In the Matter of:

ANGELINA ZINN, **ARB CASE NO. 10-029**

COMPLAINANT, **ALJ CASE NO. 2009-SOX-025**

v. **DATE: March 28, 2012**

AMERICAN COMMERCIAL LINES INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Stuart M. Nelkin, Esq., Carol Nelkin, Esq., and Kenneth M. Krock, Esq., *Nelkin & Nelkin, P.C.*, Houston, Texas

For the Respondent:
Stanley J. Brown, Esq., and Elizabeth M. Borkin, Esq., *Hogan Lovells US LLP*, New York, New York

BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge E. Cooper Brown concurring.

DECISION AND ORDER OF REMAND

This case arises under Section 806, the employee protection provision of the Sarbanes-Oxley Act of 2002 (SOX)[1] and its implementing regulations.[2] Angelina Zinn filed a complaint alleging that American Commercial Lines Inc. (ACL) violated the SOX when it discharged her from employment. After a hearing, a Department of Labor Administrative Law Judge (ALJ) determined that Zinn failed to show that her employer violated Section 806, and dismissed her complaint. Zinn petitioned for review. We vacate the ALJ's Decision and Order (D. & O.) and remand for further proceedings.

BACKGROUND

A. Facts

The ALJ's factual findings are interspersed throughout the decision. The facts set out below are drawn from the ALJ's decision, and the testimony and exhibits from the administrative hearing.

ACL is a publicly-traded company with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78l, and is required to file reports under section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78o(d). ACL's business includes contracting with customers to transport various industrial products, including liquid cargo, by barges on waterways. The company uses its own tugboats or hires other tugboats to transport its barges to and from locations as required in its customer contracts. ACL hired Zinn in November 2007 as a corporate attorney in its Liquids Division in Houston, Texas.[3]

As part of her job, Zinn reviewed "root cause analyses (RCAs)" incident reports which detailed collision incidents involving ACL barges or barges it hired. Zinn testified that several of the incident reports involved a tugboat vendor that ACL hired, DRD Towing, and indicated that DRD had used unlicensed personnel on their tugboats. ACL was required to vet or audit the tugboat vendors it hired to ensure that their tugboats were seaworthy and safe and that the personnel used were properly licensed, as ACL's customer contracts required.[4]

Zinn stated at the hearing that in late April or early May 2008 she contacted her supervisors Dan Jaworski, vice president of the Liquids Division, and Doug Ruschman, vice president in the legal department, to express her concerns that ACL had not properly vetted or audited DRD. Zinn stated that because ACL's annual Securities Exchange Commission Form

---

1 18 U.S.C.A. § 1514A (Thomson/West Supp. 2011).

2 29 C.F.R. Part 1980 (2011).

3 D. & O. at 3.

4 D. & O. at 8-10; Hearing Transcript (HT) at 55, 57-60, 74-75.

10-K had been reporting that ACL was upholding safety despite ACL's failure to properly vet DRD, ACL's Form 10-K may have misrepresented the fact that it was actually using unlicensed personnel.[5]

In May 2008, ACL hired Dawn Landry as its new General Counsel and Senior Vice President.[6] Zinn testified that her supervisor, Ruschman, informed her of Landry's hiring and that ACL did not want to file a SEC Form 8-K to announce Landry's hiring at that time because it would look like ACL had instability in its upper management.[7] Zinn later raised a concern in an e-mail to Ruschman, on May 13, 2008, as to whether ACL should file a SEC Form 8-K to announce Landry's appointment, and offered to call a securities lawyer, one of her former colleagues, for advice. Ruschman replied that ACL's counsel told the company's CEO that disclosure of Landy's appointment on the Form 8K was not required. Although Zinn was advised by her former colleague that the appointment may be reportable, Zinn did not inform Ruschman.[8]

Shortly after she raised her concerns regarding ACL's failure to properly vet DRD and the representations it made on its Form 10-K, and whether the company should file a Form 8-K to announce Landry's hiring, Jaworski reduced Zinn's work responsibilities and Landry required her to take a drug test. After the test came back negative, Zinn was subjected to increased job performance monitoring and additional work assignments.[9] Landry terminated Zinn's employment in July 2008 for poor job performance and insubordination.[10]

B. Proceedings below

Zinn filed a SOX whistleblower complaint on October 3, 2008.[11] After an investigation, the Occupational Safety and Health Administration (OSHA) dismissed the complaint on December 10, 2008.[12]

---

5 D. & O. at 10-11; HT at 79-82, 84-85.

6 D. & O. at 33; HT at 381-382.

7 D. & O. at 12; HT at 101-104.

8 D. & O. at 12, 57, 61; *see also* HT at 105, 108, 111, 116, 118; Respondent's Exhibit (RX) 1, 2; Complainant's Exhibit (CX) 115.

9 D. & O. at 11, 14-15; HT at 99-100, 131-134.

10 D. & O. at 11, 14-16, 37; HT at 99-100, 131-134, 144-150, 409.

11 Administrative Law Judge Exhibit (ALJX) 1.

12 ALJX 2.

Zinn requested a hearing before an ALJ, which he held on April 27, and 28, 2009. In a Decision and Order issued on November 5, 2009, the ALJ dismissed the complaint. The ALJ determined that Zinn failed to show that she engaged in any SOX-protected activity. Additionally, even assuming that she did, the ALJ determined that Zinn failed to show that any alleged protected activity was a contributing factor in any of the adverse employment actions she alleged, and that ACL would have "taken the same adverse employment action regardless of [Zinn's] engagement in protected activity."[13] The ALJ dismissed the complaint.

Zinn timely petitioned the Administrative Review Board (ARB or Board) for review. Along with her petition to the ARB, Zinn included exhibits that were not admitted at the hearing. ACL filed a brief urging that the Board affirm the ALJ's decision. ACL moved to strike the exhibits attached to Zinn's petition, arguing that the exhibits were outside the administrative record.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under SOX to the Administrative Review Board.[14] Pursuant to SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.[15] In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[16] Therefore, the Board reviews an ALJ's conclusions of law de novo.[17]

---

[13] D. & O. at 67.

[14] *See* Secretary's Order 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). *See also* 29 C.F.R. § 1980.110.

[15] *See* 29 C.F.R. § 1980.110(b).

[16] 5 U.S.C.A. § 557(b) (West 1996).

[17] *See Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

DISCUSSION

A. Statutory Framework and Burden of Proof Standard

Section 806 of SOX, 18 U.S.C.A. § 1514(A), provides in relevant part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(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 – . . . .
>
> (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).[18]

The legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson/West 2007) govern SOX Section 806 actions.[19] To prevail on her SOX complaint under that standard, Zinn must prove by a preponderance of the evidence that: (1) she engaged in activity or conduct that SOX protects; (2) the Respondent took an unfavorable personnel action against her; and (3) the protected activity was a contributing factor in the adverse

---

[18] 18 U.S.C.A. § 1514A(a). During the pendency of this appeal in 2010, Congress amended Section 1514A. *See* the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act). Although Sections 922 and 929A of the Dodd-Frank Act amended SOX Section 806, the amendments are not relevant to this case and do not affect our decision.

[19] *See* 18 U.S.C.A. § 1514A(b)(2)(C).

personnel action.[20] If Zinn satisfies her burden of proof, ACL can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action against her absent the protected activity.[21]

B. To prove protected activity, Zinn was not required to show a reasonable belief that her complaints related to fraud against shareholders, securities fraud, or an actual violation of a specific law

Zinn alleged in her SOX complaint that her communications with her supervisor related to the following issues were protected: (1) ACL's alleged failure to properly vet its vendors and its use by one of its vendors (DRD Towing) of unlicensed personnel; (2) failure of ACL to report on its 10-K Form the use by DRD Towing of unlicensed personnel; and (3) failure of ACL to file a Form 8-K announcing the company's appointment of a new general counsel and senior vice president.[22] In evaluating Zinn's protected activity, the ALJ determined that Zinn failed to show that she had a reasonable belief that her employer engaged in violations that related to shareholder fraud, securities fraud, or an actual violation of a specific law. Based on this interpretation of SOX, the ALJ concluded that Zinn's communications were not protected because she lacked an objectively reasonable belief that the company's actions violated the laws specified under SOX.

Since the ALJ's D. & O. was issued in this case, however, we addressed the factors related to the complainant's burden to establish protected activity under SOX Section 806 in *Sylvester v. Paraxel Int'l LLC*.[23] In *Sylvester*, the ARB analyzed the "requirements necessary for establishing the reasonableness of an employee's belief that the conduct of which he or she complains violates the laws identified under Section 806."[24] *Sylvester* establishes that since Zinn's protected activity involved "providing information to [her] employer," she must demonstrate as part of proving her case, a "reasonable belie[f]" that the conduct she complained of "constitute[d] a violation of the laws listed at Section 1514."[25] This reasonable belief

---

[20] *See* 18 U.S.C.A. § 1514A(b)(2); *Sylvester v. Paraxel, Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip at 9 (ARB May 25, 2011). *See also Inman v. Fannie Mae*, ARB No. 08-060, ALJ No. 2007-SOX-047, slip op. at 5 (ARB June 28, 2011).

[21] *Menendez v. Halliburton*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011); *Getman*, ARB No. 04-059, slip op. at 8; *cf.* 29 C.F.R. § 1980.104(c); *see* 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv).

[22] D. & O. at 4, 11.

[23] ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042 (May 25, 2011).

[24] *Id.* at 8.

[25] *Id.* at 14 (citing 18 U.S.C.A. § 1514A(a)(1)).

standard requires that Zinn show a "subjective" and "objective" belief.[26] "Subjective reasonableness requires that the employee 'actually believed the conduct complained of constituted a violation of pertinent law."'[27] 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."[28] In this case, the ALJ determined that Zinn had a subjective belief that the conduct of which she complained constituted a violation of the SOX-related laws, thus there is no issue as to Zinn having met the subjective component of the reasonable belief. We address only the legal determinations that the ALJ reached in assessing the objective reasonableness of Zinn's beliefs. Based on our decision in *Sylvester* and other precedent, we hold, for reasons explained below, that the ALJ legally erred in analyzing the evidence of Zinn's objective reasonableness of a violation of pertinent law, thus warranting a remand.

1. The ALJ erred by concluding that violations asserted by SOX complainants must relate to fraud against shareholders.

The ALJ stated that "fraud is an integral element of a cause of action under the SOX whistleblower provision,"[29] and specifically ruled that Zinn's complaints were not protected under SOX because "an allegation of 'shareholder fraud' is an essential element of a cause of

---

[26] *Sylvester*, ARB No. 07-123, slip op. at 14.

[27] *Id.* at 14 (quoting *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10); see also *Brown v. Lockheed Martin*, ARB No. 10-050, ALJ No. 2008-SOX-049, slip op. at 9 (Feb. 28, 2011).

[28] *Sylvester*, ARB No. 07-123, slip op. at 14 (quoting *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009)); *see also Brown*, ARB No. 10-050, slip op. at 9. As the Board explained, in *Sylvester*, the "reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities." *Sylvester*, ARB No. 07-123, slip op. at 15 (citing *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006)); *see also Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1377-78 (N.D. Ga. 2004) (it is sufficient that the recipients of the whistleblower's disclosures understood the seriousness of the disclosures). "Often the issue of 'objective reasonableness' involves factual issues and cannot be decided in the absence of an adjudicatory hearing." *Sylvester*, ARB No. 07-123, slip op. at 15, citing *Allen v. ARB*, 514 F.3d 468, 477-478 (5th Cir. 2008)("the objective reasonableness of an employee's belief cannot be decided as a matter of law if there is a genuine issue of material fact"); *Welch v. Chao*, 536 F.3d 269, 278 (4th Cir. 2008) ("objective reasonableness is a mixed question of law and fact" and thus subject to resolution as a matter of law "if the facts cannot support a verdict for the non-moving party"); *Livingston v. Wyeth Inc.*, 520 F.3d 344, 361 (4th Cir. 2008).

[29] D. & O. at 47.

action under SOX."[30] This is error. In analyzing the showing required to establish the reasonableness of an employee's belief of a SOX violation, we explained in *Sylvester* that of the "six categories" set out in Section 806, "only the last one refers to fraud against shareholders."[31] "In examining the SOX's language, we determined that a complainant may be afforded protection for complaining about infractions that do not relate to shareholder fraud."[32] *Sylvester* made clear that a reasonable belief about a violation of "any rule or regulation of the Securities and Exchange Commission" could encompass a situation in which the violation, if committed, is completely devoid of any type of fraud. Thus, an allegation of shareholder fraud is not a necessary component of protected activity under Section 806 of the SOX. [33]

2. A SOX complainant need not establish the various elements of securities fraud to prevail on a Section 806 retaliation complaint

The ALJ determined that "all the basic elements of securities fraud must be satisfied to support Complainant's objective reasonableness that ACL was committing fraud upon its shareholders."[34] This was also error.

---

[30] *Id.* at 49; *see also* D. & O. at 51 (ALJ stating that "all the basic elements of securities fraud must be satisfied to support Complainant's objective reasonableness that ACL was committing fraud upon its shareholders").

[31] *Sylvester*, ARB No. 07-123, slip op. at 19.

[32] *Id.* at 20 ("When an entity engages in mail fraud, wire fraud, or any of the six enumerated categories of violations set forth in Section 806, it does not necessarily engage in immediate shareholder fraud."); *see also Inman*, ARB No. 08-060,slip op. at 7.

[33] In analyzing the standard for proving protected activity, the ALJ observed that under Section 806 allegations of protected activity "must relate 'definitively and specifically' to the subject matter of the particular statute under which protection is afforded." D. & O. at 48, *quoting Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at 17 (ARB Sept. 29, 2006). The Board recently clarified in *Sylvester* that the "definitive and specific" standard employed in prior ARB cases is inconsistent with the statutory language of Section 806. *Sylvester*, ARB No. 07-123, slip op. at 17. The majority of the en banc Board in *Sylvester* noted that the "definitive and specific" standard "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." *Id.* at 19-20. While the ALJ's conclusions on protected activity did not appear to turn on the ALJ's erroneous use of this incorrect standard, we make note of this error so that it can be corrected on remand.

[34] *See* D. & O. at 51; *id.* at 55 (ALJ determined that Zinn's claim failed because she did not prove that the company's "failure to vet vendors and the failure to report the alleged use of DRD Towing's unlicensed pilots on the 10-K Form was *materially misleading* to shareholders and/or

By requiring Zinn to show elements of securities fraud, the ALJ improperly merges the elements required to prove a violation of a fraud statute with the requirements that a whistleblower must allege or prove to engage in protected activity. As we held in *Sylvester*, "requiring a complainant to prove or approximate the specific elements of a securities law violation contradicts the statute's requirement that an employee have a reasonable belief of a violation of the enumerated statutes."[35] Specifically, under SOX "a complainant can have an objectively reasonable belief of a violation of the laws in Section 806, *i.e.*, engage in protected activity under Section 806, even if the complainant fails to allege, prove, or approximate specific elements of fraud."[36] Thus, under SOX, "a complainant can engage in protected activity under Section 806 even if he or she fails to allege or prove materiality, scienter, reliance, economic loss, or loss causation" which would be required for a violation of a securities fraud statute.[37] The ALJ's requirement that Zinn prove elements of securities fraud as part of her SOX complaint was thus improper.

3. Protected activity need not describe an actual violation of law

The ALJ determined that Zinn's protected activity claim failed in part because she was unable to demonstrate that "DRD Towing's pilots were unlicensed or unskilled" and she "did not know what license is required" for tow boat pilots.[38] However, Zinn need not describe an actual violation of law, as an employee's whistleblower communication is protected where based on a reasonable, but mistaken, belief that the employer's conduct constitutes a violation of one of the six enumerated categories of law under Section 806.[39]

The ALJ similarly erred when he found that Zinn "had a reasonable subjective belief that ACL was in violation of the SEC rules" when it failed to file a Form 8-K announcing Landry's appointment as general counsel and senior vice president, but determined that her claim failed because she did not show an objectively reasonable belief that ACL violated any SEC rules or applicable statutes.[40] Specifically, the ALJ found, again, that Zinn failed to show that the failure

---

investors" and "failed to show any economic loss by shareholders and/or investors") (emphasis added).

35 *Sylvester*, ARB No. 07-123, at 22.

36 *Id*.

37 *Id*.

38 D. & O. at 52.

39 *Sylvester*, ARB No. 07-123, slip op. at 16; *see also Halloum v. Intel Corp.*, ARB No. 04-068, ALJ No. 2003-SOX-007, slip op. at 6 (ARB Jan. 31, 2006).

40 D. & O. at 58-59.

to announce Landry's appointment violates a federal law relating to "shareholder fraud" and that the announcement of Landry's appointment "was not required" at that time and, therefore, the failure to announce Landry's appointment on Form 8-K was "neither misleading nor fraudulent."[41] Ultimately, the ALJ found that Zinn's e-mail to her supervisor, Ruschman, about filing Form 8-K was "no more than a general inquiry regarding SEC rule compliance" and that Zinn, therefore, "neither sufficiently complained nor raised particular concerns about whether ACL's failure to report Landry's appointment was a violation of the SEC rules."[42] Again, whether filing Form 8-K was required or not, Zinn's communications are nevertheless protected where based on a reasonable, albeit mistaken, belief that the employer's conduct constitutes a SOX violation.[43]

C. The ALJ used an incorrect standard for determining whether Zinn's protected activity was a contributing factor to her termination

The ALJ next required that Zinn prove, by a preponderance of the evidence, that "circumstances exist which are sufficient to raise an *inference* that [any] protected activity was likely a contributing factor in the unfavorable action."[44] The ALJ stated that if Zinn satisfied her burden, ACL could avoid SOX liability by "producing sufficient evidence to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action."[45] If ACL meets that showing, the ALJ stated that "the burden [of proof] shifts [back to Zinn] who must then provide some evidence, direct or circumstantial, to rebut the proffered reasons as a *pretext* for discrimination."[46] This was error.

"Determining whether there was a prima facie case or an inference is not the same as determining whether [Zinn] ultimately proved that h[er] protected activity was 'a contributing factor'" to the adverse actions she alleged.[47] The initial burden of proof the ALJ imposed upon

---

41 *Id.* at 58.

42 *Id.* at 61-62.

43 *Sylvester*, ARB No. 07-123, slip op. at 16.

44 D. & O. at 45-46 (citations omitted) (emphasis added).

45 D. & O. at 45; *see also* D. & O. at 68 (ALJ stating that Respondent can rebut Complainant's "contention by showing a legitimate business reason for each adverse employment action").

46 D. & O. at 46 (emphasis added).

47 *Jordan v. IESI Pa Blue Ridge Landfill Corp.*, ARB No. 10-076, ALJ No. 2009-STA-062, slip op. at 2 (ARB Jan. 17, 2012). *See also, Bechtel v. Competitive Techs., Inc.*, ARB No. 06-010, ALJ No. 2005-SOX-033, slip op. at 5-7 (ARB Mar. 26, 2008).

Zinn is the lesser burden of proof required of a complainant at the investigatory stage, before a case reaches the hearing stage. Before OSHA an inference of causation is sufficient to establish the prima facie showing required to warrant an investigation.[48] On the other hand, an inference of causation alone is insufficient once the case goes to hearing before an ALJ, where proof of a contributing factor is required by a preponderance of the evidence.[49]

By further requiring ACL to "clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action" to avoid liability, and by imposing upon Zinn the additional rebuttal requirement that she prove that ACL's reasons are pretext for retaliation to ultimately prevail, the ALJ conflated the SOX burden of proof standard with the Title VII burden of proof, which SOX Section 806 replaced.[50] As a result, the ALJ imposed a lesser burden of proof upon ACL than that which SOX Section 806 requires and, ultimately, a higher burden of proof upon Zinn. In so doing, the ALJ effectively negated the lesser burden of proof that is required of a SOX complainant. Rather than a burden of proof standard requiring that Zinn merely prove that her protected activity "alone or in combination with other factors tend[ed] to affect in any way the outcome of the [adverse personnel] decision,"[51] Zinn was required to provide sufficient evidence to overcome any legitimate business reason articulated by ACL for the adverse action, *including* proof, by a preponderance of the evidence, that ACL's articulated business reason was pretext.

Under Section 806, if Zinn's actions constituted protected activity, the ALJ must determine whether that activity was a "contributing factor" in her employer's decision to terminate her employment.[52] A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[53] Zinn can succeed

---

48 *See* 29 C.F.R. § 1980.104(b)(1)-(2).

49 *Peck v. Safe Air Int'l,* ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 8-9 (ARB Jan. 30, 2004). *See Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (distinguishing complainant's respective burdens of proof at the investigatory and hearings stages of litigation under AIR 21, upon which the SOX burdens of proof standards are based).

50 SOX Section 806 replaced the *McDonnell Douglas* Title VII burdens of proof standard applicable under several of the environmental whistleblower acts over which the ARB has jurisdiction by incorporating the legal burdens of proof standards imposed by AIR 21. *See Bechtel,* ARB No. 09-052, slip op. at 24-26.

51 *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18, (ARB May 31, 2006).

52 *Bechtel,* ARB No. 09-052, slip op. at 10, 12.

53 *Id.* at 12 (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). The contributing factor standard "overrule[d] existing case law, which required that a complainant prove

by "providing either direct or indirect proof of contribution."[54] One of the common sources of indirect evidence is "temporal proximity" between the protected activity and the adverse action.[55] While not always dispositive, the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation; this indirect or circumstantial evidence can establish causation in a whistleblower retaliation case.[56]

The ALJ found no causation in part because Zinn's alleged protected activity occurred in April and May 2008, and she was not terminated until July 2008.[57] However, a temporal proximity of seven to eight months between protected activity and adverse action may be sufficient circumstantial evidence to prove that the protected activity contributed to the adverse action.[58] On remand, the ALJ must re-examine this finding in light of pertinent ARB precedent.

The ALJ also erred to the extent he required that Zinn show "pretext" to refute ACL's showing of nondiscriminatory reasons for the actions taken against her.[59] "To prevail on a complaint, the employee need not necessarily prove that the employer's reasons for the adverse action was pretext."[60] While doing so does provide "circumstantial evidence of the mindset of

---

that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor" in a personnel action. *Allen v. Stewart Enter., Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-060, -062, slip op. at 17 (ARB July 27, 2006).

54 *Id.* at 12.

55 *See Vannoy v. Celanese Corp.*, ARB No. 09-118, ALJ No. 2008-SOX-064, slip op. at 14, n.8 (ARB Sept. 28, 2011); *Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010).

56 *See Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004), *aff'd sub nom., Vieques Air Link, Inc. v. U.S. Dep't of Labor*, 437 F.3d 102, 109 (1st Cir. 2006); *see also Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

57 D. & O. at 67.

58 *See Brown v. Lockheed Martin*, ARB No. 10-050, ALJ No. 2008-SOX-049 (ARB Feb. 28, 2011) (temporal proximity of ten months between complainant's reporting activity that led to an investigation of complainant's supervisor, and complainant's subsequent adverse action was circumstantial evidence of causation); *Goldstein v. EBASCO Contractors, Inc.*, No. 1986-ERA-036, slip op. at 11-12 (Sec'y Apr. 7, 1992) (temporal proximity of seven to eight months established nexus); *see also Tellepsen Pipeline Svcs., Co. v. NLRB*, 320 F.3d 554, 566 (5th Cir. 2003) (citing *Valmont Indus. v. NLRB*, 244 F.3d 545 (5th Cir. 2001) that temporal proximity is a "strong form" of circumstantial evidence showing unlawful motive).

59 D. & O. at 46.

60 *Bechtel*, ARB No. 09-052, slip op. at 13.

the employer, which may be sufficient to establish by a preponderance of the evidence that his or her protected activity" contributed to the adverse action, such a showing is not required for a complainant to prevail under Section 806.[61] Rather than assess any such pretext evidence as rebuttal evidence to ACL's nondiscriminatory reasons for firing Zinn, the ALJ must "weigh the circumstantial evidence as a whole [which includes any 'pretext' evidence] to properly gauge the context of the adverse action in question."[62] In this case, Zinn testified that prior to raising her concerns about the company's SEC reporting practices, her work was praised and she was given more work assignments from her supervisors. But immediately after raising her concerns, she testified that she was required to undergo a drug test and monitoring of her job performance was increased.[63] Again, the closeness in time of the sequence of events in this case may provide circumstantial evidence that Zinn's alleged protected activity was a contributing factor in the adverse actions that she claims to have suffered. Since the ALJ employed the incorrect standard for determining whether Zinn established protected activity, and failed to fully account for the close proximity in time that Zinn's alleged protected activity preceded her termination and other adverse employment actions that she alleged, we vacate the ALJ's findings and remand the case for reconsideration in accordance with the correct standard of proof.

While our review under the SOX requires that we give substantial deference to the ALJ's factual findings, where, as here, the ALJ uses the wrong legal standard for analyzing the parties' burdens of proof, we can decline to rely upon factual findings made under an erroneous standard.[64] We thus vacate the ALJ's decision and remand so that the ALJ can review the evidence under the proper legal standard. On remand, the ALJ should render a decision "based upon the whole record" that is supported by "findings of fact and conclusions of law" on "each material issue of fact or law presented."[65]

D. ALJ's Evidentiary Ruling & ACL's Motion to Strike Evidence Outside the Record

At the ALJ hearing, Zinn proffered an official staff report of the United States House of Representatives Subcommittee on Coast Guard and Maritime Transportation of the Committee

---

61 *Id*.

62 *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13-14 (ARB June 24, 2011).

63 RX7 at 1-2; HT at 396-397.

64 *See Klopfenstein*, ARB No. 04-149, slip op. at 20-21.

65 29 C.F.R. § 18.57(b).

on Transportation and Infrastructure, for submission into evidence.[66] The Congressional Staff Report detailed an investigation of an oil spill in New Orleans that occurred on July 23, 2008, after Zinn's termination, involving an ACL barge that a DRD tugboat was transporting with an unlicensed pilot. Zinn argued that the report was admissible as a public document, and that it was relevant to the hearing because the report contained information relating to DRD's use of unlicensed pilots in its operations during 2007, and prior to the 2008 accident.[67] Zinn alleged protected activity that occurred in April/May 2008, and she was terminated on July 8, 2008.[68] The ALJ rejected the report because the July 2008 accident covered in the Report occurred after Zinn's termination and alleged protected activity.[69] On appeal, Zinn contends that the ALJ erred in refusing to admit the Congressional Staff Report as evidence, and attached the report to her petition for review, and three other exhibits never previously submitted to the ALJ.[70] ACL moved the Board to strike the exhibits never previously submitted to the ALJ, which Zinn attached to her petition for review before the Board.

We review an ALJ's determinations on evidentiary rulings for abuse of discretion.[71] To reverse an evidentiary ruling, we must conclude that the ALJ abused his discretion and that the error was prejudicial.[72] The evidentiary rule pertaining to administrative hearings in SOX cases, 29 C.F.R. § 1980.107(d), states:

> Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will

---

66 *See* CX 124; HT at 347-353; Staff Report of the House Subcommittee on Coast Guard and Maritime Transportation on the Hearing on Oil Spill In New Orleans in July 2008 and Safety on the Inland River System (dated Sept. 15, 2008) (Congressional Staff Report).

67 Petition for Review at 8-11; Complainant's Appeal Brief at 18, n.15; HT at 347-353.

68 *Id*.; *see also* Congressional Staff Report at 7.

69 HT at 347-353, 466-467.

70 Zinn attached to her Petition for Review filed with the Board on Nov. 20, 2009, the Congressional Staff Report (*see* n.39 *supra*) (exhibit 1), and three stock charts on ACL stock prices taken from *http://finance.yahoo.com* (exhibits 2-4).

71 *See, e.g., Mao v. Nasser*, ARB No. 06-121, ALJ No. 2005-LCA-036, slip op. at 12 (ARB Nov. 26, 2008); *Chelladurai v. Infinite Solutions, Inc.,* ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 9 (ARB April 26, 2006).

72 *McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1032 (9th Cir. 2003); *see also Wainscott v. Pavco Trucking, Inc.*, ARB No. 05-089, ALJ No. 2004-STA-054, slip op. at 9-10 (ARB Oct. 31, 2007); *cf. Germann v. Calmat Co.,* ARB No. 99-114, ALJ No. 1999-STA-015, slip op. at 5 (ARB Aug. 1, 2002).

> be applied. The administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

The ALJ erred in excluding the Congressional Staff Report because it is material and relevant to the issues Zinn raised in her complaint. The report relates to an oil spill accident that occurred on July 23, 2008, only 15 days after Zinn's termination on July 8, 2008, and is relevant because it corroborates Zinn's testimony that DRD had used unlicensed pilots. This is especially pertinent in light of the ALJ's finding that, otherwise, "[t]here was no corroborating testimony or evidence to support" Zinn's assertion that DRD had used unlicensed pilots.[73] Such evidence is relevant to whether Zinn had an objective reasonable belief that ACL's Form 10-K may have misrepresented the fact that it was actually using unlicensed personnel during the time that Zinn was employed and to whether Zinn established protected activity by a preponderance of the evidence. Because of the broad evidentiary rules regarding admissibility of evidence in SOX whistleblower proceedings to assure production of the most probative evidence, we find that the ALJ abused his discretion in not allowing the report into evidence, as it has probative value and, therefore, is admissible.[74]

As to ACL's motion to strike exhibits 2-4 attached to Zinn's petition for review (the ACL stock charts) offered now for the first time on appeal, the Board ordinarily relies upon the standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 C.F.R. § 18.54(c)(2011), which provides that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record."[75] Although Zinn urges the Board to take judicial notice of the new evidence, she has not established that the ACL stock charts (exhibits 2-4) were not available at the time of the ALJ's consideration of his case and, therefore, the ARB's standard of review does not permit consideration of the new evidence in our review. [76]

---

[73] D. & O. at 52.

[74] *See, e.g., Timmons v. Mattingly Testing Servs.*, No. 1995-ERA-040, slip op. at 5 (ARB June 21, 1996) ("Fair adjudication of a complaint such as this thus requires full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken.").

[75] *See, e.g., Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 12 (ARB Sept. 28, 2007); *Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2003-SOX-015, Order Denying Stay, slip op. 5-6 (ARB June 9, 2006).

[76] While we are precluded from considering the new evidence (exhibits 2-4 attached to the Petition for Review) that Zinn raises for the first time on appeal, on remand Zinn may move the ALJ to reopen the record and seek admission of the evidence so that the ALJ, as the trier of fact, may determine whether the documents are sufficiently probative pursuant to 29 C.F.R. § 1980.107(d) to the issues in the case to warrant admission as evidence in the record.

CONCLUSION

We **VACATE** the ALJ's Decision and Order and **REMAND** the case for further proceedings consistent with this opinion and our ruling in *Sylvester*.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, concurring:

I concur in the majority's decision, for the reasons stated therein. I write separately to more fully address the ALJ's error in concluding that Zinn's belief that Respondent's conduct of which she complained was not objectively reasonable.

In *Sylvester v. Paraxel Int'l LLC*, ARB No. 07-123, 2007-SOX-039 (ARB, May 25, 2011), the ARB, presiding en banc, recently explained:

> 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. 18 U.S.C.A. § 1514A(a)(1). The Act does not define "reasonable belief," but the legislative history establishes Congress's intention in adopting this standard. Senate Report 107-146, which accompanied the adoption of Section 806, provides that "a reasonableness test is also provided . . . which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts (*See generally, Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478)." S. Rep. 107-146 at 19 (May 6, 2002).
>
> Both before and since Congress enacted the SOX, the ARB has interpreted the concept of "reasonable belief" to require a complainant to have a subjective belief that the complained-of

> conduct constitutes a violation of relevant law, and also that the belief is objectively reasonable, "*i.e.* he must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the employee's] circumstances having his training and experience." *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 28 (ARB July 14, 2000); s*ee also, Brown v. Wilson Trucking Corp*., ARB No. 96-164, ALJ No. 1994-STA-054, slip op. at 2 (ARB Oct. 25, 1996)(citing *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 82 (2d Cir. 1994)).

Sylvester, slip op. at 14-15.

As the majority noted, Zinn cited as the basis for having engaged in SOX whistleblower protected activity the reporting to her immediate supervisor of her concerns regarding: (1) ACL's alleged failure to properly vet its vendors and its use by one of its vendors (DRD Towing) of unlicensed personnel; (2) failure of ACL to report on its 10-K Form the use by DRD Towing of unlicensed personnel; and (3) failure of ACL to file a Form 8-K announcing the appointment by ACL of a new general counsel and senior vice president. The ALJ found that Zinn actually believed that the conduct of which she complained constituted a violation of the SOX-related laws, thus there is no issue as to Zinn having met the subjective component of the "reasonable belief" test. The issue upon which the ALJ focused, and which is raised on appeal, is with respect to the second element of the "reasonable belief" standard, the objective component. Following an extensive discussion of the factors the ALJ believed were pertinent to the question of whether Zinn's belief that her expressed concerns were based on an objectively reasonable belief that ACL's failures constituted violations of the laws identified in Section 806 of SOX, the ALJ concluded that none of Zinn's expressed concerns to management constituted whistleblower protected activity because Zinn did not have an objectively reasonable belief that one of more of the applicable laws under Section 806 had been violated.[77]

The standard for determining the objective reasonableness of a complainant's belief of a violation of the SOX laws is similar to the "objective reasonableness" standard applicable to Title VII claims,[78] and is evaluated "based on the knowledge available to a reasonable person in the same

---

[77] D. & O. at 67.

[78] The concept of "reasonable belief" was imported into whistleblower precedent from retaliation law under Title VII of the Civil Rights Act of 1964 long before it was expressly included in statutory whistleblower provisions like Section 806. *See, e.g.*, *Oliver v. Hydro-Vac Services, Inc.*, Case No. 91-SWD-01 (Sec'y, Nov. 1, 1995), slip op. at 5; *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-046 (Sec'y, Feb. 15, 1995), slip op. at 10; *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-01 (Sec'y, Jan. 25, 1994), slip op. at 10-13; *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-02 (Sec'y, Apr. 25,1983), slip op. at 7-9.

factual circumstances with the same training and experience as the aggrieved employee."[79] The standard is not demanding. As the legislative history of Sarbanes-Oxley explains: the whistleblower protections of Section 806 were "intended to include all good faith and reasonable reporting of fraud, and [that] there should be no presumption that reporting is otherwise, absent specific evidence."[80] As I noted in my concurrence in *Sylvester*, slip op. at 33, this liberal construction of "protected activity" under Section 806 arises out of recognition of the significant public interest in preventing the channels of information from being dried up by employer intimidation of prospective whistleblowers. Accordingly, in *Passaic Valley* the Third Circuit, in applying this standard to a whistleblower's complaint under the Clean Water Act, affirmed the Secretary of Labor's holding "that all good faith intracorporate allegations are fully protected from retaliation under § 507(a)" of the CWA "even though the complaining employee may have been "profoundly misguided or insufficiently informed in his assessment." 992 F.2d at 478, 480.

In adopting the "reasonable belief" standard from Title VII discrimination law, the Secretary of Labor embraced appellate court reasoning that understood that requiring the conclusive accuracy of a complainant's allegations of violations by the respondent would undermine Title VII's central purpose of encouraging employees to report discrimination internally and settle complaints informally. The Secretary found this reasoning compelling in connection with whistleblower statutes, recognizing that it would ill serve the remedial purposes of whistleblower statutes to provide protection only when employees could establish definitively the merits of their claims.[81]

The Board has long interpreted whistleblower statutes in a parallel manner.[82] Given that Section 806 is expressly structured on another Department of Labor whistleblower statute,[83] it is clear that in citing *Passaic Valley*, Congress intended Section 806 to be no exception. "Reasonable belief" and the scope of protected activity under Section 806 is to be construed in the context of this long line of case authority interpreting "reasonable belief" in whistleblower statutes. Under this precedent, whistleblower activity that merely "implicates" or "touches on"

---

79 *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009). See, *Allen v. Admin. Rev. Board*, 514 F.3d 468, 477 (5th Cir. 2008).

80 Legislative History of Title VIII of H.R. 2673: The Sarbanes-Oxley Act of 2002, 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002) (statement of Senator Leahy).

81 *Minard v. Nerco Delamar Co., supra*, slip op. at 12.

82 *See, e.g.*, G*oldstein v. Ebasco Constructors, Inc.*, 86-ERA-36 (Sec'y, Apr. 7, 1992), slip op. at 4; *Poulos v. Ambassador Fuel Oil Co.*, No. 86-CAA-1, Decision and Order of Remand (Sec'y, Apr. 27, 1987), slip op. at 5-7.

83 18 U.S.C.A. § 1514A(a) adopts the burden-shifting framework applicable to whistleblower claims brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), 49 U.S.C.A. § 42121(b) (Thomson/West 2007).

the substantive statute is protected.[84] Our precedent further establishes that the accuracy or veracity of the whistleblower complaint is not determinative.[85] Nor under our precedent, as the majority points out, is an actual violation required. Consistent with this line of authority, the ARB has held that an employee's whistleblower communication is protected where based on a reasonable, but mistaken, belief that the conduct of employer at issue constitutes a violation of one of the six enumerated categories of law under Section 806.[86]

In light of the foregoing, including especially the Board's recent decision in *Sylvester,* which clarifies and explains the requirements under Sarbanes-Oxley for establishing whistleblower protected activity, the ALJ's determination that Zinn did not engaged in SOX-protected activity constitutes error as a matter of law. I thus join with my colleagues in vacating the ALJ's Decision and Order, and in remanding this case for reconsideration of whether Zinn engaged in whistleblower protected activity under Section 806 of SOX and for such further proceedings as are warranted consistent with the ARB's ruling herein.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

---

84 *See, Melendez v. Exxon Chemicals Americas,* ARB No. 96-051, 93-ERA-006 (ARB, July 14, 2000), slip op. at 11 ("[T]he Secretary and this Board have repeatedly held that the raising of employee safety and health complaints, including the filing of complaints under OSHA, constitutes activity protected by the environmental acts when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes." (citing *Jones v. EG&G Defense Materials, Inc.,* ARB No. 97-129 (ARB, Sept. 29, 1998), slip op. at 7; *Scerbo v. Consolidated Edison Co. of New York,* Case No. 89-CAA-02 (Sec'y, Nov. 13, 1992), slip op. at 4-5)). *See also, Nathaniel v. Westinghouse Hanford Co.,* Case No. 91-SWD-02 (Sec'y, Feb. 1, 1995), slip op. at 8-9; *Dodd v. Polsar Latex,* Case No. 88-SWD-04 (Sec'y, Sept. 22, 1994); *Williams v. TIW Fabrication & Machining, Inc*., Case No 88-SWD-03 (Sec'y, June 24, 1992).

85 *See, e.g., Oliver v. Hydro-Vac Services, supra* (reasonable belief may include complaints that are neither factually nor legally accurate); *Guttman v. Passaic Valley*, Case No. 85-WPC-02 (Sec'y, March 13, 1992), slip op. at 10.

86 *See, Halloum v. Intel Corp.,* ARB No. 04-068, 2003-SOX-07 (ARB, Jan. 31, 2006), slip op. at 6. *Accord, Welch v. Chao*, 536 F.3d 269, 277 (4th Cir. 2008); *Allen v. Administrative Review Board*, 514 F.3d 468, 477 (5th Cir. 2008).