Audit – Issue Notices provided by McKinney to Medpace’s management each included Impact Statements describing the potential harmful impact of each deficiency identified by McKinney. (Tr. 26.) Examples of such Impact Statements include the following:

CMDBs are critical in IT decision-making, allowing management to identify dependencies among processes, people, applications and IT infrastructure. Failure to identify IT components and relationships **could** lead to inconsistent or an accurate assessment, changes with negative downstream impacts, or security vulnerabilities, resulting in operational inefficiency, disruption, and financial loss.

(Ex. 3, 4 (emphasis added).)

Excessive administrator access to Medpace applications, databases, servers and other IT resources exposes the company to **potential** malicious or fraudulent activity, unapproved or inadvertent changes to system configuration, or a compromise of data integrity resulting in a disruption to business operation and/or financial losses.

(Ex. 5 (emphasis added); see Tr. 30, 31 (“could create a segregation of duties . . .” “could allow somebody to perform some malicious activities . . .” “could accidentally make a change to the system . . .”.)

Changes to end user access and access roles associated with Medpace applications, servers and databases without adequate request, review and approval procedures **could** lead to excessive access, segregation of duties conflicts, in adequate access, and unintended functionality changes. These failures **could** result in a loss of data integrity, security, operational disruption, and **potential** financial loss.

(Ex. 6 (emphasis added).) Similar to these Impact Statements, the Impact Statements and Risk Analysis in the remainder of the Internal Audit – Issue Notices provided by McKinney all describe harms that “can,” “may,” or “could” occur, are “risks,” or that are “potential” harms. (See Ex. 2 at C00009-C00011; Ex. 7, 8, 10, 16-19; Tr. 47.)

The headings of some of these Internal Audit – Issue Notices describe the impact as “Deficiency (High).” (See, e.g., Ex. 3, 5.) McKinney testified that “Deficiency (High)” meant

and that he believed that § 78m(b)(2)(B)(ii) related to fraud against shareholders”).

Id.

that the “likely impact of not having this control in place – and the overall result of – if that impact was realized was pretty high.” (Tr. 26.)

However, I find these descriptions of the probability of the impact of a deficiency remain limited by the express language in the bodies of the Internal Audit – Issue Notices, which use words such as “could,” “potential,” and the like to describe such probabilities. (*See, e.g.*, Ex. 3, 5.)

McKinney testified that “[t]he failure to implement controls in a publicly traded company or failure to operate standard IT controls would be considered a violation. And, not being able to produce accurate financial reporting based on the lack of control in your IT systems would constitute for [sic] a violation of that act.” (Tr. 133.) Conversely, “[i]f a control fails, we identify that as a deficiency. A failure of a control is not a SOX violation.” (Tr. 174.)

Many, if not all, of the deficiencies in the internal controls of Medpace’s information technology, which McKinney reported to Medpace’s management, could have affected Medpace’s financial reporting. (*See* Tr. 28, 35-36, 49, 216-217.) Hence, I find that such internal controls are part of or included within Medpace’s system of internal accounting controls and internal controls over financial reporting. And, the circumvention of such internal controls could constitute a violation of the SOX.²²

²² Interestingly, McKinney characterizes Medpace’s alleged violation of the SOX as the circumvention of a system of internal accounting controls, rather than a failure to implement such a system. (*See* Complainant’s Prehearing Statement, at 2; Complainant’s Br., at 2; Tr. 96.) Perhaps McKinney characterizes Medpace’s alleged violation of the SOX as a circumvention, rather than a failure to implement, because even implementation of an ineffective system of controls can comply with the SOX. *See* 17 C.F.R. § 229.308. Section 229.308, a SEC regulation, provides:

- (a) *Management's annual report on internal control over financial reporting.* Provide a report of management on the registrant's internal control over financial reporting (as defined in §240.13a-15(f) or §240.15d-15(f) of this chapter) that contains:
- (1) A statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting for the registrant;
 - (2) A statement identifying the framework used by management to evaluate the effectiveness of the registrant's internal control over financial reporting as required by paragraph (c) of §240.13a-15 or §240.15d-15 of this chapter;
 - (3) Management's assessment of the effectiveness of the registrant's internal control over financial reporting as of the end of the registrant's most recent fiscal year, including a statement as to whether or not internal control over financial reporting is effective. This discussion must include disclosure of any material weakness in the registrant's internal control over financial reporting identified by management. Management is not permitted to conclude that the registrant's internal control over financial reporting is effective if there are one or more material weaknesses in the registrant's internal control over financial reporting

Reading Section 229.308 in tandem with Section 78m(b)(5) suggests that a system of internal controls over financial reporting can be ineffective without violating the law, so long as a company’s management discloses all the material weaknesses in its internal controls. Stated another way, just because there are unresolved deficiencies in a company’s internal controls over financial reporting does not mean that the company is in violation of a law or regulation.

This leaves unanswered the question of whether a system of internal controls can be so ineffective as to not exist at all, and thus, form the basis of a violation of Section 78m(b)(5). However, this question is purely academic as it relates to this proceeding because there is no evidence that Medpace’s failure or continued failure to implement

2. Experience and Credibility of the Complainant and Witness Mark Adams

Mark Adams spent 11 years in the United States Air Force (USAF). He earned his Associate Degree from a community college in the USAF and a Bachelor Degree in Finance and Accounting from Wright State University. He worked for Ernst & Young for 2 to 2 ½ years. He has been working with the SOX for over 15 years. Presently, he is the Assistant Controller over the revenue operations at Paycor. (Tr. 223-224, 235-237.)

The court very carefully observed Adams testify at the hearing. His voice seemed to brake on more than one occasion. However, he testified clearly, intelligently, and confidently. He exuded honesty, integrity, confidence, and experience in his field. He answered tough questions without reservation, sometimes with information that was not helpful to Medpace. For instance, when asked why he did not continue to take personal notes about McKinney's conduct and performance from March 2017 until September 2017, he answered that he "thought, okay, we're good." (Tr. 258; *see* Ex. O at 4.)²³

And, importantly, he testified that McKinney's poor performance in reporting deficiencies in internal controls at an August 31, 2017 meeting with Medpace's Chief Financial Officer (CFO) and the CFO's subsequent comment to Adams that he did not have faith in McKinney (because of such performance) were the "last straw;" they were the events that led Adams to decide to terminate McKinney. (Tr. 244, 249-250.) Were the court to find that McKinney's reports of deficiencies are SOX-protected activity, this testimony by Adams would be very damaging to Medpace with respect to the contributing factor element of McKinney's claim and Medpace's affirmative defense.

Based on the foregoing and the entire record before me, I find Adams to be a credible witness. I credit the notes he prepared about McKinney, which are found at Exhibit O, as well as his testimony. And, I find that Adams has the education, experience, and/or training to provide opinions regarding what is required to comply with the SOX.

McKinney earned his Bachelor Degree in Information Systems from the University of Cincinnati. Afterwards he worked for various companies. He gained experience in IT governance, information security, and compliance with the SOX. IT governance involves the frameworks and concept of controlling information technology within an organization. Medpace hired McKinney to work on IT controls of financial systems to help Medpace be SOX compliant. He did this for Medpace as the Manager, IT Internal Audit for approximately a year. During this

McKinney's recommendations made or would have made its internal controls so ineffective as to not exist at all. Indeed, the Impact Statements in the Internal Audit – Issue Notices, which provide that the risks associated with the reported deficiencies were only possible risks, support the conclusion that Medpace had or would have had internal controls that were not so ineffective as to not exist at all. And, although McKinney testified that he "did not believe that [Medpace] would achieve effectiveness [in its internal controls] unless they began to implement [his recommendations]," (Tr. 215.), he did not further quantify or qualify such ineffectiveness.

²³ I interpret this answer as meaning that Adams thought that McKinney had improved enough that Adams no longer needed to document his concerns regarding McKinney.

time, he gained additional experience in IT governance as it relates to SOX compliance. (Tr. 11-17, 22-23, 120-122, 124; *see, generally* Tr. 14-45.)

I find that McKinney had sufficient education, experience, and/or training to understand his role at Medpace as it related to developing and improving Medpace's internal controls to comply with the SOX and to understand what is required under the SOX as it related to his position at Medpace.

The court very carefully observed McKinney testify at the hearing. He appeared nervous, but answered his counsel's questions clearly and intelligently. On cross examination, he was less confident and did not fare as well. When he answered multiple questions about unflattering conduct and performance, he often looked down and his speech appeared to ever so slightly quicken and become slightly less clear. His body language and verbal answers suggested that he was minimizing. Examples of such responses include:

Q. All right. So in this employment application, did you follow direction as you were instructed per the written words of the employment application?

A. I believe so.

Q. All right. First question was, "List all employment for the past seven years." Did you do that?

A. I'm not sure. I don't even see where they --

Q. It's Exhibit A, Page 3, Bates stamp 3 at the lower 11 right-hand corner.

A. I think I only listed the last two employers.

Q. Why didn't you list the employer before Fifth Third?

A. That would have been at the direction of the recruiter that I had been working with. . . .

(Tr. 142.)

Q. Okay. How about salary? It states, "Please ensure that all employment history information including 'base salary' and 'other compensation' is accurate." Do you see that?

A. Yes.

Q. Did you provide that accurately?

A. Yes, I provided that accurately.

Q. Okay. So are you telling me that your ending base salary at American Modern was \$92,000?

A. That would have been my ending salary plus my bonus.

Q. Okay. So that's not your base salary? That's base salary plus bonus, right?

A. Again, that was at the direction of my recruiter. He said that's what you should put down so they understand what you previously made. It wasn't to mislead anybody. And I didn't know. Compensation is compensation. I didn't give it as much thought as maybe as I could have.

Q. Look at Exhibit A, Page 4. It's the next page. That's where they have a Footnote where it talks about what base salary is. Do you see that?

A. Uh-huh.

Q. And they define – “Base salary is the amount per hour per year that you are paid for performing your job. Base salary does not include benefits, bonuses, or any other potential compensation from employer.” Do you see that?

A. Yeah. I don’t recall seeing that there before. Again, I was -- it was my application. I was just following sort of the advice of the recruiter at the time. . . .

(Tr. 143-144.)²⁴

Q. So prior to December of 2016, you were not CISA licensed, right? 19

A. That's correct.

* * *

Q. Okay. Certification. Let’s look at Exhibit G. Do you have that in front of you?

A. Not yet. Yeah, now I do.

* * *

Q. All right. So your education, do you see that section where it says PBA management information system?

A. Yes, sir.

Q. And then below it says, “Licenses/Certifications: CRISC and CISA.” That’s the one I was asking about, CISA, right?

A. Right. Yes.

Q. And you said you got those in 2015, 2016?

A. It says “Year received.” And so my test was scheduled for 2016. And so that’s why I put it on there.

Q. You submitted this application -- look at the date. It’s September 6th of 2016. You hadn’t even taken the test?

A. Right. But I was putting on there when I obtained the certification.

Q. You didn’t obtain the certification in 2016. You just said you were taking the test for CISA, you know, at the end of 2016?

A. So the intent was not to mislead. It was actually reported and described prior to my employment there that I did not yet have my CISA certification. I would be taking the exam after I was employed by Medpace. This was also discussed in

²⁴ On redirect examination, McKinney testified:

Q. You got this letter on August 23rd, 2016?

A. Yes.

Q. Okay. And then you got the September 2nd, 2016 letter?

A. Yes.

Q. Where they reduced your salary?

A. They did.

Q. And hired you?

A. Yes.

(Tr. 219.)

length by my recruiter to Medpace as well. And so this wasn't in an effort to -- I didn't really know what this sheet was for. So I just wanted to put on there that these are the certifications I'll have if they have to come back to it, right. And so --

(Tr. 180-182; Ex. G.)²⁵ McKinney also failed to recall certain unflattering circumstances. For instance, he testified as follows:

Q. . . . Did you like to joke around a lot when you first started there, but not in an appropriate setting?

A. I don't recall joking around a lot in an inappropriate setting or setting that wasn't appropriate for --

Q. Do you recall being told that your attitude was somewhat confrontational when dealing with others?

A. I don't recall being told that I was confrontational. No.

Q. Okay. What about your meeting with Ernst & Young shortly after your employment began? How did that go?

A. I'm not sure I recall that meeting in particular.

(Tr. 150.)

Adams testified that he had concerns about McKinney's trustworthiness. (*See* Tr. 244.) He testified that on one occasion McKinney suggested taking a Cincinnati Reds baseball team picture left in a kitchen area, which did not belong to him. (Tr. 278-279.) McKinney initially did not recall this event, and then essentially denied it occurred. (Tr. 179.)²⁶ Further, Adams asserted that McKinney put a certification, the CISA designation, that he had not earned on his signature

²⁵ Complainant's testimony regarding this subject continued as follows:

Q. But you understood this question on Exhibit G to be about potential licenses that you wanted -- or certifications you wanted to receive?

A. Yeah. This isn't an application or any sort of formal document. This is a personal information form, which would be updated at any time. I could have put my bank account as X and that could change next year. So this isn't, you know, a document being provided to an external party or an investor or anything like this. This is just my personal information. I had no idea who this went to when I first filled it out. Obviously I have a Social Security number and I didn't put that on there. You know, this is a very informal document right here. This isn't an application or any employment verification or anything.

(Tr. 184.)

²⁶ Specifically, McKinney testified:

Q. Okay. How about -- weren't there possessions of somebody located on the premises of Medpace, I think, maybe down in the break room that you were interested in them and you told Mr. Adams, "I'm going to jack these"? Do you recall that?

A. No. No.

Q. Okay. You never saw someone's possessions that you thought you were just going to go ahead and take?

A. I have never stolen anything from anybody in my life and I wouldn't think that way. That's really --

(Tr. 179.)

block, which was “unprofessional, unethical, and dishonest.” (Ex. O at 4; *see* Tr. 274-276; *see also* 283-285.)

Also, there were one or more instances during the proceeding when McKinney’s and Adams’ testimony were contradictory. McKinney testified:

Q. On the August 31st meeting where you were in the meeting with upper management talking about the lack of effective controls for Medpace, did you contradict yourself?

A. I did not.

(Tr. 219.) Adams testified:

Q. So were you there for these last two meetings, August 31, 2017 and September 6, 2017?

A. Yes.

Q. And did -- at one of those meetings was there a situation where Mr. McKinney contradicted himself?

A. Yes. In the meeting that we had on August 31st --

(Tr. 247.)²⁷

Additionally, McKinney related a story during his testimony, which does not help his credibility:

Q. Okay. All right. Didn’t you relate a story about this Escalade and how you got a \$2,500 gift card or some gift certificate and they inadvertently sent you another \$2,500 gift card and you were going to hold on to both of them and not return one?

²⁷ In another instance, McKinney testified:

Q. When Mr. Adams talked to you about you not coming to work and your work ethic, didn’t you say, well, I’ve been monitoring your work and your hours and when you come to and from the office and I’m here more than you?

A. No, I don’t believe I said that.

Q. You never said that?

A. I don’t believe so.

(Tr. 157-158.) And, Adams testified:

A. Yes. So I had addressed some concerns about Brad regarding his time he shows up for work and, you know, trying to coach him on that. And he looked at me and he said, “Well, you know what, I’m tracking when you show up.” And like I wrote here, I had never -- I didn’t encounter that before. When I show up is between myself and my boss. However, that irritated me greatly when he said, “So you’re telling me when I have to be at work. So I’m going to start tracking when you get here.” It’s pure insubordination.

(Tr. 259.)

THE WITNESS: There was a fight that -- I purchased a vehicle. I mean, to help you understand, I purchased a vehicle. There was supposed to be delivered, I think it was a \$500 Cosco gift card when I purchased the vehicle. They decided that because I didn't have the Cosco -- they didn't tell me this when I -- you know, that I didn't have a Cosco membership prior to X date that I was no longer eligible. I called and complained enough times with the dealer that they finally said, "Look, we're just going to send you a check." About eight weeks later I think I got a Cosco gift card in the mail from the -- not the dealer, but the corporate, whoever makes -- I can't remember who makes -- sorry. Cadillac sent me a \$500 gift card. I didn't feel any responsibility to return either of them.

(Tr. 178-179.)

Lastly, at one point while witness Mary Lynn Lanham was testifying and answering questions about a personal text she sent McKinney, he appeared to leer at her. This conduct by McKinney was inappropriate. Had it lasted more than a few seconds the court would have felt compelled to intercede.

Based on the foregoing and the entire record before me, I find that McKinney is not a credible witness.

3. Whether McKinney had a subjective belief that he was reporting a violation or prospective violation of a law, rule, or regulation enumerated in Section 1514A.

McKinney testified that he actually and objectively believed that Medpace was not meeting the controls necessary for compliance with the SOX. (Tr. 96.) He testified as follows:

Q. And with regard to this document, did you actually believe they were not meeting the internal controls that needed for SOX compliance?

A. That's correct.

Q. And in terms of your education, experience and knowledge as it relates to internal controls in IT, did you objectively believe that they were not meeting controls for SOX compliance?

A. Objectively, in my opinion, they were not meeting the SOX compliance.

(Tr. 96.)

However, McKinney further testified that he never told any manager at Medpace that he believed Medpace was violating the law. He testified as follows:

Q. Did you ever tell anybody in those meetings, "You guys are violating the law"?

A. Not exactly those words, no.

Q. Okay. You just identified the internal controls issues that you thought were pertinent and that should be implemented, right?

A. They should be implemented in order to be compliant with Sarbanes-Oxley.
Q. Right. But you never said, "You're violating the law; you're violating SOX"?
A. I would not necessarily tell anybody they're violating the law. I would mention that they're not adhering to any of the internal controls or their controls are not in place or effective. Sarbanes-Oxley decides whether or not something is in place or not. That's not my --

* * *

Q. . . . Did you ever put in writing to anybody that you thought Medpace was violating the law during your employment?

A. Again, that really is not my position is to talk about the law. It's to talk about internal controls.

Q. Okay. I'm not asking you what the law is. I'm just saying did you put in writing that you thought this might be a violation of the law by virtue of you identifying internal control issues in the course of your job?

A. That -- again, that is not my responsibility and that wouldn't be something that I would produce to anybody is tell them that they're violating the law on an internal control.

Q. So you made no written communication to Medpace that that they were potentially violating the law?

A. I made many communications to many people at Medpace that they were not adhering to the internal controls and the internal control environment was insufficient.

Q. Okay. What you're saying is in the course of your job, as you were supposed to, you identified potential internal control gaps or deficiencies, right?

A. Several, yes.

Q. Okay. But all I'm asking you is did you ever put in writing I think this is a violation of the law that they're not implementing my intent control issues that I've identified?

A. Again, that's not an activity I would do. So no, I did not.

(Tr. 169, 172.) McKinney's failure to describe the deficiencies in internal controls as violations of law to Medpace's management is telling. The court recognizes that there is no legal requirement for an employee to specifically and expressly state to its employer that the employer is "violating the law." However, McKinney was responsible for assisting Medpace to implement and improve internal controls of its information technology so that Medpace could comply with the SOX. His responsibilities and his acknowledgement that a failure of a control, i.e., a deficiency, is not a SOX violation²⁸ lead the court to conclude that if he honestly believed he was reporting a violation of law to his employer, he likely would have wanted to distinguish to his employer those reports of deficiencies that were not violations of law from those that were. He did not do this. And, this is one reason the court believes it unlikely that McKinney truly believed he was reporting a violation of a law, rule or regulation enumerated in Section 1514A to Medpace.

²⁸ "If a control fails, we identify that as a deficiency. A failure of a control is not a SOX violation." Tr. 174.

More importantly, McKinney understood that the only requirement for internal controls for SOX compliance is that such internal controls be effective. (Tr. 126, 127; *see* 15 U.S.C. § 78m(b)(5); 17 C.F.R. § 229.308.) He testified that “[t]here is no prescriptive language describing exactly what each control needs to be.” (Tr. 126.) And, as stated above, he testified that “[i]f a control fails, we identify that as a deficiency. A failure of a control is not a SOX violation.” (Tr. 174.) This understanding by McKinney leads to the conclusion that he did not actually believe that every time he submitted an Internal Audit – Issue Notice or otherwise reported a deficiency in internal controls to Medpace’s management that he was reporting a violation of one of the laws, rules or regulations enumerated in Section 1514A.

Further, as stated above, all of the Impact Statements and Risk Analysis in the Internal Audit – Issue Notices provided by McKinney to Medpace’s management describe harms that “can,” “may,” or “could” occur, are “risks,” or are “potential” harms. (*See* Ex. 4-8, 10, 16-19.) Only one of the Impact Statements also states that a harm “will” occur. However, the harm that will occur is “failure[] over the reliance on IT control.” (Ex. 10.) That Impact statement then explains that “[t]his **may** result in a greatly diminished reliance on Medpace financial information and processing systems.” (*Id.* (emphasis added).)²⁹ None of the Impact statements or Risk Analysis state that there will, likely will, would, or likely would be an adverse effect on any of Medpace’s internal accounting controls or internal controls over financial reporting. (*See* Ex. 4-8, 10, 16-19.) Thus, McKinney himself did not report to Medpace’s management that failure to remedy any of the deficiencies he identified resulted in, would result in, or likely would result in ineffective internal accounting controls or an ineffective control over financial reporting.

The importance of this point is highlighted by the distinction between this case and that of *Smith v. Corning Inc.*³⁰ In *Smith*, the plaintiff, who was the Program Manager for Corning’s Finance and Accounting Global Project Portfolio Management Group, was ““responsible for monitoring [Corning’s] compliance with GAAP with regard to its Global Portfolio financial system and financial process duties.””³¹ He alleged that he “observed that Corning’s PS 8.8 program ‘was not correctly reporting financial data, [which] affected the reporting of sub-ledgers

²⁹ The full Impact Statement reads:

Effective IT Governance relies on centralized, standardized and documented processes based on a proven governance framework. Compliance with Sarbanes-Oxley related controls require effective governance practice as well. These governance practices enable the IT organization to provide evidence in support of proper control execution and overall operational effectiveness. Without clearly defined and documented processes and the ability to provide evidence supporting them, Internal and External Audit assessments will result in failures over the reliance on IT control. This may result in a greatly diminished reliance on Medpace financial information and processing systems.

Additionally, insufficient Governance over Information [sic] technology can lead to ineffective or insufficient processes, services that do not provide business value, and inefficient use of company resources and capital. Proper Governance can greatly reduce the risk of operational disruption and improperly aligned resources providing the business greater value and ROI.

(Ex. 10.)

³⁰ 496 F.Supp.2d 244, 248-250 (W.D.N.Y. 2007).

³¹ *Id.* at 245.

to the general ledger, making the general ledger incorrect.”³² He reported his concern to his supervisor. Subsequently, he became concerned about his supervisor’s response, or lack thereof, and then reported his concerns to Corning’s Human Resources Manager and Corning’s ethics hotline.³³ Plaintiff was demoted and then terminated. He asserted a claim in district court for a violation of Section 1514A. In support of his claim, he alleged that he reasonably believed there had been a violation of 15 U.S.C. § 78m(b)(2)(B). The court denied Corning’s motion to dismiss, stating that:

the Court cannot say, as a matter of law at this stage of the litigation, that it would have been unreasonable for plaintiff to believe that Corning was violating § 78m(b)(2)(B)(ii), when it refused to address problems with PS 8.8 that were resulting in erroneous financial information, concerning “numerous financial streams including Foreign Exchange, Asset Management, and Project Costing,” being reported to Corning’s general ledger.³⁴

The distinction between *Smith* and this case is that in *Smith*, the “plaintiff allege[d] that defendants repeatedly refused to address a problem **that was resulting in incorrect financial information being reported to the company’s general ledger.**”³⁵ There was an alleged existing, negative effect on the company’s internal controls over financial reporting. Here, there is no evidence that any deficiency reported by McKinney was resulting in, would result in, or likely would result in a negative effect on Medpace’s internal controls **over financial reporting**. The possibilities reported by McKinney were just too tenuous to support a credible belief that there was any violation of law or likely would be a violation of law.

Based on my finding that McKinney is not a credible witness, I give his testimony that he believed that he reported Medpace’s violation of a law, rule, or regulation enumerated in Section 1514A to its management no weight.

Further, based on the absence of any credible evidence that McKinney actually believed he was reporting violations of law to Medpace’s management; his failure to describe the deficiencies in internal controls to Medpace’s management as violations of law; his failure to report to Medpace’s management that any of the deficiencies he identified resulted in, would result in, or likely would result in ineffective internal accounting controls or an ineffective control over financial reporting; and McKinney’s role as the Manager, IT Internal Audit, I find that McKinney did not hold an honest belief that he was reporting a violation of a law, rule, or regulation enumerated in Section 1514A to Medpace’s management before he was terminated.

The last basis of this finding requires further explanation. It was McKinney’s job to identify deficiencies in Medpace’s internal controls and provide Medpace with recommendations regarding how to resolve such deficiencies. It was not his job to identify violations of law by Medpace. Thus, it is not credible that he would equate every deficiency he identified and

³² *Id.*

³³ *Id.* at 245-246.

³⁴ *Id.* at 250.

³⁵ *Id.* at 249 (emphasis added).

reported to Medpace as a violation of law.³⁶ Further, he did not have the final say regarding whether a deficiency in internal controls was adequately remediated or acceptable. Had that been his job, he would have been empowered to do more than make recommendations to management; he would have been the “decider.” Given McKinney’s education, experience, and/or training, it is not credible that he would equate every reported deficiency in internal controls that Medpace’s management felt was acceptable or failed to remediate to McKinney’s liking to a violation of law. There was just no credible evidence that McKinney honestly believed that any of the deficiencies he reported to Medpace’s management were or would have arisen to a violation of the law because Medpace’s management resisted or refused to follow one or more of his recommendations.

4. Whether McKinney’s purported belief that he was reporting a violation or prospective violation of a law, rule, or regulation enumerated in Section 1514A was reasonable.

As stated in Section III.B.1 above, the circumvention of internal controls of Medpace’s information technology could constitute a violation of the SOX. However, even assuming that McKinney actually believed that he was reporting a violation or prospective violation of a law, rule, or regulation enumerated in Section 1514A, I find that such belief was not reasonable. The bases for this finding follow.

First, McKinney’s lack of credibility leads me to discredit his opinion that he held a “reasonable” belief that he was reporting a violation or prospective violation of a law.

Second, McKinney had the education, experience, and/or training that he should have reasonably known that an unresolved deficiency in a company’s internal accounting controls or internal controls over financial reporting, in and of itself, does not violate the law.³⁷ He reported to Medpace’s management that:

Medpace Internal Auditors have been tasked with the responsibility of assisting the organization with implementing internal controls that satisfy the requirements per Sox (Sarbanes-Oxley). . . . Sarbanes-Oxley Act Section 404 mandates that all publicly-traded companies must establish internal controls and procedures for financial reporting and must document, test and maintain those controls and procedures to ensure their effectiveness. Because there is no defined control structure within the Sarbanes-Oxley Act, the widely accepted adoption of the COSO framework (unanimously adopted by Big 4 firms, and most other publicly traded companies) is necessary to achieve Sox compliance.

* * *

³⁶ See *Joshi v. American Tower Corp.*, ALJ No. 2014-SOX-00003, PDF at 63 (Apr. 13, 2016) (“[N]owhere within his email or within testimony about what was said at the August 4th meeting does Complainant explicitly—or implicitly—indicate that Respondent was engaging in fraudulent behavior in violation of SOX. In contrast, it appears Complainant was doing what was expected of him—identifying outstanding issues that Respondent’s team needed to resolve prior to providing their work product to the outside auditors, PwC and Deloitte. Accordingly, I find that Complainant did not engage in protected activity . . .”).

³⁷ See 15 U.S.C. § 78m(b)(5); 17 C.F.R. § 229.308(a).

The most critical aspect of implementation is the selection of appropriate governance framework(s) for the organization. The principles and guidance within each of the selected frameworks do not need to be implemented all at once, and prioritization should be assigned based on business need. The most common Governance Frameworks are defined below.

(Ex. 2 at C00005, C00013.) McKinney advised that there were different Governance Frameworks, including COSO and ISO, which could be used. (*See id.*; Tr. 44, 126, 207-208.) Given McKinney's acknowledgment that there are different standards to achieve the effectiveness of internal controls and that the principles and guidance within each framework "do not need to be implemented all at once," it is impossible to see how McKinney could have reasonably believed that an unresolved deficiency in a company's internal accounting controls or internal controls over financial reporting resulted in or likely would result in a violation of the law.

Further, McKinney's failure to report to Medpace's management that any of the deficiencies he identified resulted in, would result in, or likely would result in ineffective internal accounting controls or an ineffective control over financial reporting lead me to conclude that the possibility of a violation of law in the future was just too tenuous for McKinney to reasonably have believed that he was reporting a violation or prospective violation of law.

Third, not only did McKinney fail to produce sufficient evidence to demonstrate a reasonable belief that there was such an ineffective system of internal controls as to constitute a violation of law, rule, or regulation, but the record evidence demonstrates the contrary. Medpace's management agreed with McKinney about many of the deficiencies he identified and indicated a plan to remediate them. (*See* Ex. 4-8.) Despite the disagreement of Medpace's management with some of McKinney's recommendations,³⁸ its agreement with other recommendations and indicated remediation plans demonstrate that it was in the process of improving its system of internal controls. Moreover, the existence of McKinney's and Adam's positions themselves evince the existence and effort to improve internal controls at Medpace. The mere existence of an Internal Audit department at Medpace in conjunction with Medpace's work to improve its internal controls diminishes any reasonableness of McKinney's purported belief that a violation of law occurred or was going to occur.

Fourth, accounting/consulting firm Ernst & Young conducted an audit or review of Medpace's internal controls before McKinney started working at Medpace. (Tr. 129, 231-233, 238-239.) McKinney disagreed with some of Ernst & Young's opinions. (Tr. 129-130, 151-152, 314.) Although I have given McKinney's testimony little weight, I do credit Adam's testimony that McKinney was good at the part of his job that required him to identify deficiencies in internal controls and that at least some of the deficiencies identified by McKinney were of concern. (*See* Tr. 243, 270.) However, the fact that Ernst & Young previously reviewed Medpace's internal controls and found them better than McKinney weigh against McKinney having a reasonable belief that there was a violation or prospective violation of law. (*See* Tr. 129-130, 151-152, 231, 233.)

³⁸ Tr. 85, 88-89, 91-92, 94, 96, 98, 100-101, 189.

Based on the above and the entire record before me, I find that McKinney did not engage in activity protected by the SOX. In light of this finding, consideration of the remaining elements of McKinney's claim is unnecessary to the resolution of this case.

IV. ORDER

Based on the foregoing, it is ORDERED that Complainant Bradley McKinney's claim is DENIED.

SO ORDERED.

Jason A. Golden
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it.

See 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a). If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

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

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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