



Issue Date: 22 October 2020

CASE NO.: 2020-SOX-00020

In the Matter of:

PATRICK MALONEY,
Complainant,

vs.

LOGILITY, INC.,
Respondent.

ORDER GRANTING MOTION FOR SUMMARY DECISION

This matter arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (“SOX” or the “Act”), 18 U.S.C. § 1514A, and the implementing regulations of the Secretary of Labor published at 29 C.F.R. Part 1980. This matter is currently set for video hearing before me on November 17, 2020, at 9:30 a.m., Pacific Time. Respondent is represented by attorney David E. Gevertz of the firm Baker Donelson Bearman Caldwell & Berkowitz, PC. Complainant is unrepresented.

I. PROCEDURAL BACKGROUND

On January 29, 2020, the Secretary of Labor issued findings and dismissed Complainant’s SOX whistleblower complaint. Complainant appealed to the Office of Administrative Law Judges (OALJ). His appeal was docketed on March 4, 2020, and assigned to me on March 19, 2020. Claimant contends that he was terminated by Logility as retaliation for reporting to his supervisor, Mr. Charles Warren, a statement by William Harrison, President of Demand Management at DMI, which Claimant allegedly believed violated the company’s code of conduct.

On July 28, 2020, Respondent Logility, Inc. (“Logility”) filed *Logility, Inc.’s Motion to Dismiss Patrick Maloney’s Appeal*¹ (the “Motion”), with evidentiary exhibits attached thereto as Exhibits A through H.² On August 19, 2020, having received no response or opposition from

¹ Respondent filed a one page Motion and a 16-page Brief in Support. All pinpoint citations herein are to the Brief, even though referred to as the “Motion”.

² **Exhibit A** – Affidavit of Allan Dow, November 20, 2018 (“Dow Aff.”); **Exhibit B** – Affidavit of Bill Harrison, November 19, 2018 (“Harrison Aff.”); **Exhibit C** – Letter from Janis E. Eggleston [Complainant’s former attorney] to Allen [sic] Dow, President and Vincent Klings, CFO American Software, dated September 15, 2018 (the “9/15/18 Eggleston letter”); **Exhibit D** – American Software Code of Business Conduct and Ethics; **Exhibit E** –

Complainant, I issued an *Order to Show Cause Regarding Summary Decision* (the “OSC”). In the OSC, I informed the parties of my determination to consider Respondent’s Motion as a motion for summary decision, and also notified Complainant, as a self-represented litigant, of the significance of a motion for summary decision.

On October 6, 2020, after receiving one deadline extension, Complainant filed an opposition with supporting documents, which he styled as *Patrick Maloney’s Brief in Support of His Motion to Dismiss Logility, Inc.’s Motion to Dismiss Patrick Maloney’s Appeal* (the “Opposition”), attaching an *Affidavit of Patrick Maloney*, dated October 5, 2020 (“Maloney Aff.” or “Complainant’s Aff.”).³

On October 8, 2020, Respondent filed *Logility Inc.’s Motion for Leave to File a Reply in Support of its Motion to Dismiss Patrick Maloney’s Appeal* (the “Motion for Leave”) and attached *Logility’s Reply in Support of its Motion to Dismiss Maloney’s Appeal* (the “Reply”). On October 13, 2020, and without requesting leave to do so, Complainant filed *Patrick Maloney’s Supplementary Motion to Dismiss Logility, Inc.’s Motion to Dismiss Patrick Maloney’s Appeal* (the “Supp. Opp.”), to which he attached an additional evidentiary exhibit, an affidavit of Brett Hart (the “Hart Aff.”). In addition, I received in the U.S. Mail on October 14, 2020 a flash drive from Complainant.⁴

On October 20, 2020, Respondent filed *Logility Inc.’s Response to Patrick, Maloney’s Latest Filing*, with a supporting affidavit (“Response to Latest Filing”). Later that day, Complainant filed *Patrick Maloney’s Response to Logility’s Latest Filing*, with seven attached

Affidavit of Charles Warren, dated November 16, 2018 (“Warren Aff.”); **Exhibit F** – Affidavit of William Schulman, dated March 26, 2019 (“Schulman Aff.”); **Exhibit G** – Letter from Janis E. Eggleston to James R. McGuone, General Counsel, Logility, dated September 21, 2018 (the “9/21/18 Eggleston letter”); **Exhibit H** – Letter from Janis E. Eggleston to Mark Marchione, Regional Investigator, OSHA, dated March 11, 2019 (the “3/11/19 Eggleston letter”).

³ In addition to Complainant’s Affidavit, the following documents were submitted with Complainant’s Opposition, the authenticity of which was not specifically attested to in the Affidavit, but which I accept in deference to Complainant’s status as a self-represented litigant. I describe these submissions as follows: **1**) screenshot of a calendar placeholder/save the date for FY 2019 Kick Off Meeting; **2**) an undated letter (probably email) from “Chuck” addressed to “Team”, which appears to forward an email from Allan Dow to six individuals (none of them Complainant), dated June 15, 2018; **3**) screenshot of page from forbes.com website showing Dole Food revenue for fiscal year end December 31, 2017; **4**) screenshot of page from forbes.com website related to Dole Food; **5**) screenshot of text messages between Complainant and “Chuck” on June 19, 2018; **6**) screenshot of same text exchange on same date, with name “Chuck Warren”; **7**) screenshot of email (without text) from Complainant to Matthew Colvin on June 19, 2018; **8**) copy of *Respondent’s Objections and Responses to Claimant’s Interrogatories*, dated September 23, 2019; and **9**) document showing the call history of Complainant’s Logility iPhone from 02-11-2018 through 07-06-2018. Also attached are affidavits, which are duplicative of those submitted with Respondent’s Motion, as follows: Exhibit A, Affidavit of Allan Dow (the Allen Aff.); Exhibit B Affidavit of Bill Harrison (the Harrison Aff.); Exhibit E, Affidavit of Charles Warren (the Warren Aff.); and Exhibit F, Affidavit of William Schulman (the Schulman Aff.).

⁴ Complainant attempted to submit the audiofile electronically with his Opposition, but this office could not accept that filing and requested that he send the flash drive by mail. Complainant served the audiofile electronically on Respondent. The mail submission of the flash drive included a handwritten note saying, “Here is the thumb memory drive that has the June 28th, 2018 voicemail that Brett Hart left for me.”

documents (four of which had been previously submitted), and, on October 21, 2020, Complainant filed an additional exhibit (which had also been previously submitted).

I grant Respondent's Motion for Leave and consider the Reply herein. *See* 29 C.F.R. § 18.33(d). Because of the latitude I give to Complainant as a self-represented litigant, I also accept the filing of Complainant's Supplemental Opposition, with the Hart Affidavit and flash drive, and consider it herein. I do not, however, accept Respondent's filing of a response to Complainant's Supplemental Opposition, nor do I accept Complainant's filing in response to that response. The rules governing proceedings before the Office of Administrative Law Judges have some meaning and must be construed to secure the "just, speedy, and inexpensive determination of every proceeding." 29 C.F.R. § 18.10. At some point, parties must rest on their submissions. While I accept Complainant's Supplemental Opposition in deference to his status as unrepresented, I do not afford the same deference to Respondent. The same affiant of the affidavit attached to Logility's Response to Latest Filing made an earlier affidavit, which was attached to the Motion. Surely Respondent, as moving party, had the ability to submit all evidence on which it relied to meet its burden for a dispositive motion with the Motion or with its Reply. Since I reject Respondent's Response to Latest Filing, I do not need to consider Complainant's response thereto and, therefore, reject that as well.

For the reasons set forth below, Respondent's Motion is GRANTED.

II. SUMMARY OF THE PARTIES' CONTENTIONS

A. Respondent's Motion

Respondent moves for dismissal of Complainant's appeal of the Secretary's Findings on the basis that Complainant has not and cannot meet his *prima facie* burden. Respondent argues that Complainant did not have a reasonable belief that, by making a statement to his supervisor, he was reporting wire fraud or a violation of any rule or regulation of the Securities and Exchange Commission (SEC). (Motion p. 10.) Respondent alleges that Complainant's statement did not convey a report that "definitely and specifically" related to any of the elements of wire fraud. (Motion p. 11.) Instead, Respondent contends that Complainant's purported statement disclosed nothing more than another employee's "sales puffery", and that it is inconceivable that Complainant had a subjective belief that the other employee broke the law and committed wire fraud. Further, no reasonable person in Complainant's position could have such a belief. (*Id.*)

As to Complainant's assertion that he reasonably believed he was reporting a violation of an SEC regulation (17 C.F.R. § 229.406), Respondent contends that Complainant's statement failed to "definitely and specifically" relate to the regulation, which requires companies to adopt and adhere to a code of ethics. (Motion p. 12.) Further, no reasonable person in Complainant's position could believe that the other employee's statement constituted a violation of that regulation. (*Id.*) Therefore, Respondent argues that Complainant has not met his burden to prove that he engaged in protected activity within the meaning of the Act.

In addition, Respondent alleges that Complainant failed to meet his *prima facie* burden to establish that the decision maker was aware of Complainant's report when he decided to terminate Complainant's employment. (Motion p. 13.) Respondent contends that Complainant made his report only to his supervisor, and so the decision maker cannot be charged with actual or constructive knowledge. Respondent asserts that Complainant failed to present any evidence imputing knowledge of his protected activity to the decision maker, and thus Complainant's appeal should be dismissed. (Motion, p. 13.) Respondent separately argues that Complainant's alleged protected activity was not a contributing factor in his termination.⁵ (Motion p. 14.)

Finally, Respondent argues that Complainant's termination would have occurred regardless of his alleged report. (Motion p. 14.) Respondent alleges that Complainant misrepresented the viability of a company to a potential customer, which risked that company's reputation as well as that of the company's parent companies, including Logility. (Motion p.14.) Complainant's reported misinformation resulted in his termination. (Motion pp. 14-15.)

B. Complainant's Opposition

Complainant counters Respondent's Motion by stating that 1) at the time he was terminated, he was an employee in good standing, 2) that he did not misrepresent the viability of his employer company, and that Logility falsely accused him of doing so in their testimony, and 3) that Logility used this false testimony as a pretense to hide the true reason of his termination, which he asserts to be retaliation for "reporting a violation of the code of conduct against Bill Harrison, the President of Demand Management." (Opposition p. 1.) Complainant's Affidavit sets forth his disputes with, denials of, and explanations of various statements made in the Schulman Affidavit, the Harrison Affidavit, and the Dow Affidavit.

Although Complainant does not specifically identify genuine issues of material fact regarding each of the elements of a SOX whistleblower case, I follow the Board's direction to give deference to Complainant's filings by applying his arguments and statements to the following analysis of whether there are disputed material facts necessary to prove the elements of a SOX whistleblower case.

C. Respondent's Reply

Respondent argues that the determination of a protected activity is based on whether the employee's communications definitively and specifically relate to one of the listed categories of fraud or securities violations, citing to *Micallef v. U.S. Dep't of Labor*, 790 Fed. Appx. 72, 73 (9th Cir. 2020)⁶. (Reply at 2.) Respondent asserts that Complainant's Opposition fails to

⁵ As discussed more fully below, whether the decision maker had knowledge of purported protected activity is not a separate element of a complainant's *prima facie* case of retaliation, but is part of the analysis of whether the purported activity was a contributing factor in the adverse employment action.

⁶ The memorandum decision in *Micallef* does not mention or address the ARB's rejection of the heightened evidentiary standard requiring a complainant's communication "definitively and specifically" described one of the violations listed in Section 806 of the Act. See *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42 (ARB May 25, 2011) I, too, reject that standard.

provide any evidence that he reasonably believed what he reported constituted wire fraud. (Reply at 2-3.) Respondent asserts that Complainant failed to meet this *prima facie* burden, and so it is entitled to summary decision.

Respondent further argues that Complainant provided no evidence to undermine Respondent's evidence (the Warren Aff. And Dow Aff.) showing that Claimant's supervisor, to whom Complainant made his report, never passed along the information to the decision maker and that the decision maker did not otherwise receive that information. (Reply at 4.) Respondent asserts that there is no genuine issue of material fact on this point, and it is therefore entitled to summary decision.

D. Complainant's Supplemental Opposition

Complainant contends that Logility's false narrative as to their reason for terminating him was a willful and material lie. (Supp. Opp. at 1.) Complainant reiterates his allegations as to the falsity of that narrative, and also attaches an affidavit of Brett Hart, dated October 8, 2020 (the "Hart Aff.") in support of his contentions.

Complainant alleges that Mr. Schulman fabricated a false story which is refuted by the Hart Affidavit. (Supp. Opp. p. 1.) He alleges that Mr. Harrison "forged the false narrative into forged text messages that were never on" Mr. Harrison's phone. (Supp. Opp. p. 1.) He alleges that Mr. Dow willfully and materially lied about his awareness of Complainant's alleged misconduct, because the screenshots of texts that Mr. Harrison showed Mr. Dow were obvious forgeries. (Supp. Opp. p. 2.) He alleges that Mr. Dow supported the false narrative, "which he used to retaliate against me for my whistleblowing on Bill Harrison." (Supp. Opp. p. 2.) He alleges that Mr. Dow was unwilling to investigate Mr. Harrison and Mr. Schulman's false narrative because he needed it "to get away with his retaliation against me." (Supp. Opp. p. 2.)

III. LEGAL STANDARDS

A. Summary Decision

Under OALJ Procedural Rules, an administrative law judge ("ALJ") may grant a motion for summary decision if the pleadings, affidavits, evidence obtained by discovery, or other evidence show that there is no genuine issue of material fact and that the moving party would prevail as a matter of law. 29 C.F.R. § 18.72; *see also* Fed. R. Civ. P. 56(c). A fact is material if it affects the outcome of the action. *See Anderson v. Liberty Lobby, Inc.* 477 U.S. 252, 248 (1986).

The moving party bears the initial burden to show the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party must show that there is not enough evidence of an essential element for the non-moving party to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000).

If the moving party meets its initial burden, the burden shifts to the non-moving party to show that a genuine issue of material fact remains. *Id.* at 330. In doing so, the non-moving party

“may not rest upon mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The party opposing summary judgment “cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him.” *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968); *see also* 29 C.F.R. § 18.72(c). The non-moving party must go beyond the pleadings and, by affidavits⁷ or other evidence, designate “specific facts showing that there is a genuine issue for trial.” *Celotex*, 477 U.S. at 324; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 317, 323 (1986); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 923 (9th Cir. 2001).

The party opposing summary judgment must submit sufficient probative evidence to permit a finding “based on more than mere speculation, conjecture or fantasy.” *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 681 (9th Cir. 1985). “The mere existence of a scintilla of evidence in support of the non-moving party’s position is not sufficient.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson*, 477 U.S. at 252). Summary judgment is appropriate when, “at best,” the nonmoving party’s evidence merely suggests that its ability to establish an essential element of the case is a “weak possibility.” *Id.* Further, a nonmoving party cannot defeat summary judgment by showing that it will discredit the moving party’s evidence at trial, but it must produce at least “some significant probative evidence tending to support the complaint. [Citations omitted.]” *Id.* at 1222.

When considering a motion for summary decision, an ALJ does not assess credibility or weigh conflicting evidence, as all evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences made in its favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n.*, 809 F.2d 626, 630-31 (9th Cir. 1987). To prevent summary decision, however, the non-moving party must have more than a mere “scintilla” of evidence supporting its position. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). The non-moving party must designate certain facts in dispute, *Anderson*, 477 U.S. at 250, and “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In ruling on a motion for summary decision, the ALJ does not weigh evidence or determine the truth of the matter, but evaluates “whether there is the need for trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson*, 477 U.S. at 249-50.

Finally, the Board has established that a whistleblower complainant acting as a self-represented litigant is due a “degree of adjudicative latitude.” *Sachdev v. Wells Fargo Bank*, ARB No. 2019-0069, ALJ No. 2019-CFP-00002, slip op. at 4 (ARB May 19, 2020). The Board has stated that complaints and papers filed by *pro se* complainants must be construed “liberally in deference to their lack of training in the law.” *Id.*, citing *Wimer-Gonzales v. J.C. Penney*

⁷ An affidavit or declaration that is used to support or oppose a motion for summary decision must be “made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” 29 C.F.R. § 18.72(c)(4). If a fact is not properly supported or fails to properly address “another party’s assertion of fact, the judge may... consider the fact undisputed for purposes of the motion” and “grant summary decision if the motion and supporting materials... show that the movant is entitled to it.” See 29 C.F.R. § 18.72(e).

Corp., Inc., ARB No. 2010-0148, ALJ No. 2010-SOX-00045, slip op. at 4 (ARB Feb. 7, 2012) (quoting *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, slip op. at 4 (ARB Jan. 31, 2011)). I, therefore, consider whether a reasonable fact finder could rule for Complainant, drawing all inferences in his favor and giving great latitude to his filings due to his status as an unrepresented litigant.

B. SOX Whistleblower Protections

In general, the Sarbanes-Oxley Act of 2002 protects employees of publicly traded companies who blow the whistle on violations of U.S. Security and Exchange Commission rules and regulations and other laws relating to preventing fraud against shareholders. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, P.L. 111-203, amended the SOX whistleblower provision at 18 U.S.C. § 1514A to clarify that certain subsidiaries and affiliates of publicly traded companies are covered under the SOX whistleblower provision, among other provisions. The parties here do not dispute that Complainant's status as an employee of Logility brings him into coverage under SOX.

To prevail in a SOX whistleblower complaint, a complainant must prove, by a preponderance of the evidence that (1) he or she engaged in SOX-protected activity, (2) he or she suffered adverse employment action, and (3) the protected activity was a contributing factor in the adverse action. See 29 C.F.R. § 1980.109(a); see also *Stewart v. Lockheed Martin Aeronautics Co.*, ARB No. 14-033, ALJ No. 2013-SOX-00019, slip op. at 2 (ARB Sept. 10, 2015).⁸ To be successful on a motion for summary decision, a respondent need only show that a complainant failed to establish one of the three elements. See *Bucalo v. UPS, Inc.*, ARB No. 10-107, ALJ No. 2008 SOX-00053, 2012 WL 1065844 at *2 (ARB March 21, 2012).

While other statutes protect employee-whistleblowers more broadly, SOX protects employees from retaliation only for reporting six enumerated illegal activities: 1) mail fraud, 2) wire fraud, 3) bank fraud, 4) securities/commodities fraud, 5) a rule or regulation of the SEC, or 6) any federal law relating to fraud against shareholders. See *Hoptman v. Health Net of Calif.*, ARB No. 2017-0052, ALJ No. 2017-SOX-00013, 2019 WL 5870332 at *3 (ARB Oct. 31, 2019). Complainant must show that he provided his information of such acts to either a federal regulatory or law enforcement agency, a member of Congress, a person with supervisory authority over Complainant, or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct. See 18 U.S.C. § 1514A(a)(1).

⁸ Respondent argues, citing to *Van Asdale v. Int'l Game Tech.*, 577F. 3d 989, 996 (9th Cir. 2009), that an employee must make a *prima facie* case of retaliatory discrimination which involves four elements, including that "the decision maker 'knew or suspected, actively or constructively, that the employee engaged in the protected activity'". (Motion p. 8.) However, the ARB avoids that formulation because the Sarbanes-Oxley Act does not include any explicit knowledge requirement, "although it might be implicit in the causation requirement, see 18 U.S.C. § 1514A(a) (violation only if adverse personnel action taken 'because of' whistleblowing); 49 U.S.C. § 42121(b)(2)(B)(iii) (violation only if complainant establishes that whistleblowing was a 'contributing factor' in adverse personnel action)." *Folger v. SimplexGrinnell, LLC*, ARB No. 15-021 at 2, fn. 3, ALJ No. 2013-SOX-42 (ARB Feb. 18, 2016).

Complainant must establish that he both had a subjective belief that he was reporting a violation, and that the belief was objectively reasonable based on the facts known to him, or he must otherwise justify his belief that illegal conduct was occurring. *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1000 (9th Cir. 2009); *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42 (ARB May 25, 2011)⁹. SOX-protected activity requires whistleblowers to have subjectively believed that they reported a violation of a law listed in 18 U.S.C. § 1514A(a), and that their belief was objectively reasonable. *See Sylvester v. Parexel*, ARB No. 07-123, slip op. at 14-15; *see also Day v. Staples*, 555 F.3d 42, 54 (1st Cir. 2009); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008).

To have a subjective belief, an employee must “actually have believed that the conduct he complained of constituted a violation of relevant law. (Citation omitted.)” *Sylvester v. Parexel*, ARB No. 07-123, slip op. at 14. Whether that belief is objectively reasonable is evaluated based on the perspective of a reasonable person in the same factual circumstances as the complainant in terms of knowledge, training, and experience. *Id.* at 15. On summary decision, the objective reasonableness of a complainant’s belief cannot be decided as a matter of law if there is a genuine issue of material fact. *Id.*

If an employee establishes the first element of protected activity and the second element of adverse employment action, then the inquiry turns to the third element of causation - whether the employee has proved that the protected activity was a “contributing factor” in the adverse action. *Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, slip op. at 2, fn. 3. The employee need not demonstrate the existence of a retaliatory motive, but must only establish that that the protected activity was “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 04-SOX-11, 2006 DOL Ad. Rev. Bd. LEXIS 50, *41 (ARB May 31, 21006), *quoting Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *see also Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 263 (5th Cir. 2014).

If a complainant meets the initial burden by proving each of these elements, a respondent may still prevail by showing by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. 29 C.F.R. § 1980.109(b).

IV. FACTS

A. Company Structure, the Witnesses, and Complainant’s Role

American Software wholly owns Logility. Logility wholly owns Demand Management, Inc. (“DMI”)¹⁰. Logility and DMI both offer supply chain management software to their customers. Logility markets its software directly to its customers, while DMI sells its products

⁹ As noted above, the ARB, in the *Sylvester* case, explicitly rejected the application of the “definitively and specifically” standard in the SOX whistleblower context. The “critical focus is on whether the employee reported conduct that he or she *reasonably believes* constituted a violation of federal law.” *Sylvester*, ARB No. 07-123, slip op. at 19.

¹⁰ DMI is sometimes also referred to as Demand Solutions.

through independent companies known as “value added resellers” (“VARs”). At times, Logility and VARs promoting DMI’s products compete with one another for business. In June 2018, Logility (through Complainant) and DMI (through a VAR known as Maverick Solutions, Inc.) were competing to obtain the business of Dole Fresh Vegetables (“DFV”). (*See* Dow Aff., Motion Ex. A; Harrison Aff., Motion Ex. B.)

Allan Dow is the President of American Software, Inc. and of Logility, and made the decision to terminate Mr. Maloney, a sales executive of Logility.¹¹ (Dow Aff. paras. 1-2, Motion Ex. A.) Bill Harrison is the President of DMI. (Harrison Aff. para. 1, Motion Ex. B.) Charles “Chuck” Warren is an employee of Logility and was Mr. Maloney’s supervisor. (Warren Aff. para. 1, Motion Ex. E.) William Schulman is the owner of Maverick Solutions, Inc. (Schulman Aff. para. 2, Motion Ex. F.) Complainant was an account executive with Logility from August 2017 until he was terminated on June 29, 2018. (Eggleston 9/15/18 letter, Motion Ex. C at 1-2.)¹²

Complainant disagrees with Respondent’s characterization of Logility and DMI competing for DFV’s business, by stating that Mr. Dow’s “One Team One Dream FY 2019 Go to Market” plan, announced on June 18, 2018, “ended globally the competition between Logility and DMI”. (Maloney Aff. para. 11.) Complainant states that, as of June 18, 2018, it became his “exclusive responsibility to market and sell any and all the software solutions under the American Software Company, including Logility and DMI.” (*Id.*) Complainant provides a screenshot of a calendar placeholder/save the date (June 18, 2018 to June 20, 2018) for a FY2019 Kick Off Meeting and the undated letter from “Chuck” to “Team”. Complainant also provides copies of webpages from forbes.com to show that DFV had a certain level of revenue. Because of its revenue, DFV was a direct account and therefore his responsibility. (*Id.*)

Drawing inferences in his favor, Complainant’s documentary evidence tends to prove that there was a meeting of the company on the stated date at which, according to Complainant’s Affidavit, the One Team One Dream (OTOD) strategy was announced. The company then made a distinction between direct and indirect accounts, and DFV was a direct account. Complainant’s Affidavit states that he became exclusively responsible for the DFV account from that time forward. This statement, however, is at odds with other evidence in this record and, while it does

¹¹ I use the present tense to describe the positions of the individuals who provided affidavits, in accordance with the language of the affidavits. I make no determination as to their actual current positions, but accept that they were in these positions at all times relevant to the matters raised herein.

¹² An attorney’s unsworn statements to opposing counsel or an investigator do not constitute evidence of the type envisioned by the OALJ Rules of Practice and Procedure necessary to defeat a motion for summary decision. *See* 29 C.F.R. § 18.33(d). Nevertheless, following the direction of the Board, I give great latitude to Complainant’s status as a self-represented litigant. I therefore presume that Complainant would have adopted all the factual statements in Ms. Eggleston’s correspondence and sworn to them as being true and within his personal knowledge. Even though Complainant did provide his own affidavit, thereby showing an understanding that such sworn statements were required to defeat a motion for summary decision, and even though Ms. Eggleston’s correspondence was submitted by Respondent, I consider the statements of fact contained therein to be those of Complainant and appropriately attested to. I do not consider the arguments and contentions made by Ms. Eggleston to be statements of fact.

not constitute a “sham”,¹³ I cannot reconcile it with statements made by Complainant’s former attorney on his behalf.

Shortly after joining Logility, Complainant “became involved in a competitive bid and RFP process to obtain DFV’s business.” (Eggleston 9/15/18 letter, Motion Ex. C at 2.) In March 2018, Mr. Maloney learned that Logility had made DFV’s “shortlist,” but not the identities of other vendors on the shortlist. (*Id.*) On June 11, 2018, Mr. Maloney learned that the shortlist consisted of two vendors. (*Id.*) On June 12, 2018, a conference call was held during which Mr. Maloney learned that, when the OTOD strategy was announced, Logility and DMI would no longer compete, and DFV would be in “Mr. Maloney’s territory, **even though he did not have exclusive rights to the DFV account.**” (*Id.* Emphasis added.) On June 19, 2018, Mr. Maloney learned that DMI was one of the finalists for the DFV account. (*Id.*) Complainant’s supervisor encouraged him to “win the deal” by differentiating Logility’s product from DMI’s. (*Id.*) Based on what Mr. Maloney learned on June 11, 2018, it seems that the only two remaining vendors competing for DFV’s business as of June 19, 2018, were Logility and DMI. This scenario appears to contradict Complainant’s statement that, after June 18, 2018, Logility and DMI were no longer competing and that he was “exclusively responsible” between those two companies for the DFV account.

From this evidence, I cannot conclude that Logility and DMI either were or were not in competition with one another for DFV’s business after June 18, 2018. However, while there appears to be a dispute as to whether Logility and DMI were competing for DFV’s business and whether Complainant was exclusively responsible for that account after June 18, 2018, these are not material facts. Neither party explains how these details are important to the required analysis under the SOX whistleblower protections. A finding as to these disputed facts one way or another would have no impact on the outcome.

B. Complainant Learns of Mr. Harrison’s Statement to Mr. Hart

During a June 25, 2018, conference call with Complainant and Max Higgins, “Brett Hart [a representative of DFV] reported that Bill Harrison had stated that ‘Logility cannot meet DFV’s requirements either’ but Mr. Harrison had not provided any reason(s) to support that statement.” (Eggleston 9/15/18 letter, Motion Ex. C pp. 2-3.) The use of the word “either” is peculiar. It implies that Mr. Harrison may have been responding to a statement that a different company could not meet DFV’s requirements. Mr. Hart also reported that he “‘cringed when [Bill Harrison] said it.’” (*Id.* at 3.) Complainant describes Mr. Harrison’s statement as a “material misrepresentation regarding Logility’s inability to serve DFV’s needs”. (Eggleston 9/21/18 letter, Motion Ex. G p. 1.) Complainant asserts that Mr. Harrison “knowingly misrepresented Logility’s ability to serve Dole Fresh Vegetables’ needs.” (Eggleston 9/15/18 letter, Motion. Ex. C p. 1.)

¹³ The sham affidavit rule does not imply bad faith, but is simply a rule that holds that “a party cannot create an issue of fact [at summary judgment] by an affidavit contradicting his prior deposition testimony.” *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012); *Van Asdale v. Int’l Game Technology*, 557 F.3d 989, 998-99 (9th Cir. 2009).

For his part, Mr. Harrison denies that he ever spoke with Mr. Hart or any representative of DFV prior to July 2, 2018. (Harrison Aff., Motion Ex. B para. 4.) However, Mr. Hart's report that he "cringed" when Mr. Harrison made the statement implies that Mr. Hart heard the statement directly from Mr. Harrison. Complainant allots a considerable portion of his Affidavit to attesting that the Harrison Affidavit contains a number of willful and material lies. I do not weigh the evidence or make any credibility determinations, but for purposes of evaluating the Motion, I accept Complainant's evidence that Mr. Harrison made a statement such as "Logility cannot meet DFV's requirements" to Mr. Hart sometime before June 25, 2018.

I cannot determine on this record whether Logility could or could not have met DFV's requirements. I therefore must consider Ms. Eggleston's characterizations of Mr. Harrison's statement as a knowing and material misrepresentation to be argument, rather than fact. Giving deference to Complainant and drawing all possible inferences in his favor, I determine that, on June 25, 2018, Mr. Hart told Complainant that Mr. Harrison told Mr. Hart that Logility could not meet DFV's requirements.

C. Complainant's June 27, 2018, Report to His Supervisor, Mr. Warren

On June 27, 2018, Mr. Warren called Complainant to discuss the DFV business opportunity and strategy. During this call which lasted about an hour,¹⁴ Complainant told Mr. Warren what Brett Hart had said in the June 25th conference call – that Bill Harrison "lied" about Logility's ability to meet DFV's needs. (Eggleston 9/15/18 letter, Motion Ex. C p. 3; *see also* Eggleston 9/21/18 letter, Motion Ex. G p. 1 ("Thereafter Patrick Maloney reported Brett Hart's report of Bill Harrison's false statements to his superior, Chuck Warren.")) Mr. Warren told Mr. Maloney to "continue to take the high-road and differentiate Logility from [DMI] based on DFV's needs."¹⁵ (Eggleston 9/15/18 letter, Motion Ex. C p. 3.)

Mr. Warren confirmed that Complainant told him, during their June 27th phone call, about Mr. Harrison's statement to Mr. Hart, as follows: "

I recall that during a call with Mr. Maloney in late June, 2018 where he and I were reviewing the status of a number of different sales campaigns he was involved with, he mentioned that someone at DFV told him Bill Harrison had said something to the effect that Logility can't meet DFV's needs. I did not know if this was true or not, but since competitors make such meaningless comments in competitive sales situations all the time, I thought nothing more about it.

(Warren Aff. para. 3, Motion Ex. E.)

¹⁴ Ms. Eggleston states the call lasted nearly one hour. Complainant's call history report shows an incoming call from Chuck Warren on June 27, 2018, lasting 1 hour, 1 minute, and 49 seconds, at 23:15:32.

¹⁵ This statement appears, again, to be at odds with Complainant's contention that he had exclusive responsibility, between Logility and DMI, for the DFV account.

Although Mr. Warren does not say that Complainant made any characterization of the statement, such as it being a lie or false or a misrepresentation, I draw all inferences in favor of Complainant and determine that, on June 27, 2018, Complainant told his supervisor, Mr. Warren, that Mr. Harrison misrepresented Logility's ability to meet DFV's needs in a conversation with Mr. Hart.

D. On June 27th or 28th, 2018, Mr. Schulman May Have Talked to Mr. Hart

Mr. Schulman was the owner of Maverick Solutions, a firm which markets and sells DMI's computer software products. (Schulman Aff. para. 2, Motion Ex. F.) Mr. Schulman attests that, "On June 27th or 28th, 2018, I received a call from Mr. Hart who told me that he had just heard from Patrick Maloney the Logility sales representative that because of a restructuring, DMI was in effect being phased out or going away and would not be supporting its products in the future. He asked me if this was true and I replied that I had never heard of such a thing and did not believe it to be true." (*Id.* para 4.)

Complainant avers that he "did not call Brett Hart before Brett Hart called William Schulman, or at any other time on June 28th, 2018." (Maloney Aff. para. 5.) He provides the Call History of his iPhone obtained from Logility which shows only a missed call from Mr. Hart on June 28, 2018, and no calls to or from Mr. Hart's number before that. This evidence tends to prove that Mr. Maloney did not call Mr. Hart from his Logility iPhone before June 28, 2018. It does not completely establish that Mr. Hart had not "heard from Patrick Maloney" (Maloney Aff. para. 5) prior to calling Mr. Schulman on June 27 or June 28, 2018; other means of communication are available.

Complainant denies telling Mr. Hart that DMI was in effect being phased out and would not be supporting its products in the future, and says that the alleged call between him and Mr. Hart reported by Mr. Schulman never took place. (Maloney Aff. para. 6.) Mr. Hart attests that, "At no time did Patrick Maloney tell me that Demand Management, Inc. (DMI) was being phased out or going away, nor that DMI would not be supporting its products in the future." (Hart Aff. para. 6.)

Clearly, there is a dispute between the parties as to whether Complainant told Mr. Hart that DMI would not be supporting its products in the future. Mr. Schulman says Mr. Hart told him so, Complainant and Mr. Hart deny that Complainant made such a statement.¹⁶ Viewing the evidence in the light most favorable to Complainant and drawing inferences in his favor, I discount Mr. Schulman's affidavit.

E. Complainant Receives a Voicemail Message on June 28, 2018

On June 28, 2018, Complainant received a voicemail message from Brett Hart. Complainant provided a flash drive with an audio recording which is transcribed as followed:¹⁷

¹⁶ Mr. Hart denies only that Complainant made such a statement; he does not deny that he told Mr. Schulman that Complainant had made such a statement.

¹⁷ Complainant's call history shows a missed call from Brett Hart on June 28, 2018 at 16:11:53, which appears to verify the date and caller of this message.

Hey Patrick. Brett Hart, buddy. Hey just returning your phone, excuse me, uh returning the call to you regarding the [implementation]¹⁸ methodology review. So we have that to, you know, schedule then we have the service level agreement. I'm looking for you to pick a date there. Right now I have it scheduled the 9th and the 11th – maybe the 9th is service level and the 11th is the [implementation] methodology discussion. Maybe that's what we should do, uh, cuz not too many days left between now and the 16th. So, uh, also I want to continue that discussion on Demand Solutions and Logility by American Software, um trying to understand what's up there. I did talk to Bill at Demand Solutions as well today um, so um let's get together on all of those three things there. Okay. Give me a call. Thanks bud.

This voicemail message reveals a disputed fact – whether Mr. Harrison ever talked to Mr. Hart before July 2, 2018. If “Bill at Demand Solutions” refers to Mr. Harrison, then this message directly contradicts Mr. Harrison's statement that he never talked to Mr. Hart before July 2, 2018. It is possible, however, that “Bill at Demand Solutions” refers to William Schulman, owner of the VAR which was marketing the Demand Solutions products.

For purposes of evaluating this Motion, I view the evidence in the light most favorable to Complainant and infer that “Bill at Demand Solutions” refers to Mr. Harrison. I therefore determine that Mr. Hart spoke with Mr. Harrison on June 28, 2018, about Logility, DMI, and American Software. From the evidence, I can make no further determination as to the specific content of that conversation.

Complainant asserts that, once the discussion between Mr. Harrison and Mr. Hart took place, Mr. Harrison “understood that his lie about Logility's ability to serve DFV's needs would negatively impact his opportunity to secure DFV's business and would result in a significant loss of income opportunities for Bill Harrison. Thus, Bill Harrison's self-interest drove his negative and disparaging comments about Logility.” (Eggleston 9/15/18 letter, Motion Ex. C p. 3.) This assertion is not supported by the substance of the voicemail message, nor by any other evidence in the record. It is sheer speculation about Mr. Harrison's state of mind. Further, this conversation between Mr. Harrison and Mr. Hart purportedly took place on June 28, 2018, three days after Mr. Hart reported to Complainant that Mr. Harrison had made disparaging statements about Logility. It is possible that there was another conversation prior to June 25, 2018, between Mr. Hart and Mr. Harrison at which such statements were made, but there is no evidence of that, and I cannot draw inferences out of thin air.

E. Respondent Terminates Complainant on June 29, 2018

On June 29, 2018, Logility terminated Complainant's employment. (Dow Aff.; Motion Ex. A; Warren Aff., Motion Ex. E; Eggleston 9/15/188 letter, Motion Ex. C.) Mr. Dow alone

¹⁸ This word is unclear and somewhat inaudible in the recording. “Implementation” is my best guess at what Mr. Hart was saying.

made the decision to terminate Complainant. (Dow Aff. para. 1, Motion Ex. A.) Before the termination, no one advised Mr. Dow that Complainant had claimed Mr. Harrison had “acted in any improper or unethical way in connection with DFV.” (Dow Aff. para. 3, Motion Ex. A.) Before the termination, Mr. Warren did not report Complainant’s allegation about Mr. Harrison to Mr. Dow or any other officer or employee of Logility or American Software. (Warren Aff. para 4, Motion Ex. E.) Complainant does not dispute that Mr. Dow was the sole decision maker nor that Mr. Dow was unaware of Complainant’s report of Mr. Harrison’s conduct.

Complainant asserts that Mr. Harrison spoke with Mr. Dow before Mr. Warren could escalate his report to the company’s ethics contact person. (Eggleston 9/15/18 letter, Motion Ex. C p. 4.) Mr. Dow did communicate with Mr. Harrison before deciding to terminate Complainant, during which interaction Mr. Harrison showed him text messages dated June 19, 2018, and June 28, 2018, purporting to be between Mr. Harrison and a representative from the VAR who was marketing DMI’s products to DFV. (Dow Aff. para. 4, Motion Ex. A.) Complainant argues that the screenshots of these text messages are forgeries. (Maloney Aff. para. 10.)

Complainant argues that Mr. Dow’s stated reason for deciding to terminate him is a pretext based on a false narrative, and that Complainant’s report to Mr. Warren was a contributing factor in Mr. Dow’s termination decision. (Eggleston 9/21/18 letter, Motion Ex. G p. 2.) Complainant argues that Respondent cited different reasons for the termination, which can be evidence of pretext. (*Id.*; Eggleston 3/11/19 letter, Motion Ex. H p. 2.) In one description of the reason for termination, Complainant states that Mr. Warren “terminated him for what he claimed to be an ‘ethics violation.’” (Eggleston 9/21/18 letter, Motion Ex. G. p. 2.) In another, Mr. Dow sent an email to the sales force stating that “an AE [account executive] who had decided to put himself before the One Team One Dream strategy has been fired”. (Eggleston 3/11/9 letter, Motion Ex. H. p. 2.) And, Mr. Harrison blamed Complainant for the content of the text messages shown to Mr. Dow, even though Complainant was not personally identified as the Logility employee who made the statements. (*Id.* at fn. 2.)

Viewed in the light most favorable to Complainant, I determine the evidence establishes that Mr. Dow had a conversation with Mr. Harrison before deciding to terminate Complainant. During that conversation, Mr. Harrison showed Mr. Dow certain text messages, which may have been forgeries. Mr. Dow had no knowledge of Complainant’s report about Mr. Harrison before deciding to terminate Complainant. Based solely on the information contained in the text messages he was shown by Mr. Harrison, Mr. Dow made his decision and instructed Mr. Warren to terminate Complainant on June 29, 2018.

F. Findings of Fact

In accordance with the above discussion, I make the following findings of fact:

- Mr. Harrison made a statement such as “Logility cannot meet DFV’s requirements” to Mr. Hart sometime on or before June 25, 2018.
- On June 25, 2018, Mr. Hart told Complainant that Mr. Harrison told Mr. Hart that Logility could not meet DFV’s requirements.

- On June 27, 2018, Complainant told his supervisor, Mr. Warren, that Mr. Harrison misrepresented Logility's ability to meet DFV's needs in a conversation with Mr. Hart.
- Mr. Warren believed Mr. Harrison's statement to be a meaningless comment of the kind frequently made in competitive sales situations.
- Mr. Warren did not report Complainant's allegation about Mr. Harrison to Mr. Dow or to any other officer or employee of Logility or American Software before Complainant was terminated on June 29, 2018.
- On June 28, 2018, Mr. Hart spoke with Mr. Harrison about Logility, DMI, and American Software.
- On June 29, 2018, Logility terminated Complainant's employment.
- Mr. Dow made the decision to terminate Complainant.
- Mr. Dow had no knowledge of Complainant's report about Mr. Harrison before deciding to terminate Complainant.
- Mr. Dow had a conversation with Mr. Harrison before deciding to terminate Complainant. During that conversation, Mr. Harrison showed Mr. Dow certain text messages, which may have been forgeries. Based solely on the information contained in those text messages, Mr. Dow made his decision and instructed Mr. Warren to terminate Complainant.

V. ANALYSIS

To prevail on summary decision, Respondent must show that there is not enough evidence for Complainant to establish one of the three essential elements of a SOX whistleblower case. As the parties do not dispute the second element, I consider below the first and third elements.

A. Protected Activity

To be considered SOX-protected activity, Complainant must show that he subjectively believed that they reported an illegal activity enumerated in the Act (including wire fraud and violation of an SEC rule or regulation) and that his belief was objectively reasonable. Complainant alleges that the protected activity he engaged in was "reporting a violation of the code of conduct against Bill Harrison, the President of Demand Management." (Opposition p. 1.) Complainant presumably believed that Logility could, in fact, meet DFV's needs and that, therefore, Mr. Harrison's statement that it could not was a dishonest misrepresentation. Because publicly-traded companies are required to adopt and adhere to a code of ethics and conducts, Complainant argues that a violation of such code would constitute an illegal activity.¹⁹

¹⁹ According to Complainant, Section 406 of the Act requires Respondent to disclose its adoption of a code of ethics for senior financial officers, and 17 C.F.R. § 229.406(b)(4) requires prompt internal reporting of violations of that code. (Eggleston 3/11/19 letter, Motion Ex. H, p. 3.) It is not clearly established that a misrepresentation of a competitor's ability to perform is a violation of an SEC rule or regulation, but, for purposes of deciding this Motion, I accept this interpretation of illegal activity. I also note that the file contains some references to purported "wire fraud," but Complainant appears to have dropped that argument. In any event, the findings and conclusions I

American Software's Code of Business Conduct and Ethics states that employees must promote honest and ethical conduct, to act with integrity (including being honest and candid and excluding deceit), and not to "take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any unfair dealing practice." (Eggleston 9/15/18 letter, Motion Ex. C p. 3; Motion Ex. D.)

Respondent contends that Complainant did not have a reasonable belief that he was reporting wire fraud or a violation of any SEC rule or regulation. (Motion p. 9.) Mr. Harrison's alleged statement would constitute mere "sales puffery", which neither Complainant nor a reasonable person in his position could conceivably believe constituted wire fraud. (Motion p. 11.) Further, Complainant's report to his superior did not allege that American Software, Logility, or DMI violated the regulation which requires a company registered with the SEC to disclose that it had adopted a code of ethics or that the code failed to include requisite provisions. (Motion p. 12.) Respondent contends that no reasonable person in Complainant's position could believe that Mr. Harrison's alleged statement violated the regulation found at 17 C.F.R. § 229.406. (Motion p. 12.) Neither Complainant's Opposition nor his Supplemental Opposition address this issue.

Whether Complainant, at the time he reported this misrepresentation to his supervisor, actually believed that Mr. Harrison was violating the Company's code of conduct is not conclusively established. The only evidence of such belief are subsequent statements made by his former attorney, and those are not uniformly persuasive. For instance, Complainant asserts that he "reasonably believed that Chuck Warren would be able to determine whether to treat Bill Harrison's statements to a customer as a Code of Ethics violation." (Eggleston 9/15/18 letter, Motion Ex. C p. 4.) This assertion certainly implies that Complainant did not affirmatively believe Mr. Harrison's statements constituted such a violation, but only that he trusted Mr. Warren to make that determination. Nevertheless, under the legal standards for evaluating a motion for summary decision against an unrepresented complainant in a SOX whistleblower matter, I accept that Claimant subjectively believed he was reporting a violation of law.

As to the objective reasonableness of Complainant's belief, I consider evidence of the responses of other persons to determine whether Complainant's belief, that he was reporting a violation of the company's Code of Business Conduct and Ethics and, hence, a violation of SEC regulations, was reasonable.

Mr. Hart was a director at DFV and acted as project leader and Mr. Maloney's principal contact when DFV was evaluating Logility's products. (Hart Aff. paras. 1-2.) As such, he would likely not have had training or knowledge of American Software's Code of Business Conduct and Ethics. Further, according to the forbes.com webpages submitted by Complainant, Dole Food is a private company, and Mr. Hart may therefore not have had knowledge of regulatory requirements for publicly-traded companies. His status as a reasonable person in a similar situation to Complainant is not established, but I nevertheless consider his response.

make here with regard to the allegation of a violation of an SEC rule or regulation would equally apply to an assertion of wire fraud.

Complainant reports that Mr. Hart “cringed” when Mr. Harrison told him that Logility could not meet DFV’s needs. (Eggleston 9/15/18 letter, Motion Ex. C p. 3.) The reason for Mr. Hart’s reaction is not explained by Complainant or in Mr. Hart’s Affidavit. On this record, a reasonable fact finder could not conclude that Mr. Hart’s cringing was a response borne of a belief that Mr. Harrison was intentionally lying or engaging in unlawful activity. It may have simply been a reaction to hearing a competitor disparage an opponent in a competitive sales situation. I accept Complainant’s report that Mr. Hart cringed when Mr. Harrison said that Logility could not meet DFV’s needs, but that does not tend to establish anything more than Mr. Hart found the statement distasteful or unwelcome or problematic. It is, even drawing inferences in favor of Complainant, no more than, at best, a scintilla of evidence showing that Complainant’s belief that Mr. Harrison was violating the company’s Code of Business Ethics and Conduct was objectively reasonable.

Far more probative is Mr. Warren’s response. Mr. Warren, as Complainant’s supervisor at Logility, can reasonably be charged with at least Complainant’s level of training, knowledge, and experience with regard to the company’s Code of Business Ethics and Conduct and its responsibilities under SEC regulations. And, Mr. Warren appears to have done nothing more than shrug.

In an hour-long conversation during which Mr. Warren and Complainant reviewed the status of a number of different sales campaigns Complainant was involved with, Complainant mentioned Mr. Harrison’s misrepresentation to Mr. Hart. (Warren Aff. para. 3, Motion Ex. E.) Mr. Warren “did not know if this was true or not, but since competitors make such meaningless comments in competitive sales situations all the time, I thought nothing more about it.” (*Id.*) Mr. Warren did not report the allegation to anyone at Logility or American Software. (*Id.*) Complainant’s own description of Mr. Warren’s response was that he told Complainant to “continue to take the high-road and differentiate Logility from [DMI] based on DFV’s needs.” (Eggleston 9/15/18 letter, Motion Ex. C p. 3.) This response implies that Mr. Warren thought Mr. Harrison was taking the low road, but it does not indicate that Mr. Warren considered the allegation, if true, to reveal or even hint at a violation of the company’s Code of Business Ethics and Conduct.

Neither Mr. Hart’s cringe nor Mr. Warren’s shrug demonstrate that either of them believed they were being confronted with illegal activity. Mr. Hart, as the direct recipient of Mr. Harrison’s purported misrepresentations, was someone whom American Software employees were obligated not to “take unfair advantage of.” But, it is speculation to assume that a salesperson was unethically taking unfair advantage of a customer by generally disparaging the competitor’s abilities. Surely, a company such as DFV would be able to evaluate competitors’ products on their own merits and not on claims amounting to “sales puffery”²⁰. Mr. Warren’s dismissal of Mr. Harrison’s statement as a meaningless comment unworthy of a second thought is a clear indication that the statement did not raise any red flags about a potential violation of the company’s Code of Business Ethics and Conduct. Although it may have been low-road

²⁰ As Respondent argues, “Sales puffery is defined as ‘vague, exaggerated, generalized or highly subjective statements regarding a product or business which do not make specific claims. *Cook, Perkiss & Liehe, Inc. v. N. CA Collection Serv. Inc.*, 911 F. 2d 242, 246 (9th Cir. 1990).” Mr. Harrison’s statement that Logility cannot meet DFV’s needs appears to meet this definition.

behavior, Mr. Warren saw no reason to investigate it, elevate it, or even inform anyone about it. As his company was competing for business with Mr. Harrison's company, Mr. Warren would have no reason to bury alleged misconduct by Mr. Harrison.

I do not see how a reasonable fact finder could conclude that Complainant's report of Mr. Harrison's statement to a potential customer constituted the type of protected activity protected by the Act or under case law interpreting the Act. When one looks at the context and circumstances of Complainant's report, it does not appear that even he thought he was reporting ethical misconduct, much less a violation of law. Complainant learned of Mr. Harrison's statement on June 25, 2018, but apparently did nothing about it until two days later, when he told his supervisor about it in an hour-long conversation during which various sales accounts were discussed. It appears that, only after he found himself unceremoniously fired for allegedly making a similar type of comment about Mr. Harrison's company, did he assert a belief that his report of Mr. Harrison's comment was SOX-protected activity. But, even inferring that Complainant did believe he was making a report of illegal activity, a reasonable fact finder could not determine that such belief was objectively reasonable.

Even under the expansive standards of evaluating an unrepresented complainant's opposition to a motion for summary decision under the Act, I cannot conclude that Complainant had a reasonable belief that his report to Mr. Warren constituted a SOX protected activity. The evidence does no more than suggest, and that even barely, that Complainant's ability to meet his burden to prove this essential element of his case is a weak possibility. There is no genuine issue of material fact, and the issue of Complainant's reasonable belief can be decided as a matter of law. Complainant's belief that he was reporting a violation was not objectively reasonable, nor has he otherwise justified his belief that illegal conduct had occurred.

Accordingly, I conclude that Complainant has not established that he engaged in protected activity within the meaning of the Act. Respondent is entitled to summary decision as to the first element of this SOX whistleblower case.

B. Causation – Contributing Factor

Complainant alleges that Logility falsely accused him of committing acts which he did not commit as a "pretense to hide the true reason of my termination; retaliation for reporting a violation of the code of conduct against" Mr. Harrison. (Opposition p. 1.) Respondent contends that the termination was unrelated to Complainant's statements to Mr. Warren. (Motion p. 4.) To prove the causation element of a SOX whistleblower case and withstand a motion for summary decision, Complainant must provide sufficient evidence, beyond allegations and speculation, that the protected activity was a factor which, alone or in combination with other factors, tended to affect in any way the outcome of Respondent's decision.²¹

Complainant's insistence that the story concocted by Mr. Harrison and Mr. Schulman was *not* the reason he was fired does not prove the converse – that his report to Mr. Warren was

²¹ Despite my finding that Complainant did not engage in protected activity, I make the assumption of protected activity for purposes of analyzing the element of causation as an alternative finding.

a factor in his termination. It is possible that Mr. Harrison and Mr. Schulman made up the story that Complainant had disparaged DMI to DFV, that the text messages were forged, and that Mr. Harrison presented that false narrative to Mr. Dow, who decided to terminate Complainant on that basis. Complainant alleges that Mr. Dow's stated reason for his termination is a willful and material lie. (Maloney Aff. para. 11.) Although Complainant provides no evidence to support this allegation, for the purpose of this evaluating this Motion, I consider the possible scenario.

There is no evidence, not even a scintilla, that Mr. Dow was aware of Complainant's report to Mr. Warren or that he should have been aware or that Mr. Warren's knowledge of the report should be imputed to Mr. Warren. There is no evidence that anyone at Logility, other than Mr. Warren, knew of Complainant's report regarding Mr. Harrison's alleged misconduct or that Mr. Warren considered it to be anything more than a meaningless comment in a competitive sales situation or that Mr. Warren informed anyone else at Logility or American Software about Complainant's report or that he should have.

Although not raised by Complainant, I consider the possibility of "cat's paw" liability here in deference to his unrepresented status. Under that theory, Respondent could be liable if others in the company had knowledge of Complainant's protected activity and could have affected the decision maker's decision-making process. But, there must be evidence to establish more than that this series of events could conceivably have occurred; to survive summary decision, there must be "non-speculative evidence of specific facts, not sweeping conclusory allegations." *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1061 (2011). There is no such evidence here. It is uncontradicted that Mr. Warren told no one at Logility or American Software about Complainant's report, and there is no evidence that Mr. Warren had any effect on Mr. Dow's decision-making process; he simply carried out Mr. Dow's instruction to terminate Complainant.

Complainant has not presented sufficient probative evidence to permit a finding based on more than mere speculation or conjecture. Complainant points to no evidence to support his conjecture that Mr. Dow must have known about his report to Mr. Warren. It is undisputed that Mr. Warren told no one about Complainant's report and that Mr. Dow was unaware of it when he decided to terminate Complainant. Complainant appears to contend that his report must have been a factor in his termination, because the reasons Respondent give are a pretense and not believable. Even if that were so, Respondent could have had other grounds for termination, which also had nothing to do with Complainant's report. Consideration of whether an employer would have taken the same adverse action in the absence of any protected activity is only warranted when a complainant first meets the initial burden of proving all elements of a SOX whistleblower case. Complainant here has not shown any evidence which would tend to prove that Mr. Dow's decision to terminate him had anything to do with his report to Mr. Warren.

Accordingly, I conclude that Complainant has not established that his alleged protected was a contributing factor in Respondent's decision to terminate him. Respondent is entitled to summary decision as to the third element of this SOX whistleblower case.

VI. CONCLUSION

The sudden and unexpected loss of a job can be disorienting, if not traumatic, especially if the employee believes his or her dismissal to be unwarranted. But, under the Sarbanes-Oxley Act, publicly-traded private employers do not have to justify their reason for terminating an employee who is not protected by a collective bargaining or other employment agreement, unless the employee first shows that his or her termination was due, in part, to retaliation for engaging in a protected activity. Here, Complainant has not made the requisite showing, and I therefore do not consider whether Respondent had a justifiable reason for terminating his employment.

On the record here, no reasonable fact finder could find that Complainant engaged in SOX-protected activity prior to his termination or that any such alleged protected activity was a contributing factor to his termination. Accordingly, Respondent's Motion for Summary Decision is **GRANTED** and Complainant's complaint is **DENIED**. See 29 C.F.R. § 1980.109(d)(2).

The hearing and pre-hearing conference are **CANCELLED**, and all dates are **VACATED**.

SO ORDERED.

SUSAN HOFFMAN
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 (e-File) 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).