In the Matter of:

DAVID HOPTMAN, **ARB CASE NO. 2017-0052**

COMPLAINANT, **ALJ CASE NO. 2017-SOX-00013**

v. **DATE: October 31, 2019**

HEALTH NET OF CALIFORNIA,

RESPONDENT.

Appearances:

***For the Complainant*:**
David Hoptman, Pro se; Los Angeles, California

***For the Respondent*:**
Daniel H. Handman, Esq.; Sayaka Karitani, Esq.; *Hirschfeld Kraemer LLP*, Santa Monica, California

Before: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie
Administrative Appeals Judges.

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower provision of the Sarbanes-Oxley Act of 2002 (Section 806 or SOX), 18 U.S.C. § 1514A (2010), as amended, and its implementing regulations at 29 C.F.R. Part 1980 (2016).

David Hoptman (Complainant) was a claims representative for Health Net of California. He alleges that he discovered systematic overpayments to Health Net by plan members and began working with a member, V.M., to expose his employer's actions. Hoptman claims that he spoke with an attorney who suggested that he obtain a Health Insurance Portability and Accountability Act of 1996 (HIPAA) release and file a tip with the Securities and Exchange Commission (SEC). Complainant viewed V.M.'s case as a prime example of Health Net's misconduct. Hoptman texted with V.M. asking her to fill out a HIPAA form so that he could access her personal information. Complainant noted that he did not have enough money to continue with his fraud investigation against Health Net and that he would share money with her if she would help him with his case. Hoptman asked V.M. to contact California's Department of Managed Health Care (DMHC) in regards to her overpayments. Following Complainant's suggestion, V.M. filed a complaint with DMHC concerning her overpayments.

On January 25, 2016, Complainant met with a senior Health Net manager regarding Health Net's improperly accessing his personal information. In the conversation, Complainant mentioned that he had read an online article indicating that Health Net owed a large amount of back taxes to the Internal Revenue System. Hoptman also indicated that he had a complaint in the works and that Health Net would get in a lot of trouble. Complainant did not elaborate upon the content of the complaint he intended to file. Hoptman conceded that he did not mention fraudulent activity or filing a complaint with the SEC during this conversation. Decision and Order (D. & O.) at 5.

As part of her complaint, V.M. informed DMHC about Complainant's personal texts to her. DMHC then shared that information with Health Net on January 28, 2016. Health Net suspended Complainant and then terminated him on January 28, 2016, for soliciting assistance and possible financial assistance from clients, engaging in private communications with clients on a personal device, misleading a client to sign a HIPAA form for Complainant's personal use, and offering to share a reward with V.M. D. & O. at 4.

Hoptman filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging retaliation for activity protected under SOX. Hoptman alleged that Health Net terminated him because he was about to file a complaint with a federal agency. OSHA dismissed his complaint for failing to satisfy the required element that he engaged in protected activity under SOX. Complainant filed objections with and requested a hearing from the Office of Administrative Law Judges (OALJ).

On April 21, 2017, Complainant filed with the Administrative Law Judge (ALJ) a motion for summary decision, which prompted the ALJ to invite summary decision motions for each of the elements of a successful SOX claim. Health Net filed a motion for summary decision and opposed Complainant's motion. Hoptman filed a response in opposition to Health Net's motion. On June 7, 2017, the ALJ granted Health Net's motion for summary decision based upon Complainant's failure to identify any genuine issue of material fact that he engaged in protected activity and denied the complaint. Hoptman petitioned the Administrative Review Board (ARB) for review of the ALJ's decision.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's SOX decision under Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. Part 1980.110. The ARB reviews an ALJ's grant of summary decision de novo. *Siemaszko v. First Energy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, at 3 (ARB Feb. 29, 2012). Under 29 C.F.R. § 18.72, an ALJ may enter summary decision 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 based on the law a party is entitled to summary decision.

DISCUSSION

To state a claim under Section 806, a complainant must allege that he engaged in protected activity, the employer took an unfavorable action against him, and that the protected activity was a contributing factor in the adverse action. *See Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, ALJ No. 2010-SOX-003, at 5 (ARB Nov. 9, 2011). An employer may avoid relief it shows by clear and convincing

evidence that it would have taken the same action absent the protected activity. 29 C.F.R. § 1980.109(b).

Section 806's employee-protection provision generally prohibits covered employers and individuals from retaliating against employees because they provide information or assist in investigations related to the categories listed in the SOX whistleblower statute.[1]

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[1] Section 806 states the following:

> (a) *Whistleblower Protection For Employees Of Publicly Traded Companies.*—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 79c), 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—
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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, 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—
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> (A) a Federal regulatory or law enforcement agency;
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> (B) any Member of Congress or any committee of Congress; or
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> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
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> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any

SOX protects employees who, having a reasonable belief of a violation, provide information to one of the three statutory entities, cause information to be provided to one of the three entities, or otherwise assist in an investigation by one of the three entities. The three entities are:

> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

SOX also protects employees who file, cause to be filed, or assist in a proceeding filed or are about to filed (with the employer's knowledge). 18 U.S.C. § 1514A(a)(2).

The ALJ concluded that there was a genuine issue of material fact as to whether Complainant held a reasonable belief of a violation of specified fraud statutes, any rule or regulation of the SEC, or any federal law relating to fraud against shareholders when he sent the texts to V.M.[2] Nonetheless, the ALJ found that Hoptman's communication to V.M. was not a complaint providing information to one of the three statutory entities directly nor were his communications sent with the expectation that they would "cause information to be provided" to one of the three entities. D. & O. at 12. The ALJ further concluded that Complainant did not demonstrate a genuine issue of material fact that his text messages or his communication to the senior manager on January 25, 2016, conveyed that he was

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> knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a).

[2] The complainant's belief that a violation occurred must be subjectively and objectively reasonable. A belief is objectively reasonable when a reasonable person, with the same training and experience as the employee, would believe that the conduct implicated in the employee's communication could rise to the level of a violation of one of the enumerated provisions in Section 806. *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 14-15 (ARB May 25, 2011).

"about to file" a SOX-protected complaint. Because engaging in protected activity is an essential element of a successful SOX claim, the ALJ granted Health Net's motion for summary judgment.

On appeal, Complainant devotes a significant portion of his briefing to the merits of V.M.'s claim of overpayments to Health Net. He alleges that the ALJ erred because the text messages reveal that he was "about to file" a complaint with a federal agency. Complainant asserts that details as to the content of V.M.'s discussion with DMHC may have assisted his claims of having engaged in protected activity, but the ALJ erroneously concluded that this content was not relevant to his claim. Complainant further claims that his conversation with a senior Health Net manager on January 25 "hinted" at the assertion that he was about to file a complaint with a federal agency. When Health Net also gained possession of the text messages on January 28, Complainant avers that it should have known that he was about to file a complaint with a federal agency that would constitute protected activity under SOX.

Upon review of the ALJ's Order, we conclude that the ALJ's Order is a well-reasoned decision based on the undisputed facts and the applicable law. The ALJ properly concluded that Complainant failed to establish a genuine issue of material fact that he had engaged in protected activity under SOX. It is undisputed that Hoptman did not provide information to one of the three statutory entities, nor did he demonstrate a genuine issue of material fact that his activities "cause[d] information to be provided" to one of the three entities through his texts to V.M. *Tides v. The Boeing Co.*, 644 F.3d 8090 (9th Cir. 2011). Hoptman's texts to V.M. were deliberately concealed from Health Net and inadvertently reached Health Net through V.M.'s and DMHC's actions; Complainant admitted that he was "quite surprised" that V.M. shared his texts with DMHC. D. & O. at 12. Finally, the ALJ correctly concluded that Hoptman's communications with the manager on January 25 did not create a genuine issue of fact that he was "about to file" a complaint because a manager would not be able to reasonably ascertain SOX-protected content from Hoptman's summary of an online article's content regarding back taxes owed and his references to an undefined complaint "in the works." Health Net's later possession of these texts did not, in context and when considered with other communications, establish a genuine issue of material fact as to whether Hoptman had engaged in protected activity. We agree that Complainant's communications to V.M. and to the Health Net manager were too attenuated and

conflated with other non-SOX protected conduct to convey to a reasonable person that he was about to file a complaint protected under SOX.

Accordingly, we **AFFIRM** the ALJ's Summary Decision and **DENY** the complaint.

SO ORDERED.