In the Matter of:

KEITH PRIOLEAU, **ARB CASE NO. 10-060**

COMPLAINANT, **ALJ CASE NO. 2010-SOX-003**

v. **DATE:** November 9, 2011

SIKORSKY AIRCRAFT CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Keith Prioleau, *pro se,* Stratford, Connecticut

***For the Respondent*:**
David C. Salazar-Austin, Esq., *Day Pitney LLP*, Hartford, Connecticut

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge;* and Joanne Royce, *Administrative Appeals Judge*. Judge Corchado filed a dissenting opinion.

DECISION AND ORDER OF REMAND

On September 14, 2008, Keith Prioleau filed a complaint with the United States. Department of Labor under the employee protection provision of the Sarbanes-Oxley Act of 2002 (§ 1514A or SOX) and its implementing regulations.[1] He alleged that Sikorsky Aircraft

[1] 18 U.S.C.A. § 1514A (West Supp. 2011); 29 C.F.R. Part 1980 (2010). In 2010, Congress amended Section 1514A. See the Dodd-Frank Wall Street Reform and Consumer Protection Act,

Corporation violated the SOX's employee protection provision when it discharged him because he made a protected report. On summary judgment motion, an Administrative Law Judge (ALJ) issued a decision finding that Prioleau had not engaged in protected activity. The ALJ recommended that Prioleau's claim be dismissed. We reverse and remand for further proceedings consistent with this decision and order.

BACKGROUND

The ALJ set forth the factual background in his Decision and Order (D. & O.) at 2-7. We summarize it here in pertinent part.

Prioleau worked for Sikorsky as a systems engineer assigned to the CH-53K Marine Heavy Lift Replacement (HLR) Helicopter System Development Design Program. D. & O. at 2-3; Complainant's Brief (Comp. Br.) at 5. On the program, Prioleau's duties included Information Assurance, Certification and Accreditation, Statement of Work assistance, requirements decomposition and analysis, and verification and validation that federal requirements were integrated into the HLR CH-53K Helicopter's overall design. Comp. Br. at 5-6. On April 1, 2008, Prioleau received a certificate of recognition for ten years of dedicated service to Sikorsky. Comp. Br., A10. Additionally, Prioleau completed a course on Sarbanes-Oxley on July 16, 2008. Comp. Br., A9. Prioleau's job duties and responsibilities were numerous and included various concerns about technology and security. Comp. Br., A12-A13. Prior to his employment with Sikorsky, Prioleau served as a computer scientist for Computer Sciences Corporation (CSC) where he was part of a team that helped design United Technologies Corporation's (UTC) computer infrastructure. D. & O. at 4. Sikorsky is a subsidiary of UTC. D. & O. at 2.

On June 2, 2009, Prioleau and other salaried Sikorsky employees received an e-mail from Sikorsky's legal department stating that certain electronically stored information (ESI) should be retained when the legal department issued a legal hold notice for that information needed in connection with "pending or reasonably anticipated litigation, government or internal investigation, or subpoena." D. & O. at 4. The legal hold e-mail stated that "[t]his is a compliance issue" and noted that "in 2007, Qualcomm was fined $8.6M for not producing 46K documents (300K pages) that should have been produced." Comp. Br., A6. On June 6, 2009, Prioleau received an e-mail from CSC, warning that there was a UTC Retention Policy, which consisted of a computer application that automatically placed e-mails older than thirty days in a folder where they would be automatically deleted after twenty-one days. D. & O. at 4.

On June 8, 2009, Prioleau electronically submitted a report that explained that these two policies conflicted with each other and that a procedure needed to be in place to resolve the conflict. D. & O. at 4. Prioleau went on authorized leave beginning on June 9, 2009, the day after he wrote and submitted the report on the conflict. D. & O. at 5. He returned to work on

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Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act). The amendments do not affect our decision.

June 23, 2009. D. & O. at 5. Two hours after he returned to work, Sikorsky terminated his employment. D. & O. at 5.

Prioleau filed a complaint on September 14, 2009, alleging that Sikorsky "unlawfully retaliated against [him] by terminating [his] employment on June 23, 2009, for reporting violations of shareholder fraud and § 404 assessment of internal controls of the Act." Complaint at 1 (Sept. 14, 2009).

Following an investigation, OSHA dismissed the complaint because it found that Prioleau did not engage in protected activity and did not state a prima facie case under the SOX. OSHA Findings at 1, 3 (Oct. 1, 2009). OSHA based its decision on the fact that Prioleau's report did not mention shareholders or fraud and did not raise any issues that "constitute reasonably perceived violations of 18 USC § 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." *Id.* at 2. Prioleau objected to OSHA's findings on October 24, 2009, and requested a hearing before an ALJ.

Before the ALJ, Sikorsky moved for summary decision claiming that Prioleau's claim must fail because Sikorsky was not a publicly traded company and was therefore not subject to the SOX and that Prioleau did not engage in protected activity because his internal complaint did not mention fraud, illegal activity, or anything that could reasonably be perceived to be a violation of 18 U.S.C.A. §§ 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. Sikorsky's Motion for Summary Decision at 1 (Dec. 9, 2009). Prioleau opposed the motion with an affidavit and exhibits on December 9, 2009.

On February 3, 2010, the ALJ issued a decision and order granting Sikorsky's motion for summary decision and dismissing Prioleau's complaint because he found that Prioleau did not engage in protected activity. D. & O. at 12.

Prioleau filed a timely appeal to the Board on February 19, 2010.

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the SOX, 18 U.S.C.A. § 1514A(b). The Secretary has delegated that authority to the Administrative Review Board. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). *See* 29 C.F.R. § 1980.110(a).

We review a grant of summary decision de novo, i.e., under the same standard that ALJ's employ. Pursuant to 29 C.F.R. § 18.40(d), an ALJ may "enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d) (2011).

DISCUSSION

The ALJ found no genuine issue of material fact for a hearing concerning Prioleau's claim to have engaged in SOX-protected activity. D. & O. at 12. Specifically, the ALJ found that "since the Complainant did not alert Sikorsky in his report of any suspected fraud against shareholders," Prioleau did not engage in protected activity.

On appeal Prioleau, pro se, asserts that the ARB has clarified that disclosures to management about deficient internal controls fall within the zone of protected conduct and that complaints about violations of SEC rules are protected - they do not have to relate to shareholder fraud. Comp. Br. at 15. Prioleau argues that looking at the e-mails he received and his report in context, it is reasonable to believe that his intent was to report to management a weakness of internal controls that could threaten the integrity of the corporate financial reporting system and thus constitute SOX-protected activity. Comp. Br. at 16-17. Prioleau also asserts that the internal control weakness he identified violates Public Company Accounting Oversight Board (PCAOB) standard, AS5, which the SEC has adopted.[2] Comp. Br. at 17. Finally, Prioleau asserts that the ALJ improperly limited further discovery that would aid in proving he engaged in protected activity and rebut Sikorsky's assertions. Comp. Br. at 21.

Sikorsky responds that Prioleau did not engage in protected activity under the Act. Resp. Br. at 7-9. Sikorsky asserts SOX protects an employee's disclosures only if they implicate the substantive law protected by SOX definitively and specifically. Resp. Br. at 6. Sikorsky points out that Prioleau's report revealed that he did not allege fraud or any facts that would alert Sikorsky that Prioleau believed the company was violating any federal rule or law related to fraud against shareholders. Resp. Br. at 7. Further, Sikorsky asserts that Prioleau's explanation that his report pointed out a material weakness under PCAOB standard AS5 is irrelevant because it was not made in his report but in his complaint. Resp. Br. at 9. Sikorsky avers that even if it were relevant, e-mail preservation does not rise to the level of a material weakness under PCAOB AS5, which provides for four indicators of material weaknesses. Resp. Br. at 10. Finally, Sikorsky argues that a lack of discovery did not prejudice Prioleau and that further discovery would not aid in validating that he engaged in protected activity because everything about his report is known to him at the fullest. Resp. Br. at 11.

The SOX whistleblower provisions (§ 1514A) are contained in Title VIII of the SOX, designated as the Corporate and Criminal Fraud Accountability Act of 2002. Section 1514A

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[2] The Public Company Accounting Oversight Board (PCAOB) was established pursuant to the Sarbanes-Oxley Act of 2002 to oversee the audit of public companies subject to securities laws. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 101-109, 116 Stat. 745, 750-71 (codified at 15 U.S.C.A. §§ 7211-7219 (West Supp. 2011)).

prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain fraudulent acts. That provision provides, in relevant part, that no covered employer

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

18 U.S.C.A. § 1514A.

To prevail on a § 1514A claim, a complainant must prove by a preponderance of the evidence that: (1) he engaged in activity or conduct that § 1514A protects; (2) the respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the adverse personnel action. However, the employer may avoid liability if it proves by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior. 29 C.F.R. § 1980.109(a).

We disagree with the ALJ that Prioleau has failed to generate a genuine issue of material fact that he engaged in protected activity under § 1514A. We do not rule on the merits of Prioleau's claim. We focus only on the employer's failure to demonstrate an absence of a genuine issue of material fact on the issue of protected activity.

On June 8, 2009, Prioleau submitted an electronic internal report to all levels of Sikorsky management including Jeffrey Pino, president of Sikorsky, and Phil Love, Prioleau's senior functional manager and a member of Sikorsky's Quality Control Process Charting (QCPC) team. Comp. Br. at 8. Prioleau's communication stated that: (1) a process should be in place so that employees would know how to correctly preserve information subject to a legal hold, (2) there was a conflict between Sikorsky's legal hold policy and its policy of deleting electronically stored information after a given number of days, (3) conditions as they existed created a conflict such that the automatic retention script may delete employee preservation attempts, and that (4) subcontractors who should have been receiving legal hold notices, may not have been receiving them. Comp. Br., A5.

In his report, Prioleau did not mention fraud or violations of the Securities and Exchange Act. In his Complaint to OSHA however, Prioleau stated the combination of the legal hold policy and the conflicting electronic deletion policy "made it clear that the company and its employees may commit fraud." Complaint at 5 (Sept. 14, 2009). He averred that his training in ACE (Achieving Competitive Excellence), SOX, and Business Ethics and his experience in

information security controls and audit, made clear to him that he was dealing with a SOX internal controls issue that fell under SOX and faulty fraudulent reporting. Complaint at 4 n.10. He further stated that:

> Having taken UTC Business Ethics training (ETH235) a couple months earlier and in previous years it was clear that employees have an obligation to report unethical business practices at the company. Also having completed the UTC SOX Training I was seriously alarmed and felt that this SOX violation had to be immediately reported to management. Therefore, I reported my concerns using the UTC formal ACE Turn-back Reporting System which is reviewed and tracked by senior management at Sikorsky & UTC and was given a tracking number of 19197.
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> Moreover, part of the reason I was so alarmed was due to my previous experiences in and around years 2002/2003 time frame and earlier when I participated in internal audit at UTC Newington Corporate Headquarter Datacenter in preparation for SOX legislation compliance. Note that during that time frame I was employed as a Senior Computer Scientist/Information Security Specialist supporting all United Technologies Corporation divisions' information systems security control and compliance. So today, I have a clear understanding that CSC automated background process running and deleting ESI on employee's computers was in direct violation of securities fraud legislation. I knew then and now that these opposing controls (SAC legal hold notice, automated process, and UTC retention policy) would ultimately disturb the confidentiality, integrity, and availability of all Sikorsky/UTC reporting systems in violation of SOX.
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> An information technology audit is an examination of the controls within an information technology (IT) infrastructure. An IT audit is the process of collecting and evaluating evidence of an organization's information systems, practices, and operations. The evaluation of obtaining evidence determines if the information systems are safeguarding assets, maintaining data integrity, and operating effectively and efficiently as required by section 404 of SOX to achieve the organization's goals or objectives.

Comp. at 3-5 (footnotes omitted).

Further, Prioleau believed that after making this report to all levels of management, the QCPC would forward his report "to the SAC Legal Department, SAC Information Technology Department, and CSC for relentless root-cause analysis to fix the defect." Comp. Br. at 5.

In Prioleau's notice of objection to OSHA findings, Prioleau stated that he was concerned that the automatic script made it difficult for employees to comply with the legal hold notice and could potentially delete information during shareholders litigation, leading to fraud. Comp. Objection at 4 (Oct. 24, 2009). He also stated that the conflict would weaken the effectiveness of the company's internal controls in violation of the Securities and Exchange Act by violating PCAOB standard AS5. Comp. Objection at 4.

We disagree with the ALJ's conclusion that Prioleau did not engage in protected activity, as a matter of law, because he "did not alert Sikorsky in his report of any suspected fraud against shareholders." D. & O. at 12. Furthermore, whether Prioleau's concerns credibly involved a reasonable belief of a SOX violation implicates factual questions about his understanding of the implications of the litigation hold conflict and the automatic retention policy. Therefore, questions of material fact exist about whether Prioleau engaged in protected activity.

First, the ALJ erred in finding that that Prioleau's case must be dismissed because protected activity must relate to shareholder fraud. As indicated above, § 1514A prohibits an employer from retaliating against an employee who complains about "any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C.A. § 1514A. As we observed in *Sylvester v. Paraxel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -42 (May 25, 2011), of the "six categories" set out in SOX § 1514A, "only the last one refers to fraud against shareholders." *Sylvester*, ARB No. 07-123, slip op. at 19. "In examining the SOX's language, it is clear that a complainant may be afforded protection for complaining about infractions that do not relate to shareholder fraud." *Id.* at 20.

Second, the ALJ did not properly undertake the analysis of whether Prioleau reasonably believed that he reported a violation of the Securities and Exchange Act to Sikorsky. The issue whether activity is protected concerns whether a complainant has a reasonable belief that there is a violation when he makes the communication, not whether he communicates that belief to the respondent [3] or whether he puts the respondent on notice of protected activity.[4] The reasonable

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[3] *See Sylvester*, ARB No. 07-123, slip op. at 15 ("[t]he 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."); *see also id*. at 19 (framing the issue as whether the complainants provided information to the respondent "that they reasonably believed related to one of the violations listed in Section 806, and not whether that information 'definitively and specifically' described one or more of those violations."). In *Sylvester*, we made clear that the "definitive and specific" standard that the ARB had employed in prior ARB cases and the ALJ noted in this case (D. & O. at 9-10), was inconsistent with Section 806's statutory language. *Sylvester*, ARB No. 07-123, slip op. at 17. We stated that "[n]ot only is it inappropriate, but it also presents a potential conflict with the express statutory authority of § 1514A, which prohibits a publicly traded company from discharging or in any other manner discriminating against an employee for providing information regarding conduct that the employee 'reasonably believes' constitutes a SOX violation." *Id.*

belief must be both subjective and objective.[5] The Fourth Circuit has stated that the question of "objective reasonableness" is a mixed question of law and fact. *Welch v. Chao*, 536 F.3d 269, 278 n.4 (4th Cir. 2008). Further, "[o]ften the issue of 'objective reasonableness' involves factual issues and cannot be decided in the absence of an adjudicatory hearing." (citations omitted). *Sylvester*, ARB No. 07-123, slip op. at 15.

Objective reasonableness is evaluated based upon the knowledge available to a reasonable person with the same training and experience. *Id.* at 14. Prioleau argued that someone in his position would know that what he reported constituted a violation that the SOX protected, thus demonstrating the objective reasonableness of his belief.[6] Prioleau submitted evidence demonstrating that he received SOX training in July 2008 (Comp. Br. at 7) and was familiar with SOX provisions requiring certification of a company's financial reporting system. Comp. Br. at 7-8. He alleged that earlier in his career he had participated in an internal audit in preparation for SOX compliance. Complaint at 4. He alleged that as a former IT specialist he had helped design UTC's computer infrastructure and became knowledgeable regarding the impact of automatic scripts on SOX sections 302 and 404, relating to internal controls.[7] Complaint at 5 n.11. These factual allegations are sufficient to create a genuine issue of material fact regarding whether Prioleau had a reasonable belief that his report constituted protected activity.

Therefore, we find Prioleau has proffered evidence sufficient to generate a genuine issue of material fact that he communicated a reasonable belief of a violation of §§ 1341, 1343, 1344,

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[4] Although the complainant does not have to put the employer on notice of protected activity to have engaged in protected activity, whether the employer was put on notice may be relevant to whether it retaliated because the employee engaged in protected activity.

[5] *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1000-1001 (9th Cir. 2009); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003; ALJ No. 2007-SOX-005, slip op. at 12 (ARB Sept. 13, 2011).

[6] *Menendez*, ARB Nos. 09-002, -003, slip op. at 12 (citing *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 20 (ARB July 14, 2000) (citing *Minard v. Nerco Delamar Co.*, No.1992-SWD-001, slip op. at 7 n.5 (Sec'y Dec. Jan. 25, 1994)) ("[T]he determination whether a whistleblower's belief is objectively reasonable is based on 'the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience.'").

[7] Prioleau alleges in his Complaint that he believed that the facts included in his ACE report were contrary to certification requirements of SOX §§ 302 and 404. Section 302 requires certain corporate officers to certify in each required report that they are responsible for effective internal controls and that financial statements and other information in the report fairly present in all material respects the financial condition and results of operation of the issuer. Section 404 requires corporate officers to establish and maintain an adequate internal control structure and procedures for financial reporting.

or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. Thus, we find that the ALJ erred in granting summary decision in Sikorsky's favor.

CONCLUSION

For the above reasons, we reverse the ALJ's dismissal of Prioleau's complaint for failing to generate a genuine issue of material fact that Prioleau engaged in protected activity under the SOX. We remand for proceedings consistent with this order.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Luis A. Corchado, Administrative Appeals Judge, dissenting:

I agree with the majority that the ALJ made errors of law that call into question the granting of Sikorsky's motion for summary decision. I also agree that, to prove a SOX whistleblower violation, a complainant need not prove that he provided or caused to be provided information that "definitively" and "specifically" related to a SOX-protected activity. Nor was Prioleau required to "definitively" or "specifically" explain, at the time of his alleged whistleblowing, how his alleged whistleblowing related to SOX-protected activities. As we have previously held, the critical inquiry in establishing that protected activity occurred under SOX is whether the complainant had a reasonable belief that he provided or caused to be provided information related to one of the six categories listed in 18 U.S.C. § 1514A(a) ("SOX" or the "SOX Whistleblower Statute").[8] More specifically, the complainant must demonstrate that, at the time of his alleged whistleblowing, his belief was subjectively and objectively reasonable. When responding to the Respondent's motion for summary decision in a SOX whistleblower case, the law requires the Complainant to proffer sufficient evidence that, if credible, can support a conclusion of subjective and objective reasonableness. As explained below, Prioleau failed to proffer sufficient evidence to proceed to an evidentiary hearing on his SOX whistleblower claim.

[8] *Sylvester v. Paraxel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 14 (ARB May 25, 2011).

1. Procedural Background

The essence of Prioleau's alleged whistleblower complaint is that he reported a perceived conflict between an electronic data destruction practice and a memorandum that spoke of legal holds that *might be* received by the Respondent. According to Prioleau, the electronic data destruction practice *might* cause the loss of electronic records that *might* include financial information which, in turn, *might* impact Sikorsky's financial reporting requirements. Prioleau identifies these multiple contingencies as a "material weakness of financial controls" pursuant to the Public Company Accounting Oversight Board's (PCAOB) Audit Standard 5 (AS5) and, therefore, a SOX violation. It is disputed whether Prioleau's Turn-back report actually stemmed from his concern about the AS5, but this is an issue of fact that must be viewed in the light most favorable to Prioleau, the nonmoving party.[9] Prioleau also questioned whether the Legal Hold Notice was sent to subcontractors but admitted that this "may or may not be an issue."[10] In responding to the motion for summary decision, Prioleau identified a wealth of experience he had with computer infrastructures and information technology. In fact, he claimed to have "intricate knowledge of SAC/UTC infrastructure and the impact the automatic scripts have on the company's ability to comply with Sarbanes-Oxley sections 302 and 404, respectfully[,] internal controls and the assessment of internal controls."[11] Presumably, then, he would be able to articulate more details than the average person about the nature of the material weakness arising from the alleged conflict in electronic data preservation. Prioleau has not alleged or asserted that, at the time of his disclosure, he was aware of (1) an actual litigation hold, (2) lost or missing financial records, or (3) deficient financial reporting.

Sikorsky argues, among other things, that Prioleau's whistleblowing was too vague or too speculative or both. Sikorsky contends that Prioleau cannot now rely on the AS5 to allege a SOX violation, having allegedly failed to raise this reason at the time of his disclosures.[12] Sikorsky argues that even if Prioleau could raise the AS5 in this case, e-mail preservation does not rise to the level of a material weakness under PCAOB AS5, which provides for four indicators of material weaknesses.[13] More importantly, Sikorsky points out the highly speculative nature of Prioleau's alleged whistleblowing complaint. In its motion for summary decision, the Respondent argued that computer systems typically have automatic deletion

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[9] *See, e.g., Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 1999-TSC-004, slip op. at 4 (ARB Feb. 10, 2003).

[10] *See* Comp. Brief, Ex. A6 (Turn-back report).

[11] *See* Complaint at 5, n. 11.

[12] *See* Resp. Br. at 9.

[13] Resp. Br. at 10 (generally indicators were fraud, restated financial statement to correct previous errors, weaknesses identified by an auditor, or ineffective oversight over external and internal controls of *financial reporting*). (Emphasis added).

programs that may need to be halted when litigation is reasonably anticipated. The Respondent attached Prioleau's Turn-back report where Prioleau suggested the need for a process "for when" a legal hold is sent and to preserve electronically stored data that "may be needed."[14]

The ALJ dismissed Prioleau's complaint for lack of protected activity as described in 18 U.S.C. § 1514A.[15] The ALJ correctly noted that Prioleau's belief of a SOX violation must be objectively reasonable and the ALJ embarked on a careful analysis of this issue.[16] As discussed by the majority opinion, the ALJ incorrectly required that the SOX disclosure relate to shareholder fraud. In addition, while necessarily following ARB precedent, the ALJ erroneously required that the disclosure "definitively and specifically" relate to a SOX violation. Nor was the Complainant required to communicate or explain, at the time of this disclosure, why his belief of a SOX violation was objectively reasonable. But Sikorsky's motion for summary decision does now require Prioleau to proffer the evidence required under 29 C.F.R. § 18.40 on the issue of objective reasonableness. Understandably, Prioleau appears pro se and is entitled to some leeway; however, even if done inartfully, a complainant must at least point to evidence that he will bring to trial as to the essential elements of his claim. In this case, Prioleau amply described his sophistication with computer infrastructure and SOX reporting requirements; therefore, his status as pro se should not have hindered his ability to point to the technical evidence supporting his claim of objectively reasonable whistleblowing. The question is whether Prioleau pointed to enough evidence to satisfy his burden under 29 C.F.R. § 18.40. To answer this question it is critical to review the purpose of a motion for summary decision.

2. Motions for Summary Decision

We have repeatedly recognized that 29 C.F.R. § 18.40 incorporates into the administrative proceedings the summary judgment procedure described in Rule 56 of the Federal

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[14] *See* Resp. Motion for Summary Decision at 10.

[15] See D. & O. at 9-13. 18 U.S.C. § 1514A(a) describes protected activity as follows:

> 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 . . . .

[16] Our recent ruling in *Sylvester* provides some guidance in this case on the issue of protected activity. In that case, we ruled that the SOX whistleblower statute focused exclusively on the complainant's beliefs to determine whether he or she engaged in protected activity. In that case, we ultimately found that the complainants provided sufficient information in their complaints to withstand a motion to dismiss. We did not address the proper burden of producing evidence of subjectively and objectively reasonable belief when responding to a motion for summary decision, the procedural posture of the present case.

Rules of Civil Procedure.[17] Consequently, it is important to recall that one essential purpose for summary judgment motions was to allow parties to pierce the allegations of the pleadings and test whether there is evidence to support some or all of the dispositive allegations. [18] The OALJ rule incorporates the two prongs required to obtain a summary decision, proving: (1) the absence of a genuine dispute of material fact and (2) entitlement to judgment under the current state of the law. The first prong is the focus of this case, whether there is a genuine issue of a material fact.

The law defining a genuine issue of material fact is well settled. A "material fact" is one whose existence affects the outcome of the suit.[19] A "genuine issue" exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[20] "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.'"[21]

Though not very clear, 29 C.F.R. § 18.40 appears to incorporate two well-recognized methods by which a respondent can demonstrate the lack of a genuine issue of material fact. One method is to assert that the complainant lacks evidence to support an essential element of his case.[22] In such a case, the complainant must specifically identify facts that, if true, could meet

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[17] See *Trammell v. New Prime, Inc.*, ARB No. 07-109, ALJ No. 2007-STA-018, slip op. 4-5 (ARB Mar. 27, 2009).

[18] *See, e.g., Swettlen v. Wagoner Gas & Oil, Inc.*, 369 F. Supp. 893 (W.D. Pa. 1974) (Summary judgment is a method of testing, in advance of trial, not just the bare contentions found in the legal verbiage of the pleadings but whether there is in actuality any real basis for relief or defense). *See also McCormick v. Ross*, 506 F.2d 1205 (8th Cir. 1974) (When a party seeks summary judgment and makes out a convincing showing that genuine issues of fact are lacking, the adversary is required to demonstrate by receivable facts that a real, not a formal, controversy exists in order to defeat the motion for summary judgment); *Beal v. Lindsay*, 468 F.2d 287 (2d Cir. 1972) (When the movant for summary judgment comes forward with facts showing that his adversary's case is baseless, the opponent cannot rest on the allegations of the complaint but must adduce factual material that raises a substantial question of veracity or completeness of the movant's showing or that presents countervailing facts).

[19] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[20] *Id.*

[21] *American Int'l Group, Inc. v. London Am. Int'l Corp. Ltd.*, 664 F.2d 348, 351 (2d Cir. 1981) (quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975)).

[22] See 29 C.F.R. § 18.40(a) (allows motion to be filed "with or without affidavits"). This is similar to the rules of federal civil procedure. *See Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 111 (2d Cir. 2001) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)) (a party "need not prove a negative when it moves for summary judgment on an issue that the [nonmoving party] must prove at trial. It need only point to an absence of proof on [the nonmoving party's] part, and, at

his burden of proof at trial.[23] Another method of testing the pleadings is for the respondent to attach affidavits or other documents and evidence, which purport to state the undisputed facts and challenge the complainant to produce admissible, contrary evidence that creates a genuine issue of fact.[24] In this latter method, the opposing party must do more than identify specific facts but must go beyond the pleadings and attach admissible contradictory evidence to raise a genuine issue of material fact. If the opposing party fails to attach admissible evidence, then the judge could find that there is no genuine issue of material fact and proceed to determine whether the moving party is entitled to judgment as a matter of law. Stated more simply, the complainant must identify the evidence he will bring to trial and such evidence, if believed at trial, must be enough to allow for a ruling in his favor on the issue in question. At trial, generally, the complainant can not simply hand his complaint and pleadings to the judge and expect to prove his case.

3. Prioleau's Alleged Protected Activity

Turning to the issue of protected activity in this case, we must engage in a snapshot historical analysis of Prioleau's alleged SOX disclosure and determine whether his belief at that moment was objectively reasonable. To avoid summary dismissal of his claim, he needed to provide specific facts and evidence for the essential element of protected activity, more specifically the objective reasonableness of his belief that the conflict was a material weakness in *financial reporting*, as he claimed.[25] He needed to proffer evidence that could show, if credible, it was objectively reasonable to believe that the potential loss of electronic data translates into a "material" weakness of *financial reporting*. Again, the fact that he is pro se has nothing to do with his ability or lack of ability to use his technical knowledge and skill to explain factually the objective reasonableness of his belief that he was reporting a SOX violation, not just a problem that might occur in responding to future litigation holds.

Viewing the evidence most favorably toward Prioleau, his complaint of a perceived "conflict" by itself cannot be reasonably considered a SOX violation. First, it is undisputed that the Legal Hold Notice itself spoke of notices in the future and was not itself a legal hold.[26] Consequently, contrary to the ALJ's conclusion, there was no present dilemma when Prioleau

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that point, [the nonmoving party] must 'designate specific facts showing that there is a genuine issue for trial."').

[23] *Anderson*, 477 U.S. at 256 (at this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof).

[24] *See* 29 C.F.R. § 18.40(c).

[25] See *Celotex Corp.*, 477 U.S. at 322-23 ("failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial").

[26] See Comp. Br., Ex. A6 ("Compliance with Legal Hold Notification" stating that "[f]rom time to time you may receive a legal hold notice . . . .").

raised his concern because there was no litigation hold presented in the record that required documents to be preserved.[27] Second, and more significantly, the Legal Hold Notice plainly stated that the legal hold notices would provide instructions to recipients to "prevent the deletion, destruction, or alteration of potentially relevant ESI" and that Sikorsky has "tried to minimize the burden upon individual hold notice recipients" and "UTC has invested significant resources to facilitate compliance and to mitigate risk."[28] Given Prioleau's self-proclaimed extensive experience in computer infrastructures, he should have been able to articulate some information as to why it was objectively reasonable to believe that Sikorsky's efforts were potentially not enough and still created a material risk of lost ESI that would effect financial reporting. Prioleau provided no such contrary information. Therefore, I believe that the ALJ correctly concluded that Prioleau's June 8, 2009 Turn-back report of a "conflict" failed to relate in any way to a SOX violation and, therefore, reliance on the conflict alone as a SOX violation was not objectively reasonable.[29] The next question is whether the added reliance on the AS5 was enough to create objective reasonableness.

As a matter of law, and assuming as true that Prioleau contemplated the AS5 when he complained about the "conflict," he utterly failed to present evidence that could support a finding of an objectively reasonable belief of an AS5 violation. First, similar to the issue of the "conflict," Prioleau failed to demonstrate any weakness presently existed. Most importantly, assuming that data would be lost, he neither presented evidence nor articulated facts that could reasonably be considered evidence of a "material" weakness of internal controls of financial reporting. Instead, in his response, Prioleau simply repeated the same conclusory incantations of "material weakness" and "serious" problem. He said he knew there was a "serious" problem because of his previous experiences in 2002-2003.[30] But he did not elaborate on this "serious" problem or respond to Sikorsky's charge of mere speculation of a financial reporting problem, despite his "intricate" knowledge of the company's computer infrastructure.[31] Prioleau's

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[27] *See* D. & O. at 10. The ALJ concluded that the Complainant's report states that there is a "conflict [which] creates a condition where employees attempting to comply with the Legal Hold Notice *may* actually violate the policy because of the automatic retention scripts deletes preservation attempts."

[28] See Comp. Br., Ex. A6.

[29] Prioleau seemed to implicitly recognize that the "conflict" alone was insufficient to state a SOX violation because, in his response to the Sikorsky's motion for summary decision, he tries to explain how the word "conflict" meant more. *See* Comp. Affidavit and Reply Motion to Respondent's Motion for Summary Decision at 9.

[30] SOX was signed into law July 30, 2002.

[31] *Cf. Foecker v. Allis-Chalmers*, 366 F. Supp. 1352 (D.C. Pa. 1973) (defendant entitled to summary judgment where plaintiff alleged that defendant alleged negligent design and manufacture but presented no evidence in support of those allegations); *Aetna Life Ins. Co. v. Harley*, 365 F. Supp. 1210 (D.C. Ga. 1973) (stubborn reliance upon allegations and denials in pleadings will not alone suffice to defeat a motion for summary judgment, when faced with affidavits or other materials showing the absence of triable issues of material fact).

additional argument that violating the AS5 violates SOX merely restates the same conclusory assertions that are devoid of evidence for objective reasonableness at this stage of the proceedings. His explanation that he meant to say "fraud" instead of "conflict" still does not get to the objective reasons for asserting that there was a "material weakness of internal controls over financial reporting" under AS5.[32] Continuing to beg the question, he argues that a jury would believe that he was trying to report about a "material weakness in internal controls" but not what an objectively reasonable employee would believe with the same training, skill, knowledge and experience as Prioleau.[33] It was not enough to assert that computer script might delete e-mails indiscriminately and that employees "may" not get a chance to police their e-mails.[34] This fact and all of Prioleau's assertions taken together do not objectively connect the perceived problem to a "reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis."[35] Prioleau's assertions require too many assumptions and giant leaps in logic about Sikorsky's actual responses to legal holds, its financial records, and its financial reporting requirements that would be highly improper in deciding a motion for summary decision. To raise a genuine issue of fact on the question of objective reasonableness, it was Prioleau's obligation as the complainant to provide some factual bridges between the potential "conflict" he perceived and Sikorsky's internal controls over financial reporting; he failed to do this. Therefore, in the end, I would affirm the ALJ's grant of summary decision.[36]

LUIS A. CORCHADO
Administrative Appeals Judge

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[32] *See* Comp. Br. at 4.

[33] *See* Complaint at 8.

[34] *See* Comp. Br. at 19.

[35] *See* Comp. Br., Ex. A17 ("material weakness" defined).

[36] The record reflects that Prioleau served discovery requests. But, Prioleau's failure to articulate support for the objective reasonableness of his beliefs was not dependent on discovery.