No. 18-72418

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA MICALLEF,
Petitioner,

v.

U.S. DEPARTMENT OF LABOR,
Respondent,

CAESAR'S ENTERTAINMENT
CORPORATION, INC. and HCAL, LLC,
Real Parties in Interest.

On Petition for Review of the Final Decision and Order of the United States Department of Labor's Administrative Review Board

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BRIEF FOR THE SECRETARY OF LABOR

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BRIEF FOR THE SECRETARY OF LABOR

On behalf of Respondent United States Department of Labor ("Department") Administrative Review Board ("ARB"), the Secretary of Labor ("Secretary") submits this brief in response to the brief filed by Petitioner Patricia Micallef.

STATEMENT OF JURISDICTION

This case arises under the whistleblower provision of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley", "SOX", or "the Act"), 18 U.S.C. 1514A, and its implementing regulations, 29 C.F.R. Part 1980. The Secretary had subject matter jurisdiction over this case pursuant to 18 U.S.C. 1514A(b) based on a complaint filed with the Secretary on October 18, 2012, by Ms. Micallef against her former

employer, Harrah's Rincon Casino and Resort ("Harrah's").[1] SER 1 ("ARB Op.") at 2.[2] On September 9, 2016, a Department Administrative Law Judge ("ALJ") granted summary decision to Harrah's and dismissed Ms. Micallef's complaint. SER 5 ("ALJ Op."). On July 5, 2018, the ARB issued a Final Decision and Order affirming the ALJ's decision.[3] ARB Op.

On August 31, 2018, Ms. Micallef timely filed a petition for review with this Court. Pet. for Review, ECF No. 1; *see also* 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(4)(A) ("petition for review must be filed not later than 60 days after the . . . final order of the Secretary[.]") Because the alleged violation occurred in California, this Court has jurisdiction to review the Board's Final Decision and Order. 49 U.S.C. 42121(b)(4)(A) (jurisdiction proper in the Court of Appeals for

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[1] Ms. Micallef's complaint named as respondents several entities that may have either directly employed her or had some involvement in her employment, including HCAL, LLC and Caesar's Entertainment Corp. Which company employed her is not at issue on appeal. The ARB referred to the employer as "Harrah's," and for the sake of brevity, the Secretary does the same here.

[2] The Secretary is filing Supplemental Excerpts of Record with this Brief, pursuant to 9th Cir. R. 30-1.7, which are cited as "SER __."

[3] The Secretary has delegated authority to the Board to issue final agency decisions under the whistleblower provision of SOX. *See* Sec'y's Order No. 02-2012 (Oct. 19, 2012), Delegation of Auth. & Assignment of Responsibility to the Admin. Review Bd.,77 Fed. Reg. 69,378 - 69,380, 2012 WL 5561513 (Nov. 16, 2012) (Final Rule); *see also* 29 C.F.R. 1980.110(a).

the circuit in which the alleged violation occurred or where the complainant resided at the time of the alleged violation).

STATEMENT OF THE ISSUES

1. Whether the ALJ and ARB correctly granted summary decision to Harrah's because Ms. Micallef presented no genuine issue of material fact regarding whether she engaged in activity protected by SOX.

2. Whether an email that Ms. Micallef sent before this case commenced, but that she did not attach to her opposition to Harrah's summary decision motion, satisfies the "new and material" standard required to reopen the record.

STATEMENT OF THE CASE

A. Background

Congress enacted the Sarbanes-Oxley Act in 2002 "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014) (citing 116 Stat. 745). The Act includes a provision that protects employees from retaliation for reporting conduct to their employer that they reasonably believe violates any of six categories of law: mail fraud, wire fraud, securities fraud, bank fraud, a violation of any Securities and Exchange Commission rule or regulation, or a violation of "any provision of Federal law relating to fraud against

shareholders." 18 U.S.C. 1514A(a).

The Secretary has delegated authority for receiving and investigating SOX whistleblower cases to the Occupational Safety and Health Administration ("OSHA"). Sec'y's Order No. 01-2012 (Jan. 18, 2012), Delegation of Auth. & Assignment of Responsibility to the Assistant Sec'y for Occupational Safety & Health, 77 Fed. Reg. 3912, 2012 WL 194561 (Jan. 25, 2012) (Final Rule); *see also* 29 C.F.R. 1980.104(a). Following an investigation, OSHA issues a determination either dismissing the complaint or finding reasonable cause to believe that unlawful retaliation occurred and ordering appropriate relief. *See* 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.105. The complainant or the respondent may file objections to OSHA's determination with a Department of Labor ("DOL") ALJ. 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.106. The ALJ's decision is subject to discretionary review by the Board. 29 C.F.R. 1980.110.

B. Statement of Facts[4]

Ms. Micallef became a table games dealer for Harrah's Rincon Casino and Resort in November 2006. The next year, Harrah's implemented an incentive program which allowed employees to earn additional paid time off for perfect attendance, volunteerism, and working overtime. In September 2009, Ms. Micallef

[4] The facts in this section are drawn from the ARB Opinion at 2.

was appointed to a “Toke Committee” responsible for collecting and counting the tips of all table dealers. On September 16, 2010, Ms. Micallef sent an email to members of the Employee Action Committee in which she raised employee concerns about the incentive program. Ms. Micallef alleges that in September 2010, she also raised concerns with Harrah’s managers about misappropriation of dealers’ tips.

Ms. Micallef began an extended leave of absence from Harrah’s in November 2010. Almost a year later, she reported to Harrah’s that she had suffered injuries to her hand while working as a dealer, and she filed a workers’ compensation claim. She was released to return to work on February 21, 2012, but with limitations on her hand movement that prevented her from working as a dealer. During the following months, Harrah’s and Ms. Micallef attempted to identify a suitable alternative open position.

On August 27, 2012, Harrah’s sent Ms. Micallef a letter informing her that if she did not contact Harrah’s by September 15, 2012, the company would assume that she had decided not to continue seeking a suitable alternative position. On September 27, 2012, Harrah’s sent Micallef a letter terminating her employment, to which she did not respond.

C. Procedural History

Ms. Micallef filed a complaint with OSHA on October 18, 2012, alleging that Harrah's violated SOX by terminating her employment because she reported: (1) a work-related injury; (2) occupational health and safety concerns, such as fire hazards near oxygen tanks; and (3) misappropriation of tips owed to employees. ARB Op. at 2. OSHA dismissed the complaint on June 30, 2015, and Ms. Micallef requested an ALJ hearing. *Id.*

On July 22, 2016, Harrah's filed a motion for summary decision with the ALJ, to which Ms. Micallef filed an opposition. ALJ Op. at 1. On September 9, 2016, the ALJ granted Harrah's motion and dismissed Ms. Micallef's complaint on the basis that Ms. Micallef had failed to demonstrate any genuine issue of material fact regarding whether she engaged in SOX-protected activity. *Id.* at 6–7. In granting summary judgment to Harrah's, the ALJ specifically noted that Harrah's acknowledged that Ms. Micallef raised three potential sources of protected activity in opposing its motion for summary decision: (1) complaints related to her alleged on-the-job injury; (2) complaints regarding the distribution of tips in the workplace; and (3) complaints regarding occupational safety and health concerns such as fire hazards in the proximity of oxygen tanks. *Id.* at 6.

In alleging that she engaged in SOX-protected activity, Ms. Micallef specifically identified a September 16, 2010 email in which she claims that she

raised employee concerns regarding "EE credits used as PTO earned from employer incentive raffles and employee volunteering" that related to misappropriation of employee tips. ALJ Op. at 7 (citing Micallef Summ. Decision Opp'n at 18–19 and Ex. C6 to Summ. Decision Opp'n, p. 2); *see also* SER 6 (Micallef Summ. Decision Opp'n), SER 8 (Ex. C6). She also identified a lawsuit filed in intertribal court in 2011 related to the same issue alleging violations of California law. ALJ Op. at 7 (citing Ex. C5 to Summ. Decision Opp'n); *see also* SER 7 (Ex. C5). However, as the ALJ noted, the email reflects only that "the issue of 'EE credits used as PTO earned from employer incentive raffles and employee volunteering' was a subject of discussion between casino employees and management." ALJ Op. at 7. And, with respect to the alleged misappropriation of tips and other issues, Ms. Micallef had provided only the general allegation that she regarded Harrah's "use of 'EE credits . . . for their benefit" and "misappropriation of tips" as "illegal." *Id*. As the ALJ explained, "[n]owhere . . . is there any suggestion of any objectively reasonable belief that either of these activities was in any way related to fraud or a securities violation." *Id*. Thus, the ALJ reasoned that while "irregularities in the distribution of tips to employees has some relevance to the financial state of [Ms. Micallef's] employer," Ms. Micallef's

allegations did "not support a reasonable belief that the employer is defrauding its shareholders, if any, or anyone else." *Id.* at 6.[5]

Following the ALJ's grant of summary decision to Harrah's, Ms. Micallef filed a petition with the ARB for review of the ALJ's decision. ARB Op. at 1–2. On July 8, 2018, the ARB affirmed the ALJ's decision. ARB Op. In affirming the ALJ's decision, the ARB rejected Ms. Micallef's argument that her complaints about misappropriation of tips were "directly related to fraud" and agreed with the ALJ that "'SOX does not protect [an employee] from retaliation for reporting 'illegal' activities of any kind;' instead, a complainant must allege and support a reasonable belief that her disclosures relate to one of the enumerated categories of fraud or securities violations under the SOX." *Id.* at 5, citing ALJ Op. at 6–7.

SUMMARY OF ARGUMENT

The Court should uphold the ALJ's decision, affirmed by the ARB, granting summary decision in favor of Harrah's. The ALJ and ARB correctly determined that Ms. Micallef failed to meet her burden to establish a prima facie case under

[5] In its motion for summary decision, Harrah's made additional arguments concerning the applicability of SOX, tribal sovereign immunity, and which company actually employed Ms. Micallef. ALJ Op. at 2–6. The ALJ declined to grant summary decision to Harrah's on these bases. Thus, the only issue ripe for review and the only issue the ARB considered was whether the ALJ properly granted summary decision to Harrah's based on Ms. Micallef's failure to demonstrate any SOX-protected activity. ARB Op. at 3–5. The other arguments that Harrah's raised with the ALJ are not before this Court at this time.

SOX because she did not demonstrate a genuine issue of material fact regarding whether she engaged in activity protected by the Act. In addition, the ARB's decision not to reopen the record to admit an email written by Ms. Micallef in 2011 as "new evidence" was proper, and the Court should affirm that determination.

The whistleblower provision of SOX protects employees of publicly-traded companies and other covered employers from retaliation for providing information to their employers regarding conduct that they reasonably believe violates mail, wire, bank, or securities fraud statutes; SEC rules or regulations; or any provision of federal law relating to fraud against shareholders. Ms. Micallef alleged that she raised concerns both in a September 16, 2010 email and in a lawsuit filed in tribal court that Harrah's misappropriated its employees' tips. Additionally, the ALJ and the ARB noted that Ms. Micallef asserted that she had raised concerns regarding workplace safety issues and an on-the job injury. Even though, as the ALJ and the Board noted, misappropriated tips could have some impact on Harrah's financial state, Ms. Micallef failed to demonstrate that when she expressed any of her concerns she was complaining about conduct that she reasonably believed violated any of the fraud statutes or securities rules and regulations listed in SOX. Thus, the ALJ was correct in holding, and the ARB properly affirmed, that Harrah's was entitled to summary decision.

In addition, Ms. Micallef seeks to reopen the record to have an email she wrote on April 11, 2011 admitted as "new" evidence. Ms. Micallef asserts that she was not able to submit the email as an attachment to her opposition to the motion for summary decision because she had trouble keeping up with all of Harrah's legal arguments, and because her paper files were stolen. While Ms. Micallef's circumstances may be unfortunate, that alone is not enough to demonstrate that the record should be reopened to admit additional evidence. It is undisputed that the email was not new, and it was available to Ms. Micallef when she filed her opposition. More importantly, however, the email is not relevant to the key issue in this case, which is whether Ms. Micallef engaged in activity protected by SOX. Rather, the email pertains to whether she reported her concerns correctly, which is not in dispute. Thus, the Court should affirm the ARB's decision that the April 11, 2011 email should not be admitted. Finally, the Court should decline Ms. Micallef's request to correct certain statements in the ARB opinion regarding whether she received compensation for her alleged workplace injury which are also not relevant to the question of whether Ms. Micallef engaged in protected activity.

ARGUMENT

THE ALJ AND ARB CORRECTLY DETERMINED THAT MS. MICALLEF FAILED TO SHOW A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER SHE ENGAGED IN ACTIVITY PROTECTED UNDER SOX, AND THIS COURT SHOULD AFFIRM THE GRANT OF SUMMARY DECISION IN THIS CASE.

A. Standard of Review

Judicial review of the ARB's final decision is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). *See* 49 U.S.C. 42121(b)(4)(A); *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010). Under the APA's narrow and deferential standard, this Court must affirm the agency's decision if it is supported by substantial evidence and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. 706(2)(A), (E); *see also Coppinger-Martin*, 627 F.3d at 748 (review of ARB decision concerning SOX whistleblower complaint governed by APA).

Summary decision is analogous to summary judgment, and is appropriate where "no genuine issue of material fact is found to have been raised." 29 C.F.R. 18.41(a)(1); *see Kanj v. Viejas Band of Kumeyaay Indians*, ARB Case No. 06-074, 2007 WL 1266963, at *2 (ARB Apr. 27, 2007) ("The standard for granting summary decision in whistleblower cases is the same as for summary judgment under the analogous Fed. R. Civ. P. 56(e)."). On appeal of a summary judgment decision, this Court conducts a *de novo* review in which it "view[s] the evidence in

the light most favorable to the nonmoving party . . . and draw[s] all reasonable inferences in that party's favor." *Krechman v. Cty. of Riverside*, 723 F.3d 1104, 1109 (9th Cir. 2013) (quoting *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009)).

While the ARB's legal determinations are reviewed *de novo*, the Court may give *Chevron* deference to the Board's reasonable interpretation of the whistleblower protection provisions of SOX. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1212–13 (9th Cir. 2008) ("When a statute is silent or ambiguous on a particular point, the court may defer to the agency's interpretation if based on a permissible construction of the statute." (citing *Chevron*, 467 U.S. at 843)).

B. Ms. Micallef Did Not Present A Prima Facie Case Of Retaliatory Discrimination Because She Did Not Show That She Engaged In Protected Activity

The whistleblower protection provision of SOX protects an employee who "provide[s] information" or "assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C.] 1341 [mail fraud], 1343 [wire, radio, or TV 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 shareholders." 18 U.S.C. 1514A(a)(1). A claim for retaliation in violation of this

provision is "governed by a burden-shifting procedure under which the plaintiff is first required to establish a prima facie case of retaliatory discrimination." *Tides v. The Boeing Co.*, 644 F.3d 809, 813–14 (9th Cir. 2011). To establish a prima facie case, the plaintiff must show that:

> (1) [s]he engaged in protected activity or conduct; (2) [her] employer knew or suspected . . . that [s]he engaged in the protected activity; (3) [s]he suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable action.

Id. at 814 (citing *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009) and 29 C.F.R. 1980.104(e)(2)(i)–(iv)). "[T]o trigger the protections of the Act, an employee must also have (1) a subjective belief that the conduct being reported violated a listed law, and (2) this belief must be objectively reasonable." *Van Asdale*, 577 F.3d at 1000. Only when the plaintiff has met her burden of setting forth a prima facie case does the burden shift to the employer to "demonstrat[e] by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the plaintiff's protected activity." *Tides*, 644 F.3d at 814 (quoting *Van Asdale*, 577 F.3d at 996).

To demonstrate that she engaged in protected activity, the employee need not show that she complained of an actual violation of one of the categories of law listed in SOX. *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1187 (9th Cir. 2019). She need only prove that she "'reasonably believed that there might have been' a

violation." *Id.* (quoting *Van Asdale*, 577 F.3d at 1001). Nor does the employee need to cite any particular provision of law in raising concerns to the employer. *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) (noting that to be protected under the SOX whistleblower provision, "[t]he employee is not required to provide the employer with the citation to the precise code provision in question . . . . [t]he employee is not required to show that there was an actual violation of the provision involved") (citations omitted). The complainant will be protected so long as a reasonable person with the same training and experience would also believe that the relevant activity constitutes a violation. *See, e.g.*, *Beacom v. Oracle Am.*, 825 F.3d 376, 380–81 (8th Cir. 2016). As this Court has recognized, these rules constitute a "minimal threshold requirement," and "[t]o encourage disclosure, Congress chose statutory language which ensures that 'an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected.'" *Van Asdale*, 577 F.3d at 1001 (*citing Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008)).

However, while the standards for establishing SOX-protected activity are flexible, they are not limitless. SOX "prohibits retaliation *only if* the employee provides information regarding conduct that he or she reasonably believes violates one of the six enumerated categories of U.S. law." *Villanueva v. Admin. Review*

Bd., 743 F.3d 103, 108 (5th Cir. 2014). Where the employee's concerns cannot "even reasonably be squared with the elements of a crime referenced in SOX, then the whistleblower cannot be said to have formed a reasonable belief necessary to trigger protection under the statute." *Dietz v. Cypress Semiconductor Corp.*, 711 F. App'x 478, 484 n.5 (10th Cir. 2017); *accord Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 222 n.6 (2d Cir. 2014) ("[T]he statutory language suggests that, to be reasonable, the purported whistleblower's belief cannot exist wholly untethered from these specific provisions."); *Van Asdale*, 577 F.3d at 1001 (quoting *Day*, 555 F.3d at 55 ("[T]o have an objectively reasonable belief there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud")).

Consequently, courts and the Board have found that complaints regarding violations of law without apparent relation to one of the six categories of law listed in SOX are not protected. For instance, an employee did not engage in SOX-protected activity by expressing concerns regarding the legality of an employee bonus plan under California and Colorado wage laws where the facts did not demonstrate that he could reasonably believe the employer had an intent to defraud shareholders or employees through its implementation of the plan. *Dietz*, 711 F. App'x at 483-84. Similarly, complaints about violations of foreign tax laws, racial discrimination, wage and hour violations, or generalized allegations of unethical or

fraudulent business practices have not been found to be protected under SOX. *See, e.g.*, *Villanueva*, 743 F.3d at 108-9 (holding employee's complaint about violations of Colombian tax law were not protected under SOX); *Nielsen*, 762 F.3d at 223 (holding that employee's conclusory assertion of a "practice that had the potential of exposing the company to extreme financial risk" was too tenuously connected to shareholder fraud to qualify for protection under SOX); *Levi v. Anheuser-Busch Co.,* ARB Case Nos. 06-102, 07-020, 08-006, 2008 WL 1925640, at *10 (ARB Apr. 30, 2008), *aff'd per curiam*, 360 F. App'x 710 (8th Cir. 2010) ("although Levi made general, conclusory accusations of bad corporate governance, safety problems and racial discrimination . . . prior to his discharge, these do not constitute SOX-protected activity"). *See also Erhart v. Bofi Holding, Inc.*, No. 15-CV-02287-BAS(NLS), 2016 WL 5369470, at *10 (S.D. Cal. Sept. 26, 2016) (rejecting "the assumption that a reasonable belief of *any* violation of law is sufficient to constitute protected activity under Sarbanes-Oxley," and explaining that "Sarbanes-Oxley does not protect an employee from harassment for reporting any believed violation of law").

As in the cases cited above, Ms. Micallef, either in her allegations regarding her communications to Harrah's or in her filings before the ALJ and the ARB, has not identified conduct that she could reasonably believe violated any of the types of fraud—mail, wire, bank, securities, or shareholder fraud—or SEC rules

enumerated in SOX. She has not set forth facts connecting her concerns regarding her on-the-job injury and workplace safety complaints to any of the categories of law listed in SOX. With respect to her allegations regarding the misappropriation of tips, her lawsuit in intertribal court alleged violations of California law without any facts that would connect the allegations to SOX-protected activity. Furthermore, as the ALJ noted, Ms. Micallef's September 16, 2010 email to Harrah's reflects only that "the issue of 'EE credits used as PTO earned from employer incentive raffles and employee volunteering' was a subject of discussion between casino employees and management." ALJ Op. at 7. Thus, Ms. Micallef has provided only the general allegation that she regarded Harrah's "use of 'EE credits . . . for their benefit" and "misappropriation of tips" as "illegal" and "directly related to fraud." ARB Op. at 4. Ms. Micallef advanced no facts or even a more specific explanation regarding how her complaints concerned conduct that she reasonably believed violated any of the six categories of law listed in SOX. Thus, as the ALJ correctly reasoned, and the ARB correctly affirmed, while "irregularities in the distribution of tips to employees has some relevance to the financial state of [Ms. Micallef's] employer," Ms. Micallef's allegations did "not support a reasonable belief that the employer is defrauding its shareholders, if any, or anyone else." ALJ Op. at 6.

At bottom, it appears that Ms. Micallef believed that Harrah's engaged in wrongdoing that impacted her and other employees, that she believed that she was fired for reporting those wrongs, and that she hopes to use the SOX whistleblower protection provision as a means to seek redress. However, regardless of the merits of any separate claim that Ms. Micallef might be able to bring for, for example, purported wage theft, SOX is not an appropriate vehicle for Ms. Micallef to obtain relief. Ms. Micallef's allegations may indicate a belief that Harrah's violated laws other than those listed in SOX, but that is not sufficient to demonstrate that she held a reasonable belief that Harrah's committed a violation of one of the six categories of law listed in SOX. Because her claims fall short of satisfying the requirement to establish a protected activity under the SOX whistleblower protection provision, this Court should uphold the ALJ's decision, affirmed by the ARB, that Harrah's is entitled to summary decision in its favor.

C. The Court Should Not Admit The April 11, 2011 Email As New Evidence Or Correct Immaterial Factual Statements

Ms. Micallef also asks this Court to rule that an email that she sent to Mr. Raleigh Bowen at the U.S. Department of Justice on April 11, 2011 should be admitted into evidence, and to remand this matter back to the ALJ for reconsideration in light of the email. Ms. Micallef's request should be denied for two reasons. First, she has not demonstrated that the email constitutes "new" evidence that was unavailable to her at the time that she filed her opposition to

Harrah's summary decision motion. Second, even if the Court did conclude that the email constitutes newly-discovered evidence, it is not "material" because admitting it would have no impact on the outcome of this case. Thus, this Court should decline to reverse the ARB's decision on the basis of the April 11, 2011 email.

According to Department of Labor regulations that govern proceedings before Department ALJs and the ARB, a motion to remand to introduce new evidence is treated as a motion to reopen the evidentiary record. *See* 29 C.F.R. 18.90(b) (setting forth standard governing motions to reopen the record after new evidence is discovered); *Gupta v. Headstrong, Inc.*, ARB Case Nos. 11-065, 11-068, 2012 WL 2588596, at *4 (ARB June 29, 2012) (analyzing motion to remand based on new evidence as motion to reopen record under 29 C.F.R. 18.54(c), the predecessor to 29 C.F.R. 18.90(b)); ARB Op. at 6 n.16 (rejecting Ms. Micallef's attempt to submit new evidence, including April 11, 2011 email, for failure to satisfy requirements of 29 C.F.R. 18.54(c)). Under the section 18.90(b) standard, once the record is closed, "[n]o 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." 29 C.F.R. 18.90(b)(1).

In holding that the record should not be reopened to admit the April 11, 2011 email, the ARB applied an earlier version of the applicable standard, found at 29 C.F.R. 18.54. ARB Op. at 6 n.16. That particular section changed on June 18, 2015, when the text located at section 18.54, titled "Closing the [R]ecord," was moved to 29 C.F.R. 18.90, with some minor modifications. The earlier version of section 18.54 allowed for the admittance of "new and material" evidence "which was not readily available" prior to the closing of the record. Section 18.90 provides for the admittance of "new and material evidence" that "could not have been discovered with reasonable diligence before the record closed." 29 C.F.R. 18.90(b)(1). Under either standard, Ms. Micallef has not demonstrated that the email should be admitted, and thus, the ARB correctly rejected Ms. Micallef's submission of the email.

Ms. Micallef asserts that the April 11, 2011 email was not available to her at the time she submitted her opposition to Harrah's motion for summary decision because she was "overwhelmed with the amount of documentation" she needed, particularly because there were multiple legal questions at issue. Pet'r's Br. 8, ECF No. 12. She also asserts that someone broke into her car and stole a bag that contained her paperwork, which meant that she had to re-create her exhibit list by memory. *Id.* The Secretary is sympathetic to the difficulties of proceeding pro se, and acknowledges Ms. Micallef may have faced logistical problems. However, the

regulations simply do not allow additional evidence to be admitted for these reasons. First, and most importantly, Ms. Micallef admits that the evidence is not "new;" it existed at the time she filed her opposition to the motion for summary decision. Moreover, by her own telling, the email was "ready available" to her; the only issue is that she forgot to submit it. Moreover, the current standard does not apply to this type of situation, as it allows for the admission of new evidence only if it "could not have been discovered with reasonable diligence" earlier. 29 C.F.R. 18.90(b)(1). Here, the email was not "discovered," because it was known to Ms. Micallef all along. Thus, it is apparent that the April 11, 2011 email cannot be admitted into evidence now.[6]

Next, even if this Court determined that the email constitutes "new" evidence, it still is not "material" and it would not change the outcome of this appeal. *See* 29 C.F.R. 18.90(b)(1) (providing for admission only of evidence that is "new and material"). Apparently, Ms. Micallef seeks to introduce this email into evidence to prove that she complied with the requirement under SOX that a whistleblower must provide information or assistance to a federal regulatory or law

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[6] The Court should apply the 29 C.F.R. 18.90(b)(1) standard here. *See Copart, Inc. v. Admin. Review Bd.*, 184 F. App'x 711, 713 (10th Cir. 2006) (applying 29 C.F.R. 18.54(c) standard on appellate review). However, even if the Court applied an analogous standard, such as Fed. R. Civ. P. 60(b)(2) (concerning "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial"), the result would be the same.

enforcement agency, a member of Congress, or a "person with supervisory authority over the employee." 18 U.S.C. 1514A(a)(1)(C). However, the ALJ noted that Ms. Micallef claims she made at least three complaints to Harrah's. *See* ALJ Op. at 6. The crux of the ALJ's opinion explained that those complaints—which concerned tip distribution, as well as an injury Ms. Micallef suffered, and alleged occupational health and safety hazards—did not pertain to any categories of fraud or securities violations listed in 18 U.S.C. 1514A. *Id.* The ARB reached the same conclusion after explaining that the "only issue on appeal is whether [Ms.] Micallef demonstrated . . . that she engaged in conduct the SOX protects." ARB Op. at 4. Thus, the question of whether Ms. Micallef reported her concerns to the proper authorities is beside the point. The only issue before the Court is whether the *contents* of those complaints sufficiently pertain to fraud or violations of securities rules and regulations such that they are protected under the SOX whistleblower provision. And as discussed *supra*, pages 12–18, the answer is unequivocally no.

Lastly, Ms. Micallef also complains that the ARB's opinion included some statements that she believes to be factually inaccurate. For example the ARB indicated that she received worker's compensation payments for her injuries, *see* ARB Op. at 5, but she asserts that she did not. Again, regardless of whether these aspects of the ARB's opinion are correct or not, they ultimately have no relevance to the key question here, which is whether Ms. Micallef's allegations concern

conduct that she reasonably believed to be in violation of any of the provisions of law listed in SOX. Even if this Court took all of Ms. Micallef's factual allegations to be true, they would not be sufficient to establish her prima facie case under SOX.[7] Thus, the ALJ was correct to grant Harrah's motion for summary decision, and the ARB was correct to affirm, and those opinions should be upheld.

CONCLUSION

The Court should uphold the ALJ's opinion, affirmed by the ARB, determining that Ms. Micallef did not present a prima facie case under the whistleblower provision of SOX because she did not demonstrate that she engaged in activity protected by the Act. In addition, the Court should affirm the ARB's decision not to reopen the record to admit the April 11, 2011 email because it is not new evidence and is not material to whether Ms. Micallef engaged in protected activity. The Court should also decline to evaluate whether to correct factual statements made by the ARB that are not relevant to the key issue in this case.

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[7] The same is true of Ms. Micallef's claims, *inter alia*, that Harrah's did not comply with its "obligation to participate in an interactive process" with her, and that she did not abandon her job. *See* Pet'r's Br. 6, ECF No. 12. None of these allegations, if true, would change the outcome of this appeal. Rather, it appears that these assertions relate to whether Ms. Micallef suffered an adverse personnel action, which is also not on review here.

Dated: April 1, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the Secretary of Labor is unaware of any related cases pending in this court.

s/ Sarah M. Roberts
SARAH M. ROBERTS

CERTIFICATE OF SERVICE

I certify that on this 1st day of April 2019, a copy of the foregoing Response Brief for the Secretary of Labor was filed electronically through the Court's CM/ECF system. I further certify that upon receipt of a directive, I will serve seven (7) copies of this Brief in paper format to the Clerk of this Court by express mail. The following party is not a registered CM/ECF user, and I certify that I have served her by U.S. mail at the following address:

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SARAH M. ROBERTS