U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

MICHAEL DICKERSON,

COMPLAINANT,

v.

ITERIS, INC.,

RESPONDENT.

ARB CASE NO. 2023-0026

ALJ CASE NO. 2019-SOX-00009
ALJ STEVEN B. BERLIN

DATE: September 17, 2024

Appearances:

For the Complainant:
Michael Dickerson; *Pro Se*; San Juan Capistrano, California

For the Respondent:
Kevin D. Holden, Esq.; *Jackson Lewis, P.C.*; Richmond, Virginia

Before THOMPSON and ROLFE, Administrative Appeals Judges

DECISION AND ORDER

ROLFE, Administrative Appeals Judge:

This complaint arises under the Sarbanes-Oxley Act (SOX or Act), as amended, and its implementing regulations.[1] Complainant Michael Dickerson alleges that Respondent, Iteris, Inc., unlawfully terminated his employment under the Act in retaliation for reporting financial irregularities. On March 21, 2023, ALJ Steven Berlin issued a decision holding that Dickerson did not engage in protected activity under the Act because he determined that Dickerson did not subjectively believe, nor was it objectively reasonable for him to believe, that he had reported SOX-related violations prior to his termination. He thus denied Dickerson's claim, and Dickerson appealed.

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[1] 18 U.S.C. § 1514A; 29 C.F.R. Part 1980 (2024).

Because substantial evidence supports the ALJ's decision, we affirm.

BACKGROUND

Iteris is a publicly traded company focusing on the application of information and technology to solve problems in transportation and agriculture, among other things.[2] In 2014, in response to an independent auditor's report finding that it did not use appropriate controls for recording revenue from its consulting contracts, Iteris began changing its processes related to evaluating and recording revenue, including creating a Director of Revenue Recognition position to guide the transition process.[3]

In 2016, Iteris hired Dickerson as the second person to hold that position, with the ultimate responsibility of "oversee[ing] the proper revenue recognition for Iteris's customer contracts."[4] Dickerson is (and was at the relevant time) a seasoned accountant with a bachelor's degree in business administration and accounting with experience in both public and private accounting firms, as well as in-house experience at large corporations, including Pacific Life Insurance Company.[5]

Iteris insists it never intended Dickerson's position to be permanent. Rather, it claims it created the position as a stopgap measure it hoped would become unnecessary once it implemented the missing internal revenue controls its outside auditors identified.[6]

Iteris alleges that by September 2017, enough progress had been made that the Director position, in fact, largely became redundant.[7] Facing a significant budget shortfall, it therefore eliminated the position and separated Dickerson as a part of an alleged company-wide effort to reorganize operations and cut unnecessary costs. Iteris thus terminated Dickerson's employment on February 16, 2018 -- one of 21 such layoffs made during the alleged reorganization.[8]

Dickerson, conversely, maintains that Iteris did not terminate him for the business reasons it claims, but rather (at least in part) as retaliation for his

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[2] Decision and Order Denying Claim (D. & O.) at 2.

[3] *Id*. at 3-4; Iteris Brief on Appeal (Iteris Br.) at 21-25.

[4] D. & O. at 5.

[5] *Id*. at 3.

[6] Iteris Br. at 22-23.

[7] *Id*.

[8] *Id*.; D. & O. at 2.

reporting of SOX-related financial irregularities.[9] Notably, Dickerson is unrepresented by counsel on appeal, as he was before the ALJ.[10] His briefs below and before us are disjointed and his arguments difficult to understand.

Nevertheless, he presented four "key events" to the ALJ that he continues to maintain constitute protected activity under the Act: an accounting dispute where Iteris adopted his advice; an accounting method Iteris used prior to his tenure that he disapproved of but that he ultimately conceded was "immaterial;" an HR dispute in which he alleges an executive harshly treated his subordinate; and his own concern that a colleague's alleged inexperience could eventually lead to future violations.[11]

After a four-day trial, and considering the parties' post-hearing briefs, the ALJ held that Dickerson's four key events did not constitute protected activity because he found Dickerson did not subjectively believe, nor would it have been objectively reasonable for him to believe, that he had reported SOX violations prior to his termination.[12]

The ALJ first found that Dickerson legitimately "held himself out as an expert on securities regulation and controls (and related accounting practices)" and that "he was hired as an expert[.]"[13] He then generally concluded the facts established even Dickerson subjectively considered the key events "too hypothetical" with only the "potential" to create violations for him to truly believe they were actual violations or were likely to become violations.[14] The ALJ (for similar reasons) generally found that "others with [his] level of expertise" also would not objectively "have concluded that a violation of a SOX-related legal requirement had occurred or was likely to occur" from any of the events.[15]

Key Event 1 - Iteris adopts Dickerson's recommendation on how to record revenue on an incrementally-funded contract.

In February 2017, Iteris entered into a contract with the Orange County Transit Authority valued at a total of $5.5 million that was drafted so that the work would proceed incrementally on a task order basis. A dispute arose over whether

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9 Dickerson Brief on Appeal (Dickerson Br.) at 25.

10 D. & O. at 1.

11 *Id.* at 6-11.

12 *Id.* at 1, 20.

13 *Id.* at 17.

14 *Id.* at 14.

15 *Id.* at 17.

Iteris could enter in its accounting software the value of the whole contract upfront or whether it had to enter the value of individual task orders as they came in.[16]

At the time it arose, the only executed task order was for $1.5 million. Dickerson maintained that he could not approve an entry for the full amount of the contract and wanted Iteris to recognize only the value of the executed task order. Others disagreed. Iteris then held a meeting about how to record the revenue, and in the end, the attendees agreed with Dickerson's assessment.[17]

Dickerson now characterizes the dispute as a "control environment issue." But the company's vice president and controller -- despite agreeing with Dickerson on the numbers -- testified the dispute was actually a nonissue when it arose that became contentious only because Dickerson was overly argumentative: "[I]t was just a very simple issue of just look at the contract; it's incrementally-funded; it should be $1.5 million. I think it could have been resolved in a simple 10-minute meeting."[18]

The ALJ considered Iteris's adoption of Dickerson's advice "crucial" in finding no protected activity.[19] Since Iteris followed his explicit direction, the ALJ determined Dickerson logically "had no reason to think a violation was likely to occur."[20] He also considered any potential SEC-related violation to be entirely too hypothetical because -- even under Dickerson's own account of the event -- no one approved an improper accounting practice on the contract or reasonably would be expected to approve one in the future.[21] As an expert in the field, the ALJ thus concluded that Dickerson had neither a subjective belief a violation had occurred or was likely to occur, nor would it have been objectively reasonable for him to hold such beliefs.[22]

Key Event 2 - Dickerson identifies a past accounting practice he disapproved of but admitted was inconsequential.

In October 2015, five months before it hired Dickerson, Iteris signed a contract to build and service an Interactive Voice Response System, commonly referred to as a 511 system, with the Metropolitan Transit Commission of the San

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16 D. & O. at 6.

17 *Id*. at 6-7.

18 *Id*. at 7.

19 *Id*. at 15.

20 *Id.*

21 *Id.*

22 *Id*. at 17.

Francisco Bay area. A debate arose about the proper accounting method for the project given the dual nature of the services it covered. After consultation with its outside auditors, Iteris adopted a proportional performance method, which is typically used on service contracts, given Iteris characterized the contract as primarily concerning services rather than construction.[23]

In October 2016, seven months after his hiring, Dickerson discovered a discrepancy between the accounting methods reflected in Iteris's financial software, which showed the proportional performance method, and another internal document used to record the chosen accounting treatment for the project.[24] The financial software reflected the proportional performance method, while the other document showed construction accounting.[25] Dickerson told an accountant on the project that he thought a construction accounting method should have been used at the outset of the project instead of the proportional performance method. At Dickerson's request, the project accountant then recalculated revenue using both accounting methods as a safeguard.[26]

Even Dickerson acknowledged that those results showed the distinction made no difference: given the results under both methods were roughly the same, he told the manager "it looks like we're good" and thanked him for his quick turnaround.[27] While Dickerson would raise the issue on at least two other occasions, both times he again explicitly accepted Iteris's justification for using the method stating, for example, "it's fine" and that the projects "were already established prior to my hire date -- you had already made the call."[28] Ultimately, at the October 2019 hearing, Dickerson again unequivocally confirmed that he had "instructed the project accountant to run an analysis to see if there was a difference . . . *and it was, indeed, immaterial*."[29]

The ALJ thus held Dickerson "did no more than comment on how a matter had been handled before he arrived and state that he'd handle it differently if it ever crossed his desk, which it never did."[30] The ALJ further noted Dickerson's repeated acknowledgements that the distinction was immaterial before concluding the facts thus do not "establish by a preponderance [of the evidence] that

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[23] D. & O. at 8.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 8-9.

[29] *Id.* at 9 (emphasis added).

[30] *Id.* at 15.

[Dickerson] believed a violation occurred or was likely to occur[.]"[31] And he likewise determined that "even if [they] did" that belief necessarily would not be "objectively reasonable" under the circumstances.[32]

<u>Key Event 3 - Dickerson objects to the way an executive treated Dickerson's subordinate.</u>

In August 2017, in response to an email request about accounting methods, an Iteris vice president expressed frustration to one of Dickerson's subordinates about a project. Dickerson subsequently complained about the treatment to the executive, who explained, "The tone and content of my prior email reflects a complete and utter sense of frustration that arises from interactions on [this project] and others."[33] Dickerson and the executive thereafter agreed on the accounting method to use going forward, and Dickerson responded that he "appreciate[ed] the feedback."[34] Dickerson nevertheless contacted human resources about the incident even after their reconciliation.[35]

Given the nature of the complaint, the ALJ deemed it a garden variety HR matter and not SOX-related in any way. He accurately reasoned that nothing in the matter "involves a rejection of [Dickerson's] views on an accounting issue;" instead, it is exclusively "a human resources problem."[36] And while Dickerson speculated at the hearing that a "chain reaction" of hypothetical future events could conceivably transform the HR issue into an accounting issue, the ALJ reasonably found such rank speculation "no more than conjecture about a hypothetical circumstance that never occurred."[37] He therefore rejected Dickerson's claim that he held an objectively reasonable belief in a violation or potential violation based on the event.[38]

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31 D. & O. at 15.

32 *Id.*

33 *Id.* at 10.

34 *Id.*

35 *Id.*

36 *Id.* at 15.

37 *Id.* at 16.

38 *Id.* at 15-16.

Key Event 4 - Dickerson expresses concern over a colleague's alleged inexperience.

Iteris hired Stephen "Ziggy" Yasbek in July 2017, to provide finance and IT consulting services.[39] Yasbek, experienced with finance in publicly traded companies, became involved with the same project Dickerson was working on, which the company needed to complete on time in order to meet an SEC regulatory deadline. The company repeatedly assured Dickerson that Yasbek's role was limited to providing simple oversight and that Dickerson remained in charge of the technical accounting aspects of the project.[40]

Yet Dickerson nevertheless complained to his supervisors that Yasbek was taking too much of his time because he was posing questions they were already "addressing."[41] Two months later, Dickerson complained about Yasbek's "fluency" with accounting concepts and said he was concerned that Yasbek was not able to properly assess revenue recognition issues.[42]

The CEO, who received both of Dickerson's complaints, worked with human resources and Dickerson's supervisor in response to further clarify Yasbek's limited oversight role to Dickerson. Dickerson nevertheless complained about Yasbek to his supervisors a third time in February 2018, stating: "At some point, the auditors are going to question management's competence. This is not the first time I've emailed both of you with such concerns. If I don't hear back from either of you -- my next email will be to the company's audit chair."[43] The ALJ found no evidence that Dickerson's supervisors responded or that Dickerson took any further action before his termination, however.

The ALJ thus concluded that Iteris hired Yasbek only to provide oversight and that Dickerson unquestionably knew as much. He thus held Dickerson "did not subjectively believe what he reported as Yasbek's lack of fluency was likely to lead to a violation of relevant law" but held instead that Dickerson found Yasbek's oversight "annoying, intrusive, and time-consuming," and that "he wanted Yasbek to back off."[44] Given Yasbek's limited role, the ALJ further held an objective "reasonable technical accounting expert" such as Dickerson should realize Yasbek's involvement would "not result in the failure of control or violation of a covered legal

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[39] D. & O. at 10.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 11.

[43] *Id.*

[44] *Id.* at 16.

requirement."[45] Instead, he would understand Yasbek helped ensure "an accurate and timely adoption of the new accounting standards," which the same expert should also recognize as further safeguarded through Iteris's outside auditors' review of their internal work.[46]

Given that Dickerson did not meet his threshold burden to establish he engaged in protected activity during any of his key events, the ALJ denied Dickerson's claim outright without reaching any of the remaining elements.[47] On appeal, Dickerson ostensibly argues that the ALJ did not correctly apply the law to the facts, but he does not coherently support his argument by pointing to any error the ALJ made in his decision, opting instead to essentially resubmit the post-hearing brief he filed below.[48]

Iteris counters that Dickerson has thus failed to sufficiently brief his appeal and that it should be rejected on that basis alone. Regardless, it further contends that substantial evidence supports the ALJ's findings on protected activity, and that, even if it did not, the company still established below by clear and convincing evidence that it would have legitimately terminated Dickerson's employment in the absence of protected activity, preserving an argument the ALJ did not have to reach because of his dispositive finding on protected activity.[49]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to review ALJ decisions under SOX.[50] The ARB reviews questions of law de novo but is bound by the ALJ's factual determinations that are supported by substantial evidence.[51] "Substantial evidence" is "such relevant evidence as a

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[45] D. & O. at 19.

[46] *Id.*

[47] *Id.* at 20.

[48] *See generally* Dickerson Br. at 2.

[49] Iteris Br. at 4-5, 21-24.

[50] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

[51] *Cerny v. Triumph Aerostructures-Vought Aircraft Div.*, ARB No. 2019-0025, ALJ No. 2016-AIR-00003, slip op. at 5 (ARB Oct. 31, 2019) (citing 29 C.F.R. § 1979.110(b) (2022)); *see Leviege v. Vodafone US, Inc.*, ARB No. 2019-0058, ALJ No. 2016-SOX-00001, slip op. at 3 (ARB Mar. 19, 2021) (citations omitted).

reasonable mind might accept as adequate to support a conclusion."[52] Because an ALJ observes all witnesses throughout a hearing, the Board will defer to an ALJ's credibility determinations unless they are "inherently incredible or patently unreasonable."[53]

DISCUSSION

1. Dickerson has failed to meet his burden to adequately brief his appeal.

As a threshold matter, a petition for the Board's review must identify "the legal conclusions or orders to which [a petitioner] object[s]."[54] Further, once the Board accepts the appeal, the parties in their briefs must establish the factual basis of their claims and defenses with citations to the record and relevant legal authority in support of the relief they request. Where a party completely fails to meet these minimum briefing requirements, and instead relies upon bare conclusions, the party forfeits its position on appeal.[55] And while the Board enforces relaxed briefing standards for unrepresented litigants such as Dickerson, those standards are not nonexistent: "Despite the fact that pro se filings are construed liberally, the Board must be able to discern cogent arguments[.]"[56]

As Iteris points out, Dickerson has submitted a disjointed brief, little of which appears to relate to the ALJ's decision, and most of which appears to be entirely identical to his original post-hearing brief. Dickerson does not cogently support any

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[52] *Cerny,* ARB No. 2019-0025, slip op. at 5 (quoting *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019) (quotation marks and additional citations omitted).

[53] *Mizusawa v. United Parcel Serv.*, ARB No. 2011-0009, ALJ No. 2010-AIR-00011, slip op. at 3 (ARB June 15, 2012), *aff'd* No. 12-9563 (10th Cir. 2013) (quoting *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 2006-0035, ALJ No. 2004-AIR-00030, slip op. at 13 (ARB Feb. 29, 2008)); *see also Negron v. Vieques Air Link, Inc.*, ARB No. 2004-0021, ALJ No. 2003-AIR-00010, slip op. at 5 (ARB Dec. 30, 2004), *aff'd* No. 05-1278 (1st Cir. 2006).

[54] 29 C.F.R. § 1980.110(a).

[55] *Shah v. Albert Fried & Co.,* ARB No. 2020-0063, ALJ No. 2019-SOX-00015, slip op. at 8 (ARB Aug. 22, 2022); *Pajany v. Capgemini, Inc.*, ARB No. 2019-0071, ALJ No. 2019-LCA-00015, slip op. at 3 (ARB Jan. 25, 2021); *Hasan v. Sargent & Lundy*, ARB No. 2005-0099, ALJ No. 2002-ERA-00032, slip op. at 8-9, 9 n.39 (ARB Aug. 31, 2007) (quoting *Cruz v. Am. Airlines, Inc.*, 356 F.3d 320, 333-34 (D.C. Cir. 2004) (citations omitted)) ("Although we may discern a hint of such an argument after a close reading of plaintiff's reply brief (albeit not a hint supported by both citations to authority and argument, as is required by Federal Rule[s] of Appellate Procedure 28(a)(9)), plaintiff was required to present, argue, and support this claim in his opening brief for us to consider it. We are not 'self-directed boards of legal inquiry and research, but essentially . . . arbiters of legal questions presented and argued by the parties.'").

[56] *Hasan*, ARB No. 2005-0099, slip op. at 8 (citations omitted).

assertions of error with citation to record evidence or relevant legal authority regarding the ALJ's dispositive protected activity finding. Dickerson's pleadings thus are per se insufficient to support his burden to demonstrate that the ALJ erred. Nevertheless, given his unrepresented status, the Board in this case will independently review the ALJ's decision to determine whether it is supported by substantial evidence and accords with the law.

For the following reasons, we find that it is and that it does.

2. Substantial evidence supports the ALJ's decision Dickerson did not engage in protected activity.

Section 806 of SOX protects employees who provide information to a covered employer regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the SEC (including regulations governing financial statements), or any provision of Federal law relating to fraud against shareholders.[57]

To prevail under the Act's shifting burdens, a complainant must first establish by a preponderance of the evidence that: (1) they engaged in activity or conduct that SOX protects; (2) the respondent took unfavorable personnel action against them; and (3) the protected activity was a contributing factor in the adverse personnel action.[58] Failure to establish any of these elements by a preponderance of the evidence ends the whistleblowing inquiry without the need to go further.[59]

This appeal thus concerns only the first element relating to protected activity that the ALJ decided against Dickerson that required him to first establish a subjective and objective belief of a violation of a SOX-related rule or regulation.

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[57] 18 U.S.C. § 1514A; *see also* 17 C.F.R. Part 210 (2005), Form and Content of the Requirements for Financial Statements.

[58] 49 U.S.C. § 42121; *see also* 18 U.S.C. § 1514A(b)(2)(C).

[59] *Turin v. Maiden Holdings, Ltd.*, ARB No. 2021-0066, ALJ No. 2010-SOX-00018, slip op. at 9 (ARB June 29, 2023) (rejecting complainant's claim on failure to establish protected activity alone because "[b]ecause a complainant's failure to prove any one of the aforementioned three elements necessarily requires dismissal of her whistleblower claim.") (citation omitted).

A. The ALJ rationally determined Dickerson did not establish that he held either a subjective or objectively reasonable belief a SOX-related violation had occurred or was likely to occur.

As the ALJ recognized, in order to establish protected activity, a complainant must establish a "reasonable belief" that they disclosed illegal activity, which has both a subjective and objective component.[60] To satisfy the subjective component, the employee must actually have believed that the conduct constituted a violation of relevant law or was likely to.[61] An objectively reasonable belief, in turn, is measured "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."[62]

As a threshold matter, we agree with the ALJ's determination that Dickerson, a sophisticated professional with extensive accounting knowledge, qualified as an expert with respect to the reasonable belief standard. Given Dickerson's education and experience, the ALJ aptly reasoned Dickerson appropriately held himself out as an expert on securities regulation and controls and that he was ultimately hired as an expert. Dickerson further testified at length regarding his background and knowledge about key financial controls, financial statements, and revenue recognition.[63] That testimony logically supports the ALJ's conclusion that Dickerson was an expert on these matters. Moreover, Dickerson on appeal does not dispute the finding. We therefore affirm the ALJ's finding as both supported by substantial evidence and unchallenged on appeal.

Substantial evidence also supports the ALJ's overarching conclusion that even Dickerson considered his key events too "hypothetical" for him to truly believe they were actual violations or were likely to become violations. Critically, Dickerson has never coherently discussed any SEC-related rule or regulation in detailing any of his key events, as would be expected of an accounting expert in these circumstances. Instead, as the ALJ correctly held, "nothing in the record suggests that Complainant brought to Iteris' attention any completed or ongoing conduct

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60 *Sylvester v. Paraxel Int'l, LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 14 (ARB May 25, 2011) (citing *Melendez v. Exxon Chems.*, ARB No. 1996-0051, ALJ No. 1993-ERA-00006, slip op. at 28 (ARB July 14, 2000)). The ALJ noted in his decision that while the Ninth Circuit had not yet revisited the SOX-protected activity issue, he concluded that the Ninth Circuit would apply *Sylvester*. D. & O. at 13 n.14.

61 *Sylvester*, ARB No. 2007-0123, slip op. at 14 (citing *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009)).

62 *Sylvester*, ARB No. 2007-0123, slip op. at 15 (citing *Harp*, 558 F.3d at 723).

63 D. & O. at 17.

that he believed violated any of the statutes, regulations, rules, or other law listed in the Act."[64]

And that fundamental omission is dispositive. To satisfy the subjective component of the "reasonable belief" test, the employee must actually have believed that the conduct he complained of constituted a violation of the six enumerated categories of law under Section 806; general assertions of wrongdoing not tied to the Section 806 categories are not protected.[65] Given Dickerson's failure to identify anything beyond the most vague (and at times incomprehensible) allusions to highly technical accounting practices in discussing his key events, the ALJ permissibly concluded that he could not have truly believed he reported either a past violation or an imminent future violation.[66]

Similarly, it inherently follows that another objective expert in the same circumstances also would not perceive either a past or future violation of an SEC rule or regulation. Both findings -- which are well within the ALJ's discretion as the factfinder -- are independently fatal to Dickerson's complaint.[67] Regardless, substantial evidence likewise supports the ALJ's determinations regarding each of the individual key events.

It remains undisputed that Iteris followed Dickerson's recommended course of action during his first event.[68] The ALJ found that fact material, concluding it necessarily follows that "[n]o reasonable person with [Dickerson's] training and experience, if presented with the facts here, would think anything more than that accounting professionals and executives discussed an issue and came to a reasonable judgment that, if implemented, would not violate any of the statutes, regulations, rules, or other law to which the SOX refers."[69] We agree.

Indeed, even Dickerson acknowledged that the event itself did not violate a SOX-related rule or regulation, only that it revealed the "potential" for Iteris to change course in the future and that such a hypothetical future course *could* conceivably lead to a violation. That plainly is not enough: while a whistleblowing

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[64] *Id.* at 14.

[65] *Leviege*, ARB No. 2019-0058, slip op. at 4 (citing *Welch v. Chao*, 536 F.3d 269, 276-77, 279 (4th Cir. 2008); *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009)).

[66] *See Sylvester*, ARB No. 2007-0123, slip op. at 14 (citing *Harp*, 558 F.3d at 723).

[67] *See Williams v. QVC, Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 9 (ARB Jan. 17, 2023) (affirming the ALJ's finding that complainant failed to establish that he engaged in protected activity on the complainant's failure to establish an objectively reasonable belief alone).

[68] D. & O. at 15.

[69] *Id.* at 17.

complaint may concern a future violation that an employee reasonably believes is *likely* to happen, a complainant must do more than "speculate, argue theoretical scenarios, or share mere beliefs that some corporate activity is wrong and may theoretically affect the corporation's financial statements and its shareholders."[70] Dickerson's first theory (admittedly) is pure speculation anchored to a foundation of overtly hypothetical future events. The ALJ thus acted well within his discretion in finding Dickerson did not actually hold an objectively reasonable belief in a violation under the applicable law concerning event one.[71] Substantial evidence supports the ALJ's finding.

Similarly, Dickerson's testimony (when taken at its word) unequivocally establishes he did not believe the second event even reached the point of a theoretical violation. While he may have sincerely preferred another accounting method, he repeatedly and indisputably explained his preferred method would not have led to a different outcome and the prior method caused no harm. The ALJ thus accurately concluded that Dickerson "did nothing more than comment on how a matter had been handled before he arrived" and therefore did not subjectively believe that he was reporting a current or future SOX-protected activity.[72] We again agree. To the extent Dickerson intends to imply the practice could hypothetically lead to some sort of violation in different circumstances, the argument would suffer the same fatal flaws as his first event.

We further agree that event three was a garden variety HR issue and not something SOX is designed to protect. The dispute, at its core, simply concerned how Dickerson's employee was treated by a superior. Notably, the plain text of SOX limits the Act's reach to the reporting of fraud or the violation of "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."[73] SOX thus is not a general remedy for simple employment grievances unrelated to corporate fraud, as the Board repeatedly has held with similar whistleblower statutes it administers.[74] Indeed, the ALJ correctly noted that Dickerson took his complaints to human resources, establishing even Dickerson definitively knew this was not an issue with Iteris's

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70 *Leviege*, ARB No. 2019-0058, slip op. at 4 (citing *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 355 (4th Cir. 2008)); *see also Sylvester,* ARB No. 2007-0123, slip op. at 16 ("A whistleblower complaint concerning a violation about to be committed is protected as long as the employee reasonably believes that the violation is likely to happen.").

71 *Leviege*, ARB No. 2019-0058, slip op. at 4.

72 D. & O. at 15.

73 18 U.S.C. § 1514A.

74 *See e.g. Forrand v. Fedex Express*, ARB No. 2019-0041, ALJ No. 2017-AIR-00016, slip op. at 3 n.8 (ARB Jan. 4, 2021) (AIR21 "is not a general remedy for employment grievances unrelated to air safety.").

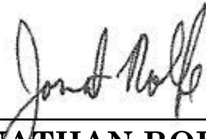
financial statements or SEC compliance. So too would any objective accounting expert with his experience. Substantial evidence thus supports the ALJ's finding on event three.

Finally, we affirm the ALJ on event four for similar reasons. It was well within the ALJ's wide discretion in evaluating witness testimony to determine that Dickerson "did not subjectively believe what he reported as Yasbek's lack of fluency was likely to lead to a violation of relevant law" but to find instead that Dickerson found Yasbek's oversight "annoying, intrusive, and time-consuming."[75] Given the ALJ's credibility determination is not "patently unreasonable" (when put in the context of this case) we affirm his credibility finding.[76] And whatever one thinks of the burden of putting up with an annoying co-worker, it is not something covered by the umbrella of SOX. Nor are hypothetical future violations based on speculation regarding that employee's alleged incompetency. Substantial evidence thus supports the ALJ's protected activity determination regarding event four.

CONCLUSION

Because Dickerson did not establish that he engaged in protected activity, we affirm the ALJ's decision and order.

SO ORDERED.



JONATHAN ROLFE
Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge

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75 D. & O. at 16.

76 *Mizusawa*, ARB No. 2011-0009, slip op. at 3.