



In the Matter of:

KENNON MARA,

ARB CASE NO. 10-051

COMPLAINANT,

ALJ CASE NO. 2009-SOX-018

v.

DATE: June 28, 2011

SEMPRA ENERGY TRADING, LLC,

RESPONDENT.

BEFORE: ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kennon Mara, *pro se*, Northport, New York

For the Respondent:

Kathleen M. McKenna, Esq., Nathaniel M. Glaser, Esq., *Proskauer Rose, LLP*, New York, New York

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*, Luis A. Corchado, *Administrative Appeals Judge*, Lisa Wilson Edwards, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. 1514A (Thomson West 2010)(the “Act” or “SOX”), and its implementing regulations found at 29 C.F.R. part 1980 (2010). Kennon Mara (Mara) filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging harassment by employees at Sempra Energy Trading LLC (SET), in violation of SOX. OSHA dismissed the complaint. On motion for summary decision, an Administrative Law Judge (ALJ) dismissed Mara’s complaint finding that SET was not a covered company under SOX. The ALJ also denied Mara’s motion

for reconsideration. Mara petitioned the Administrative Review Board for review. We reverse and remand for further proceedings.

BACKGROUND

A. Submission on Summary Decision

The following submissions of the parties, outlined by the ALJ at pages 2-5 of his order, are summarized below and are drawn from affidavits from Complainant Mara and Respondent SET's Controller Michael Beaury.

1. *Sempra Energy Trading LLC*

SET is a limited liability company based in Stamford, Connecticut. SET is a full-service energy trading company that markets and trades physical and financial energy and metals products, including electric power, natural gas, crude oil, base metals, and associated commodities. Prior to April 1, 2008, SET was an indirectly, wholly-owned subsidiary of Sempra Energy, a public utility holding company based in San Diego and traded on the New York Stock Exchange. SET Motion for Summary Dismissal, Affidavit of Michael Beaury (Beaury Aff.) ¶¶ 2-5; Order Granting Respondent's Motion for Summary Decision (ALJ Order) at 2.

Beginning April 1, 2008, SET became an indirectly, wholly-owned subsidiary of RBS Sempra Commodities LLP (RBS Sempra Commodities), a UK limited liability partnership. RBS Sempra Commodities is 51% owned by The Royal Bank of Scotland plc (RBS), and 49% owned by Sempra Energy. RBS, a public limited company registered in Scotland, is a financial holding company under the U.S. Bank Holding Company Act of 1956, registered with, and subject to examination by, the Board of Governors of the Federal Reserve System, and is engaged in a full range of banking, capital markets, and asset management activities. RBS is a wholly-owned subsidiary of The Royal Bank of Scotland Group plc (RBS Group), a publicly traded company registered in Scotland, and headquartered in Edinburgh, Scotland. RBS Group is traded on the London Stock Exchange. Beaury Aff. ¶¶ 6-8; ALJ Order at 2-3.

2. *Events Leading To Mara's Resignation From SET*

Michael Beaury is the Controller of SET and is responsible for the majority of SET's accounting functions. Beaury Aff. ¶ 1; Mara's Reply Brief at 2. Beaury had hired consultant Brian McGowan in 2003 to draft and implement policies and procedures relating to various Financial Accounting Standards (FAS), including FAS No. 133. Beaury Aff. ¶ 15. In 2007, Beaury hired Kennon Mara Associates, and its principal, Mara, to assist McGowan to "work on the current FAS 133 reporting for the oil group," which involved "fair-value hedging."¹ Mara

¹ Mara states in an affidavit that FAS No. 133 work involved "yielding a quarterly hedge ineffectiveness number by calculating the hedge ineffectiveness of all the hedge relationships for that quarter." Complainant's Motion for Reconsideration, Mara Supplemental Affidavit (Mara Supp. Aff.) ¶¶ 6-7. She stated that the task was "performed using an excel worksheet which was referred to

Supp. Aff. ¶6; Complainant’s Response To SET Motion To Dismiss, Mara Affidavit Of Illegal Discrimination Practices (Mara Aff.) ¶ 11; see also Beary Aff. ¶¶ 16-18; ALJ Order at 3.

Mara explains in an affidavit that shortly after she started working for SET, she was informed about a “backlog” regarding FAS 133 reporting. Mara Aff. ¶ 12; see also Mara Supp. Aff. ¶¶ 9-11. Mara was asked to “fill in” the backlog, which required “running regressions for six months worth of hedges and creating hedge documents for every hedge dating back to December 2005.” Mara Aff. ¶ 12; Mara Supp. Aff. ¶10. According to Mara, the filling in process required her to “revis[e] most of the quarterly published hedge ineffectiveness numbers that had been incorrect.” Mara Aff. ¶12; Mara Supp. Aff. ¶ 13. Mara viewed this “filling in” as “essentially cook[ing] the books in order to make the records look legitimate.” Mara Aff. ¶ 12; see also Mara Supp. Aff. ¶¶ 12-13 (Mara states: “I knew these published hedge ineffectiveness numbers were *false*, yet, I was being asked to create the hedge documents and to run the regressions to mesh with these *false* hedge ineffectiveness numbers.” (emphasis added)).

Mara became uncomfortable with her assignment and believed that she had a duty to bring the footnote inaccuracies to the attention of her supervisors. Mara Aff. ¶ 13. In October 2007, she met with Beary and told him that she was finding mistakes in documentation regarding the ineffectiveness numbers in the footnote, and complained that certain documentation was not timely prepared. Mara Aff. ¶ 13; Beary Aff. ¶ 35. Mara stated in her affidavit that during this meeting she believed that the company had “yielded and published a hedge ineffectiveness number without ever testing or proving that the hedge relationships behind this number [were] legitimate. Mara Supp. Aff. ¶ 16. She gave Beary a “report on the backlog” and she described to him the “poor record keeping and the missing appendices (another type of documentation that supports the hedge relationships) that [she] had discover[ed].” *Id.* at ¶ 17. Mara told Beary that she was “concerned with the inaccuracy of the already published hedge ineffectiveness numbers for the[] [affected] quarters and that the more [she] discovered and digested what [she] was finding, [she] was not willing to create the backlog to mesh with hedges numbers that [she] knew were false.” *Ibid.* Mara was surprised that Beary did not know about

as the ‘footnote.’” *Ibid.* Mara understood that her “responsibilities also involved creating the supporting hedge contracts (known as hedge documents) for every hedge relationship listed in the quarterly footnote, as well as running the regressions for all the hedge relationships to make sure they passed the pass/fail criteria (recognized as ‘highly effective’).” *Id.* at ¶ 7. Mara stated that McGowan told her that “only after these regressions are run and prove themselves to be highly effective, can a hedge relationship be considered viable and eligible for FAS 133 accounting treatment.” *Ibid.* Mara stated that “if the regression run for the hedge relationship doesn’t pass, that hedge relationship cannot be included on the footnote.” *Ibid.* Mara stated that the “quarterly hedge ineffectiveness number that was yielded was used directly for the purpose of being published in the Parent’s Company’s, Sempra Energy Financial quarterly reports, specifically the 10Q [and] 10K [and that] [t]his report is not only mailed to Sempra Energy’s shareholders but is filed with the SEC.” *Id.* at ¶8. SET controller Beary stated in his affidavit that “FAS No. 133 establishes accounting and reporting standards for derivative instruments and hedging activities [and] provides guidance for disclosing ‘hedge ineffectiveness’ – a measurement reflecting how well the hedge worked in offsetting price fluctuations in the underlying asset.” ALJ Order at 3 n.2, citing Motion for Summ. Dec. at 4 n.5, Beary Aff. ¶ 23.

the backlog, and his “lack of concern regarding the flaws in record-keeping and the unethical, as well as illegal, nature of the assignment she had been given.” Mara Aff. ¶ 13.

Following the meeting with Mara, Beury called Margie Carlacci, SET’s controller for the Oil Accounting Group, and McGowan, to discuss concerns Mara raised. Beury Aff. ¶ 37; Mara Supp. Aff. ¶ 19. Beury stated in an affidavit that both Carlacci and McGowan explained to him how the ineffectiveness footnote was calculated and assured him that there were no problems with SET or Sempra’s financial reporting. Beury Aff. ¶ 38.

Mara and Beury met again with McGowan, and McGowan told Beury that Mara’s concerns were “no big deal and that in the scheme [] of things the errors and inaccuracies with the hedge relationships within the footnote had an insignificant effect on the overall quarterly calculation.” Mara Supp. Aff. ¶ 21. Mara stated that she “questioned” McGowan’s view on the numbers and “reiterate[d] specific examples to” Beury, including “hedge relationships that had never been accounted for on the footnote worksheet that should have been, incorrect prices or commodities, incorrect quantity listed for the inventory position and the hedging item.” *Ibid.* Beury stated in his affidavit that this conversation with Mara “concerned only alleged inaccuracies in the hedge ineffectiveness backup documentation[,]” and that “[a]t no point did she mention fraud or indicate that any type of fraud was allegedly occurring with regard to the hedge ineffectiveness footnote or otherwise.” Beury Aff. ¶ 40.

After discussing her concerns with Beury, Mara learned that “false rumors” about her were circulating among SET employees, including Carlacci. Mara Aff. ¶ 14. The rumors accused her of “having various illnesses including AIDS, vaginitis, [and] hemorrhoids” and of being “sexually promiscuous.” *Ibid.* She believes that these rumors were spread intentionally to intimidate, humiliate, and harass her into leaving SET, and she warned her co-workers to stop the rumors. Mara Aff. ¶ 15. Mara stated in her affidavit that the rumors continued into the spring of 2008, and were published on a website called pickhoops.com, where a SET employee ran an office “March madness pool” and moderated a related blog. Mara Aff. ¶ 16. Mara told SET attorney Andrea Elder-Howell about her concerns. *Ibid.* Mara states that Elder-Howell did nothing in response to Mara’s concerns and told Mara that she was “being paranoid.” *Ibid.* Mara stated that later, members of SET’s IT department began probing her computer and personal e-mail accounts. Mara Aff. ¶ 17. As a result, Mara claims that personal medical information was obtained and disseminated among her co-workers who then used this information to further harass her. *Ibid.*

Mara stated in her affidavit that on April 7, 2008, while she was at SET, her co-workers called her a “slut,” went through her “personal belongs” and voice-recorded more rumors about her. Mara Aff. ¶ 19. Mara left the office and informed McGowan that she was resigning because of the hostile environment and ongoing harassment. *Ibid.*

B. Administrative Proceedings

Mara filed a complaint with OSHA on June 29, 2008, alleging that she was harassed and humiliated at work by SET employees in retaliation for reporting about inaccurate accounting

practices at SET in violation of SOX. OSHA determined that Mara was not a covered employee under the Act, and dismissed the complaint on November 19, 2008.

Mara sought an ALJ hearing. SET moved for summary decision, and Mara objected on various grounds, including that summary decision was not appropriate prior to discovery in the case.

On October 5, 2009, the ALJ entered an order granting SET's motion for summary decision and dismissing Mara's complaint. The ALJ determined that SET "is not a covered employer under SOX" because "SET is not a publicly-traded company and did not act as an agent on employment matters for either Sempra Energy or RBS," SET's parent companies. ALJ Order at 12. The ALJ also determined that, based on the pleadings, Mara did not engage in activity that is protected under SOX because she failed to inform the company that it was "violating some federal rule or law relating to fraud against shareholders." *Id.* at 13. Mara moved for reconsideration. The ALJ denied the motion for reconsideration on January 14, 2010. See ALJ Order Denying Motion To Reconsider (Jan. 14, 2010). The ALJ again determined that there was no evidence showing that Mara communicated to SET her belief that the company was "violating some federal rule or law relating to fraud against shareholders" and thus there was "no protected activity." *Id.* at 3. The ALJ further determined that SET was not a covered employer under SOX, and that there was no "agency relationship with its publicly traded parent, Sempra Energy" that would bring SET under SOX. *Ibid.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board reviews an ALJ's grant of summary decision de novo. *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006; ALJ Nos. 2006-SOX-037, 2006-SOX-108, 2007-SOX-055, slip op. at 6 (ARB Apr. 30, 2008) (citing *Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 6 (ARB Sept. 28, 2007)).

The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. *Frederickson v. The Home Depot, U.S.A.*, ARB No. 07-100, ALJ No. 2007-SOX-013 (ARB May 27, 2010). Under 29 C.F.R. § 18.40(d), the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." *Id.*, slip op. at 5; see also Fed. R. Civ. P. 56(a). Viewing the evidence in the light most favorable to the nonmoving party, we determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law. *Frederickson*, ARB No. 07-100, slip op. at 5. Thus to prevail on a motion for summary judgment, the moving party must show that there are no genuine issues of material fact, while the nonmoving party opposing the motion "must set forth specific facts showing there is a genuine issue of fact for the hearing." *Ibid.*; see also 29 C.F.R. § 18.40. "A genuine issue of material fact is one, the resolution of which could establish

an element of a claim or defense and, therefore, affect the outcome of the action.” *Frederickson*, slip op. at 5, citing *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322 (1986).

DISCUSSION

A. SET’s Coverage as a “Subsidiary or Affiliate” Under SOX

The ALJ erred in holding that SET is not a covered company under SOX. ALJ Order at 10-12.²

Section 806 of the Sarbanes-Oxley Act, protects from retaliation employees of covered companies who engage in SOX-protected activity. On July 21, 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (Dodd-Frank Act). Section 929A of the Dodd-Frank Act amended Section 806 by inserting within subsection (a) the following provision: “including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company.” Section 806, as amended, reads, in relevant part:

(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 any officer, employee, contractor, subcontractor, or agent of such company, . . . 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 -- .

18 U.S.C.A. §1514A (emphasis added). In explanation of the 2010 amendment, the Senate Report accompanying S. 3217, ultimately Section 929A of the Dodd-Frank Act, states:

[Section 929A] amends Section 806 of the Sarbanes-Oxley Act of 2002 to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers in actions brought by whistleblowers. Section 806

² While the ALJ determined that there was no agency relationship between SET and Sempra Energy or RBS based on the submissions of the parties on summary decision, we do not address this issue now because we are remanding the case for other reasons. To the extent this issue becomes relevant on remand, the ALJ should consider the agency discussion in *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015, slip op. 16-17 (ARB Mar. 31, 2011).

of the Sarbanes-Oxley Act creates protections for whistleblowers who report securities fraud and other violations. The language of the statute may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer. This clarification would eliminate a defense now raised in a substantial number of actions brought by whistleblowers under the statute.

Senate Report 111-176 at 114 (Apr. 30, 2010) (S. 3217).

In *Johnson v. Siemens Bldg Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (Mar. 31, 2011), we determined that Section 929A of the Dodd-Frank Act, which extends SOX coverage to “subsidiary or affiliate [companies] whose financial information is included in the consolidated financial statements of such company,” is a “clarification” of the original Section 806’s term “company.” Slip op at 15-16. We determined that this construction “fit[s] within the remedial purposes of Section 806 and its intended purpose of protecting whistleblowers and investors by encouraging disclosure throughout the corporate structure.” *Id.* at 16.

Even though SET is a limited liability company that is not publicly traded³, the record reflects that one of SET’s parent companies, Sempra Energy, is publicly traded on the New York Stock Exchange. See Beaury Aff. ¶¶ 4-5; see also SET Brief as Respondent at p. 4; ALJ Decision at 2. Mara was hired to work for SET on April 2, 2007, when SET was wholly owned indirectly by Sempra Energy. Beaury Aff. ¶ 4. On April 1, 2008, SET became an indirectly wholly owned subsidiary of RBS Sempra Commodities, a UK limited partnership that is 51% owned by the RBS, and 49% owned by Sempra Energy. Beaury Aff. ¶ 6. Mara worked at SET until April 7, 2008, a few days after SET’s acquisition by RBS Sempra Commodities, when she resigned because of alleged harassment directed at her by SET employees purportedly stemming from her reporting activities on the company. Mara Aff. ¶ 19.

While the Dodd-Frank Act of 2010 was passed *after* Mara’s employment at SET, our holding in *Johnson*, that Section 929A clarified that Section 806’s coverage includes “a subsidiary or affiliate whose financial information is included in a publicly traded parent company’s consolidated financial statements,” applies to pending cases. 18 U.S.C.A. § 1514A; *Johnson*, ARB No. 08-032, slip op. at 16. Although the ALJ found that SET’s parent companies are publicly traded (ALJ Order at 2, 11), the ALJ did not make findings on whether SET appears on the consolidated financial statements of its publicly traded parent companies. Thus we remand to the ALJ for findings on whether SET is a “subsidiary or affiliate” company within the meaning of SOX.⁴

³ The term “publicly traded” for Section 806 purposes refers to companies with a “class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78I), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)).” 18 U.S.C.A. § 1514A; see also *Johnson*, ARB No. 08-032, slip op. at 3 n.2.

⁴ SET argues in its brief that we wrongly decided *Johnson*. See Brief of Respondent Sempra Energy at 12-15. However, our recent decision in *Johnson* controls the determination that Section 929A of the Dodd-Frank Act clarified that Section 806 includes as covered companies “subsidiaries

B. Mara's Protected Activity

The ALJ stated that for an employee's activity to be protected, it "must relate 'definitively and specifically' to the subject matter of the particular statute under which protection is afforded." ALJ Order at 13. Based on that standard, the ALJ granted summary decision in SET's favor on finding that Mara failed to "mention[] in any conversation [with Beaury] the word 'fraud' or indicated that any type of fraud was occurring regarding the hedge ineffectiveness or otherwise." *Id.* at 13. The ALJ stated that "[a]t best, Mara made mention of accounting irregularities and that is not sufficient to establish protected activity under SOX." *Id.* at 14.

In *Sylvester v. Paraxel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042 (May 25, 2011), we addressed the factors related to the complainant's burden to establish protected activity under SOX Section 806. Based on our holdings in *Sylvester*, we find that that the ALJ in this case legally erred in dismissing Mara's SOX claim based on a finding that Mara failed to mention the word "fraud" when she reported her concerns over alleged accounting irregularities to Beaury. ALJ Order at 13 (ALJ finds that "Mara never mentioned in any conversation the word 'fraud' or indicated that any type of fraud was occurring" and concludes that "if Mara failed to inform SET that she believed the company was violating some federal rule or law relating to fraud against shareholders, there is no protected activity.").

"To sustain a complaint of having engaged in SOX-protected activity, where the complainant's asserted protected conduct involves providing information to one's employer, the complainant need only show that he or she 'reasonably believes' that the conduct complained of constitutes a violation of the laws listed at Section 1514." *Sylvester*, ARB No. 07-123, slip op. at 14, citing 18 U.S.C.A. § 1514A(a)(1). The reasonable belief standard contains both subjective and objective components. *Ibid.* To satisfy subjective reasonableness, "the employee must actually have believed that the conduct he complained of constituted a violation of relevant law." *Sylvester*, ARB No. 07-123, slip op. 14, citing *Harp v. Charter Comm'ns*, 558 F.3d 722, 723 (7th Cir. 2009). Objective reasonableness "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." *Ibid.*

In *Sylvester*, we made clear that the complainant need not describe an actual violation of one of the six-enumerated laws to engage in protected activity. *Id.* at 16; see also *Welch v. Chao*, 536 F.3d 269, 277 (4th Cir. 2008). Complainants who communicate a "good faith and reasonable reporting of fraud" fall under SOX's protection. *Id.* at 17, quoting 148 Cong. Rec. S7419-01, S7421 (daily ed. July 26, 2001). *Accord Day v. Staples*, 555 F.3d 42, 55 (1st Cir. 2009), citing *Welch*, 536 F.3d at 275; see also *Van Asdale v. International Game Tech.*, 577 F.3d 989, 997 (9th Cir. 2009) (court of appeals holds that failure of a whistleblower complainant to use the words "fraud," "fraud on shareholders," or "stock fraud" when communicating

and affiliates whose financial information is included in the consolidated financial statements of" publicly traded companies, and that this interpretation of Section 806 applies to pending cases.

statements to her employer did not foreclose SOX-protected activity status). Moreover, contrary to the ALJ's holding, complainants' activity need not relate "definitively and specifically" to a particular statute enumerated in Section 806 to be protected. ALJ Order at 13 (stating that "an employee's protected communications must relate 'definitively and specifically' to the subject matter of the particular statute under which protection is afforded."). In *Sylvester*, we held that the "definitive and specific" standard that had been employed in prior ARB cases and noted by the ALJ in this case, was inconsistent with the statutory language of Section 806. *Sylvester*, ARB No. 07-123, slip op. at 17. We stated that "[n]ot only is it inappropriate, but it also presents a potential conflict with the express statutory authority of § 1514A, which prohibits a publicly traded company from discharging or in any other manner discriminating against an employee for providing information regarding conduct that the employee 'reasonably believes' constitutes a SOX violation." *Ibid.*⁵

Viewing the evidence in favor of the Complainant, the non-moving party, Mara's affidavits show that she reported conduct to Beaury that she believed related to fraud. Her affidavit states that she began working at SET to "run regressions for six months worth of hedges and creating hedge documents for every hedge dated back to December 2005 . . . [and] that the 'backlog' [she] was asked to 'fill in' actually consisted of revising most of the quarterly published hedge ineffectiveness numbers that had been incorrect." Mara Aff. ¶ 12. She also stated that by October 2007, she became increasingly uncomfortable with her assignment and believed she had a "duty to [her] employer to bring the gross inaccuracies" to Beaury's attention. *Id.* at ¶ 13. Mara's affidavit also contains language which strongly suggests her belief that she was asked to engage in fraudulent activity. Mara Supp. Aff. ¶¶ 12-13 (Mara states: "I knew these published hedge ineffectiveness numbers were *false*, yet, I was being asked to create the hedge documents and to run the regressions to mesh with these *false* hedge ineffectiveness numbers."). SET stated in a Verified Answer that Mara told Beaury that she was finding "mistakes in documentation regarding the hedge ineffectiveness footnote and that certain documentation had not been prepared on a timely basis." SET's Verified Answer at ¶13. SET also responds, though, that "Mara had limited knowledge of FAS 133 accounting and did not have a basis to question the validity of the footnote or the financial reporting." *Ibid.* Thus this case further requires a remand so that the ALJ can resolve the genuine issue of material fact as to the reasonableness of Mara's concerns over the reporting activity that she was required to undertake for SET, and to determine whether that activity is protected under SOX.

⁵ Indeed, of First Circuit cases that have addressed SOX, only one, *Day v. Staples*, 555 F.3d 42, 55 (1st Cir. 2009), referred to the term "specifically" in describing the nature of activity that will be protected under SOX, i.e., "communications to the employer *specifically* related to one of the laws listed in § 1514A." While the court in *Day* stated that protected activity is that which relates to the enumerated laws of § 1514A, the court also observed, similar to our holdings in *Sylvester*, that to be protected, activity need not establish either "the precise code provision in question" or "an actual violation of the provision involved." *Day*, 555 F.3d at 55. See also *Sylvester*, ARB No. 07-123, slip op. at 17-18 ("The issue before the ALJ here was whether [complainants] provided information to [their employer] that they reasonably believed related to one of the violations listed in Section 806, and not whether that information 'definitively and specifically' described one or more of those violations.").

CONCLUSION

Accordingly, we **REVERSE** the ALJ's order on summary decision, and **REMAND** for further proceedings.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge