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

IN THE MATTER OF:

EILEEN MORRELL,

COMPLAINANT,

v.

DLH HOLDINGS CORP.,

RESPONDENT.

ARB CASE NO. 2023-0030

ALJ CASE NO. 2020-SOX-00005
ALJ MONICA MARKLEY

DATE: September 23, 2024

Appearances:

For the Complainant:
Eileen Morrell; *Pro Se*; Adairsville, Georgia

For the Respondent:
Vincenzo M. Mogavero, Esq., Catelyn Stark, Esq.; *Becker & Poliakoff, LLP*; New York, New York

Before HARTHILL, Chief Administrative Appeals Judge, and WARREN, Administrative Appeals Judge

DECISION AND ORDER

WARREN, Administrative Appeals Judge:

This case arises under the whistleblower protections of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX), as amended, and its implementing regulations.[1] Eileen Morrell (Complainant) filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that DLH Holdings Corporation (Respondent) violated the SOX by terminating Complainant's

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

employment in retaliation for engaging in protected activity.[2] On March 27, 2023, the Administrative Law Judge (ALJ) issued a Decision and Order Dismissing Complaint[3] finding that: (1) Complainant did not engage in protected activity because it was not objectively reasonable for her to believe that she had reported SOX-related violations prior to her termination, and (2) even if Complainant had established she engaged in protected activity, Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse employment action against Complainant absent that activity.[4] Complainant appealed. Because substantial evidence supports the ALJ's decision, we affirm.

BACKGROUND

Complainant, who has over thirty years of experience in financial planning, financial analysis, and government contract accounting,[5] began working for Respondent on June 20, 2011.[6] Her initial job duties included performing accounting work on government contracts, reviewing financial statements, preparing earnings releases, preparing budgets, and preparing presentations for the Board of Directors.[7] In December 2012, Respondent's Controller resigned and Complainant inherited that position's public reporting duties, which included reviewing 10-K and 10-Q reports filed with the U.S. Securities and Exchange Commission (SEC).[8] In July 2016, Respondent increased Complainant's salary and promoted her to the role of Director of Financial Planning and Analysis.[9]

In mid-2015, Respondent initiated the process of acquiring a company called Danya.[10] In early 2016, to prepare for the acquisition, Respondent began planning a reduction-in-force (RIF) and identified positions that could be eliminated.[11] The acquisition of Danya closed in May 2016.[12] Zach Parker, Respondent's President and CEO, testified that Complainant's position was selected to be included in the RIF in April or May 2016 because Complainant's job duties were going to be

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2 Decision and Order (D. & O.) at 1.

3 *Id.* at 1.

4 *Id.*

5 *Id.* at 4, 17.

6 *Id.* at 4.

7 *Id.* at 4, 17.

8 *Id.* at 4, 8, 16-18.

9 *Id.* at 5.

10 *Id.* at 14.

11 *Id.* at 39.

12 *Id.* at 6, 11.

integrated into a new Controller position.[13] Kathryn JohnBull, Respondent's CFO, also testified that DLH selected Complainant's position to be included in the RIF in early 2016 for the same reason.[14]

Respondent decided to seek a new Controller and began recruiting for the position in February 2016.[15] JohnBull began interviewing candidates in March 2016.[16] At the same time, Complainant proposed new positions for herself within the company but did not apply for the Controller position.[17] In August 2016, Respondent hired Norm Toma as the new Controller[18] and transferred some of Complainant's job duties to Toma.[19]

During the last three months of 2016, Complainant complained that Toma was not providing timely and accurate financial statements, took issue with an updated valuation model, and disagreed with JohnBull on showing earnings per share on the adjusted expected earnings before interests, taxes, depreciation, and amortization (EBITDA).[20] On January 24, 2017, Complainant emailed Parker regarding a reduction in workers' compensation accruals.[21] On February 11, 2017, Complainant formally filed an internal whistleblower complaint by emailing Frederick Wasserman, the Chairman of the Board of Directors, and Victor DiGioia, outside legal counsel.[22] In response, Respondent's outside counsel initiated an investigation.[23]

While the investigation was pending, Complainant continued to attempt to craft a new position for herself and inquired about open positions for a Director of Contracts and Corporate Compliance, and Vice President of Corporate

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13 *Id.* at 39-40.

14 *Id.*

15 *Id.* at 17.

16 *Id.* at 10, 17.

17 *Id.* at 5, 18-19, 25, 40.

18 *Id.* at 14, 18, 26, 40.

19 *Id.* at 14, 18.

20 *Id.* at 40.

21 *Id.*

22 *Id.* at 5, 40.

23 *Id.* at 36, 40.

Compliance.[24] In an email to DiGioia, Complainant acknowledged that she would likely be terminated from her position.[25]

On March 27, 2017, Respondent's outside counsel concluded that Complainant's complaints had no merit and submitted the results to the Audit Committee of the Board of Directors.[26] While the Audit Committee accepted the results, it decided to have an outside accounting firm and an independent auditor review the complaints.[27] Both the outside accounting firm and the independent auditor concluded that Respondent did not engage in any illegal conduct.[28]

On March 31, 2017, Respondent terminated Complainant's employment as part of the planned RIF.[29] Parker testified that, upon hiring Toma, it was his expectation that Complainant's job duties would be transferred to Toma in a cooperative process until the company terminated Complainant's position as part of the RIF.[30] After Respondent terminated Complainant's employment, her position was indeed eliminated, and her job duties were absorbed into the Controller position and the Director of Financial Systems role.[31]

On August 15, 2017, Complainant filed a whistleblower complaint with OSHA alleging that Respondent unlawfully terminated her employment in retaliation for her engaging in protected activity.[32]

1. Procedural Background

On October 4, 2019, OSHA dismissed the complaint.[33] Complainant timely requested an ALJ hearing, which was held on May 3-4, 2021.[34] On March 27, 2023, the ALJ issued a D. & O. Dismissing Complaint.[35] Complainant filed a timely

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24 *Id.* at 40.

25 *Id.*

26 *Id.* at 36-37.

27 *Id.* at 37.

28 *Id.*

29 *Id.* at 11.

30 *Id.* at 16.

31 *Id.* at 16, 22.

32 *Id.* at 1.

33 *Id.* at 1-2, 13.

34 *Id.*

35 *Id.* at 1.

petition for review with the Administrative Review Board (Board or ARB), alleging that she engaged in protected activity across several emails and a formal internal whistleblower complaint.[36] Those alleged protected activities are as follows:

1. Complainant reported concerns that Respondent reduced its workers' compensation accrual to show a small net gain instead of the loss shown prior to the adjustment.
2. Complainant reported concerns that Respondent made improper accounting adjustments on financial reports to hit EBITDA targets.[37]
3. Complainant disagreed with Respondent's allocation of fringe benefits on government contracts because it reduced expenses in public disclosures and was misleading to investors.[38]
4. Complainant alleged that Respondent was not compliant with a bank reporting covenant that resulted in default.
5. Complainant made complaints pertaining to Respondent's business and personnel decisions.

2. ALJ Decision

The ALJ found that Complainant established she held a subjective belief that Respondent violated securities laws and/or regulations specifically regarding the takedown of the workers' compensation accrual and fringe benefits allocations on government contracts.[39] The ALJ, however, questioned Complainant's motivation for raising allegations about Respondent's accounting practices and determined that Complainant's complaints were a mix of objections to accounting decisions and general objections to her compensation and position within the company.[40] While the ALJ indicated it seemed as though Complainant's complaints "were asserted at

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[36] *Id.* at 34-35.

[37] More specifically, after Respondent acquired Danya, Complainant alleged that internal financial controls weakened, and the EBITDA were reduced to half the amount Respondent had planned when it acquired Danya. D. & O. at 5. JohnBull elected to amortize this loss over a period of ten years. *Id.* Complainant disagreed with JohnBull's approach and raised her concern that Respondent was underrunning its amortization and violating accounting principles. *Id.* Complainant felt it was misleading and not in compliance with SEC rules. *Id.* at 6, 28. She proposed another measure, which Respondent adopted. *Id.* at 6.

[38] Complainant alleged that in early March 2017, she reported her concerns regarding Respondent's allocation of fringe benefits on government contracts via emails to Parker, Wasserman, and DiGioia. D. & O. at 30, 35. She argues that Respondent's cost-shifting on Danya government contracts intentionally misallocated fringe benefits. *Id.* at 35.

[39] *Id.* at 35-36.

[40] *Id.* at 36.

least in part due to her being disgruntled with her position title and salary,"[41] the ALJ concluded a secondary motivation did not undermine her subjective belief in accounting irregularities.[42]

However, the ALJ found that Complainant did not establish an objectively reasonable belief that Respondent violated the SOX on any of the alleged protected activities.[43] The ALJ found significant that even though Complainant reported her "concerns to a plethora of individuals, no one else found her complaints to have a foundation."[44] For this and other reasons further explained below, the ALJ concluded that "a reasonable person in the same factual circumstances with the same training and experience" would not believe that any of Complainant's allegations rose to the level of a SOX violation.[45]

Regarding the workers' compensation accrual, the ALJ found that Complainant's allegation was without merit because the change was appropriately disclosed and was part of the normal first quarter reassessment of accruals.[46] The ALJ also credited the investigation into Complainant's internal claim, which found that there were no errors or illegal actions, and there was no fraud with respect to Respondent's accounting and disclosure of its workers' compensation accrual.[47]

Next, the ALJ found that Respondent's EBITDA reports and financial data did not contain any inaccuracies or information presented in a misleading way.[48] The ALJ credited JohnBull's testimony that she performed normal monthly diligence during the closing process and her explanation that the estimated annual rates used for the budget were subject to review based on actual performance and updated facts, and that she adjusted accordingly.[49] Further, the investigation into Complainant's internal claim confirmed that Respondent's accounting of fringe benefits for the contracts in question was correct.[50]

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41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at 36-39.

46 *Id.* at 36, 39.

47 *Id.* at 37.

48 *Id.* at 36-37.

49 *Id.* at 38.

50 *Id.* at 37-38.

Regarding the allocation of fringe benefits, the ALJ found that the financial data did not contain any inaccuracies or information presented in a misleading way, and Respondent's methodology in allocating fringe benefits was consistent with industry standards.[51] The ALJ credited JohnBull's testimony that, to the extent that she and Complainant disagreed on the fringe benefits rate, she requested Complainant use the rate that was already disclosed to and approved by the government until a new rate was approved for the 2017 fiscal year.[52] The ALJ also credited outside counsel's investigation, which confirmed that Respondent's methodology was correct.[53]

Regarding Complainant's allegation that Respondent defaulted on a bank covenant, the ALJ found that JohnBull informed the bank that certain financial statements would be late, and Respondent complied within the cure period.[54] The ALJ also credited the investigation that found Respondent compliant with its applicable bank loan covenants.[55] The ALJ concluded that there was no default, nor would the situation ever result in default.[56]

Lastly, the ALJ found that Complainant's other complaints regarding JohnBull's operation of the Finance Department, Complainant's job security, and her issues with Toma, did not allege any SOX-protected activity.[57] Rather, Complainant's complaints involved "differences of opinion on processes that were not deficient, inaccurate, or misleading; properly disclosed changes in normal processes; acceptable delays that would not result in default; and complaints regarding personnel and compensation that did not allege illegality under SOX."[58] The ALJ credited JohnBull's testimony that "any disagreement that Complainant had with [JohnBull] on accounting issues was not a matter of fraud, but showed simple differences of professional opinion."[59] The ALJ concluded that an individual in Complainant's position would have deduced that she and her supervisor had differing opinions on procedures that could have been appropriately addressed in different ways.[60]

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51 *Id.* at 36-37.

52 *Id.* at 38.

53 *Id.* at 37.

54 *Id.* at 38.

55 *Id.* at 37.

56 *Id.* at 36.

57 *Id.* at 37.

58 *Id.*

59 *Id.* at 38.

60 *Id.* at 39.

The ALJ concluded that because Complainant had not established that she had an objectively reasonable belief that she reported a violation, she failed to establish a necessary element of her retaliation claim, protected activity, and thus her claim failed.[61] In the alternative, the ALJ found that, even if Complainant had established she engaged in protected activity, Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse employment action against Complainant absent the alleged protected activity.[62]

3. Parties' Positions on Appeal

On appeal, Complainant broadly contends that the ALJ erred in finding that she did not engage in protected activity and that Respondent established by clear and convincing evidence that it would have terminated her employment in the absence of protected activity.[63] Specifically, Complainant reiterates her argument that Respondent's workers' compensation accrual and EBITDA adjustments violate the SOX.[64] In addition, Complainant contends that, up until the last three months of her employment, she received outstanding feedback, a salary increase, stock option awards, and a large bonus.[65]

Respondent contends that the ALJ's decision is supported by substantial evidence,[66] and that the ALJ correctly found that Complainant's beliefs were not objectively reasonable based on evidence to that effect, including that JohnBull, outside counsel, independent accountants and auditors, and Respondent's Audit

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61 *Id.*

62 *Id.*

63 *See* Complainant's Brief (Comp. Br.).

64 *Id.* at 10, 12-13. Complainant additionally moves to present new exhibits before the Board. When determining whether to consider new evidence on appeal, the Board relies on the regulations governing OALJ hearings that specify "no additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed." *Trivedi v. Gen. Elec.*, ARB No. 2022-0026, ALJ No. 2022-SOX-00005, slip op. at 3 (citing 29 C.F.R. § 18.90(b)(1)). Complainant has not explained why she meets this standard. We therefore will not consider this new evidence on appeal. *See Childs v. DimensionalMechanics, Inc.,* ARB No. 2021-0001, ALJ No. 2017-LCA-00008, slip op. at 4 (ARB Sept. 30, 2021) (rejecting newly submitted evidence as the complainant was unable to show that it could not have been discovered with reasonable diligence before the record closed); *Aityahia v. Air Line Pilots Ass'n*, ARB No. 2019-0037, ALJ No. 2018-AIR-00042, slip op. at 3 n.2 (ARB May 19, 2020) (same).

65 Comp. Br. at 10.

66 Respondent's (Resp.) Br. at 21-30.

Committee and Board of Directors all concluded that Complainant's beliefs had no merit.[67] Respondent asserts that Complainant's concerns related to differences of opinion and do not support an allegation of fraud or any other violation under the SOX.[68] In the alternative, Respondent contends that it would have terminated Complainant's employment absent the alleged protected activity as shown by Respondent's decision to include Complainant's position in the RIF before Complainant lodged any complaints.[69]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to review ALJ decisions under SOX.[70] The ARB reviews questions of law de novo but is bound by the ALJ's factual determinations if they are supported by substantial evidence.[71] "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[72] 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."[73]

DISCUSSION

The SOX prohibits covered employers from discriminating against an employee who provides information or otherwise assists in an investigation regarding 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 . . . ."[74] A SOX claim is governed by the burdens of proof set out in the

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67 *Id.* at 23.

68 *Id.* at 23-25, 33-37.

69 *Id.* at 25-28, 31.

70 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).

71 *Schaefer v. New York Cmty. Bancorp, Inc.*, ARB No. 2022-0050, ALJ Nos. 2018-SOX-00048, -00051, slip op. at 12 (ARB June 22, 2023) (citing to *Cerny v. Triumph Aerostructures-Vought Aircraft Div.*, ARB No. 2019-0025, ALJ No. 2016-AIR-00003, slip op. at 5 (ARB Oct. 31, 2019)) (additional citations omitted).

72 *Id.* (citing to *Cerny,* ARB No. 2019-0025, slip op. at 5 (citations omitted)).

73 *Id.* (citation omitted).

74 18 U.S.C. § 1514A(a)(1) (citing 49 U.S.C. § 42121(b)).

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21).[75]

To prevail, a SOX complainant must establish by a preponderance of the evidence that: (1) they engaged in activity that SOX protects; (2) the respondent took an unfavorable personnel action against them; and (3) the protected activity was a contributing factor in the adverse personnel action.[76]

An employee engages in protected activity when the employee "provide[s] information" to the government or a supervisor "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholder . . . ."[77] Although "[a] complainant need not cite a specific code provision she believes was violated to engage in protected activity, but [a complainant] nonetheless has to complain or provide information about conduct that she reasonably believes concerns one of the six specifically enumerated categories in the statute . . . ."[78]

1. Substantial Evidence Supports the ALJ's Decision That Complainant Did Not Engage in Protected Activity

A. Substantial Evidence Supports the ALJ's Finding That Complainant Had a Subjectively Held Belief That Respondent Violated the SOX

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.[79] To satisfy the subjective component, the employee must have actually believed that the conduct constituted a violation of relevant law or was likely to.[80]

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75 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)).

76 *Schaefer*, ARB No. 2022-0050, slip op. at 13; *see also* 29 C.F.R. § 1980.109(a); 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)).

77 18 U.S.C. §1514A(a)(1); *see also Leviege v. Vodafone US, Inc.*, ARB No. 2019-0058, ALJ No. 2016-SOX-00001, slip op. at 3 (ARB Mar. 19, 2021) (citations omitted).

78 *Leviege*, ARB No. 2019-0058, slip op. at 4 (citations omitted) ("A complainant need not cite a specific code provision she believes was violated to engage in protected activity").

79 *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 14 (ARB May 25, 2011) (citations omitted).

80 *Sylvester*, ARB No. 2007-0123, slip op. at 14 (citing *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009)), 16.

Substantial evidence supports the ALJ's finding that Complainant had a subjective belief that Respondent violated the SOX.[81] Specifically, Complainant established that she actually believed that Respondent violated the SOX in the way it calculated its workers' compensation accrual based on her emails to Parker, Wasserman, and DiGioia, which stated that Respondent's change in its estimation practice should be disclosed because it made the difference between reporting net income instead of net loss.[82] Complainant also established that she actually believed that Respondent was misleading its investors regarding its allocation of fringe benefits based on emails expressing her concern to coworkers, Parker, Wasserman, and Digioia.[83] We therefore affirm the ALJ's findings that Complainant subjectively believed that Respondent violated the SOX based on substantial evidence in the record, satisfying the first component of a reasonable belief.

B. *Substantial Evidence Supports the ALJ's Ruling That Complainant Did Not Establish an Objectively Reasonable Belief That Respondent's Workers' Compensation Accrual Constituted a SOX Violation*

Complainant also bears the burden of showing that "a reasonable person of similar experience, training, and factual knowledge would objectively believe that a violation has occurred."[84] To demonstrate a reasonable belief that she was reporting violations, a complainant "need not prove an actual violation of law, but they '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.'"[85]

Here, Complainant's first concern related to a theoretical situation that did not occur. In this situation, Complainant alleged that Respondent permissibly decreased its workers' compensation accrual, but it needed to disclose the change in its estimation practice—otherwise it could mislead investors and would violate SEC recordkeeping requirements.[86] However, the change in Respondent's estimation

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81 The ALJ did not make a specific finding on whether Complainant had a subjective belief that Respondent violated the SOX regarding its EBITDA reports, the timeliness of its bank reporting covenants, defaulting on its bank reporting covenants, or via any of Complainant's HR concerns. *See* D. & O. at 35-36. Because we find that Complainant did not have an objectively reasonable belief that any of these activities violated SOX, *infra* Part 1(E) to 1(F), her subjective belief is moot and the ALJ's omission was harmless error.

82 D. & O. at 12, 28-29, 35.

83 *Id.* at 16, 30, 35-36.

84 *Schaefer*, ARB No. 2022-0050, slip op. at 13-14 (quoting *Leviege*, ARB No. 2019-0058, slip op. at 4)).

85 *Id.* at 14.

86 D. & O. at 35.

practice *was* appropriately disclosed in Respondent's Form 10-Q and was part of the normal first quarter reassessment of accruals.[87] In the "Commitments and Contingencies" section of the notes of Form 10-Q, Respondent explained that, regarding workers' compensation accrual, "[w]e accrue workers compensation expense based on claims submitted, applying actuarial loss development factors to estimate the costs incurred but not yet recorded."[88] In addition, the form also included a section on the use of estimates, which explained,

> Significant estimates include . . . measurement of loss development on workers' compensation claims . . . . We evaluate these estimates and judgments on an ongoing basis and base our estimates on historical experience, current and expected future outcomes, third-party evaluations and various other assumptions that we believe are reasonable under the circumstances. The results of these estimates form the basis for making judgments about the carrying values of assets and liabilities as well as identifying and assessing the accounting treatment with respect to commitment and contingencies. We revise material accounting estimates if changes occur, such as more experience is acquired, additional information is obtained, or there is new information on which an estimate was or can be based.[89]

Moreover, although Complainant felt the disclosure was too inconspicuous, she acknowledged that the change was addressed on both Form 10-Q and financial statements.[90] Complainant further acknowledged that, by the time she emailed Wasserman and DiGioia, Respondent had publicly filed the 10-Q report.[91]

Thus, as Respondent did disclose that it decreased its workers' compensation accrual, Complainant's concern related to a theoretical situation—a lack of disclosure that never transpired. Complainant was a financial planning and government accounting professional with over 30 years of accounting and SEC reporting experience and knowledge.[92] A reasonable person with Complainant's experience would not have objectively believed that a SOX-protected violation had

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87 *Id.* at 12, 36, 38.

88 *Id.* at 32.

89 *Id.*

90 *Id.* at 12.

91 *Id.*

92 *Id.* at 4

occurred since the change in Respondent's estimation practice was disclosed.[93] By comparison, and providing support for the ALJ's finding, JohnBull also had over thirty years of experience in the finance industry and government services,[94] and did not believe there were any SEC violations.[95] Complainant has not pointed to contrary (or indeed any) evidence in the record that demonstrates her belief was objectively reasonable. Thus, we affirm the ALJ's ruling that Complainant did not have an objectively reasonable belief that Respondent's workers' compensation accrual methodology constituted a violation.

C. *Substantial Evidence Supports the ALJ's Ruling That Complainant Lacked an Objectively Reasonable Belief That Respondent's EBITDA Reports Violated the SOX*

Substantial evidence in the record supports the ALJ's finding that Complainant's reports regarding Respondent's EBITDA reports were likewise not objectively reasonable. Complainant had reported that JohnBull made improper accounting adjustments on financial reporting in order to hit EBITDA targets. However, in an email from JohnBull to Toma dated February 23, 2017, JohnBull stated that she was not trying to meet a predetermined adjusted EBITDA, but rather was attempting to estimate where she thought they would come out in order to have an early indication if the update appropriately reflected the adjustments.[96] Further, JohnBull testified that this email reflected a normal, standard monthly diligence of the closing process.[97] She also testified that estimated annual rates were formed during the budget cycle and were later subjected to review based on actual performance and updated facts, and that it would not have been appropriate to continue to use estimates throughout the year.[98] Finally, the internal investigation into the matter found no inaccuracies.[99]

Complainant has not cited record evidence to support her argument that Respondent's accounting adjustments on the EBITDA reports violated the SOX.

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93 *See Allen v. Stewart Enters., Inc.*, ARB No. 2006-0081, ALJ Nos. 2004-SOX-00060, -00061, -00062, slip op. at 14 (ARB July 27, 2006), *aff'd Allen v. Admin. Rev. Bd.,* 514 F.3d 468, 478-79 (5th Cir. 2008) (finding that it was not objectively reasonable for complainant, a licensed CPA, to believe that internal financial documents did not comply with securities law because complainant knew the internal documents were not submitted to the SEC and knew the documents did not have to be compliant).

94 D. & O. at 17.

95 *Id.* at 19-21.

96 *Id.* at 24.

97 *Id.*

98 *Id.* at 24, 38.

99 *Id.* at 36-37.

Rather, as the ALJ found, Complainant's argument rests on speculation and reflects a difference of opinion.[100] Given Complainant's lengthy experience and training, substantial evidence supports the ALJ's determination that a reasonable person of similar experience, training, and factual knowledge to Complainant would not have believed that a violation had occurred. Thus, we affirm the ALJ's ruling that Complainant did not have an objectively reasonable belief that Respondent's EBITDA reports were a violation under the SOX.

D. Substantial Evidence Supports the ALJ's Ruling That Complainant Did Not Establish an Objectively Reasonable Belief That Respondent's Method of Allocating Fringe Benefits Violated the SOX

Substantial evidence in the record also supports the ALJ's finding regarding Complainant's report of concerns about Respondent's allocation of fringe benefits on government contracts. Complainant asserted that JohnBull made a $100,000 reduction in Danya fringe benefits costs that should have equally applied to both administrative expenses and direct costs, but which was applied entirely to administrative expenses.[101] Complainant alleged this allocation reduced these expenses in reporting and public disclosures and was misleading to investors.[102] JohnBull testified that this was ultimately an immaterial issue because it did not impact revenue recognition.[103] Parker testified that he did not recall having a reaction to Complainant's concern because it was normal practice that Danya had a different way of treating these indirect costs.[104] In addition, an outside accounting firm reviewed Respondent's methodology and confirmed that Respondent's accounting of fringe benefits was correct and consistent with industry standards.[105]

Given that Complainant has over thirty years of experience in financial planning, analysis, and government accounting, the ALJ permissibly found based on witness testimony and the results of the outside counsel investigation, that a reasonable person of similar experience, training, and factual knowledge to Complainant would not have objectively believed that Respondent's method in allocating fringe benefits violated the SOX. Moreover, Complainant has not cited to evidence in the record that would demonstrate that the ALJ's ruling is not supported by substantial evidence. Thus, we find that substantial evidence supports

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100 *Id.* at 37.

101 *Id.*

102 *Id.*

103 *Id.* at 24.

104 *Id.* at 16.

105 *Id.* at 37.

the ALJ's finding that no objectively reasonable person could believe that Respondent's method in allocating fringe benefits violated the SOX.

E. Substantial Evidence Supports the ALJ's Ruling That Complainant Lacked an Objectively Reasonable Belief That Complainant's Alleged Non-compliance with a Bank Reporting Covenant Does Not Support Protected Activity

Complainant alleged she engaged in protected activity on February 11, 2017, when she expressed concerns about Toma's delays in sending her data she needed to prepare financial statements for a bank.[106] She claimed the delay resulted in a late financial statement which could violate Respondent's covenant with the bank.[107]

Regarding Complainant's allegations about Respondent's non-compliance with a bank reporting covenant, substantial evidence supports the ALJ's determination that an investigation showed that Respondent complied with the reporting within the cure period.[108] JohnBull communicated to the bank that certain financial statements would be delivered after the normal due date, and the bank accepted the proposed reporting date.[109] In addition, JohnBull testified that one of Complainant's job duties was to prepare these financial statements, and that late delivery of financials typically would not result in default, but rather was a routine administrative requirement.[110]

Complainant has not cited to any record evidence to support her allegation that Respondent defaulted. Rather, Complainant's concern relates to a theoretical situation that may have occurred if Respondent had not complied within the cure period—and, *if it had* occurred, Respondent would have been required to report it.[111] But again, none of this happened. As the ALJ found "there was no default, nor would the situation have ever resulted in a default."[112] Thus, we hold that substantial evidence supports the ALJ's finding that no reasonable person of similar experience, training, and factual knowledge to Complainant would have objectively believed that a violation occurred.

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106 *Id.* at 12, 36

107 *Id.* at 12.

108 *Id.* at 36.

109 *Id.*

110 *Id.* at 20, 36.

111 *See Schaefer*, ARB No. 2022-0050, slip op. at 14 (complainants "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.") (inner quotations omitted).

112 D. & O. at 36.

F. Substantial Evidence Supports the ALJ's Ruling That Complainant's Additional Complaints Were Not Protected Activity

Complainant raised several complaints about Respondent's business and personnel decisions. She complained of Toma's competence, JohnBull's treatment of her after reporting concerns, Respondent's labor charging practices, and having to inform one of Respondent's Human Resources representatives that she intended to file a SOX complaint if her internal complaint was not accepted.[113]

"General assertions of wrongdoing untethered from [the SOX's] enumerated categories are not protected . . . ."[114] Here, rather than reporting a SOX violation, Complainant merely cited disagreements over the ways in which JohnBull operated the Finance Department, differences of opinion on business and personnel decisions, and concerns about her job security.[115] Complainant has not alleged any connection to a violation under SOX regarding these concerns. In addition, Complainant's concern that her internal complaint would not be accepted was rendered moot because Respondent not only fully investigated her complaint but also had an outside accounting firm independently investigate the claim.[116] Thus, we find that substantial evidence supports the ALJ's finding that no objectively reasonable person would believe that these generalized personnel and compensation concerns alleged violations under SOX.[117]

Accordingly, we affirm the ALJ's finding that Complainant has not demonstrated that she had an objectively reasonable belief that she engaged in protected activity on any of the aforementioned grounds. Again, the ALJ's overarching conclusion regarding whether Complainant held an objectively reasonable belief was based primarily on the fact that "even though she reported her concerns to a plethora of individuals, no one else found her complaints to have foundation," which was supported by substantial evidence. Because Complainant has not established that she engaged in protected activity, she has failed to meet her burden to establish her whistleblower claim by a preponderance of the evidence and her claim fails.

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113 D. & O. at 34-35.

114 *Leviege*, ARB No. 2019-0058, slip op. at 4 (citations omitted).

115 D. & O. at 37.

116 *Id.* at 37-39.

117 *Id.*

2. Substantial Evidence Supports the ALJ's Finding That Respondent Established by Clear and Convincing Evidence That It Would Have Terminated Complainant's Employment Absent Any Alleged Protected Activity

If a complainant meets their burden of proof, the employer may avoid liability if it proves its affirmative defense, which requires demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.[118] The ALJ found, assuming that Complainant *had* established that she engaged in protected activity, that Respondent demonstrated that it would have taken the same adverse employment action against Complainant absent that activity.[119] Complainant contends that Respondent did not meet their burden of proving by clear and convincing evidence that it would have terminated Complainant's employment absent protected activity because Respondent did not memorialize the list of employees who were to be included in the RIF until mid-March 2017.[120]

Although Respondent did not memorialize the list of employees included in the RIF, the record substantially supports the ALJ's ruling that the testimony of Parker and JohnBull made it evident that Complainant's position was included in the RIF nearly a year before Complainant engaged in her alleged protected activities. Respondent began planning a RIF in early 2016, once it was apparent that Respondent was going to successfully acquire Danya.[121] Parker specifically testified that Complainant's position was included in the RIF in April or May of 2016.[122] JohnBull testified that Complainant's position was included in the RIF in early 2016.[123]

Notably, Complainant's job duties were absorbed by either the Controller position or the Director of Financial Systems.[124] JohnBull testified that, prior to the acquisition of Danya, Respondent committed to implementing a new accounting system.[125] Respondent previously had a Controller until 2012, at which point

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118 29 C.F.R. § 1980.109(b).

119 D. & O. at 39.

120 Comp. Br. at 16.

121 D. & O. at 39.

122 *Id.* at 14, 39.

123 *Id.* at 17, 39.

124 *Id.* at 18, 40.

125 *Id.* at 17.

Complainant took on several of that position's job duties.[126] As part of the restructuring process, JohnBull reestablished the Controller role, began recruiting for the position in February/March 2016, and hired Toma in August 2016.[127] Parker testified that it was his expectation that Complainant's job duties would be transferred to Toma in a cooperative process leading up to the RIF.[128] After Respondent terminated Complainant's employment, Complainant's position was eliminated.[129] This evidence provides support for the finding that Respondent eliminated Complainant's position because her job duties were going to be absorbed by the Controller, and would have done so absent Complainant's alleged protected activity.

In addition, although Complainant received a salary increase in July 2016,[130] other employees included in the RIF also received salary increases in 2016.[131] Parker testified that compensation adjustments did not influence whether an employee was selected to be included in the RIF.[132] Parker stated that, like Complainant, the Director of Health Technology also received a bonus in 2016 but was later included in the RIF because that position was also absorbed by another position.[133] Thus, evidence that similarly situated employees received salary increases and were still part of the RIF, supports the ALJ's finding that Respondent planned to terminate Complainant's employment prior to her alleged protected activity and does not present a contradiction to the ALJ's determination.

Therefore, we affirm the ALJ's finding that Respondent established by clear and convincing evidence that it would have terminated Complainant's employment absent the alleged protected activity.

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126 *Id.* at 16.

127 *Id.* at 18, 40.

128 *Id.* at 16.

129 *Id.* at 22.

130 *Id.* at 5.

131 *Id.* at 14, 41.

132 *Id.* at 14.

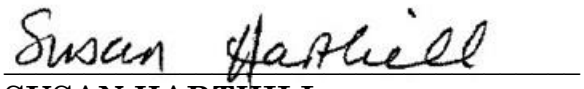
133 *Id.*

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's D. & O.[134]

SO ORDERED.

IVEY S. WARREN
Administrative Appeals Judge



SUSAN HARTHILL
Chief Administrative Appeals Judge

[134] In any appeal of this Decision and Order, the appropriately named party is the Secretary, U.S. Department of Labor, not the Administrative Review Board.