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Issue Date: 24 June 2009

CASE NO.: 2008-SOX-00064

IN THE MATTER OF

MATTHEW VANNOY,
Complainant

v.

CELANESE CORP.,
Respondent

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

A. Background

This case arises under the Sarbanes-Oxley Act of 2002 ("SOX" or "the Act"), technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 *U.S.C.* §1514A *et seq.*, and the employee protective provisions promulgated hereunder at 29 *C.F.R.* Part 1980. Under SOX, the Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of publicly traded companies who are allegedly discharged or otherwise discriminated against, with regard to their terms and conditions of employment, for providing information about fraud against company shareholders to supervisors, federal agencies, or members of Congress.

B. Uncontested Facts:[1]

1. Celanese is an international publicly traded company that manufactures and distributes value-added industrial chemicals. Celanese is headquartered in Dallas, Texas. As of December 31, 2007, the Company had approximately 8,400 employees.

2. Celanese's Business Conduct Policy ("BCP") governs employee conduct.

[1] Respondent submitted 91 (originally marked as 92 but Number 36 was omitted) Uncontested Facts in Support of its Motion for Summary Decision in conjunction with its Motion for Summary Decision. In his Reply to the Motion for Summary Decision, Complainant contested or denied 25 of these facts. In its Reply to Complainant's Objection to the Motion for Summary Decision, Respondent submitted 2 additional Uncontested Facts in Support, but neither were admitted by Complainant prior to the rendering of this decision. The contested/denied facts are omitted from this decision.

3. Under the BCP, employees may report suspected misconduct, or legal or ethical concerns. These reports may be made anonymously.

4. The BCP prohibits retaliation for reporting violations in good faith or for participating in an investigation of potential misconduct.

5. Complainant has resided in Carrollton, Texas since March 2001.

6. At present, and during the time of his employment at Celanese, Complainant resides with his domestic partner, Joseph Silvia.

7. Complainant graduated from Seattle University with a Bachelor of Arts degree in Psychology in 1997. Complainant did not take any business courses or courses in tax accounting at the University. Before and during his time in college, Complainant worked in the food service and hospitality industry. After graduation from Seattle University, Complainant moved to Dallas, where he was a manager at a Starbucks café and an AMC Theatre.

8. Complainant also worked at GTE as a customer accounting representative. Complainant left GTE to work for Allied Riser Communications in 1999, as an executive assistant to the Company's Vice-President and General Legal Counsel. Complainant remained with Allied Riser as a customer application development specialist until 2000, where he participated in pre- and post-sale counseling and service, eventually becoming a manager in that area. Complainant left Allied Riser to take a comparable position with ConferenceCall.com.

9. Celanese hired Complainant in September 2004, as a contract employee through Venturi Staffing Resources.

10. Complainant filed a complaint with the Occupational Safety and Health Administration against Celanese on January 25, 2008, pursuant to the employee protection provisions of the Sarbanes-Oxley Act of 2002.

11. After conducting an investigation, OSHA dismissed Vannoy's Complaint on August 12, 2008.

12. Complainant filed an objection to OSHA's determination on September 2, 2008 and requested a hearing before the Department of Labor's Office of Administrative Law Judges.

13. Complainant filed an Amended Complaint in this proceeding on December 5, 2008.

14. Celanese soon noticed potential weaknesses in its U.S. Bank Card Program. In September 2004, Celanese contracted Complainant through Venturi Staffing Resources to assist in the Company's efforts to catalogue and reconcile employee expense reimbursement submissions.

15. By early 2005, senior management and Celanese Global Audit Services were already well aware of the potential weaknesses surrounding its U.S. Bank Card Program.

16. At the request of the Company's Chief Financial Officer and the Audit Committee of the Board of Directors, Celanese retained Protiviti, a third party consultant, to assist in its analysis of the U.S. Bank Card Program and the Company's expense reimbursement system in June 2005.

17. Protiviti submitted an "Expense Audit and Reconciliation Project Wrap Up" report to Celanese management in September 2005, detailing its findings and recommendations. Protiviti recommended that Celanese identify and implement a new electronic system for submitting and reimbursing employee business expenses.

18. The U.S. Bank Card Program and the steps taken to remediate potential weaknesses in the program were a regular subject at the meetings of the Office of the Chairman ("OTC") during 2006. The OTC functions as Celanese's Chief Executive Officer's Committee.

19. In February 2006, Celanese decided to identify and implement an electronic system for submitting and reimbursing employee business expenses to replace its U.S. Bank Card Program. GELCO, an electronic expense reimbursement system, replaced the U.S. Bank Card Program for all U.S. based operations on December 21, 2006.

20. Celanese hired Complainant as a contractor through Venturi Staffing in September 2004.

21. Complainant was part of a team of employees and contractors involved in cataloguing expense reimbursement documentation to support the Company's efforts to improve the U.S. Bank Card Program.

22. Celanese hired Complainant on a full-time basis as its U.S. Bank Card Program Administrator on May 30, 2005.

23. Complainant worked within Celanese Global Transaction Shared Services. His immediate supervisor between March 2005, and his dismissal in January 2008, was Donna Tillapaugh, Supervisor Accounts Payable.

24. Debra Keehn indirectly supervised Complainant from January 2005, until March 2007. Ms. Keehn was Global Accounts Payable Manager between January 2005, and March 2007.

25. Corey Fox is the Global Transaction Shared Services Director. He indirectly supervised Complainant from December 2006, until Complainant's dismissal in January 2008. In his position as U.S. Bank Program Administrator, Complainant reported to Ms. Tillapaugh, who reported to Ms. Keehn, who reported directly to Mr. Fox.

26. Complainant and others within his department were provided Company-issued laptop computers. These laptop computers had remote access capabilities, which allowed Complainant and others in the department to work from home.

27. During his time as a contract and full-time employee, Complainant assisted in the "Gap Closure" project. The purpose of the "Gap Closure" project was to identify and collect missing expense report documentation to support employee expenses charged to their U.S. Bank credit cards and p-cards, and for which Celanese had paid on each employee's behalf to U.S. Bank.

28. Complainant filed an internal BCP Complaint on February 15, 2007. Complainant received a favorable 2006 performance review from Ms. Tillapaugh on March 6, 2007. Celanese paid Complainant a bonus of over $6,000.00 in March 2007. Complainant also received an increase in salary in March 2007 in the form of a special performance award.

29. Complainant went on short-term disability leave on or about April 3, 2007.

30. In the spring of 2007, Celanese decided to phase out certain finance positions in the U.S. and relocate them to Budapest, Hungary. Ms. Tillapaugh and Ms. Keehn informed Complainant via telephone in late April or early May 2007, that this transition would include his position and all others in his department.

31. On May 9, 2007, Complainant signed a Retention Agreement with Celanese. Under the Agreement, Complainant would be entitled to $7,500.00 if he remained with the Company until the transition to Hungry was complete. Celanese agreed to provide 60 days written notice to affected employees, including Complainant, before their official termination of employment date. At the time he signed the Retention Agreement, Complainant understood his position with the Company would no longer be available within the next 6 to 18 months.

32. Complainant returned from short-term medical leave on or about October 2, 2007.

33. Complainant's former department, as well as related accounts receivable, accounts payable, and master data functions, were completely transitioned to Budapest, Hungary by March 2008.

34. As part of his job responsibilities, Complainant engaged in frequent email communications with employee cardholders regarding their submission of expense reimbursement requests and supporting documentation. Donna Tillapaugh counseled Complainant to refer any inappropriate communications he received from employee cardholders to her attention, and not to engage in such communications himself.

35. After receiving Casey Tarkington's complaint, Tillapaugh conferred with Corey Fox on October 29, 2007. Fox and Tillapaugh decided to review Complainant's sent emails to evaluate whether this same behavior was being exhibited in his communications with employee cardholders, in that Complainant had previously been counseled about not engaging in confrontational behavior with cardholders who questioned his efforts to secure necessary documentation.

36. Complainant does not believe that it was improper for Tillapaugh to conduct this review. Complainant received notice each time he logged into his Company-issued laptop

computer that his activities could be monitored and that unauthorized use of the Company email system would be prosecuted.

37. Following the meeting on October 29, 2007, Celanese suspended Complainant with pay pending further investigation.

38. Complainant admits that he attempted on at least four occasions to email confidential documents, some containing sensitive personal indentifying information, to his or his domestic partner's personal email account on February 15, 2007.

39. Complainant admits that he successfully copied confidential documents, some containing sensitive personal identifying information, to a compact disc on February 15, 2007, and that he removed this disc from Celanese.

40. In early November 2007, Celanese also discovered that Complainant had sent a document containing 1,600 unique social security numbers of current and former Celanese to the personal email account in the name of his domestic partner on July 15, 2005.

41. Between 2005 and 2007, Complainant admits he copied, emailed, or otherwise removed from Celanese confidential proprietary information and documents containing sensitive personal indentifying information related to current or former Celanese employees.

42. On November 5, 2007, Celanese informed Complainant via letter that his suspension was converted to a suspension without pay because it had discovered "compelling evidence" that he had violated Company policies. Complainant then "supplemented his BCP Complainant on November 8, 2007.

43. Complainant did not ask anyone at Celanese for permission to remove this information from the Company nor did he inform anyone at Celanese that he had removed confidential and sensitive Company documents before his data security breach was first discovered in October 2007.

44. As the U.S. Bank Card Program Administrator, Complainant was aware of the confidential information which he had access to, including employee credit card information and personal identifying information such as employee home addresses and social security numbers.

45. Complainant agreed to the Company's Confidentiality Agreement in May 2005, when he was hired as a full-time employee.

46. Complainant acknowledged his familiarity with Celanese's Business Conduct Policy on August 5, 2006. The BCP provides that employees "will use the Company's e-mail and Internet access only in accordance with the Company's Electronic Communications Policy."

47. Complainant was familiar with several important Celanese policies related to data security during his employment. In particular, Complainant was aware of Celanese

requirements that its employees' personal data—including name, date of birth, and social security number—must be guarded closely and carefully.

48. Donna Wegner, who conducted the investigation into Complainant's BCP Complaint, did not participate in the date security breach investigation or the decision to dismiss Complainant. Ms. Wegner was on maternity leave when Complainant's data security breach was discovered and during the data security breach investigation.

49. Gary Rowen, who received and participated in the investigation into Complainant's BCP Complaint, and its "supplement", did not participate in the data security breach investigation or the decision to dismiss Complainant.

50. Debra Keehn, Complainant's indirect supervisor until April 2007, did not participate in the data security breach investigation or the decision to dismiss Complainant.

51. Donna Tillapaugh participated in the data security breach investigation and the decision to suspend and dismiss Complainant. Corey Fox participated in the data security breach investigation and the decision to suspend and dismiss Complainant. Joseph Fox, Celanese Vice-President of Human Resources and Employment Law, participated in the data security breach investigation and the decision to suspend and dismiss Complainant. Zarinah Curry, Celanese Manager Human Resources, participated in the data security breach investigation and the decision to suspend and dismiss Complainant.

52. Complainant filed a Business Conduct Policy Complaint via Celanese's secure fax hotline on February 15, 2007. He notified Donna Tillapaugh of his BCP Complaint after he filed it on February 15, 2007.

53. Complainant received a favorable 2006 performance review from Ms. Tillapaugh on March 6, 2007. Celanese paid Complainant a bonus of over $6,000.00 in March 2007. Complainant also received an increase in salary in March 2007 in the form of a special performance award.

54. Complainant "supplemented" his BCP Complaint on November 8, 2007, after his suspension for his data security breach, also through the Company's internal secure fax hotline.

55. Complainant was in contact with Michael Sullivan, an Atlanta area attorney, as early as February 2007. Complainant formally retained Sullivan on March 1, to represent him in the "IRS Whistleblower Rewards Program." Under their agreement, Sullivan would be entitled to 40% of any "sum, award, bounty, or reward" the IRS awarded Complainant.

56. Complainant filed a "Disclosure Pursuant to 26 U.S.C. § 7623(b)" as part of the IRS Rewards program on June 12, 2007. Attached as exhibits to this disclosure were 33 documents containing proprietary and confidential Celanese information.

57. In February 2007, Gary Rowen, Celanese Chief Compliance Officer, received Complainant's BCP Complaint and assigned Donna Wegner, Vice President of Celanese Global Audit Services, to investigate.

58. Donna Tillapaugh was interviewed by Gary Rowen and Donna Wegner as part of their investigation into Complainant's BCP Complaint and its "supplement," but Tillapaugh did not conduct the investigation nor was she aware its conclusions. Corey Fox was interviewed by Gary Rowen and Donna Wegner as part of their investigation into Complainant's BCP Complaint, but Fox did not conduct the investigation nor did he speak with Complainant about the substance of his BCP Complaint. Zarinah Curry was not interviewed as part of the investigation into Vannoy's BCP Complaint or its "supplement," nor did she participate in any way in the investigation. Joseph Fox was generally aware that Complainant had filed a BCP Complaint, but did not participate in the investigation into the BCP Complaint or its "supplement."

59. In April 2007, Rowen advised the Celanese Audit Committee of the BCP Complaint and the status of the investigation. Rowen stated that financial statements were not misstated, that a tax reserve was established to offset and realized tax benefit at risk, and that Celanese had already acted to address the issues raised by Complainant before he filed his BCP Complaint.

60. After her investigation, Wegner summarized her findings to Rowen before going on maternity leave in September 2007.

61. Wegner produced a written report summarizing her investigation. Wegner's conclusions supported Rowen's initial report to the Audit Committee in April 2007. Company financial statements had not been misstated.

62. "[Celanese] had already acknowledged that the previous [expense reporting] system was deficient and had taken significant actions to remedy the situation" before Complainant's BCP Complaint. Management was "well aware" of employees' misuse of company credit cards and had given the matter "excellent attention." Complainant himself was aware of the "large number of activities that were going on in the Company to address the issue" in the time before he filed his BCP Complaint.

63. Complainant's "supplement" to the BCP Complaint, filed on November 8, 2007, contains two emails he previously sent to Donna Tillapaugh on October 18, and October 24, 2007, and a spreadsheet listing several employees and their credit numbers without explanation.

64. After investigating the "supplement" by discussing the matter with Robin Stephenson, Director of Celanese Global Audit Services, Donna Tillapaugh, and Company Tax Executives, Rowen concluded the "supplement" raised no violations of Company policy or IRS regulations. In particular, Rowen determined, in conjunction with Harry Franks, Celanese Vice President of Tax, that deductions were not disallowed merely because documentation was not provided, and an expense report was not submitted, within 60 days after the expenses was incurred. To the contrary, the 60 day rule was merely a safe harbor. Thereafter, the deductibility was merely a question of fact. If documentation could be provided to substantiate the expense, then the deduction would be allowed.

65. On February 5, 2008, Rowen sent Complainant a letter summarizing the investigation into his BCP Complaint and its "supplement."

66. In connections with the "Gap Closure" project and consistent with its obligations under financial accounting standards, because there was an issue concerning the deductibility of certain travel and entertainment expenses without the required documentation, Celanese established a reserve of 1.8 million dollars against potential additional tax liability associated with this gap.

C. Parties' Positions

Respondent has moved for summary judgment based on due to the lack of any genuine issue of material fact being in three of the elements for SOX protection. First, Respondent contends that Complainant did not engage in any activity that is protected by SOX. With regards to this contention, Respondent asserts that Complainant cannot satisfy any of the elements required for showing the existence of a protected activity under SOX, and therefore, summary decision is warranted in favor of Respondent. Second, Respondent contends that Complainant can offer no evidence that his suggested "protected activity" was a contributing factor in his ultimate dismissal. Finally, Respondent contends that Complainant repeatedly and knowingly violated Respondent's policies. Respondent argues that these violations were the exclusive and non-retaliatory reason for Complainant's suspension and ultimate dismissal from the Company. Respondent asserts that clear and convincing evidence shows that Complainant was released solely due to his violations of Company policy, which resulted in the breach of personal identifiable information of a total 6,764 unique, confidential numbers of Celanese employees. As clear and convincing evidence shows that Respondent would have suspended and dismissed Complainant independently of any alleged "protected activity," Respondent asserts that it is further entitled to summary decision.

Complainant has responded to Respondent's Motion, contending that genuine issues of material fact remain in this matter to warrant the denial of a motion for summary decision. In his Response, Complainant asserts that he engaged in protected activity under SOX, as his activity directly related to Respondent's substantive violations of any rule and regulation of the Securities and Exchange Commission. Specifically, Complainant's protected activity dealt with violations of the record keeping requirement of Section 13(b) of the Exchange Act of 1934, codified as 15 U.S.C. § 78m(b)(5). Complainant further contends that the evidence presented shows he satisfied all of the elements necessary to show that he was conducting a protected activity when he filed a BCP Complaint with Respondent; when he voiced his concerns on numerous occasions to his superiors; when he refused to perform "any illegal acts"; and when he made a disclosure to the Internal Revenue Service pursuant to the "IRS Whistleblower Rewards Program." Complainant further contends that his possession of Company information is protected by the "informer's privilege". Finally, Complainant contends that he was suspended and ultimately terminated based on a pretextual motives relating solely to his reporting of Respondent's violations. As such, Complainant asserts that his protected activity was a significant contributing factor to his ultimate dismissal. Based on the presence of evidence showing all of his contentions, Complainant asserts that genuine issues of material fact exist to warrant the denial of Respondent's Motion for Summary Judgment.

D. Substantive Law and Procedure

Summary Decision

The standard for granting summary judgment or decision is set forth at 20 *C .F .R.* §18.40(d) which is derived from Federal Rules of Civil Procedure (FRCP) 56. Section 18.40(d) permits an Administrative Law Judge to enter summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision." 20 *C.F.R.* §18.40(d) (1994). A "material fact" is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And, a "genuine issue" exists when the non-movant produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. *Id.* at 249.

In deciding a motion for summary decision, the Court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). In other words, the Court must look at the record as a whole and determine whether a fact-finder could rule in non-movant's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587. The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. ***Id.*** at 324. If the non-movant fails to sufficiently show an essential element of his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Id.* at 322-323.

Burden of Proof under SOX

Section 806 of SOX, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. Section 1514A(a) states, in relevant part:

> (a) 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)), 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--
>
> > (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders,

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

18 U.S.C. § 1514A(a); *see also Hendrix v. American Airlines, Inc.*, 2004-AIR-00010, 2004-SOX-00023 (A.L.J. Dec. 9, 2004) (unpublished). The information or assistance must be provided to, or the investigation must be conducted by, a federal regulatory or law enforcement agency, any member of Congress, any committee of Congress, or a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.). 18 *U.S.C.* §1514A(a)(1); See also, 29 *C.F.R.* §1980.102(a)(1). Any employer may not 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 under the Act's protection. *Id.*

The legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b), govern SOX whistleblower actions. 18 U.S.C. § 1514A(b)(2)(C). To prevail, an employee must prove by a preponderance of the evidence that (1) he or she engaged in protected activity; (2) the employer knew that he or she had engaged in the protected activity; (3) he or she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor to the unfavorable action. 49 U.S.C. § 42121(b)(2)(B)(iii); *Allen v. Admin Rev. Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008); *see also* 29 C.F.R. § 1980.104(b)(1)(i)-(iv); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, (ARB July 29, 2005). A contributing factor need not be significant, motivating, substantial, or predominant; and can be any factor which alone, or in connection with other factors, tends to affect in any way the outcome of the decision. *Collins v. Beazer Homes U.S.A., Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004). Ordinarily, temporal proximity between the protected activity and unfavorable personnel action will satisfy the burden of making a *prima facie* showing of employer knowledge and that the protected activity was a contributing factor. *Id.*

If the employee establishes these four elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of that [protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv);

Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-00008, (ARB January 31, 2006); *Allen*, 514 F.3d at 476.

Protected Activity

SOX prohibits a publicly-traded company from retaliating against an employee who reports information to a supervisor "regarding any conduct which the employee reasonably believes constitutes a violation" of one of the six enumerated categories. 18 U.S.C. § 1514A(a)(1); *Marshall v. Northrup Gruman Synoptics*, 2005-SOX-00008 (A.L.J. June 22, 2005). For protection under SOX, the employee's complaint must "definitively and specifically relate" to one of the six enumerated categories found in § 1514A. *Allen*, 514 F.3d at 476; *see also Platone v. FLYI, Inc.*, ARB Case No. 04-154, 2006 WL 3246910 (ARB Sept. 29, 2006); *Harvey v. Home Depot USA, Inc.*, ARB Case No. 04-114, 2006 WL 3246905 (ARB June 2, 2006). SOX does not apply to generic allegations of accounting violations, violations of GAAP, or general allegations of fraud. *Marshall*, 2005-SOX-00008 at 5 (stating that, "The fact that the concerns involved accounting and finances in some way does not automatically mean or imply that fraud or any other illegal conduct took place."). IRS regulations are also not part of the enumerated categories of statues and regulations list in § 1514A. *McClendon v. Hewlett-Packard, Inc.*, ALJ No. 2006-SOX-00029 at 73 (A.L.J. Oct. 5, 2006).

The employee's reasonable belief of a violation must be scrutinized under both subjective and objective standards. *Welch v. Cardinal Bankshares Corp.*, ARB Case No. 05-064, 2007 WL 1578493 (ARB May 31, 2007). *see also Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, 93-ERA-00006 (July 14, 2000). The employee does not need to show that the employer's conduct actually caused a violation of the law, but must show that he reasonably believed the employer violated one of the laws or regulations enumerated under SOX, any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders. *Id.*; s*ee also Halloum v. Intel Corp.*, ARB No. 04-068, 2006 WL 3246900 (ARB Jan. 31, 2006). The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee. *Allen*, 514 F.3d at 477; s*ee also Welch*, 2007 WL 1578493 at *7. The subjective reasonableness requires that the employee actually believe the conduct being complained of constitutes a violation of pertinent law. *Day v. Staples*, 555 F.3d 42, 54 (1st Cir. 2009); *see also Harp v. Charter Communications, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009). To have engaged in a protected activity, an employee must have a reasonable belief of a violation at the time the employee makes the report. *Id.* SOX does not offer protections of a belief that "a violation is about to happen upon some future contingency." *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 340-41 (4th Cir. 2006).

Protected activity under SOX is thus essentially comprised of three elements: (1) report or action that involves a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders; (2) complainant's belief concerning the activity must be subjectively and objectively reasonable; and (3) complainant must communicate his concern to either his employer, the federal government or a member of Congress who has the requisite reviewing ability. *See Harvey v. Safeway, Inc.*, 2004-SOX-00021 at 29 (ALJ Feb. 11, 2005).

Fraud is an integral element of a SOX protected activity claim, which necessarily includes an implicit element of deceit that would impact shareholders or investors. *Marshall,* 2005-SOX-00008 at 4; *Allen,* 514 F.3d at 480 Fn. 1. SOX's legislative history reflects that fraud is an integral element of a cause of action under the whistleblower provision. *See, e.g.,* CONG. REC. S7418 (daily ed. July 26, 2002) (whistleblower provision to protect "those who report fraudulent activity that can damage innocent investors in publicly traded companies."); S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (the relevant section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company").

Whether materiality to shareholders is an integral element of a SOX protected activity claim is an issue that is split amongst administrative law judges and the circuits. A large amount of case precedent states materiality to shareholders is implicit within the SOX statute and its history. Section 302 of SOX specifically "establishes a requirement for the accuracy of material facts relating to finances." *Harvey v. Safeway, Inc.* 2004-SOX-00021 at 31 (A.L.J Feb. 11, 2005). This provision particularly "demonstrates Congress' intention to protect shareholders by requiring accurate reporting of significant information concerning a corporation's financial condition." *Id.* Stated differently, the Act "was not intended to capture every complaint an employee might have as a potential violation of the Act." *Id.* Instead, the "goal of the legislation was to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." *Id.* Thus, materiality requires that the protected activity shows that the reported violation is material to shareholders. *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009); *see also Allen*, 514 F.3d at 479-80 (holding "the plain language of the statute indicates that some form of scienter related to fraud against shareholders is required."); *Livingston v. Wyeth, Inc.*, 520 F.3d 344 (4th Cir. 2008) ("The Supreme Court has noted that to fulfill the materiality requirement, ''there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.' *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (internal quotation marks omitted)."); *Deremer v. Gulfmark Offshore Inc.*, 2006-SOX-00002 (A.L.J. June 29, 2007) (after noting a split in the authority over whether SOX whistleblower protection is limited to fraud "against shareholders," and after reviewing the nature of that split, the ALJ found that his conclusion was consistent with that of the ARB – that an allegation of "shareholder fraud" is an essential element of a cause of action under SOX. The ALJ concluded, therefore, that materiality was required for alleged conduct to rise to the level of shareholder fraud.); *Wengender v. Robert Half International, Inc.*, 2005-SOX-00059 (A.L.J. Mar. 30, 2006) (complainant provided no evidence of the intent to deceive shareholders and thus did not satisfy the materiality required under SOX).

At least one other circuit court has found that nothing in § 1514A indicates that § 1514A contains an independent materiality requirement. *Welch v. Chao*, No. 07-1684 (4th Cir. Aug. 5, 2008). Administrative law judges have also followed this rationale. *See Richards v. Lexmark International, Inc.*, 2004-SOX-49 (A.L.J. June 20, 2006) ("[t]here is no materiality requirement for recovery under the Act …."); *Morefield v. Excelon Services, Inc.*, 2004-SOX-00002 (A.L.J. Jan. 28, 2004) (the Act "places no minimum dollar value on the protected activity it covers" and "[t]he mere existence of alleged manipulation, if contrary to a regulatory standard, might not be

criminal in nature, but it very well might reveal flaws in the internal controls that could implicate whistleblower coverage for seemingly paltry sums.").

In order to establish protected activity under the SOX, a complainant must prove that he "provided information" about conduct that he reasonably believed constituted one of the six violation types enumerated under SOX. It has been held that refusal to do an act does not fulfill the "provide information" requirement of a protected activity under SOX. *See Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-00051 (ARB June 29, 2006) (holding that even if the refusal occurred, it was not protected activity because the Complainant did not "provide information" to his supervisor about a potential SOX violation). The ARB has further held that if Congress wanted to protect a refusal as distinct from providing information, it could have done so in drafting the SOX legislation. *Getman v. Southwest Securities, Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-00008 (ARB July 29, 2005) (noting different whistleblower acts such as the Energy Reorganization Act and Surface Transportation Act expressly extending coverage to those who refuse to do an act, while SOX does not mention refusal in the statute).

In this case, the undersigned finds that Complainant did not engage in a protected activity with respect to any of his actions within this instant matter. The undersigned notes several reasons for this ruling. First, even though he filed a BCP Complaint; filed a disclosure to the IRS; and voiced several complaints to his superiors, Complainant failed to allege a violation that definitively and specifically relates to one of the six enumerated categories considered under 1514A. Second, the evidence presented shows that Complainant did not possess a reasonable belief that the conduct he was reporting violated an enumerated category under 1514A. Third, Complainant failed to allege actual fraud, and failed to show any adverse, material affect to shareholders in any of his actions. Fourth, Complainant's speculative refusal to do "any illegal act" is not an action that would "provide information" which is sought to be protected under SOX. Finally, Complainant's disclosure to the IRS does not constitute a complaint to a "federal regulatory or law enforcement agency" as contemplated by 1514(A).

The undersigned finds that at the time of his actions in this matter, Complainant failed to allege any violation that definitively and specifically relates to one of the six enumerated categories considered under 1514A. In this matter, Complainant alleges he made various complaints to his superiors regarding incorrect business deductions being taken through the Company's T&E expense reports. Complainant also filed a BCP Complaint based on the accounting issues in the "Gap Closure" project on February 12, 2007, and filed a disclosure with the IRS pertaining to Respondent's business deductions on June 7, 2007. For SOX protection, a whistleblower must allege a violation that pertains to one of the six enumerated categories under 1514A: Sections 1341 (fraud and swindles), 1342 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (securities fraud); any rule or regulation of the Securities and Exchange Commission; or any provision of federal law relating to fraud against shareholders.

While Complainant alleges that his various actions are predicated upon the record keeping requirements of Section 13(b) of the Exchange Act of 1934, 15 U.S.C. § 78m(b)(5), the first time this allegation is made is in Complainant's Brief in Opposition to Respondent's Motion for Summary Judgment. The evidence shows that at no time prior to his brief did Complainant allege that Respondent had definitively and specifically violated 15 U.S.C. § 78m(b)(5). Rather, the evidence shows that Complainant believed he was reporting conduct that was in violation of

Internal Revenue Code § 162 and other IRS regulations dealing with business expenses. Complainant testified at deposition[2] that he had an understanding of IRS regulations and that he believed that Respondent was potentially violating these requirements of the IRS. (EX-1; pp. 161-162). Complainant further testified that he had no knowledge that Respondent had violated any SEC rules or regulations. (EX-1; pp. 123).

Through his own testimony, it is evident that Complainant did not know about, or assert any violation towards, the SEC rules at the time of his various actions. Further, there has been no evidence presented to suggest that Complainant's various complaints to his supervisors were based definitively and specifically on any of the enumerated categories under 1514A. At the heart of Complainant's actions was the belief that Respondent, through improper accounting practices, was taking improper business expense deductions which led to a tax windfall. SOX does not apply to generic allegations of accounting violations, violations of GAAP, violations of IRS regulations or general allegations of fraud that are not definitive and specific. Complainant appears to have lacked the requisite knowledge of the SEC rules and did not make any specific allegation of SEC rules violations prior to his Reply brief. Based on the evidence presented by both parties, the undersigned believes Complainant to be more in the vein of an IRS whistleblower, not a SOX whistleblower. As Complainant's various actions did not "definitively and specifically relate" to one of the six enumerated categories found in § 1514A, Complainant has not engaged in a protected activity under SOX.

The undersigned further finds that during his various actions in this matter, Complainant did not reasonably believe that the conduct he was reporting violated one of the six enumerated categories under 1514A. In order to satisfy this reasonable belief burden under SOX, evidence must show that Complainant had both a subjective and an objective reasonable belief of violations at the time his complaints were made. A subjective reasonable belief requires Complainant to actually believe that the conduct he was complaining of constituted a violation of pertinent law; in this case, one of the six enumerated categories under 1514A. An objective reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant. Here, the evidence shows that Complainant did not have either a subjective or objective reasonable belief that Respondent was violating one of the enumerated categories under 1514A at the time of his complaints.

Complainant contends that he made various complaints regarding Respondent's accounting problems prior to his BCP Complaint. However, no evidence has been provided to show that Complainant ever believed that Respondent had committed fraud when he made these complaints. It appears that Complainant's complaints were routed on poor accounting practices that were company-wide, and not on fraudulent accounting practices. Testimony shows that Complainant did not believe that Respondent was violating any rule or regulation of the SEC at the time of his BCP Complaint. (EX-1; pp. 122-123). Testimony further shows that Complainant did not have any belief at the time of his BCP Complaint that Respondent's conduct amounted to actual fraud on the shareholders. (EX-1; pp. 121-122). Rather, Complainant has asserted that his complaints were based on conduct that potentially could cause fraud. The belief and presence of fraud is essential for SOX violations. SOX was not enacted to correct poor business practices and

[2] Complainant's deposition was taken on March 11, 2009. The deposition was entered into evidence as EX-1.

inept business policies that have no affect on shareholders. Rather, SOX was enacted to protect shareholders against the fraudulent behavior of a company. Without the actual subjective belief that Respondent is doing something fraudulent, SOX cannot provide any protection. As such, SOX cannot protect Complainant from making various allegations of incorrect business procedures, unless Complainant can provide evidence that he truly believed that what the company was doing was fraudulent. Further, while Complainant alleges that the conduct he was reporting could potentially amount to fraud, case precedence shows that 1514A does not protect a belief that a violation may happen on a contingent basis. Allegations of potential fraud do not satisfy the requisite subjective belief needed for SOX protection. The undersigned finds no evidence to show that Complainant had a subjective belief of a SOX violation at the time of his initial complaints, his BCP complaint or the disclosure with the IRS.

With regards to the objective belief standard, the undersigned must look at the totality of the circumstances, taken in context with Complainant's experience, to determine if a reasonable person would believe Respondent was doing something fraudulent. Complainant has admitted that he did not have the requisite experience to make any determination that Respondent's conduct amounted to fraud. (EX-1; pp. 119-120). Complainant has testified that he filed the BCP Complaint to ask someone else to review potential violations. (EX-1; pp. 120-121). Complainant's role with Respondent dealt with the accounting practices of Respondent. Complainant testified that he had requisite knowledge of IRS rules and regulations. Complainant's allegations and complaints dealt with the widespread violation of business expense deductions within Respondent, which is in essence the violation of accounting procedures for a tax benefit. Thousands of employees across the company violated IRS regulations. Respondent moved to rectify this business deduction issue and further developed a surplus to deal with any potential fines and taxes owed based on these violations. Complainant did not have any outside knowledge of any other violations or any fraudulent behavior of Respondent. Through the totality of the circumstances, the undersigned believes that a reasonable person would find that Respondent had a company-wide violation of IRS regulations; a problem inherent in their business practices, but with no fraudulent intent. A reasonable person would find this problem to be more along the lines of company-wide ineptitude and bad practice, but not an example of fraudulent behavior. This lack of fraud is especially highlighted by the violations being widespread amongst the company. Based on the evidence, the undersigned cannot find that a reasonable person would believe that Respondent was fraudulent in any manner. As such, the undersigned finds that Complainant did not have an objective belief of a SOX violation at the time of his initial complaints, his BCP complaint, or the disclosure with the IRS.

The undersigned further finds that Complainant failed to allege any violation that would have a material, adverse outcome to shareholders. Fraud and materiality are an essential element to a SOX claim. While Complainant has contended that his various complaints to his superiors, and the filing of his BCP Complaint were to expose potential fraud, Complainant cannot provide any evidence that he alleged actual fraud was being committed by Respondent. Further, Complainant cannot provide any evidence that shows the conduct he was reporting had any materiality or scienter with regards to fraud against the shareholders. Complainant has testified that he had no knowledge that the conduct Respondent was committing would affect the shareholders. (EX-1; pp. 119-120). There is no mention of any affect on shareholders within Complainant's BCP Complaint, and no evidence has been provided to suggest that the

complaints made to his superiors involved conduct that adversely affected the shareholders of Respondent. As such, Complainant has not engaged in a protected activity, as the complaints made did not involve any fraudulent conduct that would materially affect the shareholders of Respondent.

For protection under SOX, there must be a report of some violation that has some material, adverse affect on shareholders. Complainant has argued that scienter with regards to the shareholders is not a necessary component in this claim. The undersigned disagrees. While at least one circuit has ruled that materiality is not an essential component of a protected activity, there is overwhelming precedence, including language developed by the Fifth Circuit, that states that the plain language of the 1514A indicates that some form of scienter related to fraud against shareholders is required. The purpose of SOX is to prevent fraud against shareholders by requiring accurate reporting of significant and material financial information. Without this materiality component, there would be numerous claims filed by potential whistleblowers for various allegations and violations that amount to no affect to shareholders and do not amount to any fraudulent behavior by a company. Legislative history and case precedence shows that SOX was developed to ultimately protect the shareholders. One form of this protection is to not inundate the courts with claims that seeks protection under SOX for minor discrepancies or potential violations. SOX was not enacted to correct business flaws that do not relate to shareholder protection. Thus, the undersigned believes that SOX claims must satisfy the element that requires the conduct being reported to be material to the shareholders of a company. Potential violations do not satisfy the requisite scienter and materiality component engrained in the SOX statute without proof that shareholders have been adversely affected. As such, Complainant's allegations and complaints of potential fraud do not satisfy the materiality requirements under SOX and are therefore not protected activities requiring SOX protection.

The undersigned further finds that Complainant's speculative refusal to do "any illegal act" is not an action that would "provide information" which is sought to be protected under SOX. Under SOX, a protected whistleblower must "provide information" in order to be found to be engaging in a protected activity. The SOX statute is silent with regards to whether refusal to do an act amounts to providing information for SOX protection, and precedence is split with regards to the status of refusal being akin to providing information in the context of SOX. From the evidence presented, it appears that Complainant refused to do "any illegal acts" during a meeting held with his supervisors, where Complainant requested to be removed from the "Gap Closure" project after filing his BCP Complaint. However, these "illegal acts" are never specified. Rather, it appears that Complainant's refusal is towards speculative "illegal acts." Complainant appears to have associated his tasks on the "Gap Closure" project as being illegal, based on the perceived deduction problems with the project. No evidence or facts have been presented to suggest that Complainant was being forced to commit any act against any law with respect to his tasks in association with the "Gap Closure" project. Complainant was merely told to perform the job he was hired to do. The undersigned finds nothing illegal about Complainant's job requirements, and further finds nothing illegal in a supervisor instructing Complainant to do a job he was hired to perform. Complainant refusing to do an speculative "illegal act" does not amount to an action requiring SOX protection because his refusal was not providing any information of a violation, or predicated on having to perform a fraudulent act that would affect the shareholders. Complainant merely refused to do parts of his job that he thought were illegal, without any basis to justify the refusal or any proof that his job forced him to conduct illegal

actions. As such, the undersigned finds that Complainant's refusal to do "any illegal acts" is not a protected activity under SOX.

The undersigned further finds that Complainant's reporting to the IRS does not constitute a complaint to a "federal regulatory or law enforcement agency" as contemplated by 1514(A). Under SOX, a complaint by an employee must be directed to, or the investigation must be conducted by, a federal regulatory or law enforcement agency, any member or any committee of Congress, or a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct). According to the evidence and arguments presented, Complainant complained of violations to his supervisors on numerous occasions and filed a BCP Complaint. These two types of reporting of conduct are in line with SOX's requirement that a complaint be directed to a person with supervisory authority over the employee. However, the undersigned finds that Complainant's disclosure to the IRS does not constitute a complaint to a federal agency under 1514A.

During the time he was employed by Respondent, Complainant engaged an attorney who specializes in whistleblower litigation to represent Complainant in a claim under the "IRS Whistleblower Rewards Program." Shortly thereafter, Complainant filed a "Disclosure Pursuant to 26 U.S.C. § 7623(b)" to the IRS. Under Section 7623(b), incentives are provided to whistleblowers who report tax evasions to the IRS. Complainant testified that prior to his filing of the disclosure, he entered into an agreement with his attorney whereby his attorney would receive a percentage of any amount he would receive in compensation for his filing with the IRS. (EX-1; pp. 142-143). SOX was not enacted to provide protections to whistleblowers who report conduct to agencies for financial gain rather than for the protection of shareholders. Based on his testimony, it appears that Complainant, at the very least, contemplated some form of compensation prior to his reporting of Respondent's violations to the IRS, rather than report allegations of fraud for the protection of shareholders. While receiving these incentives for reporting violations to the IRS is legal, this reporting done by Complainant should not be given SOX protection, especially when there is no evidence that the violations reported are based on fraudulent behavior, but rather on accounting errors that lead to tax evasion.

Further, legislative history provides that whistleblower protection is provided to employees who report acts of fraud to federal officials with the authority to remedy the wrongdoing. The IRS can remedy accounting errors that amount to tax evasion. However, the IRS is not the proper federal authority to approach with allegations of fraudulent conduct that affects shareholders. Complainant appears to have approached the IRS because of his knowledge of their regulations, his perception that Respondent had violated these regulations, and the contemplation of incentives for the reporting of misconduct. No evidence shows that Complainant approached the IRS with allegations of fraud or that he approached the IRS because he believed Respondent had violated statutes dealing with fraud. If Complainant had known of a violation of a statute dealing with fraud of a violation of the SEC statutes, as he alleges, he would have known to report the misconduct the SEC, not the IRS. It appears that Complainant approached the IRS because he only knew that Respondent had violated their regulations and had no knowledge of who to report to otherwise. SOX does not protect IRS regulations or regulations that are not based on elements of fraud. As such, Complainant's reporting to the IRS should be given IRS whistleblower protection, but not SOX protection. Therefore, the undersigned finds

that Complainant's reporting to the IRS under the "IRS Whistleblower Rewards Program" is not a protected activity under SOX.

Based on Complainant's failure to allege a violation that definitively and specifically relates to one of the six enumerated categories considered under 1514A; the fact that Complainant did not possess a reasonable belief that the conduct he was reporting violated an enumerated category under 1514A; Complainant's failure to allege actual fraud, or show any adverse, material affect to shareholders in any his complaints; Complainant's speculative refusal to do "any illegal act" not being protected under SOX; and Complainant's reporting of conduct to a federal regulatory agency not contemplated by 1514(A), the undersigned finds that Complaint did not engage in a protected activity under SOX to allow for whistleblower protection. Complainant's actions are more akin to that of an IRS whistleblower, which cannot receive protection under the SOX statutes.

Unfavorable Personnel Action

Under SOX, an employee of a publicly traded company may not be discharged or otherwise discriminated against with regard to his terms and conditions of employment for providing information about fraud against company shareholders. See, 29 *C.F.R.* §1980.102. In order to be an "unfavorable personnel action," a complainant must show that a reasonable employee would have found the challenged action materially adverse, which in this context means the action might have dissuaded a reasonable worker from engaging in the protected activity. *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006). An employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures. A complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities. *Daniel v. TIMCO Aviation Servs., Inc*, 2002-AIR-00026 (A.L.J. June 11, 2003)

The mere threat of termination is not an adverse employment action. *Van Der Meulen v. Brinker Int'l*, 153 Fed.Appx. 649, 655 (11th Cir. 2005). Further, an employer's after-acquired evidence of wrongdoing that could have resulted in discharge does not bar an employee from prevailing in a retaliation case. *McKennon v. Nashville Publishing Co.*, 513 U.S. 352, 358 (1995).

In the instant case, Complainant did not suffer an unfavorable personnel action to violate the provisions of SOX. Complainant was not terminated because he filed a BCP Complainant or complained to his supervisors. The evidence shows that Complainant received performance bonuses after he filed his BCP Complaint. Further, Complainant remained with the company for a period of time after he filed his BCP Complaint and his disclosure to the IRS. Respondent was further not made aware of Complainant's contact with an attorney regarding his disclosure with the IRS until late January 2008, after Complainant was terminated. The evidence also shows that the allegations and complaints made towards Complainant's supervisors were taken under advisement for over a year, and used to install new policies and programs with regards to the T&E expense reports.

Rather, Complainant was scheduled to be terminated based on a business decision by Respondent to outsource the division where Complainant was employed. Complainant was

notified of this decision months prior to his termination and was only to be terminated when his position had been completely outsourced to Hungary. However, prior to his outsourcing date, Complainant engaged in conduct that was in direct violation of company policies by misappropriating several employees' personal identifiable information. His actions violated company policies, which are in line with state and federal law and were known by Complainant at the time of their violation. This conduct was discovered by an investigation of Complainant's computer, in response to a complaint filed against Complainant by one of his co-workers. This investigation was conducted by several superior officers in the company and Complainant was invited to participate in the investigation. Complainant did not participate in the investigation, and was suspended without pay on November 8, 2007. Complainant was terminated in January 2008, after refusing for the second time to participate in the investigation. The investigation and Complainant subsequent suspension occurred months after his BCP Complaint, his disclosure to the IRS and the beginning of his complaints to superior company officials. There is simply no evidence or temporal factors to suggest that Complainant was terminated because he reported fraud conducted by Respondent. Rather, he was terminated based on his own conduct that was in direct violation of company policies. As such, the undersigned finds that Complainant did not suffer an unfavorable personnel action due to a protected activity.

Contributing Factor to Unfavorable Personnel Action

Under the evidentiary framework of a SOX whistleblower cause of action, a complainant must establish that there are circumstances which suggest that the protected activity was a contributing factor to the unfavorable action. 49 U.S.C. § 42121(b)(2)(B)(iii); A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-00060 to 62 (ARB July 27, 2006). The contributing factor standard was "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *Id.* To prevail, the whistleblower must show this contributing factor by a preponderance of the evidence. *Id.*

Normally the burden of establishing a *prima facie* showing of a contributing factor "is satisfied…if the complainant shows that the adverse personnel action took place shortly after the [reported] activity, giving rise to an inference that it was a factor in the adverse action." 29 *C.F.R.* §1980.104(b)(2); See also, *Kendrick v. Penske Transportation Services, Inc.*, 220 F. 3d 1220, 1234 (10th Cir. 2000). However, temporal proximity alone does not establish retaliatory intent, but may establish the causal connection component of the prima facie case. *Taylor v. Wells Fargo Bank, NA*, ARB No. 05-062, ALJ No. 2004-SOX-00043 (ARB June 28, 2007). The ARB has held that "the probative value of temporal proximity decreases as the time gap lengthens, particularly when other precipitating events have occurred closer to the time of the unfavorable personnel action." *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-00051 (ARB June 29, 2006), slip op. at 18.

A complainant does not have the burden to establish that a respondent's articulated reason for the adverse action was pretext. *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-00011 (ARB May 31, 2006). Further, the contributing factor

does not have to be the primary motivating factor to establish causation. *Halloum v. Intel Corp.*, ARB No. 04-068, 2003-SOX-00007 (ARB Jan. 31, 2006).

It has been held that summary decision is proper when there is insufficient evidence in the record to support a factual or legal inference of retaliatory discrimination. *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (A.L.J. Apr. 1, 2005). It has further been held that an employee's own admitted misconduct provides a legitimate intervening basis that shows the lack of a link between the protected activity and the adverse action. *Tice v. Bristol-Myers Squibb Co.*, 2006-SOX-00020 (A.L.J. Apr. 26, 2006).

Here, the undersigned finds that there is insufficient evidence in the record to support an inference of retaliatory discrimination. The undersigned finds no evidence of pretext in the decision to terminate Complainant. First, Complainant remained with the company months after he initially began complaining to his supervisors. Complainant even received performance bonuses after his BCP Complaint. Second, evidence shows that Complainant was notified in May 2007, that his position was scheduled to be terminated based on a business decision by Respondent to outsource the division where Complainant was employed. Complainant signed an agreement whereby he would remain with the company until then in return for a bonus was only to be terminated when his position had been completely outsourced to Hungary. This outsourcing was to be completed by March 2008. Complainant signed the agreement to remain with the company after filing his BCP Complaint and after leaving for short-term disability in April 2007.

Third, Complainant was terminated based on his own actions. According to the undisputed facts in this case, as part of his job responsibilities, Complainant engaged in frequent email communications with employee cardholders regarding their submission of expense reimbursement requests and supporting documentation. Complainant's supervisor, Donna Tillapaugh, counseled Complainant to refer any inappropriate communications he received from employee cardholders to her attention, and not to engage in such communications himself. After his return from short-term disability in October 2007, a complaint was filed by a co-worker against Complainant, which required an investigation of Complainant's email and laptop, based on Complainant's supervisor's initially instructions. This investigation was Respondent policy, and Complainant received notice each time he logged into his Company-issued laptop computer that his activities could be monitored and that unauthorized use of the Company email system would be prosecuted. After an initial investigation found that Complainant had transferred personal identity numbers of other employees to his home email address and his partner's email address, Complainant was suspended in late October 2007, with pay. After a month-long investigation found that Complainant performed questionable conduct that was in strict violation to company policies, Complainant was suspended without pay in late November 2007.

During the investigation, it was discovered that Complainant had participated in the breach of approximately 6,764 unique, confidential numbers of Respondent employees. Complainant admitted that he successfully copied confidential documents, some containing sensitive personal identifying information, to a compact disc on February 15, 2007, and that he removed this disc from Celanese. Complainant further admitted that he attempted on at least four occasions to email confidential documents, some containing sensitive personal indentifying information, to his or his domestic partner's personal email account on February 15, 2007. It was further discovered that he began sending social security numbers of other employees to his

partner's email account in July 2005, eighteen months before his BCP Complaint was filed. According to a Protiviti Analysis Report, a portion of the confidential information that was sent to unauthorized emails and burned to compact discs were not included in Complainant's disclosure to the IRS. The breach by Complainant resulted in Respondent having to comply with notification procedures under civil and criminal statutes of various states in which its employees resided. Complainant was terminated in January 2008, after refusing to participate in the investigation for a second time. Complainant has testified that he knew of Respondent's policies and procedures prior to his actions, and further knew that he was breaking these procedures by emailing and copying these personal identifying numbers. (EX-1, pp. 194-195).

Complainant argues that he was not terminated earlier than January 2008 because he was on short-term disability leave from April 2008, to October 2008. However, the records shows that Respondent contacted Complainant regarding him staying with the company prior to outsourcing in May 2007. Further, it was only after a complaint being filed against Complainant in late October 2007, that Respondent began their investigation of Complainant's laptop. Prior to this investigation, it appears that Respondent was not aware of Complainant's breach. Further, the Protiviti Analysis Report was received by Respondent after Complainant's termination. In this Report, Respondent first became aware of Complainant's disclosure to the IRS. At no time prior to their discovery of Complainant's breach of personal identifying information of thousands of employees did Respondent punish or reprimand Complainant for his allegations, complaints, or BCP Complaint. As there is no evidence of any pretextual motive for the termination of Complainant, or any evidence of Complainant's alleged protected activity having a casual link with his adverse employment action, the undersigned finds that Complainant did not undergo any adverse employment action with regards to his allegations and complaints, his BCP Complaint, and his disclosure to the IRS. Therefore, no SOX protection is owed.

Same Adverse Action

As clarified above, a complainant must show by a preponderance of evidence that the plaintiff's protected activity was a contributing factor in the unfavorable action. If the employee does so, the burden shifts to the employer to show by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected behavior. 49 U.S.C. § 42121(b)(2)(B)(iv); *Allen*, 514 F.3d at 476.

In this case, the undersigned has found that Complainant did not conduct a protected activity with regards to his complaints to his superiors, his BCP Complaint, or his disclosures to the IRS. However, the undersigned further finds that Respondent has provided clear and convincing evidence that Respondent would have taken the same unfavorable personnel action, in this case terminating Complainant, in the absence of any protected behavior. As documented above, Complainant participated in a breach of confidential information without Respondent's knowledge or permission. This breach was in direct conflict with Respondent's business policies. Complainant knew Respondent's policies and further knew that he was violating these procedures during his breach of information. Complainant began this breach in July 2005, eighteen months prior to filing his BCP Complaint. Complainant further breached several social security numbers and information that would not be used in his disclosure to the IRS. Complainant put over 6,000 employees' personal information at risk without any permission bestowed by Respondent. This forced Respondent to spend sums of money to contact all

employees whose information had been breached and to safeguard this information. Regardless if Complainant had undergone a protected activity in conjunction with this breach, which he had not, Respondent still would be justified in terminating him for a gross violation of company policy.

The undersigned is further unconvinced by the "informer's privilege" defense that Complainant has raised for his possession of the confidential information in other email addresses and computers. SOX allows for the reporting of violations but not for illegally obtaining documents. *JDS Uniphase Corporation v. Jennings*, 473 F.Supp.2d 697 (D. Va. 2007). Complainant gathered excessive amounts of confidential information, some information even prior to make the BCP Complaint. Complainant further did not use a large amount of this information in his disclosure to the IRS. The "informer's privilege" is more in line with an employee being able to subpoena for documents that may contain confidential information. It should not excuse the illegal acquisition of confidential information or allow employees to bypass certain protected channels to acquire the information that they have a right to receive.

Complainant had the right to access this information as part of his employment duties with Respondent. Complainant further had the right to report IRS violations as a protected IRS whistleblower. However, Complainant could have acquired the necessary information through legal and ethical means. The acts committed by Complainant are a blatant example of wrongfully obtaining information to support complaints and, with respect to the IRS disclosure, engage in whistleblowing activities without going through the proper means of acquiring information. As such, the undersigned finds no merit to allow Complainant's actions to be found to be protected by the "informer's privilege."

E. Conclusion

Based on the foregoing law and discussion, construing all facts in the light most favorable to Complainant, the undersigned finds that Complainant did not perform any activities which would be deemed protected under SOX. Complainant further did not sustain any adverse employment action that would be attributable to his complaints to his superiors, his filing of a BCP Complaint, or his filing of a disclosure with the IRS. Complainant's allegations and complaints were not a contributing factor to his adverse employment action, as Complainant was fired for just cause based on his own actions in violation of company policies. Clear and convincing evidence exists to show that regardless of the presence of any protected behavior on the part of Complainant, Respondent would have taken the same unfavorable personnel action in the absence of protected behavior. No genuine issue of material fact in this matter remains, requiring dismissal based on summary decision of the instant complainant in favor of Respondent.

F. Recommended Order

For the reasons set forth above, Respondent's Motion for Summary Decision is hereby **GRANTED**. Accordingly, the undersigned recommends the dismissal of Complainant's complaint.

A

CLEMENT J. KENNINGTON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (.Petition.) with the Administrative Review Board (.Board.) within ten (10) business days of the date of the administrative law judge's decision. See 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a). At the time 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. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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(c). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).