



In the Matter of:

BORIS GALINSKY,

ARB CASE NO. 11-057

COMPLAINANT,

**ALJ CASE NOS. 2011-SOX-010
(formerly) 2007-SOX-076**

v.

DATE: October 31, 2012

BANK OF AMERICA, CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Boris Galinsky, *pro se*, Summit, New Jersey

For the Respondent:

Valecia M. McDowell, Esq., *Moore & Van Allen, PLLC*, Charlotte, North Carolina

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

FINAL DECISION AND ORDER

This case arises under Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (the Act or SOX) (Thomson/West 2007), and its implementing regulations found at 29 C.F.R. Part 1980 (2007). On January 26, 2007, Boris Galinsky filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Bank of America Corp. (BOA)¹, retaliated against him in violation the SOX. OSHA dismissed the complaint because Galinsky failed to allege activity protected by the SOX. Galinsky objected and requested a hearing with the Office of Administrative Law Judges (OALJ). An Administrative Law Judge (ALJ) issued an Order directing the parties to show cause whether there was jurisdiction under SOX (Show Cause Order). The parties responded. On October 12, 2007, the ALJ entered an Order granting summary judgment in favor of BOA, and dismissed the complaint. Galinsky petitioned the ARB for review.

While Galinsky's petition for review was pending with the ARB, Galinsky filed a second SOX complaint with OSHA against BOA on February 28, 2008. After BOA terminated his employment on April 28, 2008, Galinsky filed a third complaint on July 16, 2008.

On January 13, 2010, the ARB remanded the case, instructing the ALJ that Galinsky was prejudiced by the ALJ's *sua sponte* decision to convert BOA's response to the show cause order into a motion for summary decision without giving Galinsky notice and an opportunity to respond. On remand, the ALJ consolidated the complaint remanded by ARB with Galinsky's two other SOX complaints and, after a hearing, determined that Galinsky engaged in protected activity, that protected activity contributed to his adverse actions and termination, but that BOA proved by clear-and-convincing evidence that it would have terminated Galinsky despite the protected activity. The ALJ dismissed the complaint. We affirm.

BACKGROUND AND PROCEDURAL HISTORY

A. Facts

1. Events leading to Galinsky's first SOX complaint of January 26, 2007

In 2003, Boris Galinsky joined a BOA technology division as a vice president and software developer in New York. He was promoted to senior vice president in 2005.² At the

¹ Galinsky claims that he actually worked for Bank of America, N.V., and not Bank of America, Corporation. Galinsky objected to the ALJ's suggestion that the respondent be switched to Bank of America, N.V. Bank of America Corporation does not object to being the named party, and thus, we affirm the ALJ's caption naming Bank of America Corporation as the named respondent. In either case, as we held in *Johnson v. Siemens Building Tech.*, the subsidiary can be a covered entity under SOX. See *Johnson v. Siemens Building Tech*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011).

² *Galinsky v. Bank of America Corp.*, ALJ Nos. 2007-SOX-076, 2011-SOX-010 (ALJ May 31, 2011) (R. D. & O.) at 4.

New York office, Galinsky reported to Miram Delman, and Delman reported to Diana Donato-Katz.³

In 2006, Galinsky began working on the company's Anti-Money Laundering (AML) surveillance project based in Charlotte, North Carolina.⁴ The AML project was designed to monitor the bank's compliance with federal regulations; the project software used statistical models to identify abnormalities or potential money laundering in several key areas of bank operations.⁵ Galinsky, a computer expert, built a number of compliance technology applications in his career; he specialized in the Java computer language, and used his expertise in the AML project to convert a single-user-desktop prototype into a new software product based on Java.⁶ Galinsky's supervisors in Charlotte were Chris Chapman and Marty Walsh.⁷ These individuals reported to Bucky Feagans, the managing director and manager of the bank's Risk Technology Group.⁸

From May to July 2006, Galinsky expressed concern with the design and progress of the AML project.⁹ Galinsky recommended that the AML team use a Spring-Frame platform.¹⁰ Galinsky initially shared these complaints with Donato-Katz and Delman in New York¹¹, and also e-mailed his AML indirect supervisor, Feagans, expressing his frustration with the project.¹² On July 24, 2006, Marty Walsh, an AML project leader, sent various members of the AML team an e-mail indicating that the company had decided not to go with the Spring-Frame platform for the AML project.¹³ Galinsky was not included in the final decision, and in a series of e-mails sent to Feagans, he complained about the bank's decision not to use the platform and with the

³ Hearing Transcript (Tr.) at 88.

⁴ R. D. & O. at 4.

⁵ Tr. at 615; see also Galinsky Resp. to Show Cause Ord. at 3-4.

⁶ R. D. & O. at 4; see also Tr. at 485; BOA Resp. to Show Cause Ord. at 3.

⁷ R. D. & O. at 4; see also Tr. at 88-89.

⁸ R. D. & O. at 4.

⁹ Respondent's Exhibit (RX)-4; Tr. at 318-321.

¹⁰ RX-5.

¹¹ Tr. at 317.

¹² RX-4, 5; Tr. at 65-66, 323.

¹³ RX-5; Tr. at 420-421; CX-51.

AML project as a whole, which he described as a simple, inflexible, and failed project with many design flaws.¹⁴ After telling Feagans in the e-mails that he wanted to be taken off the AML project, Galinsky was removed.¹⁵

After his removal from the AML project, Galinsky had a “quick performance review” with Delman on July 30, 2006.¹⁶ Delman rated Galinsky as “meets expectations” in all categories.¹⁷ Later that fall, Galinsky began having significant communication problems with his co-workers and managers. For instance, in September 2006, when troubleshooting a software development unrelated to the AML project, Galinsky was involved in a heated exchange with Jay Slavin, a subordinate from another group.¹⁸ Galinsky attempted to speak with Slavin’s supervisor, Noel Ikoku, about the software issue.¹⁹ Ikoku felt that Galinsky acted inappropriately and reported the situation to their supervisor, Feagans.²⁰ In addition to the problems with Slavin and Ikoku, Galinsky sent to several colleagues a May 19, 2006 e-mail about bathroom usage, which supervisors felt was inappropriate.²¹

Galinsky received negative peer feedback in a September 2006 leadership survey attributed, in part, to his communication problems.²² Donato-Katz and Feagans discussed how to improve Galinsky’s behavior and communication problems.²³ Within a few weeks, Galinsky sent an e-mail to numerous BOA employees questioning the prudence of co-workers soliciting donations for United Way.²⁴ This e-mail further upset Galinsky’s BOA managers.²⁵

¹⁴ See R. D. & O. at 4; see also Tr. at 87-88, 107-109, 420-421; Complainant’s Exhibit (CX)-51, 111; RX-5.

¹⁵ R. D. & O. at 4-5; see also CX-51; RX-5.

¹⁶ *Id.*

¹⁷ *Id.*; se also CX-58; Tr. at 111-13.

¹⁸ RX-9, 10.

¹⁹ *Id.*

²⁰ Tr. at 807-808; RX-10.

²¹ RX-3; CX-54.

²² RX-11, 12; Tr. at 116-122; CX-59.

²³ RX-12.

²⁴ RX-15; Tr. at 124, 632-637; CX-72 (Donato-Katz affidavit).

²⁵ *Id.*

On November 7, 2006, when Galinsky received his end-of-year performance review, his communications skills rating was lowered to “did not meet expectations.”²⁶ He was placed on a performance improvement plan to address his communication and interpersonal skills problems.²⁷ Galinsky claims that there was disagreement between Delman and Feagans over Galinsky’s evaluation.²⁸ Galinsky claims Delman informed him that she did not complete the entire appraisal and that Feagans had a role in the performance review.²⁹ Donato-Katz testified that Galinsky did not meet her expectations.³⁰ Feagans wrote an October 17, 2006 e-mail to Donato-Katz explaining his reasons in favor of a “does not meet” rating in one category.³¹ As a result of the negative performance review, Galinsky did not receive his 2006 year-end bonus.³²

On December 5 and 8, Galinsky sent e-mails to Steven Venezia (Feagans’s supervisor) complaining that the AML project was a failure and that the failings could be construed as fraud.³³ Venezia tried to help Galinsky improve his communication style, specifically addressing the United Way e-mail.³⁴ After that meeting, Galinsky sent Venezia an e-mail on December 8, alleging that the AML project was fraudulent.³⁵ On January 3, 2007, BOA issued Galinsky a written warning for communication problems.³⁶ Galinsky responded by repeating his criticisms of the AML project, among other grievances.³⁷ As part of the negative review and written warning, Galinsky had another coaching session with Donato-Katz where they worked on ways for Galinsky to improve his communication skills.³⁸

²⁶ R. D. & O. at 5.

²⁷ *Id.*; see also CX-60; Tr. at 123-125, 139, 441-442.

²⁸ R. D. & O. at 5; see also CX-97; Tr. at 112-124, 139, 141-142, 145.

²⁹ CX-88 (transcript of Aug. 2007 Delman-Galinsky conversation); *Cf.*, Tr. at 183; CX-12 (Aug. 2007 e-mail).

³⁰ Tr. at 638, 640.

³¹ CX-97.

³² Tr. at 141, 152-153.

³³ R. D. & O. at 5; see also RX-7, -18; CX-14, 61; Tr. at 126-130.

³⁴ CX-61, 62; Tr. at 129-130.

³⁵ CX-61; RX-7.

³⁶ RX-21; CX-62, 91; Tr. at 154.

³⁷ RX-22.

³⁸ RX-23.

On January 26, 2007, Galinsky filed a complaint with OSHA claiming the negative 2006 performance review, loss of his 2006 year-end bonus, and written warning were a result of his complaints about the AML project.

2. *Events leading to Galinsky's second SOX complaint on February 28, 2008*

In February 2007, BOA transferred Galinsky to a production-support team where he reported to Alexei Yashkov; Yashkov reported to Ikoku.³⁹ Galinsky claims that the transfer caused him to be sidelined and set him up to fail.⁴⁰ Galinsky further complained that BOA demoted him and lowered his band and code grade in June 2007.⁴¹ There were more e-mails from July 24 to 26, demonstrating tensions between BOA managers and Galinsky over his communication style.⁴² On August 9, 2007, Ikoku and Yashkov conducted Galinsky's mid-year review and concluded that there had been no improvement in Galinsky's communication skills and other categories for which Galinsky had been marked deficient.⁴³ Galinsky secretly recorded the review meeting.⁴⁴

In November 2007, Galinsky worked on a potential Green Belt project, and complained that he did not receive all the information he needed.⁴⁵ He attempted to contact several managers for more information and received responses from his direct management.⁴⁶ Galinsky, however, believed that he had not received complete information, and on November 14 he contacted senior BOA manager Mike Radest, Director of Compliance for BOA Securities, for additional information and complained about the bank's failed internal audit.⁴⁷ Ikoku and Yashkov, upon learning of the communication, immediately met with Galinsky, expressing concerns that his discussion with Radest was an improper escalation of issues to higher

³⁹ R. D. & O. at 5.

⁴⁰ Tr. at 163.

⁴¹ R. D. & O. at 5; see also CX-7, 8, 10, 11; RX-29, 30; Tr. at 166, 170-175, 337-342.

⁴² RX-33; CX-13.

⁴³ RX-34.

⁴⁴ R. D. & O. at 5.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.*; see also RX-37, 38, 39 (Oct.-Nov. 2007 e-mail chain).

⁴⁷ R. D. & O. at 6, see also RX-40, 41; CX-18.

management.⁴⁸ Galinsky accused Ikoku of fraud.⁴⁹ On November 30, 2007, Ikoku, Gardner-Turner, and Yashkov issued Galinsky a written warning, citing his improper e-mail to senior management and his attitude toward other employees.⁵⁰ The written warning also cited him for violating conditions of his performance-improvement plan.⁵¹

In December 2007, Galinsky went on vacation and was placed on administrative leave while the bank investigated the complaint he raised in his November e-mail.⁵² Galinsky had further communications with BOA managers in December 2007, in which he responded to his written warning and claimed BOA's failed products constituted fraud.⁵³ Galinsky returned to work on January 29, 2008, and met with BOA attorneys.⁵⁴ Galinsky's written warning was modified to remove the complaint about having an attitude problem with other employees.⁵⁵

Galinsky filed a second SOX complaint with OSHA on February 28, 2008.

3. *Events leading to Galinsky's third SOX complaint on July 28, 2008*

In the spring of 2008, Galinsky was assigned to follow-up on a minor change to software, and contacted employees in the control room, a compliance office in the Global Corporate and Investment Banking Group at BOA.⁵⁶ He met with Prakash Totala in the control room, and Yashkov in his office, and asked them about communications documenting the change requests.⁵⁷ Based on these conversations, Galinsky believed that BOA employees do not

⁴⁸ R. D. & O. at 6; see also CX-36; RX-40, 41.

⁴⁹ R. D. & O. at 6, 9; see also RX-40, 41.

⁵⁰ R. D. & O. at 6; see also CX-20; RX-45, 46; Tr. at 207.

⁵¹ RX-45.

⁵² R. D. & O. at 6.

⁵³ RX-47 (Dec. 3, 2007 e-mail); see also RX-46.

⁵⁴ R. D. & O. at 6; see also Tr. at 389-390.

⁵⁵ R. D. & O. at 6; see also CX-23; RX-46; Tr. at 214-17.

⁵⁶ CX-32, 149, at 8.

⁵⁷ Tr. at 260-261.

document change requests because the SEC could discover the documentation.⁵⁸ Galinsky tape recorded conversations that he had with Totala and Yashkov without their knowledge.⁵⁹

After Galinsky's job band and code were realigned, *supra* at 6, Galinsky sought to collect bank information so that he could compare his job band and code with that of other vice presidents within the company. He downloaded and exported data from the bank's computer systems, and ran a program on a BOA database that analyzed code and band rank of senior vice presidents.⁶⁰

In March 2008, Holden learned that Galinsky had been recording conversations with co-workers since June 2007.⁶¹ Donato-Katz testified that she learned of the recordings through BOA attorneys.⁶² Yashkov testified that Rob Russell, from internal auditing, told him about Galinsky's recordings and misuse of corporate data during a phone call.⁶³ The bank audited Galinsky for recording employees without their knowledge and for improper downloading and use of corporate data.⁶⁴ Galinsky admitted recording conversations with supervisors in June 2007, August 2007, January 2007, and March 2008,⁶⁵ and submitted many of the recordings and data with his pleadings in October 2007 and again in February 2008.⁶⁶

BOA human resources officer Holden met with bank managers and consulted with Galinsky's current and former supervisors.⁶⁷ Around April 28, 2008, the bank terminated Galinsky due to continued disciplinary problems for workplace behavior, loss of trust and confidence arising out of his use of BOA's corporate directory system exported for non-BOA

⁵⁸ CX-32.

⁵⁹ See CX-32, 33; see also R. D. & O. at 10 n.17.

⁶⁰ R. D. & O. at 10; see also Tr. at 786-95.

⁶¹ R. D. & O. at 10.

⁶² Tr. at 657-58.

⁶³ Tr. at 930.

⁶⁴ Tr. at 931.

⁶⁵ CX-32, 33, 88.

⁶⁶ Complainant Brief (Br.) at 10-11 (filed with ARB July 12, 2011). Galinsky made two additional recordings in March 2008, which he distributed to OSHA and the SEC after his termination. *Id.* at 11.

⁶⁷ R. D. & O. at 10; see also Tr. at 791-92.

purposes, and for recording conversations with peers and supervisors without their knowledge.⁶⁸ Yashkov informed Galinsky of his termination.⁶⁹

Galinsky filed a third SOX complaint with OSHA on July 16, 2008. The complaint was amended on July 17, 2009, and February 10, 2010.

B. Proceedings below

1. OSHA dismisses complaints

OSHA dismissed Galinsky's second and third complaints on November 12, 2010. He requested hearings on both complaints with the OALJ. After the ARB remanded Galinsky's first complaint by order dated January 13, 2010, the ALJ consolidated all three complaints and held a hearing from January 11-14, 2011.

2. ALJ Decision

On May 31, 2011, the ALJ issued a Recommended Decision and Order dismissing the complaints.⁷⁰

The ALJ determined that Galinsky's June 14, 2006 e-mail to Feagans and November 14, 2007, e-mail to Radest were not protected because they did not convey information reporting shareholder fraud.⁷¹ The ALJ determined that Galinsky's communications on July 24 and 26, 2006, regarding the AML project were protected because they related to shareholder fraud, and that Galinsky's belief of fraud was "objectively reasonable because the AML project was designed to implement software across a variety of systems in order to monitor high risk accounts with Bank of America."⁷² The ALJ further held that the November 14, 2007 meeting with Ikoku and Galinsky's December 3, 2007 e-mail to him were protected because they involved discussions regarding potential fraud associated with "hiding items from auditors."⁷³ The ALJ found that e-mails to Venezia on December 5 and 8, 2006, were protected because they related to fraud concerning the AML project and that Galinsky "had a legitimate concern that the AML project was developing a non-functional system that would be detrimental to the

⁶⁸ R. D. & O. at 10; see also CX-105, 106.

⁶⁹ R. D. & O. at 10, citing Tr. at 791-792, 923-925.

⁷⁰ *Galinsky v. Bank of America Corp.*, ALJ Nos. 2007-SOX-076, 2011-SOX-010 (ALJ May 31, 2011).

⁷¹ R. D. & O. at 10-11.

⁷² *Id.* at 11.

⁷³ *Id.*

shareholders of Bank of America.”⁷⁴ The ALJ found that Galinsky’s first and second SOX complaints were also protected under the SOX.⁷⁵

The ALJ determined that Galinsky’s negative performance review on November 6, 2006, and the bank’s decision to realign his job code and band change on June 1, 2007, were adverse employment actions within the scope of SOX.⁷⁶ The ALJ stated that the negative performance review “had a direct effect on [Galinsky’s] compensation because he [became] ineligible for his bonus,” and that, as to the band change, “being downgraded from a Senior Consultant in band 4 to a Consultant in band 5 is a tangible action that significantly changes one’s employee status.”⁷⁷ The ALJ also determined that Galinsky’s mid-year review in August 2007, which indicated that Galinsky had “no improvement in his ‘does not meet’ rating in the ‘how’ category” was an adverse employment action under the SOX.⁷⁸ The ALJ determined that the written warning from November 30, 2007, that was “affirmed by [the bank] on January 29, 2008,” was an adverse action because it “affected [Galinsky’s] status” by putting him “on official notice that he could be further disciplined or terminated if he did not improve his behavioral conduct.”⁷⁹

Galinsky alleged that Feagans created a hostile work environment by sharing his e-mails with co-workers. The ALJ rejected this contention, determining that Feagans’s act of sharing the e-mails “does not rise to the level of intentional discrimination; rather he seemed to be exploring with Donato-Katz and others how they could counsel [Galinsky].”⁸⁰ The ALJ also rejected Galinsky’s contention that BOA managers sought to tarnish his reputation by informing his managers about his OSHA complaints. The ALJ determined that these “are not tangible employment actions affecting his employee status.”⁸¹ The ALJ held that Galinsky’s termination on April 28, 2008, was an adverse employment action under the SOX.⁸²

The ALJ determined that Galinsky’s protected activities contributed to much of the adverse action that he suffered at the bank. The ALJ held that his protected activity related to the

⁷⁴ *Id.* at 12.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ R. D. & O. at 13.

⁷⁹ *Id.*

⁸⁰ *Id.* at 14.

⁸¹ *Id.*

⁸² *Id.*

AML project “was a contributing factor in this November 2006 performance review” and that Galinsky’s communications with Feagans influenced the negative review that he received.⁸³ The ALJ also determined that Galinsky’s protected activity contributed to his job band and code realignment, given that Galinsky was the only vice president out of 1,842 with the internal job title of consultant.⁸⁴ The ALJ also found that Galinsky’s first OSHA complaint contributed to his negative performance review in August 2007.⁸⁵ The ALJ determined, however, that his protected activity of e-mailing Ikoku in December 2007 “was not a motivating factor in him receiving a warning on November 30, 2007,” because it took place after the warning.⁸⁶ The ALJ stated that while the warning was re-issued in January 2008, the re-issuance did not mention the December 3, 2007 e-mail.⁸⁷ Finally, the ALJ determined that Galinsky’s “protected activity was in some way part of [the bank’s] decision to terminate him.”⁸⁸

The ALJ determined that while Galinsky proved his prima facie case, BOA “prove[d] by clear and convincing evidence that it would have taken the same actions regardless of [Galinsky’s] protected activities.”⁸⁹ The ALJ found that bank managers undertook many efforts to “coach Complainant regarding his behavior,” and that “[d]espite this coaching effort, Complainant still displayed inappropriate behavior with colleagues.”⁹⁰ The ALJ found that Galinsky exchanged “rude emails with Slavin on September 14, 2006,” sent the “mass email on October 26, 2006 blasting the United Way Campaign,” and that Galinsky “continued to display rude behavior in the face of proper coaching.”⁹¹ Based on this evidence, the ALJ concluded that the bank “would have given him a negative performance review despite any protected activit[y].”⁹²

⁸³ *Id.* at 15.

⁸⁴ *Id.* (the “disparity in numbers suggests that Complainant may have been classified as a Consultant out of retaliation for his complaint”).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 16.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

The ALJ also determined that the bank “would have realigned Complainant’s job and band code in 2007 even in the absence of . . . protected activity.”⁹³ The ALJ found that the company “conducted a division-wide job code and band realignment in the spring of 2007” and that “numerous other employees [including Galinsky] were affected.”⁹⁴ The ALJ thus determined that “even had Galinsky never engaged in protected activity, [the bank] still would have examined his work duties in order to see if they reflected his job band and code.”⁹⁵ The ALJ concluded that his “job band and code would have been changed regardless of any protected activity.”⁹⁶

The ALJ further determined that Galinsky would have received a negative mid-year performance evaluation in August 2007 despite his protected activity.⁹⁷ The ALJ found that Galinsky’s rude behavior “had not improved with regards to him receiving a ‘does not meets’ on the ‘how’ rating” and Galinsky continued to display inappropriate and/or rude behavior “despite his performance plan and prior negative performance review.”⁹⁸

Finally, the ALJ determined that there was clear and convincing evidence that Galinsky would have been terminated regardless of any protected activity due to his violating “company policy by secretly recording conversations with co-workers” and “improper downloading company information for personal use.”⁹⁹ The ALJ found that the bank’s “handbook states that these activities are prohibited and could result in termination,” and that Galinsky “admitted at trial that he was aware he was violating company policy when he taped his co-workers.”¹⁰⁰ The ALJ concluded that there was nothing pretextual surrounding BOA’s decision to terminate Galinsky.¹⁰¹

⁹³ *Id.* at 17.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 17-18.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under SOX.¹⁰² Under the SOX, the ARB is bound by the ALJ's findings of fact if substantial evidence on the record considered as a whole supports those findings.¹⁰³ The ALJ's legal conclusions are reviewed de novo, and the ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision"¹⁰⁴

DISCUSSION

A. *Statutory Framework and Burden of Proof Standard*

SOX Section 806, 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. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee —

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

¹⁰² See Secretary's Order 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board) (Oct. 19, 2012).

¹⁰³ 29 C.F.R. § 1980.109(c)(3); see also *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

¹⁰⁴ 5 U.S.C.A. § 557(b) (Thomson/West 2007); see also *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

(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).^[105]

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's Section 806 actions.¹⁰⁶ To prevail on his SOX complaint under that standard, Galinsky must prove by a preponderance of the evidence that: (1) he engaged in activity or conduct that SOX protects; (2) his employer took an unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the adverse personnel action.¹⁰⁷ If Galinsky satisfies his burden, BOA can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action against him absent the protected activity.¹⁰⁸

Here, the ALJ found that Galinsky engaged in protected activity that contributed to adverse actions that BOA took against him. The ALJ's decision cites to ample evidence in the record to support those findings. While we assume, without deciding, that Galinsky satisfied his burden, we affirm the ALJ's decision on a more narrow ground: that BOA demonstrated by clear and convincing evidence that it would have terminated Galinsky's employment in the absence of his protected activity.¹⁰⁹

¹⁰⁵ 18 U.S.C.A. § 1514A(a).

¹⁰⁶ 18 U.S.C.A § 1514A(b)(2)(C).

¹⁰⁷ 18 U.S.C.A. § 1514A(b)(2); *see also Sylvester v. Parexel, Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip at 9-10 (ARB May 25, 2011).

¹⁰⁸ *Menendez v. Halliburton*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011). 0

¹⁰⁹ *See, e.g., Johnson v. Stein Mart, Inc.*, 440 Fed. App'x 795, 801 (11th Cir. 2011) (court assumes, without deciding, that complainant satisfied her burden of proof under SOX but affirms on basis that employer "effectively demonstrated, by clear and convincing evidence, that it would have terminated [Complainant's] employment in the absence of her protected conduct."); *see also Lucas v. W.W. Grainer, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2010) ("We need not decide whether the district court properly resolved [an] issue if there is another basis for affirming its judgment, because we may affirm its judgment 'on any ground that finds support in the record.'"). We note that the ALJ erred in his summary of the governing standards of law. R. D. & O. at 2, 16. The ALJ stated the prima facie evidence standard correctly but interchanged the respondent's burden of production to rebut a prima facie case with the respondent's burden of persuasion to prove by clear and convincing evidence after the complainant has proven unlawful discrimination. The result is harmless, however, because the ALJ found that BOA satisfied this higher burden applied erroneously at an earlier stage. *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986) (agency may rely on harmless error rule when its mistake does not affect the result); *see also Canter v. Maverick Transp.*, ARB No. 11-012, ALJ No. 2009-STA-054, slip op. 4, n.5 (ARB June 27, 2012). The fact that the ALJ applied the clear-and-convincing standard at the rebuttal phase does not change the outcome. We interpret the

B. Substantial evidence in the record fully supports the ALJ's determination that BOA presented clear and convincing evidence that it would have terminated Galinsky's employment even absent the protected activity

Proof of BOA's clear and convincing non-retaliatory rationale for terminating Galinsky centers on his lack of professional conduct at the bank. The ALJ found that Galinsky suffered from poor communication skills, rude behavior, and poor judgment (e.g., recording co-workers without their knowledge and violating company policy by downloading sensitive corporate information for his personal use) despite efforts by bank managers to assist him in improving his performance. This finding is supported by substantial evidence in the record and serves as clear and convincing evidence to support his termination.

1. Galinsky engaged in improper and inappropriate communications with bank managers and co-workers

After BOA removed Galinsky from the AML project in 2006, the record reflects that he continued to engage in unprofessional conduct. For instance, Galinsky continued to voice his displeasure over the AML project to his supervisors, Donato-Katz and Feagans. His supervisor, Feagans, requested that Galinsky receive coaching within the bank on how to conform his communication style and behavior so that he could work more effectively and cooperatively with co-workers. Despite these efforts, Galinsky exchanged several rude e-mails with Slavin on September 14, 2006.¹¹⁰ After Donato-Katz sent an e-mail to employees requesting support for the United Way campaign, Galinsky sent a mass e-mail to employees on October 26, 2006, questioning the integrity of United Way and its financial statements.¹¹¹ Donato Katz immediately met with Galinsky and told him that his correspondence with BOA employees undermined the charity efforts and was inappropriate.¹¹²

The record also shows that despite the company's efforts to improve Galinsky's performance, his behavioral issues continued throughout the summer and fall of 2007. In June 2007, Galinsky secretly recorded a conversation that he had with Feagans, where Galinsky referred to management as incompetent.¹¹³ On July 26, 2007, he e-mailed an internal client in another department that the bank "should not install unsupported products on bank computers . .

ALJ's application as applying the mixed-motive standard. In applying the mixed-motive standard, a complainant can show pretext to further his or her cause, but it is not required. A successful complainant can show "contributing to" causation without disproving the employer's offered reasons as pretext.

¹¹⁰ R. D. & O. at 8; see also RX-9.

¹¹¹ R. D. & O. at 8; see also RX-15.

¹¹² R. D. & O. at 8; Tr. at 610-636.

¹¹³ R. D. & O. at 9.

. [adding that, however, he] can be easily overruled by [his] managers.”¹¹⁴ Ikoku was troubled by the discourse and e-mailed Galinsky asking him to stop making “flippant comments that tend to undermine production support.”¹¹⁵ In November 2007, Galinsky sought information on the Green Belt project, and e-mailed Radest and others seeking information and referred to the release process in compliance technology as “completely broken.”¹¹⁶ Ikoku talked to Galinsky and told him that his use of words was inappropriate; Galinsky responded by accusing Ikoku of fraud.¹¹⁷

2. *Galinsky’s band and job code realignment was part of a division-wide effort that affected numerous employees*

There is also support for the ALJ’s determination that the bank’s job and band code realignment was division-wide and not targeted at Galinsky. BOA human resources manager Christy Holden testified that the realignment was designed to align the code to the work that the employee was performing, and that these job code reviews occurred very frequently.¹¹⁸ She testified that job code realignments, or reviews for proposed realignments, normally occurred after a team merger or the implementation of a new technology.¹¹⁹ Mary Rankin, then BOA human resources manager, testified that Galinsky’s job code and band were reviewed as part of changes going on in his department.¹²⁰ The ALJ heard evidence that employee performance has no relationship with a job code realignment.¹²¹ Galinsky switched teams and was operating in a new environment before the job code review and realignment took place.¹²² Given the evidence, the ALJ reasonably concluded that “even had Galinsky never engaged in protected activity, [BOA] still would have examined his work duties in order to see if they reflected his job band and code.”¹²³

¹¹⁴ R. D. & O. at 9, citing RX-33.

¹¹⁵ R. D. & O. at 9; see also RX-33.

¹¹⁶ R. D. & O. at 9, citing RX-40.

¹¹⁷ R. D. & O. at 9.

¹¹⁸ Tr. at 764-769.

¹¹⁹ Tr. at 736, 765-767 (Holden).

¹²⁰ Tr. at 737.

¹²¹ See Tr. at 737-738 (Rankin); see also Tr. at 797-798 (Holden).

¹²² Tr. at 813 (Ikoku).

¹²³ R. D. & O. at 17.

3. *Galinsky tape recorded co-workers without their knowledge and downloaded data in knowing violation of company policy*

In the spring of 2008, Holden learned that Galinsky had been taping co-workers without their knowledge. For instance, the evidence shows that Galinsky tape recorded conversations with Yashkov and Totala, as well as his supervisors Feagans, Ikoku, Delman, and Donato-Katz. These tape recordings occurred in June 2007, August 2007, January 2007, and March 2008.¹²⁴ Holden testified that employees are prohibited from unauthorized monitoring and recording.¹²⁵ Around the same time, BOA managers learned that Galinsky had downloaded sensitive information from the corporate directory, and had knowingly done so in contravention of company policy.¹²⁶

In *Vannoy v. Celanese Corp.*,¹²⁷ we remanded for an evidentiary hearing to determine the circumstances surrounding a complainant's procurement of sensitive company and employee data, and whether that conduct constituted protected activity. The circumstances surrounding *Vannoy* are distinctly different from the facts before us in this case. In *Vannoy*, the complainant procured company employee data to further his complaint instituted under the IRS Whistleblower program.¹²⁸ We determined in *Vannoy* that “[b]ecause there is no limiting language in Section 1514A that precludes complaints to agencies other than the SEC and Department of Labor, . . . that in these unique circumstances, Vannoy’s complaint to the IRS would fall within SOX’s coverage,” and ordered on remand further findings whether the complainant’s procurement of company data was done for the purpose of facilitating his IRS Whistleblower complaint, and if so whether that constituted protected activity under the SOX.¹²⁹ In this case, however, there is no evidence that Galinsky recorded conversations with co-workers and managers or downloaded confidential company data to facilitate a complaint under the IRS or SEC Bounty program – indeed, most of the tape recordings involved Galinsky’s discussions

¹²⁴ See CX-32, 33, 88.

¹²⁵ Tr. at 791; see also Tr. at 786-787; RX-50.

¹²⁶ R. D. & O. at 18; see also Tr. at 791-794 (Holden); Tr. at 924-925, 934 (Yashkov).

¹²⁷ ARB No. 09-118, 2008-SOX-064 (ARB Sept. 28, 2011).

¹²⁸ *Vannoy*, ARB No. 09-118, slip op. at 13 (citing Amended Compl. at 25 that complainant “raised concerns to his own management chain” about the company’s “failure to comply with obligations under IRS and U.S. securities laws.”).

¹²⁹ *Id.* at 11-12.

with colleagues concerning his employment status.¹³⁰ Moreover, and quite significantly, Galinsky did not expressly contend to the ALJ that the act of recording colleagues without their knowledge was protected activity, and thus the ALJ had no basis for making that finding.¹³¹ Galinsky admits that his conduct of tape recording co-workers and supervisors violated company policy.¹³²

Given the specific facts of this case, substantial evidence fully supports the ALJ's determination of clear and convincing evidence that BOA "would have terminated [Galinsky] for a loss of trust and confidence regarding the Complainant after discovering these activities" regardless of any protected activity.¹³³

4. *The ALJ fully resolved any material conflicting evidence*

Galinsky argues that "conflicting" evidence in the record undermines the ALJ's determination of clear and convincing evidence that BOA would have terminated him despite his protected activity.¹³⁴ Specifically, Galinsky argues that BOA knew of his recordings five months before deciding to terminate him,¹³⁵ and he argues that Holden could not have learned about the recordings in the spring of 2008 because she testified that she did not fire him on the spot because she wanted BOA to finish its internal investigation, which took place in November-December.¹³⁶

To the extent that these arguments are material to BOA's nondiscriminatory decision to terminate Galinsky, Holden's testimony does not support them. Holden testified that she was handed the case by Mary Rankin from human resources in or around March 2008.¹³⁷ Prior to receiving his case, Holden testified that she became involved in Galinsky's 2007 mid-year appraisal when one of the senior managers contacted Holden about Galinsky's November 14,

¹³⁰ See, e.g., June 6, 2007 (recording of Galinsky and Feagans); Aug. 7, 2007 (recording of Galinsky with Yashikov and Ikoku); Aug. 2, 2007 (recording of Galinsky and Delman); Jan. 18, 2007 (recording of Galinsky and Donato-Katz).

¹³¹ Post-Trial Brief of Complainant Galinsky, p. 18 (filed with ALJ on Mar. 15, 2011).

¹³² Tr. at 392-395, 396-397 (Galinsky).

¹³³ R. D. & O. at 17.

¹³⁴ Pet. at 1-2.

¹³⁵ Complainant's Br. at 8-9, 23 (filed with ARB, July 12, 2011); see also Tr. at 232-233.

¹³⁶ Pet. at 2-3.

¹³⁷ Tr. at 763-764.

2007 e-mail. Holden started working with Yashkov to understand what was going on.¹³⁸ Holden and Yashkov investigated Galinsky's complaints as well as his behavior. BOA conducted an internal investigation during November and December concerning Galinsky's e-mail. There is also evidence that Galinsky's direct managers became aware of the recordings after he filed his second complaint in February 2008.¹³⁹ Holden testified that she learned of the recording in the spring of 2008 from Ulmer-Jones.¹⁴⁰ Holden also testified that she learned of improper data usage from Ulmer-Jones.¹⁴¹ Further, Yashkov testified that Rob Russell, who worked for internal auditing, told him about Galinsky's recordings and information downloads during a phone call when Russell asking about the department's policies on copying corporate data on external devices.¹⁴² Russell had also investigated Galinsky's complaints concerning the AML software. According to the testimony, there seems to be two investigations by Russell: one following Galinsky's November complaint and a second investigation by internal auditing in the spring involving the recording and misuse of corporate data.¹⁴³

In any event, contrary to Galinsky's contentions, the ALJ properly resolved any conflicts.¹⁴⁴ The ALJ acknowledged that some BOA employees might have known about the recordings in October 2007 and thereafter, but more employees became aware as Galinsky continued to file further pleadings. More importantly, though, there is no dispute that Galinsky admitted¹⁴⁵ that his conduct of recording co-workers and downloading employee data violated company policy, and that such conduct was grounds for termination.

¹³⁸ Tr. at 770, 777-778.

¹³⁹ Tr. at 790-794.

¹⁴⁰ Tr. at 791, 793, 794.

¹⁴¹ Tr. at 793.

¹⁴² Tr. at 929-930.

¹⁴³ See Tr. at 927-941.

¹⁴⁴ *Svensden v. Air Methods, Inc.*, ARB No. 03-074, ALJ No. 2002-AIR-016, slip op. at 5 (ARB Aug. 26, 2004).

¹⁴⁵ Tr. at 392-395.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's decision, but on the more narrow grounds that clear and convincing evidence supported BOA's decision to terminate Galinsky's employment despite the protected activity, and **DISMISS** the complaint.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge