



In the Matter of:

ANITA JOHNSON,

ARB CASE NO. 11-035

COMPLAINANT,

ALJ CASE NO. 2010-SOX-038

v.

DATE: February 25, 2013

THE WELLPOINT COMPANIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Anita Johnson, *pro se*, Richmond Hill, Georgia

For the Respondent:

Steven J. Pearlman, Esq.; Kenneth D. Sulzer, Esq.; and Erin McPhail Wetty, Esq.;
***Seyfarth Shaw, L.L.P.*; Chicago, Illinois**

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX), 18 U.S.C.A. § 1514A (Thomson/West Supp. 2012) and its implementing regulations, 29 C.F.R. Part 1980 (2012). Complainant Anita Johnson filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that her employer, WellPoint Companies Inc. (WellPoint), violated SOX when it terminated her employment. On February 25, 2011, a

Department of Labor (DOL) Administrative Law Judge (ALJ) granted WellPoint's motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, and granted summary decision in favor of WellPoint. Johnson petitioned the ARB for review. We reverse the ALJ's order granting the motion to dismiss and motion for summary decision, and remand for further proceedings.

BACKGROUND

A. Facts

The following facts, which are set out in the ALJ's February 25, 2011, order, are taken from Johnson's complaint and affidavits, and exhibits filed with the ALJ below.¹

WellPoint is a publicly-traded company with offices in the State of Georgia. Johnson Complaint at ¶ 1 (Jan. 20, 2009). The company maintains contracts with several state governments for the administration of state-sponsored members' health insurance plans. *Id.* at ¶ 6. The state government contracts require that WellPoint maintain certain levels of productivity and timeliness in processing such correspondence inquiries. *Id.* WellPoint was required to document its performance and compliance with these standards with periodic reports concerning the numbers of correspondence inquiries that WellPoint had received, the number of correspondence inquiries that had been resolved, and the number of correspondence inquiries that remained unresolved and open at the end of each reporting period. *Id.* If WellPoint failed to meet the productivity and timeliness requirements of the state contracts, it would be in breach of its contracts with state governments. *Id.* Johnson began working at WellPoint in April 2002, and was involved in "processing of correspondence including complaints or inquiries concerning the receipt of benefits or payments of fees made to health care providers" who "rendered medical services to state-sponsored members." *Id.* at ¶ 5. The correspondence was logged into the company's computer tracking system. *Id.*

In May 2007, Jennifer Wade, a Vice President of Consumer Operations, promoted Johnson to manage the Customer Care Call Center at the company's "State-Sponsored" business unit in Savannah, Georgia and Carmillo, California. Johnson Correction of Deficiencies In Pleading at ¶ 2 (filed Feb. 3, 2011) (Correction of Deficiencies); see also ALJ Ord. at 20, 23, citing CX² 2 (Wade Deposition) (Dec. 9, 2010). Johnson was responsible for overseeing correspondence processing at these Call Centers, alleviating the backlog of claims, and supervising Center managers in the processing of correspondence. Correction of Deficiencies at ¶ 2; see also ALJ Ord. at 20. From May 2007 to September 2008, Johnson and Wade met monthly, and Johnson raised several issues associated with Call Center operations. Correction of

¹ *Johnson v. WellPoint*, ALJ No. 2010-SOX-038 (Feb. 25, 2011) (ALJ Ord.).

² "CX _" refers to items included with Complainant's Exhibits. "RX _" refers to items included with Respondent's Exhibits. These items are cited in the ALJ's February 25, 2011, Decision.

Deficiencies at ¶ 4. Johnson informed Wade that the company’s “D-950 system was inadequate to support the required activities for claim correspondence processing of Medicaid Plans and other State-Sponsored Programs.” *Id.* Johnson discussed with Wade her belief that there “was a lack of internal controls in place to ensure adequate processing of incoming claims and for reporting correspondences, thus the process for reporting correspondence was inadequate and did not include all of the variables required to capture an accurate projection of inventory levels on which WellPoint was to report in its financial reports.” *Id.*

In June 2008, WellPoint’s ethics and compliance department received an allegation that Johnson and Carolyn Harper, a Savanna Call Center Manager, were advising employees to close correspondence/contact logs before resolving the claims. ALJ Ord. at 21, citing RX D & CE 2 (Wade Dep.). Wade was notified, and the Ethics and Compliance Office conducted an investigation. ALJ Ord. at 21-22 (citing RX D, CE 2 (Wade Dep.)), 24-25 (citing RX C, CE 4 (Hunt Dep.)). When confronted about the allegation, Johnson responded that she “hadn’t done anything.” ALJ Ord. at 18, citing RX E, CE8 (Johnson Dep.). Johnson told Wade that neither she nor Harper had any “motive for doing so since the company excluded the open correspondence inquiries in its statistical reports to the state governments on the company’s performance, thus leaving no advantage to Ms. Harper or Ms. Johnson prompting them to permit employees to prematurely close out their correspondence inquiries before the matters had been fully resolved.” Johnson Complaint at ¶ 10. Wade fired Johnson and two other managers she supervised on October 21, 2008. ALJ Ord. at 18, citing RE3, CE 8 (Johnson Dep.); Correction of Deficiencies at p. 6.

B. Proceedings Below

Pending a hearing before the ALJ, WellPoint moved to dismiss Johnson’s complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The company contended that the complaint failed to state a claim for relief under SOX because Johnson’s complaints to the company did not constitute protected activity under SOX. Johnson opposed the motion. She argued that her discussions with Wade from May 2007 through September 2008 constituted SOX-protected activity. See ALJ Ord. at 2, citing Complainant’s Response to Motion To Dismiss (filed Dec. 14, 2010).

On January 20, 2011, the ALJ issued an order allowing Johnson to correct deficiencies in her complaint to “set forth facts demonstrating communications to her supervisor” during May 2007 through September 2008, “which expressed definitive and specific concern” that WellPoint had “committed or [was] committing mail fraud, wire fraud, stock fraud and/or fraud on the shareholders.”³ Johnson filed a “Correction of Deficiencies in Pleadings” and supplemented her

³ See ALJ’s Order Granting Complainant Opportunity to Correct Deficiencies in Pleadings Prior To Final Ruling On Respondent’s Motion To Dismiss Pursuant To FRCP Rule 12(b)(6) at 5 (Jan. 20, 2011).

complaint with additional details about her conversations with Wade and some documents obtained during discovery.⁴

On January 31, 2011, WellPoint moved for summary decision under 29 C.F.R. § 18.40, and included with the pleading other documents substantiating the company's contention that Johnson did not engage in protected activity; the company alleged that Johnson never complained of fraudulent activities to Wade, Nathan Hunt, the company's ethics and compliance investigator, or M. McGee, a human resources manager for the company. See Respondent's Motion for Summary Decision, Attachment 11. Johnson opposed the motion, and in support submitted various supplemental documents, including depositions. See ALJ Ord. at 3, citing Complainant's Response to Motion for Summary Decision (filed Feb. 14, 2011).

C. ALJ's February 25, 2011, Order Granting Motion to Dismiss Under Rule 12(b)(6) And Summary Decision Under 29 C.F.R. § 18.40

On February 25, 2011, the ALJ granted WellPoint's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and summary decision in favor of WellPoint under 29 C.F.R. § 18.40.

1. ALJ's ruling on motion to dismiss

The ALJ stated that to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the non-moving party must "amplify a claim for relief with plausible factual content, which if accepted as true 'allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.'" ALJ Ord. at 4. The ALJ stated that Johnson's allegations of protected activity "must set forth facts that she provided definitive and specific information to her employer about conduct that she reasonably believed constituted one of six violation types enumerated in SOX" (*Id.*), and there must be "a definitive and specific expression of concern to the employer over the perceived violation(s)" (*Id.* at 5). See also *Id.* at 13 ("In this case, the alleged facts must contain not only Complainant's subjective/objective reasonable belief of activity that would violate one or more of the six protected areas of the Act, but also include a definitive and specific expression of concern communicated to Respondent over the perceived violations.").

Based on the complaint, an amendment, and documents attached to or referenced in the complaint, the ALJ determined that Johnson failed to "set forth any alleged fact in support of the requirement that her alleged concern over mail fraud and/or wire fraud being committed by Respondent was communicated to any Respondent agent, let alone to the person she alleged made the decision to terminate her employment." *Id.* at 14. The ALJ determined that the "first mention of wire fraud and mail fraud to Respondent came in the Complainant's initial complaint filed after her employment was terminated. *Id.* The ALJ found that Johnson did not imply violations of federal security law and regulations until the filing of her amended complaint in

⁴ ALJ Ord. at 10-12; Complainant's Correction of Deficiencies in Pleadings (filed Feb. 3, 2011).

June 2010. *Id.* at 15. The ALJ held that for securities fraud to be alleged under Rule 10b of the Exchange Act, the facts alleged “must at least approximate the basic elements of securities fraud [which include:] . . . (1) a material representation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss.” *Id.* The ALJ stated that to survive a motion to dismiss, the employee “must have an objective reasonable belief that the company intentionally misrepresented or omitted certain facts to investors which were material and which risked loss and would have been viewed by the reasonable investor as having significantly altered the total mix of information available.” *Id.* The ALJ determined that Johnson failed, as a matter of law, to “adequately allege an offense under SOX upon which relief may be granted. *Id.*

2. ALJ’s ruling on summary decision

The ALJ stated that summary decision under 29 C.F.R. § 18.40 is proper where the “pleadings, discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to a material fact and a party is entitled to judgment as a matter of law.” ALJ Ord. at 6. Evaluating affidavits and supplemental documentary evidence, *Id.* at 15-32, the ALJ determined that Johnson “failed to establish that she communicated to appropriate personnel that fraudulent activity with[in] the scope of SOX had occurred, or was ongoing.” *Id.* at 33. The ALJ further determined that Johnson “failed to establish she engaged in ‘protected activity,’” and that the company knew that Johnson’s activity would be protected under SOX. *Id.*

Based on the pleadings and documentary evidence, the ALJ determined that during the company’s ethics evaluation of the Savannah Call Center, Johnson denied that Center employees were inappropriately closing open correspondence. *Id.* The ALJ also determined that during the investigation, Johnson did not report any allegation of mail fraud, wire fraud, violations of SEC regulations, or other activities related to fraud on shareholders by the company. *Id.* The ALJ observed that Johnson “first complained of SOX specific violations in her initial complaint to OSHA after she was terminated,” and held that this “cannot be considered ‘protected activity’ under SOX.” *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under SOX. Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378-69380 (Nov. 16, 2012); 29 C.F.R. § 1980.110(a). The ARB reviews an ALJ’s order on motions to dismiss and summary decision de novo. *Boyd v. U.S. Env’l Prot. Agency*, ARB No. 10-082, ALJ No. 2009-SDW-005, slip op. at 2-3 (ARB Dec. 21, 2011); *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 6 (ARB Dec. 28, 2012).

DISCUSSION

A. Statutory Framework

SOX Section 1514A(a) provides whistleblower protection for employees of publicly-traded companies who report certain acts that they reasonably believe to be unlawful. 18 U.S.C.A. § 1514A(a). To prevail in a SOX proceeding, an employee must prove by a preponderance of the evidence that he: (1) “engaged in activity or conduct that the SOX protects; (2) the respondent took an unfavorable personnel action against . . . him; and (3) the protected activity was a contributing factor in the adverse personnel action.” *Sylvester v. Paraxel Int’l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011). If the employee proves these elements, the employer may avoid liability if it can prove “by clear and convincing evidence” that it “would have taken the same unfavorable personnel action in the absence of the [protected] behavior.” 29 C.F.R. § 1980.104(c); *Poli v. Jacobs Eng’g Grp., Inc.*, ARB No. 11-051, ALJ No. 2011-SOX-027, slip op. at 4 (ARB Aug. 31, 2012).

B. The ALJ erred in dismissing Johnson’s claim under Fed. R. Civ. P. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal of a case for “failure to state a claim upon which relief can be granted.” However, because “federal litigation materially differs from administrative whistleblower litigation within the Department of Labor . . . a different legal standard for stating a claim” is required in cases pending before the agency. *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 6 (ARB July 31, 2012), citing *Sylvester*, ARB No. 07-123, slip op. at 12-13. To survive a motion to dismiss in this administrative proceeding, Johnson’s complaint is reviewed to determine whether it provides “fair notice of [her] claim.” *Evans*, ARB No. 08-059, slip op. at 9. In *Evans*, we explained that “fair notice” for purposes of surviving a motion to dismiss requires a showing that the complaint contains: “(1) some facts about the protected activity and alleging that the facts relate to the laws and regulations of one of the statutes in the [DOL’s] jurisdiction; (2) some facts about the adverse action; (3) an assertion of causation, and (4) a description of the relief that is sought.” *Id.* Johnson’s complaint clearly satisfies this threshold.

First, Johnson’s complaint alleges facts about her purported protected activity and pertinent laws within the DOL’s jurisdiction. The OSHA complaint contends that WellPoint’s exclusion of the open files from its reports to the states with respect to state-sponsored health care customers violated 18 U.S.C.A. §§ 1341 and 1343, and that Johnson’s termination violated 18 U.S.C.A. § 1514A(a)(1)(C). Johnson’s Complaint at ¶¶ 12, 15 (Jan. 20, 2009). Moreover, in objecting to OSHA’s denial of her complaint, Johnson stated concerns that she purports to have raised with Wade about WellPoint’s policy of excluding open correspondence logs from company reporting. She stated in her complaint that she reasonably believed that the processing faults she disclosed to Wade “constituted violations of Section 10(b) of the Exchange Act; violations of the internal accounting controls and books and records provisions of Section 13 of the Exchange Act; and violations of Sections 13 and 33 of the Investment Company Act of 1940.” Correction of Deficiencies at ¶ 13. Additionally, she alleged that she verbally informed Wade about open correspondence logs that WellPoint did not report internally or externally

despite the impact of that omission on the accuracy of inventory representations, which formed part of WellPoint's liabilities and financial reporting and implicated compliance with contracts for state-sponsored programs.⁵

Second, Johnson's complaint contains facts about the adverse action she suffered, and an assertion of causation. Johnson's complaint states that WellPoint fired her on October 21, 2008. ALJ Ord. at 8. The complaint states that the termination occurred after Johnson informed her supervisor, Wade, about "information . . . reveal[ing] that WellPoint's reporting of correspondence inventory did not meet the requirements for the administration of the state health insurance programs." ALJ Ord. at 8, citing Johnson Complaint (Jan. 20, 2009); see also ALJ Ord. at 708, citing Johnson Complaint at ¶¶ 10-14 (Jan. 20, 2009).

Finally, the complaint contains a description of the relief sought. In the complaint, Johnson seeks reinstatement at the company, full back pay and interest since October 21, 2008, costs, and any other appropriate relief. Johnson Complaint at ¶ 15 (Jan. 20, 2009).

The ALJ granted the motion to dismiss Johnson's complaint applying standards not required for review of a complaint filed in an administrative proceeding under SOX. As we explained in *Evans*, "[a]dministrative complaints filed with DOL are informal documents that initiate an investigation into allegations of unlawful retaliation." ARB No. 08-059, slip op. at 7. In this case, there was sufficient information contained in Johnson's complaint to satisfy the threshold requirements to survive a motion to dismiss under the standard enunciated in *Evans*.⁶

C. The ALJ's grant of summary decision in favor of WellPoint was error

Summary decision under 28 C.F.R. § 18.40(d) is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. *See also Williams*, ARB No. 12-024, slip op. at 6. The first step of this analysis is to determine whether there is any genuine issue of a material fact. *Id.* If the pleadings and documents that the parties submitted demonstrate the existence of a genuinely disputed material fact, then summary decision cannot be granted. *Id.* Denying summary decision because there is a genuine issue of

⁵ Johnson's Response to WellPoint Inc.'s Motion To Dismiss Complaint (filed June 23, 2010) at 4.

⁶ The ALJ granted the motion to dismiss in this case in part because the facts alleged in Johnson's complaint failed to set out facts communicating "definitely and specifically" to Wade, Hunt, or any other manager prior to her firing that WellPoint's conduct in handling its claims correspondence had any of the required elements of violations of federal statutes related to mail or wire fraud. ALJ Ord. at 4-5. This was error. In *Sylvester*, the ARB held that the "definitive and specific" standard conflicts with section 806's statutory language, 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. *Sylvester*, ARB No. 07-123, slip op. at 17. Moreover, the ALJ's use of this standard in ruling on a motion to dismiss was error for reasons set out in *Evans*.

material fact simply indicates that an evidentiary hearing is required to resolve some factual questions and is not an assessment on the merits of any particular claim or defense. *Id.* As we have explained:

Determining whether there is an issue of material fact requires several steps. First, the ALJ must examine the elements of the complainant's claims to sift the material facts from the immaterial. Once materiality is determined, the ALJ next must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. The party moving for summary decision bears the burden of showing that there is no genuine issue of material fact. When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the non-moving party, the complainant in this case. The moving party must come forward with an initial showing that it is entitled to summary decision. The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim.

In responding to a motion for summary decision, the nonmoving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts that could support a finding in his favor. *See* 29 C.F.R. § 18.40(c). If the moving party presented admissible evidence in support of the motion for summary decision, the non-moving party must also provide admissible evidence to raise a genuine issue of fact. In reviewing an ALJ's summary decision, we do not weigh the evidence or determine the truth of the matters asserted.

Williams, ARB No. 12-024, slip op. at 6, quoting *Hasan v. Enercon Servs., Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-22, -027; slip op at 4-5 (ARB July 28, 2011) (citations omitted).

The ALJ determined, based on additional evidence beyond the complaint, that there were no genuine issues of material fact with respect to Johnson's purported protected activity, and granted summary decision in WellPoint's favor. The ALJ based his grant of summary decision on his determination that Johnson failed to report activity "implicating mail fraud by the Respondent, wire fraud by the Respondent, violations of SEC regulations by the Respondent, or other activities related to fraud on shareholders," and that Johnson did not state specific SOX violations until she filed her complaint with OSHA. ALJ Ord. at 33. This was error. Contrary to the ALJ's determination, there are genuine issues of material fact in the case that preclude a grant of summary decision on protected activity.

First, the ALJ construed too narrowly the meaning of protected activity. 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.” *Sylvester*, ARB No. 07-123, slip op. at 19. “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.” *Id.* at 20. *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. *Zinn v. Am. Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 8 (ARB Mar. 28, 2012) (quoting *Sylvester*, ARB No. 07-123, slip op. at 17). Thus, an allegation of shareholder fraud is not a necessary component of protected activity under SOX Section 806. *Id.*

By requiring Johnson to show elements of securities fraud to withstand a motion for summary decision, 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. *Zinn*, ARB No. 10-029, slip op. at 9. “[R]equiring 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.” *Zinn*, ARB No. 10-029, slip op. at 9, quoting *Sylvester*, ARB No. 07-123, slip op. at 22. 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.” *Zinn*, ARB No. 10-029, slip op. at 9. 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. *Id.* at 9 (quoting *Sylvester*, ARB No. 07-123, slip op. at 22). The ALJ’s requirement that Johnson prove, on motion for summary decision, elements of securities fraud as part of her SOX complaint was thus improper.

Rather than prove an actual violation of shareholder fraud to withstand a motion for summary decision, Johnson must instead show a “reasonable belief” of a violation of law that falls within the scope of SOX. *Zinn*, ARB No. 10-029, slip op. at 9; *Prioleau v. Silorsky Aircraft Corp.*, ARB No. 10-060, ALJ 2010-SOX-003, slip op. at 7-8 (ARB Nov. 9, 2011). The concept of “reasonable belief” includes both an objective and subjective component. *Zinn*, ARB No. 10-029, slip op. at 6-7. The objective component of reasonable belief “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.*, slip op. at 7 & n.28. To satisfy subjective reasonableness, the employee must actually have possessed the belief that the conduct he complained of constituted a violation of relevant law. *Id.*⁷ The subjective element has also

⁷ “[T]he law is *not* meant to protect those whose complaints are *not* undertaken in subjective good faith.” *Day v. Staples*, 555 F.3d 42, 55 (1st Cir. 2009) (emphasis added). “Subjective reasonableness requires that the employee actually believed the conduct complained of constituted a violation of pertinent law,” and in this regard, “the plaintiff’s particular educational background and sophistication [is] relevant.” *Sylvester*, ARB No. 07-123, slip op. at 14-15, quoting *Day*, 555 F.3d 42, 54 n.10 (internal quotations omitted).

been described as having a “good faith” requirement. *Sylvester*, ARB No. 07-123, slip op. at 14, citing *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1002 (9th Cir. 2009). “The legislative history of Sarbanes-Oxley makes clear that its protections were ‘intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise.’” *Id.*, quoting *Van Asdale*, 577 F.2d at 1002 (citing 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002)). Moreover, the reasonable belief standard requires an examination of the reasonableness of a complainant’s beliefs *not* whether those beliefs were actually communicated to management or the authorities.⁸ Based on the record, there is a genuine issue of material fact whether Johnson had a reasonable belief of a violation.

The disputed material facts as to protected activity in this case stem from the communications between Johnson and Wade during their monthly meetings from May 2007 until September 2008. Johnson alleged that she informed Wade many times that WellPoint’s practice of excluding open correspondence inquiries from its performance reports to its state contractors was fraudulent and misrepresented information to its investors. Johnson’s Complaint at ¶ 10 (Jan. 20, 2009); Correction of Deficiencies at ¶ 4-5 & pp. 3-4. Johnson believed that WellPoint’s “failure to report internally or externally report the number of open claim correspondence was significant” for many reasons, including “misrepresent[ing] the accuracy of the Claims Reserves category on WellPoint’s financial statement.” Correction of Deficiencies at ¶ 15 & p. 8. Johnson believed that “[b]y not including the number of open-pended correspondence in the total inventory that is reported to the principal stakeholders is . . . a violation of the Medicaid state contract terms with WellPoint.” *Id.* at ¶ 15 & p. 8. She also believed that WellPoint’s failure to report this information meant that WellPoint understated the number of open claims it was processing at any given time, which increased “the cost of business associated with Medicaid patients.” *Id.* at ¶ 15 & p. 8.

Wade disputes this account. In her deposition, Wade denied Johnson’s allegations that they discussed any potential fraud concerns at their monthly meetings. See Wade Affidavit at 5 (Jan. 26, 2011). In her deposition, Wade stated that the concerns Johnson and other managers presented to her about the correspondence backlog were “operational in nature” and had nothing to do with SEC violations. Wade Dep. at 101 (dated Dec. 9, 2010). Wade stated that correspondence reporting had no direct tie to WellPoint’s financial systems, and that instead WellPoint tracked correspondence from an inventory perspective. Wade Dep. at 148, 151. The information flowing to the financial systems would relate to the actual claims processed because that number affected the amount of money that WellPoint would pay out and its pricing and operating costs. *Id.* Wade stated in her affidavit that “at no time did Johnson ever tell me that WellPoint or any of its employees were engaging in fraudulent conduct of any type.” Wade Affidavit at 5. Wade stated further that “Johnson never indicated or made any statements suggesting that WellPoint was engaging in any conduct that defrauded, deceived, or intentionally misled any of its clients, shareholders, or any other entities or individuals.” *Id.*

⁸ See *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006) (court of appeals reverses ARB’s misapplication of the reasonable belief standard where the agency required that complainant actually convey the reasonable belief to management).

Whether Johnson engaged in protected activity under the SOX turns on credibility. An ALJ is afforded great deference in assessing credibility of witnesses. *Chen v. Dana Farber Cancer Inst.*, ARB 09-058, ALJ No. 2006-ERA-009, slip op. at 9 (ARB Mar. 31, 2011). Here, Johnson states that she discussed the fraudulent implications of the correspondence backlog and the inadequate internal controls,⁹ while Wade states that no such discussions occurred.¹⁰ The ALJ must resolve these contradictory facts. *See, e.g., Hasan*, ARB No. 10-061, slip op. at 9 (“It may be that the ALJ will come to the same conclusion after an evidentiary hearing, but there is contradictory evidence that requires factual determinations after allowing Hasan to call witnesses and challenge the credibility of Enercon’s proffered reasons. Therefore, solely because of the conflicting evidence raising questions of material fact regarding causation, we reverse the ALJ’s dismissal.”). This conflicting evidence raises a genuine dispute over material facts regarding protected activity that must be resolved by the ALJ.

CONCLUSION

For the foregoing reasons, the ALJ’s order granting the motion to dismiss and motion for summary judgment is **REVERSED**, and the case is **REMANDED** for further proceedings.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

⁹ In her corrected complaint, Johnson alleged that because WellPoint’s state contracts represented a substantial portion of its revenues, violations of the state contracts were clearly material and therefore implied violations of not only section 10(b) of the Exchange Act, 15 U.S.C.A. § 78m(b)(2)(B), and its Rule 10b-5 and items 101 and 303 of Regulation SK, but also violations of sections 13 and 33 of the Investment Company Act. See Correction of Deficiencies at pp. 7-8.

¹⁰ Wade Affidavit at 5.