UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

THOM THIBODEAU, Complainant, v. WAL-MART STORES, INC., Respondent.	)	ARB Case No. 2017-0078 ALJ Case No. 2015-SOX-00036

BRIEF FOR THE SOLICITOR OF LABOR AS AMICUS CURIAE

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Pursuant to the Administrative Review Board's ("Board") order of August 2, 2020, the Solicitor of Labor submits this brief as *amicus curiae*.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The anti-retaliation provisions of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. 1514A, prohibit publicly traded companies and other listed respondents from discharging or otherwise retaliating against an employee because the employee, among other protected activities, provided information regarding "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 shareholders." 18 U.S.C.

1514A(a)(1). Under SOX, information can be provided to a Federal regulatory or law enforcement agency; any Member of Congress or any committee of Congress; or a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct). 18 U.S.C. 1514A(a)(1).

An employee who reasonably believes that he or she has been subjected to retaliation for protected activity may file a complaint with the Secretary of Labor ("Secretary"). *See* 18 U.S.C. 1514A(b)(1)(A). To succeed in a claim under the whistleblower protection provision of SOX, an employee must show by a preponderance of the evidence that (1) the employee engaged in protected activity; (2) the employee suffered an adverse action; and (3) the protected activity was a contributing factor in the adverse action. 29 C.F.R. 1980.109(a); *Ronnie v. Office Depot, Inc*., ARB No. 2019-0020, slip op. at 3 (ARB Sept. 29, 2020). If a complainant meets this initial burden, the burden then shifts to the employer to show by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 29 C.F.R. 1980.109(b); *Ronnie*, ARB No. 2019-0020, slip op. at 3.

B. Statement of Facts[1]

In 2007, Thom Thibodeau ("Thibodeau") began working for Wal-Mart Stores, Inc. ("Wal-Mart") as a Senior Estimator in the Estimating Department. D&O at 1. The Estimating Department was responsible for evaluating Change Order Requests, which are requests submitted to Wal-Mart by construction contractors asking for additional payment beyond the original contract amount for building or remodeling stores. *Id.* at 2. Thibodeau was responsible for providing estimates on Change Order Requests for 19 states in the western region of the U.S. *Id*.

Change Order Request Process

The Change Order Request process began when a contractor submitted a "Proposed Change Order Request" to one of Wal-Mart's Construction Managers describing the scope of work and non-binding, ball-park cost. *Id.* Approval of a Proposed Change Order Request required authorization by a Construction Manager, and higher-value Proposed Change Order Requests required additional authorization from higher-level managers. *Id*. If the Construction Managers (and higher-level management if needed) decided that the scope of work was valid, the Construction Managers would allow the general contractor to begin the proposed

[1] The facts stated herein are summarized from the factual findings of the ALJ in his Decision and Order (D&O).

work. *Id*. Following approval of a Proposed Change Order Requests, the general contractor would submit a Change Order Request and supporting documentation regarding the value of the work. *Id*.

Change Order Requests with a value in excess of a certain threshold amount ($50,000 at the time of the events in this case) were required to be submitted to the Estimating Department for review. *Id*. at 3. The Estimating Department would provide an opinion to Construction Managers on the "validity and fair market value" of the Change Order Request to help "mitigate costs of construction claims." *Id.* at 2. However, Construction Managers had the authority to approve a Change Order Request even if it conflicted with the Estimating Department's recommendation. *Id.*

Upon approval, Proposed Change Order Requests and Change Order Requests were entered into "Evoco," an electronic system used by Wal-Mart to maintain records for all Proposed Change Order Requests and Change Order Requests including the amount requested, the reasons for the request, authorizations for expenditures, and the payment of monies made by Wal-Mart. *Id.* at 17.

Alleged Protected Activities and Disciplinary History

In November 2013, Thibodeau's supervisor Jason Cantey emailed him that he was considering cancelling the software licenses on certain estimating software

because they had increased in price. *Id.* at 2. Thibodeau sent multiple emails to Cantey arguing that the software was worth the cost because it helped him achieve significant cost savings for Wal-Mart, but Cantey ultimately decided that the software was unnecessary and decided to cancel the subscription. *Id.* On January 10, 2014, Thibodeau raised the issue with Volker Heimeshoff, the vice president for prototype and new format development, via Wal-Mart's "Open Door Policy." *Id.* Following further discussion of the issue in February and early March 2014, Cantey asked Thibodeau to negotiate with the software providers to try to reduce the price. *Id*. at 3. Thibodeau managed to reduce the price of the software and Cantey approved purchase of the software licenses. *Id.*

In March 2014, Cantey and his superior issued a second-level coaching to Thibodeau for copying a subcontractor on a reply email to a Construction Manager containing internal-only information and failure to follow instructions on two other occasions. *Id.* at 3-4. During the coaching, Cantey also noted that Thibodeau had recently made a disparaging comment about a colleague, and Thibodeau said that Cantey was not qualified to make decisions about estimating tools.[2] *Id.* at 4.

On September 4, 2014, Thibodeau sent an email to Cantey, Ruehle, and Heimeshoff with detailed spreadsheets and other documents related to a Change

[2] Following the coaching, Cantey consulted with HR and decided to enter the discipline as a second-level coaching based on the situation. *Id.* at 4.

Order Request for a new store construction project in Marysville, Washington. *Id.* at 5. Cantey told Thibodeau afterward and in his mid-year performance evaluation that he should send such emails to Cantey to review before being sent to upper-level management and Thibodeau agreed to do so in the future. *Id.* at 5-6. On September 16, 2014, Thibodeau again emailed two vice presidents in the construction department about the Marysville project without including Cantey. *Id*. at 6. Cantey issued a third-level coaching against Thibodeau for insubordination on September 24, 2014, and informed him that the next step for further misconduct would be termination. *Id.*

In March 2015, Thibodeau had a phone conversation with a contractor for a store remodel project in Glendora, California who had repeatedly failed to attach supporting documentation to his Change Order Requests. *Id.* at 7. Thibodeau grew irritated during the call and questioned whether the contractor was worth the money requested and critiqued his spelling mistakes in the Change Order Request. *Id.* On March 11, 2015, Wal-Mart terminated Thibodeau for this incident pursuant to its progressive disciplinary policy. *Id*. at 8.

C. Procedural History

On August 27, 2015, Thibodeau filed a SOX whistleblower complaint with the Occupational Safety and Health Administration ("OSHA"). OSHA dismissed

his complaint on September 16, 2015, and Thibodeau filed a timely objection with the Office of Administrative Law Judges and requested a hearing.

After conducting an evidentiary hearing and considering the complete record in the case, the ALJ issued a Decision and Order dismissing the complaint on September 11, 2017. The ALJ held that Thibodeau did not engage in protected activity because he did not have an objectively reasonable belief that his internal complaints to supervisors and higher level officials in the company regarding Wal-Mart's decision not to renew the license for his preferred estimating software and contractors' failure to submit complete documentation to him was a violation of the SEC's rule on internal controls. D&O at 22. The ALJ found that the Estimating Department's role was to provide information to Wal-Mart's Construction Managers related to the reasonableness of Change Order Requests. *Id.* Since a reasonable person with Thibodeau's training and experience would have known that Department's estimates did not impact Wal-Mart's financial reporting under SEC rules, it was not objectively reasonable for Thibodeau to believe that the estimates were an internal control.[3] *Id.* The ALJ also found that even if the estimates and his related internal complaints did relate to Wal-Mart's financial

[3] In contrast, the ALJ found that the Evoco system was an internal control because it appears to meet all three prongs of 17 C.F.R. § 240.13a-15(f). Specifically, the system maintains records for all Proposed Change Order Requests and Change Order Requests including the amount of monies paid, which are authorized by management and could have a material effect on Wal-Mart's financial statements.

reports, it was not objectively reasonable for Thibodeau to believe that they had a material effect on the financial reports. *Id.* at 22-23.

The ALJ also held that, alternatively, even if Thibodeau engaged in protected activity that contributed to Wal-Mart's decision to terminate him, Wal-Mart nonetheless met its affirmative defense of proving by clear and convincing evidence that it would have terminated him even absent his protected activity. *Id.* at 28-29.

ARGUMENT

I. THE ALJ'S FINDING THAT THIBODEAU DID NOT ENGAGE IN PROTECTED ACTIVITY APPEARS TO BE SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE ALJ'S REASONING IS CONSISTENT WITH APPLICABLE LAW.

A. Substantial evidence appears to support the ALJ's determination that it was not objectively reasonable for Thibodeau to believe that his complaints concerned conduct related to the SEC rule on internal controls.

To establish protected activity under SOX, a complainant must prove that he reported conduct that he reasonably believed related to a potential violation of one of the categories of laws or regulations enumerated in section 1514A. *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, 2011 WL 2165854, at *11 (ARB May 25, 2011) (en banc). In order to meet the reasonable belief standard, the complainant must show that 1) he or she had a subjective belief that the complained-of conduct constituted a violation of the relevant law or rule, and 2) the belief was objectively reasonable, meaning reasonable to a reasonable person with the same knowledge,

training and experience as the complainant. *Sylvester*, 2011 WL 2165854, at *11. "[T]he reasonableness of the employee's belief will depend on the totality of the circumstances known (or reasonably albeit mistakenly perceived) by the employee at the time of the complaint, analyzed in light of the employee's training and experience." *Rhineheimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 812 (6th Cir. 2015) (citing *Sylvester*, 2011 WL 2165854, at *12).

A complainant does not need to show that he reported an actual violation, but "can engage in protected activity when he reports a belief of a violation that is about to occur or is in the stages of occurring." *Ronnie*, ARB No. 2019-0020, slip op. at 4. Additionally, the employee does not need to show that his or her belief was reasonable with regard to each element of the alleged violation at issue. *Sylvester*, 2011 WL 2165854, at *18. Finally, the concerns reported by the complainant do not need to relate to shareholder or investor fraud to be protected activity under SOX, but rather can relate to any of the six categories of law and regulations listed in SOX. *Sylvester*, 2011 WL 2165854, at *15-16; *Ronnie*, ARB No. 2019-0020, slip op. at *4.

In this case, Thibodeau alleges only that the concerns he raised related to conduct that he reasonably believed would violate SEC rules related to the requirement that publicly traded companies establish and maintain internal controls over financial reporting. He does not allege that he reported fraud or a violation of

law relating to fraud against shareholders. Therefore, under applicable law, Thibodeau was required to prove that the concerns he raised to his supervisor and higher-level officials in the company about 1) cancellation of estimating software and 2) the Marysville and Glendora contractors' submission of Change Order Requests without supporting documentation amounted to conduct that he could reasonably believe violated the SEC rule requiring securities issuers to maintain internal control over financial reporting. Substantial evidence appears to support the ALJ's determination that a reasonable employee in the same factual circumstances with the same knowledge, training and experience would not have believed that these concerns amounted to concerns about conduct that could violate the SEC's rule requiring maintenance of internal control over financial reporting. *See* 29 C.F.R. 1980.110(b) ("The ARB will review the factual determinations of the ALJ under the substantial evidence standard.").

The SEC's rule on internal controls states that securities issuers must "maintain disclosure controls and procedures... and internal control over financial reporting." 17 C.F.R. 240.13a-15(a). Failure to establish, maintain, attest to, and assess such internal controls is a violation of securities law and the SEC regulations. 15 U.S.C. 7241 and 7262; 17 C.F.R. 240.13a-15. The rule defines "internal control over financial reporting" as:

> a process designed by, or under the supervision of, the issuer's principal executive and principal financial officers... to provide reasonable

> assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:
>
> (1) Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
>
> (2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and
>
> (3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements.

17 C.F.R. 240.13a-15(f).

The ALJ found that Thibodeau had a subjective belief that the Estimating Department was created because SOX requires managers to create an auditable account of decision-making related to disposition of assets to fulfill a fiduciary duty toward the shareholders. D&O at 12. However, in contrast with Thibodeau's subjective belief, the SEC's rule on internal controls at 17 C.F.R. 240.13a-15 is meant to ensure that financial reports are complete and reliable, not to ensure that disposition of assets are based on wise or efficient business decisions. *See* Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Securities Act

Release No. 8238, Exchange Act Release No. 47,986, Investment Company Act Release No. 26,068, 2003 WL 21294970, at *8 (June 5, 2003). *See Day v. Staples, Inc.*, 555 F.3d 42, 56 (1st Cir. 2009) ("A complaint about corporate efficiency is also not within the intended protection of SOX"); *see also Erhart v. Bofi Holdings, Inc.*, _ F. Supp. 3d. __, 2020 WL 1550207, at *14 (S.D. Cal. Mar. 31, 2020) (describing the SEC's explanation in the Release of the Internal Control Rule that the rule focuses on the reliability of an issuer's financial reporting and not "internal control objectives associated with enterprise risk management and corporate governance") (citations and quotations omitted). Accordingly, each of the three prongs of 17 C.F.R. 240.13a-15(f) are related to ensuring that the financial statements are accurate and reliable.

Without ever explicitly saying so, Thibodeau appears to argue that he could reasonably believe that the concerns he raised pertained to the third type of policy or process that fits within the definition of an internal control—a policy or process that provides "reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements." *See* Thibodeau's ARB Br. at 20-22 (challenging ALJ's factual finding that Estimating was a "valuation system"). He seems to argue that he reasonably believed Estimating's role was to protect against unauthorized use or disposition of Wal-Mart's assets that could have a material

effect on the company's financial statements. *Id.* at 25-27. Thus, he asserts that he reasonably believed that Wal-Mart's refusal to renew the software license and contractors' refusal to provide him with requested documentation undermined the process for preventing and detecting unauthorized expenditures of Wal-Mart funds on construction projects, and that the ALJ erroneously held him to the standard of proving an actual violation of the SEC's internal control rule. *Id*.

However, Thibodeau's mistaken belief that saving Wal-Mart money on construction costs was required under SEC internal control rules would not have been reasonable to a person with the same training and experience. Section 240.13a-15(f)(3) concerns "prevention or timely detection of *unauthorized* acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements." 17 C.F.R. 240.13a-15(f)(3) (emphasis added). The first and second prongs of 17 C.F.R. 240.13a-15(f) concern keeping accurate records of transactions of dispositions of assets and expenditures are made only in accordance with authorization from managers and directors. *Id.* Thibodeau knew that Construction Managers, not estimators, had authority to approve Change Order Requests, with higher-level approval up the chain in the Construction Department required for particularly costly changes. D&O at 21. He also knew that Construction Managers were permitted to disregard the Estimating Department's advice when deciding whether to approve a Change Order Request, which aligns

with the testimony of several Construction Managers characterizing the Estimating Department's role in the Change Order Request process as purely advisory and serving a limited cost-cutting function that was unrelated to the accuracy of Wal-Mart's financial reports. *Id.* at 15. While the Estimating Department provided advice to Construction Managers to achieve cost savings on certain Change Order Requests, it did not have any control over the authorization of expenditures, disposition of assets, or accurate recording of Change Order transactions in Evoco. *Id*. at 21.

Additionally, use of the Estimating Department was well established to be a tool for evaluating construction costs, but Construction Managers had wide latitude to consider factors other than Estimating's results and could ignore those results entirely if other factors weighed in favor of accepting a Change Order Request. *Id.* at 16. Thibodeau knew or should have known that his estimates were based on the more limited perspective of the average costs of labor and materials, and that the discretion granted to Construction Managers to ultimately decide whether to grant a Change Order Request was not based solely on the estimator's input. *Id.*

In light of this understanding of the Estimating Department's role in the Change Order Request process, Thibodeau's belief that cancellation of the estimating software amounted to circumvention of an internal control was not objectively reasonable. The estimating software was only used by the Estimating

Department as a tool to provide non-binding estimates and advice to Construction Managers and had no bearing on the accuracy of financial reporting or potential unauthorized disposition of assets.[4] Similarly, a reasonable person in the same position as Thibodeau would not believe that the Marysville and Glendora contractors' failure to submit adequate supporting data to him amounted to contravention of an internal control. He was aware that all approved Change Orders were authorized by Construction Managers or higher-level managers in the Construction Department, and that they ensured that final approved monies were paid out and entered into the Evoco system regardless of whether they were approved at the same amount that was originally requested by the contractor in the Proposed Change Order Request.[5]

In sum, Thibodeau knew that the Construction Department, not the Estimating Department, was responsible for authorizing the disposition of assets to

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[4] In his opening brief, Thibodeau asserts that four out of twelve estimators used the software because they were the only staff members who reviewed Change Order Requests at the time, and that this fact invalidates the ALJ's finding that, "if two-thirds of the estimators could perform their jobs without using the software, the software could not be necessary to the internal control." D&O at 20. However, even if the ALJ had not considered the number of estimators who used the software, it was not reasonable for Thibodeau to believe that his complaint about the software was related to contravention of an internal control since he knew that estimators did not have any control over authorization or disposition of funds.

[5] The ALJ also found the language about SOX in Wal-Mart's training materials on the Change Order Request process to be of limited probative value because Thibodeau himself drafted the language. D&O at 21-22.

contractors for Change Orders, and that the Construction Department was not required to follow recommendations from the Estimating Department. Since Thibodeau's complaints about concerns with conducting objective estimates do not reasonably relate to any of the three prongs of 17 C.F.R. 240.13a-15(f), the ALJ properly found that Thibodeau did not engage in protected activity because his belief was not objectively reasonable.

B. The ALJ did not legally err by considering whether Thibodeau's complaints involved allegations that would have a material impact on Wal-Mart's financial statements.

Contrary to Thibodeau's arguments to the Board, the ALJ did not err by considering the materiality of Thibodeau's reported concerns and concluding that even if the issues Thibodeau raised were relevant to Wal-Mart's financial reporting, it was not objectively reasonable for Thibodeau to believe that they could have materially impacted that reporting in violation of 17 C.F.R. 240.13a-15(f)(3).

Thibodeau is correct that the SOX whistleblower provision requires only that a complainant have a reasonable belief that reported conduct related to a violation of one of the six categories of law listed in SOX. Thus, the SOX whistleblower provision does not require the complainant to prove an actual violation by alleging or proving that each of the elements of fraud or of a violation of an SEC rule were satisfied. *Beacom v. Oracle Am.*, 825 F.3d 376, 380 (8th Cir.

2016) (noting that "an employee's mistaken belief may still be objectively reasonable"); *Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 668 (4th Cir. 2015) (noting that to be protected under SOX, the employee does not need to prove "that the employer's conduct was, in fact, a legally actionable fraud. The whistleblower need only show that she 'had both a subjective belief and an objectively reasonable belief that the conduct' violated relevant law) (internal citations omitted); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008) ("Importantly, 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"). Also, because complainants may not have access to complete information, the complainant's communication to the employer does not need to include information relevant to each element of a violation. *Wiest v. Lynch*, 710 F.3d 121, 134 (3rd Cir. 2013) (a whistleblower's report of a potential violation need not "ring the bell on each element" of the relevant violation at issue to be protected because "an employee may not have access to information necessary to form a judgement on certain elements, such as scienter or materiality..."). Nor does the SOX whistleblower provision include an independent materiality requirement. *Sylvester*, 2011 WL 2165854, at *18 (citing *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008) ("Although many of the laws listed in 1514A . . . contain materiality requirements, nothing in § 1514A (nor in

Livingston) indicates that § 1514A contains an *independent* materiality requirement").

However, to be protected, a complainant's concerns cannot be completely untethered from one or more of the six categories of law listed in SOX. S*ee Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 n.6 (2d Cir. 2014) ("the statutory language suggests that, to be reasonable, the purported whistleblower's belief cannot exist wholly untethered from these specific provisions"); *see also Dietz v. Cypress Semiconductor Corp.*, 711 F. App'x 478, 484 n.5 (10th Cir. 2017) ("If the facts known to the claimant could not even reasonably be squared with the elements of a crime referenced in Sarbanes-Oxley, then the whistleblower cannot be said to have formed a reasonable belief necessary to trigger protection under the statute"). The fraud provisions listed in SOX and many SEC rules include a requirement that a misrepresentation be material or that a violation materially impact a company's financial reporting. *See, e.g., Neder v. United States*, 527 U.S. 1, 25 (1999) (holding that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes"). Therefore, depending on the facts at issue, it may be relevant in some cases to consider the materiality of the reported conduct to determine whether it was objectively reasonable for an employee in the same circumstances as the complainant to believe that the conduct constituted a violation. *See, e.g., Puffenbarger v. Engility Corp.*, 151 F. Supp. 3d 651, 660-61

(E.D. Va. 2015) (it was not objectively reasonable for the complainant to believe that an unauthorized paid time off award worth $856.20 could have a material effect on the employer's financial statements in violation of the internal control rule).

As noted above, section 240.13a-15(f)(3) states that an internal control over financial reporting provides "reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a *material effect on the financial statements*." 17 C.F.R. 240.13a-15(f)(3) (emphasis added). Materiality in this context means that "the judgement of a reasonable person would have been changed or influenced by the inclusion or correction of the item." SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,151 (Aug. 19, 1999). In this case, it was proper for the ALJ to consider the materiality of the complained-of conduct when analyzing the objective reasonableness of Thibodeau's belief. As the ALJ explained, Thibodeau had enough information to know that the savings realized by the Estimating Department was a relatively small amount compared to Wal-Mart's overall construction spending, which was itself only a subset of its total operating costs. D&O at 19 (finding that the annual savings realized by the Estimating Department at best amounted to roughly 1% of the total annual $2-3 billion in construction spending). *See Beacom*, 825 F.3d at 381 ("[Complainant] would understand that

$10 million is a minor discrepancy to a company that annually generates billions of dollars").[6] With regard to the cancellation of construction estimating software, the hypothetical reduction in cost savings that would result from conducting estimates without it would represent an even smaller proportion of this amount. And the value of the Marysville and Glendora project Change Order Requests would also be viewed as immaterial by a reasonable person in his position since these projects represented a small subset of value in the overall construction budget. Since materiality was an element of the SEC internal control rule at issue and the relevant facts related to materiality would be known and understood by a reasonable person with Thibodeau's training and experience, it was not error for the ALJ to consider the potential materiality of the issues Thibodeau raised as part of the ALJ's analysis of whether Thibodeau had a reasonable belief that certain conduct violated the SEC rule.

Lastly, even if the ALJ erred by considering the materiality of the complained-of conduct, it is not reversible error. As discussed in Section I.A

[6] This is not to say that the amount of money implicated is the sole factor in determining whether a whistleblower's concerns relate to conduct that could be reasonably believed to be material. Although a numerical threshold can be quite useful as an initial step in assessing materiality under securities laws, "it cannot appropriately be used as a substitute for a full analysis of all relevant considerations." SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. at 45,151 (explaining SEC's view of materiality and providing examples of circumstances, not relevant here, in which a quantitatively small misstatement might nonetheless be material).

above, the Estimating Department had no control over authorizing or recording the disposition of assets. Thus, under the circumstances, it was not objectively reasonable for Thibodeau to believe that his lack of certain estimating software or supporting documentation on two projects could lead to an unauthorized disposition of assets in violation of 17 C.F.R. 240.13a-15(f)(3).

II. SUBSTANTIAL EVIDENCE APPEARS TO SUPPORT THE ALJ'S FINDING THAT WAL-MART SHOWED BY CLEAR AND CONVINCING EVIDENCE THAT IT WOULD HAVE TERMINATED THIBODEAU IN THE ABSENCE OF HIS ALLEGED PROTECTED ACTIVITY.

If a complainant establishes by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action, the respondent can still avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *See* 49 U.S.C.A. 42121(a)-(b)(2)(B)(iv); 29 C.F.R. § 1980.109(b); *Bechtel v. Competitive Techs., Inc*., ARB No. 06-010, 2008 WL 7853800, at *4 (ARB Mar. 26, 2008). To meet the clear and convincing evidence standard, "the employer must show that the truth of its factual contentions are highly probable." *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (2013) (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316, 104 S.Ct. 2433, 81 L.Ed.2d 247 (1984), *reh'g denied*, 468 U.S. 1224 (1984) (internal quotation marks omitted).

Pursuant to SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard. *See* 29 C.F.R. 1980.110(b). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Menendez v. Halliburton, Inc*., ARB Nos. 09-002, 003, 2013 WL 1282255, at *6 (ARB Mar. 15, 2013), *aff'd,* 771 F.3d 254 (5th Cir. 2014). An ALJ's factual findings should be upheld when supported by substantial evidence, even if the Board would have justifiably made a different choice had the matter been before it de novo. *Id.* An ALJ's credibility determinations are overturned only "if they conflict with a clear preponderance of the evidence or are inherently incredible or patently unreasonable." *Bobreski v. J. Givoo Consultants, Inc*., ARB No. 13-001, 2014 WL 4389968, at *9 (ARB Aug. 29, 2014) (citing *Palmer v. W. Truck Manpower*, 1985-STA-006, slip op. at 4 (Sec'y Jan. 16, 1987) (internal quotation marks omitted).

The ALJ held that even if Thibodeau were found to have engaged in protected activity under SOX, Wal-Mart proved by clear and convincing evidence that it would have terminated him even in the absence of the alleged protected activity due to his pattern of brusque communications with Construction Managers and contractors and repeated failure to follow his supervisor's instructions. D&O at 28. The ALJ's decision reflects consideration of the relevant evidence presented at the hearing and application of the proper legal standards in reaching his

determination. Under the deferential standard of review described above, based on the ALJ's decision and the record materials available to the Solicitor, it appears that the ALJ's decision should be upheld.

The ALJ first considered the evidence related to Thibodeau's second-level coaching, which was issued in part for insubordination because Thibodeau refused to look into a labor rate issue assigned by Cantey. D&O at 24. The ALJ made what appears to be a reasonable credibility determination finding Cantey's contemporaneous notes and his hearing testimony to be more credible than Thibodeau's conflicting explanations of the situation in his response to the coaching and his email to upper-level management about the second coaching. *Id*. This credibility determination is entitled to deference as it is not in conflict with a clear preponderance of the evidence or inherently incredible or patently unreasonable. The coaching also addressed Thibodeau's admittedly disparaging remarks about a coworker, which he apologized for, and copying a subcontractor in an email to a CM that included internal-only information despite past instructions not to do so. *Id.* at 4, 27. Thus, the evidence appears to support that the coaching was issued for conduct that was independent from the protected activity.

Substantial evidence also appears to support that the third-level coaching was issued for insubordination for communicating with upper-level management without first communicating with his supervisor as instructed. *Id.* at 24. Thibodeau

stated as part of his testimony in the ALJ hearing that he sent the communication that triggered the coaching as a "celebration of the construction team working together... It wasn't meant as anything else." *Id.* at 25. Thibodeau also explained to upper-level management that he sent out the communication because he wanted to show one of the managers that he had made the right choice in hiring him. *Id.* This evidence supports the ALJ's finding that Thibodeau sent the email to "demonstrate [his] worth to upper management" less than a week after agreeing to run such communications by Cantey first, amounting to insubordination that was unrelated to protected activity. *Id.*

Lastly, substantial evidence appears to support that Thibodeau was terminated for a disrespectful phone conversation with a contractor that was overheard by a colleague. *Id.* at 28. This incident appears to have been part of a long-standing pattern of untactful speech that could be offensive or ineffective, as consistently reflected in record evidence. *Id.* at 26-28. In light of his prior coachings, Wal-Mart's decision to terminate him was in line with its progressive disciplinary policy. *Id.* at 28.

Thibodeau argues that the ALJ erred by "uncritically adopting Wal-Mart's subjective assertions" about his workplace communications to justify his termination. Thibodeau's ARB Br. at 29. However, the ALJ's conclusion about Thibodeau's communications was not only based on subjective assessments in his

performance evaluations, but evidence of Thibodeau's work emails themselves. D&O at 26-27. For example, the ALJ noted that Thibodeau wrote that a business decision was based on "convoluted logic which I don't comprehend," and "[t]his is my last communication on this matter so I'll be succinct in how I've reached my conclusion". *Id*. Further, Thibodeau's own testimony acknowledged the communication issue, stating that his "method of direct speak sometimes is misunderstood." *Id.* at 26. And his performance evaluations, some of which were issued prior to his alleged protected activities, consistently stated that he needed to improve his communication skills with customers and contractors. *Id*.

Thibodeau also argues that the second-level and third-level coachings were retaliatory, and that if they had not occurred he would not have been terminated for the March 4, 2015 phone call with the contractor. Thibodeau's ARB Br. at 28. Specifically, he asserts that the second-level coaching was retaliatory since it occurred soon after he complained about the cancellation of the software and Cantey admitted that a coworker had also copied the subcontractor on an email with the information but was not criticized or disciplined. *Id.* He also argues that the third-level coaching was retaliatory because it was issued for engaging in the alleged protected activity of providing information to senior management about serious problems with the Maryville project Change Order Requests. *Id.*

However, the evidence as a whole substantially supports the ALJ's findings related to the second-level and third-level coachings. Regarding the second-level coaching, the ALJ found that Thibodeau's Open Door request disputing the coaching stated that, "[e]verything in the coaching is false," but a month earlier he had admitted to some of the events that he was cited for in the coaching and apologized for them. D&O at 24 n. 26. The ALJ properly made a credibility determination that, without further explanation of the disagreement in the evidence, Thibodeau's credibility regarding the events leading to the coaching was diminished. *Id.* As to the third-level coaching, Thibodeau's own testimony about his email to upper-level management supports the ALJ's finding that it was touting the cost savings he achieved on the Change Order to show that he had done a good job, not reporting circumvention of an internal control. *Id.* at 25. Further, Thibodeau does not dispute that he sent this message in defiance of instructions from his supervisor less than a week earlier and does not explain why deviation from that instruction was justified. In sum, substantial evidence appears to support the ALJ's determination that the coachings and termination would have occurred even in the absence of the protected activity.

CONCLUSION

For the foregoing reasons, the ALJ's decision appears to be based on substantial evidence and the ALJ's analysis is consistent with applicable law.

CERTIFICATE OF SERVICE

I certify that on this 14th day of October, 2020, I electronically filed the foregoing Solicitor of Labor's Motion for Extension of Time to File Amicus Brief in This Matter with the Board using the Electronic File and Service Request (EFSR) system. I also served a copy of the motion solely via electronic mail as follows, with agreement of the parties' counsel and in light of the shift in operations resulting from the COVID-19 pandemic:

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