U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

MICHAEL LAQUEY,

COMPLAINANT,

v.

UNITEDHEALTH GROUP, INC., d/b/a OPTUM,

RESPONDENT.

ARB CASE NO. 2017-0060

ALJ CASE NO. 2016-SOX-00002

DATE: October 9, 2020

Appearances:

For the Complainant:
Michael LaQuey; *pro se*; Crystal Bay, Minnesota

For the Respondent:
Sandra Jezierski, Esq.; Allyson Petersen Francis, Esq.; *Nilan Johnson Lewis, PA*; Minneapolis, Minnesota

Before: Thomas H. Burrell, Heather C. Leslie, and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

This case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act of 2002 (Section 806 or SOX), 18 U.S.C. § 1514A (2010), as amended, and its implementing regulations at 29 C.F.R. Part 1980 (2020). Michael LaQuey (Complainant) filed a complainant alleging that UnitedHealth Group, Inc. (Respondent) violated the SOX when it placed him on a corrective action plan and subsequently terminated his employment. The ALJ dismissed Complainant's case. We affirm.

BACKGROUND

Complainant began working for Respondent as a Senior IT Business Analyst on December 7, 2009.[1] In August 2011, Complainant was assigned to work on a project called LaunchPad, which he described as a program in which users enter input parameters that affect reporting systems including financial reports, operational reports, and asset reports.[2] Respondent's project manager for LaunchPad, Alex Sentryz, described the project as an order intake tool that was unrelated to Respondent's financial information or accounting practices.[3]

On September 8, 2011, Complainant alleged that he informed Jason Bornholdt, his manager in 2011, and Scott Johnson, his supervisor, that there were not enough processes and process management resources for the LaunchPad project.[4] Complainant thought that Respondent should use HP Quality Center, a tool that could be used to manage process requirements and quality assurance. Complainant believed that Bornholdt and Johnson understood this conversation to mean that he was complaining about potential Securities and Exchange Commission (SEC) violations.[5] Bornholdt and Johnson denied that they understood that Complainant was complaining about illegal activity.[6] Bornholdt testified that he invited Complainant to present the pros and cons of using HP Quality Center, but Complainant never prepared the requested presentation.[7]

On November 17, 2011, Sentryz prepared a performance evaluation assigning Complainant the following numeric scores: 1 out of 5 in Acting as a Team Player and Supporting Change and Innovation; 2 out of 5 in Focus on Customers, Making Fact-Based Decision, and Communicates Effectively.[8] Sentryz also provided the following comments:

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1 D. & O. at 13.

2 *Id*. at 16.

3 *Id*.

4 *Id*. at 17; Hearing Transcript (Tr.) at 285.

5 D. & O. at 17-19; Tr. at 287-88; Tr. at 113-14.

6 D. & O. at 18-19; Tr. at 287-88; Tr. at 113-14.

7 D. & O. at 17; Tr. at 73.

8 D. & O. at 21; Exhibit M.

> Mike presented a number of negative experiences when working together on our project. Mike has business analysis skills, but overall he has a number of areas that need improving . . . unless he drastically improves those additional skills, I would not select Mike for future engagements.[9]

Respondent's witnesses testified that Complainant had difficulty working with co-workers on the LaunchPad project.[10] Complainant was removed from the project and began working on another project.

Following the November 17, 2011 performance evaluation, Complainant received performance evaluations on February 26, and June 17, 2012. Bornholdt assigned Complainant the following numeric scores on February 26: 2 out of 5 in the areas of Acting as a Team Player and Communicates Effectively; and 4 out of 5 in areas of Making Fact-Based Decisions and Delivering Quality Results. Bornholdt assigned an overall score of 3 out of 5, indicating that Complainant met expectations.[11] Doug Trott, Complainant's manager in 2012, prepared Complainant's June 17 performance evaluation and also gave him an overall score of 3 out of 5.[12]

In June 2012, Complainant was assigned to work on the Gateway project. Glen Blenkush, the Gateway project manager, stated that Gateway's purpose was to test "if people were interested in seeing health-related offerings, like a Fitbit or information about weight plans."[13] Blenkush believed that Respondent "sunsetted the program" before it got to Phase 2 (in which Respondent would make those offerings to the member).[14]

While working on the project, Complainant alleged that he told Blenkush that employees should not put untested computer code into production on the

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9 D. & O. at 22; Exhibit M.

10 *Id*. at 16.

11 *Id*. at 22; Exhibit N.

12 *Id*. at 14.

13 D. & O. at 23; Tr. 193-94.

14 *Id*.

Gateway project.[15] Blenkush denied having a conversation with Complainant on this topic.[16]

On February 24, 2013, Complainant received a performance evaluation from Johnson. Johnson did not score Complainant lower than a 3 out of 5 in any evaluation areas, and gave him an overall rating of "meets expectations." Johnson provided the following comments: "Mike — thank you for your continued efforts in supporting your clients and bringing added value to your projects." Complainant performed a self-review for this same time period and rated himself a 5 out of 5, meaning that he believed he exceeded all expectations.[17]

Complainant's involvement in the Gateway project ended in April 2013. Complainant began working on the Medicare Secondary Payer Project in May 2013. On July 28, 2013, Johnson prepared a performance review for Complainant and Complainant's overall score fell to a 2 out of 5.[18] Johnson supplied copious notes documenting his views of Complainant's declining performance. These notes included the following: "Mike is not meeting expectations in terms of client engagement[,]" and "[h]is interpersonal skills and inability to effectively interact with others as well as a misalignment between [his] behavior and values set for in Our United Culture indicate a substantial cultural deficit."[19] Johnson also received comments from Blenkush that Complainant challenged his authority and focused on activities that were not helping the Gateway project move forward.[20]

Complainant disagreed with this rating and believed that Johnson did not have personal knowledge of his performance.[21] Complainant also supplied more than a page of comments regarding his performance evaluation which included his assertion that the review was discriminatory and retaliatory, but provided no explanation or basis for those conclusions.[22]

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15 D. & O. at 23; Tr. 523.

16 D. & O. at 23; Tr. 225.

17 D. & O. at 14.

18 *Id*. at 24; Exhibit R.

19 D. & O. at 24; Exhibit R.

20 D. & O. at 25; Tr. 655-59.

21 D. & O. at 14.

22 D. & O. at 28; Exhibit R.

Following the review, Complainant was placed on a Corrective Action Plan (CAP) to address his performance shortcomings.[23] Complainant provided comments stating that the CAP was retaliatory, but did not explain why it was retaliatory.[24]

Complainant appealed the CAP twice through Respondent's internal dispute resolution process. Respondent issued a Final Corrective Action (FCA) on October 1, 2013.[25] The FCA alleged that Complainant did not make sufficient progress on the goals established in the CAP. Respondent denied Complainant's internal appeals on November 18, 2013.[26]

Respondent terminated Complainant's employment on January 31, 2014.[27] Complainant appealed the termination through Respondent's internal dispute resolution process on February 18, 2014.[28] In that appeal process, Complainant claims Respondent terminated his employment in retaliation for identifying Sarbanes-Oxley compliance issues.[29] Complainant's appeal was denied.[30]

Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) on September 9, 2014.[31] On September 17, 2015, OSHA dismissed the complaint. Complainant requested a hearing before the Department of Labor (DOL) Office of the Administrative Law Judges (OALJ) on October 16, 2015.[32]

Prior to the hearing before OALJ, Complainant commenced an arbitration proceeding challenging his termination before the American Arbitration Association (AAA).[33] Complainant asserted, among other things, that Respondent retaliated

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23 D. & O. at 28; Exhibit V.

24 D. & O. at 28; Exhibit V.

25 D. & O. at 28; Exhibit DD.

26 D. & O. at 30; Exhibit CC and FF.

27 D. & O. at 31; Exhibit TT.

28 D. & O. at 31-32; Exhibit JJ.

29 *Id*.

30 D. & O. at 32.

31 *Id*. at 2.

32 *Id*.

33 *Id*. at 3.

against him in violation of a Minnesota whistleblower protection statute.[34, 35] Throughout the AAA proceedings, Complainant deposed nine of Respondent's employees, including Sentryz, Johnson, Blenkush, and Bornholdt.[36] The parties produced thousands of pages of documents in discovery and each party filed summary judgment briefs.[37] The AAA arbitrator issued Complainant an award which brought the AAA matter to a close.[38]

Following the arbitrator's decision, the parties continued the SOX proceedings before the OALJ. On February 26, 2016, the Administrative Law Judge (ALJ) issued a Discovery Order which limited discovery because he found that there was substantial similarity between the AAA and SOX cases.[39] The Discovery Order permitted the parties to use the depositions from the AAA case, required Respondent to produce documents, denied Complainant's request to take additional oral depositions, and required Complainant to seek leave to take up to three written depositions and/or request additional documents from Respondent.[40]

On July 7, 2017, the ALJ issued a Decision and Order dismissing Complainant's complaint (D. & O.). On July 21, 2017, the Administrative Review Board (ARB or Board) received Complainant's Petition for Review. For the reasons discussed below, we affirm the ALJ's D. & O.

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34 *Id.*; Minnesota Statute § 181.932.

35 Section 181.932 provides that "[a]n employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee . . . because: (1) the employee . . . in good faith, reports a violation, suspected violation, or planned violation of any federal or state law . . . to an employer or to any governmental body or law enforcement official."

36 D. & O. at 3-6; Complainant deposed the following individuals: Sentryz on July 25 and November 30, 2015, Johnson on July 23 and November 30, 2015, Laura Crandon on July 24 and November 23, 2015, John Beacham on July 29 and December 14, 2015, Blenkush on July 22 and November 23, 2015, Brian Murray on July 22, 2015, Maureen Shurson on July 22, 2015, Bornholdt on July 22, 2015, and Margaret Kershner on July 22, 2015. Each individual was deposed for at least thirty minutes, except for Kershnr. D. & O. at 6.

37 D. & O. at 3.

38 *Id.*

39 D. &. O. at 7-8; *LaQuey v. UnitedHealth Group, Inc.*, ALJ No. 2016-SOX-00002 (ALJ Feb. 10, 2016) (Discovery Order).

40 *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue agency decisions in review or on appeal of matters arising under the SOX.[41] The Board reviews an ALJ's procedural rulings under an abuse of discretion standard.[42]

Conversely, the ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence.[43] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[44]

DISCUSSION

1. Preliminary outstanding matters before the Board

While this matter has been pending before the Board, Complainant filed a Motion to Reconsider the Board's January 5, 2018 Order Denying Complainant's Motion to Compel Proper Service, Reject Respondent's Memorandum, and for Related Sanctions. In his motion for reconsideration, Complainant contends that he suffered prejudice when Respondent did not adhere to the formatting requirements in the ARB's Notice of Appeal and Order Establishing Briefing Schedule on July 25, 2017. Complainant states that since Respondent did not adhere to the formatting requirements, Respondent's brief contained more characters per page than Complainant's brief and as a result, was permitted sixteen additional pages.[45] Therefore, Complainant requests that the Board reject Respondent's brief.[46]

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41 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. 13186 (Mar. 6, 2020).

42 *Boegh v. EnergySolutions, Inc.*, ARB No. 2015-0062, ALJ No. 2006-ERA-00026, slip op. at 7 (ARB Feb. 24, 2017) (citing *NCC Electrical Servs., Inc.*, ARB No. 2013-0097, ALJ No. 2012-DBA-00006, slip op. at 6 (ARB Sept. 30, 2015).

43 29 C.F.R. § 1980.110(b); *Micallef v. Harrah's Rincon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015-SOX-00025, slip op. at 3 (ARB July 5, 2018).

44 *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

45 Complainant's Reconsideration Motion at 4.

46 *Id.* at 2.

The Board is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued. The Board will reconsider its decisions under limited circumstances, which include: (i) material differences in fact or law from those presented to a court of which the moving party could not have known through reasonable diligence; (ii) new material facts that occurred after the court's decision; (iii) a change in the law after the court's decision; or (iv) failure to consider material facts presented to the court before its decision.[47]

Complainant's argument in his Motion to Reconsider is the same argument that he posed to the Board in his November 6, 2017 Motion to Compel. The Board fully considered Complainant's argument and determined that Respondent substantially complied with the briefing order.[48] Therefore, we **DENY** Complainant's Motion to Reconsider.

Complainant also filed a Motion to Vacate on May 29, 2020, claiming that he is entitled to a new hearing before a different ALJ under the United States Supreme Court's decision in *Lucia v. S.E.C.*[49] because the ALJ was not properly appointed under the Appointments Clause of the U.S. Constitution.[50, 51] Respondent argues that Appointments Clause challenges are non-jurisdictional and subject to the doctrines of waiver and forfeiture.[52]

We agree with Respondent's contention that all of the information needed to challenge the ALJ's appointment was available prior to the issuance of the ALJ's

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47 *Gupta v. Headstrong, Inc.*, ARB Nos. 2015-0032, -0033, ALJ No. 2014-LCA-00008, slip op. at 2 (ARB Feb. 14, 2017) (Order Denying Motion for Reconsideration) (citing *Kirk v. Rooney Trucking Inc.*, ARB No. 2014-0035, ALJ No. 2013-STA-00042, slip op. at 2 (ARB Mar. 24, 2016) (Decision and Order Denying Reconsideration)).

48 *LaQuey v. UnitedHealth Group, Inc.*, ARB No. 2017-0060, ALJ No. 2016-SOX-00002, slip op. at 2 (Jan. 5, 2018) (Order Denying Complainant's Motion to Compel Proper Service, Reject Respondent's Memorandum, and for Related Sanctions and Complainant's Motion to Strike).

49 *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018).

50 U.S. Const. Art. II § 2, cl. 2. Which provides that Congress may vest the appointment of inferior officers in the President, "Courts of Law," or "Heads of Departments."

51 Complainant's Motion to Vacate at 2.

52 Respondent's Memorandum in Opposition to Claimant's Motion to Vacate at 2-3.

decision in this case. First, we note that the Appointments Clause issue was raised by the Supreme Court in *Freytag v. Comm'r of Internal Rev.* in 1991, seventeen years prior to the issue being raised again in *Lucia*.[53] Second, it is clear that Complainant had inquiry notice as early as December 2017 when the Secretary of Labor "ratified" the appointment of its administrative law judges. Yet, Complainant did not file his Motion to Vacate until three years later. Thus, we hold that the challenge was not raised in a timely manner as it was not raised before the ALJ, in the petition for review, or in the initial brief before the ARB. Accordingly, we hold that the issue is forfeited and **DENY** Complainant's Motion to Vacate.[54]

2. The ALJ did not abuse his discretion in limiting discovery

Complainant argues that the ALJ erred by "illegally preclud[ing] discovery."[55] Complainant asserts that the ALJ was well aware that the discovery in the AAA whistleblower arbitration was unfair, severely limited, and should not preclude discovery in the instant case.[56] Conversely, Respondent avers that the ALJ's conclusions were particularly appropriate considering the amount of discovery in the AAA case. Respondent points out that the ALJ permitted the Complainant to seek leave to request additional discovery and that Complainant did not cite case law or administrative decisions supporting his argument.[57]

Again, we agree with Respondent. ALJs have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion.[58] 29 C.F.R. § 18.51(b)(4) provides that:

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53 *Freytag v. Comm'r of Internal Rev.,* 501 U.S. 868 (1991).

54 *See Perez v. BNSF Ry. Co.*, ARB Nos. 2017-0014, -0040, ALJ No. 2014-FRS-00043, slip op. at 4-5 (ARB Sep. 24, 2020) (citing *Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054 (ARB May 19, 2020)); *see also Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009).

55 Complainant's Brief (Comp. Br.) at 5.

56 *Id.* at 5.

57 Respondent's Response Brief (Resp. Br.) at 16-17.

58 *McNiece v. Dominion Nuclear Conn., Inc.*, ARB No. 2015-0083, ALJ No. 2015-ERA-00005, slip op. at 6 (ARB Nov. 30, 2016) (citing *Friday v. Northwest Airlines, Inc.*, ARB No. 2003-0132, ALJ No. 2003-AIR-00020, slip op. at 4 (ARB July 29, 2005)).

> [T]he judge must limit the frequency or extent of discovery . . . where (i) The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; . . . (iii) The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case. . . [,] the importance of the issues at stake in the action[,] and the importance of the discovery in resolving the issues.

Having reviewed the parties' arguments, the briefs, and the deposition transcripts, the ALJ observed that Complainant and Respondent had already engaged in substantial discovery in the AAA case, which included the production of thousands of pages of documents and more than a dozen depositions of persons who were likely to be witnesses in the present case.[59]

We note that the ALJ did not deny all of Complainant's requests. In his Discovery Order, the ALJ directed Respondent to produce Complainant's personnel file, Complainant's performance reviews, all unprivileged documents discussing Complainant's discipline, and all documents evidencing any complaint or report made by Complainant. Furthermore, the ALJ's Discovery Order provided Complainant with the option to seek leave and take up to three additional written depositions and/or request production of documents from Respondent.[60] Yet, Complainant never sought leave to exhaust these options available to him.

For these reasons, we conclude that the ALJ did not abuse his discretion in limiting discovery in this case.

3. The hearing before OALJ was not prejudicial to Complainant and the ALJ did not abuse his discretion by asking Complainant questions

Complainant argues that the ALJ disrupted Complainant by asking him questions, "prejudicing Complainant's flow and his presentation and causing anxiety that severely impacted Complainant's testimony and presentation."[61] Respondent contends that Complainant cites no case law holding that it is an abuse

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59 D. & O. at 5-6.

60 D. &. O. at 7-8; *LaQuey v. UnitedHealth Group, Inc.*, ALJ No. 2016-SOX-00002 (ALJ Feb. 10, 2016) (Discovery Order).

61 Comp. Br. at 17.

of discretion for an ALJ to ask witnesses questions during a hearing and that the whole point of the hearing is for the ALJ to hear testimony supporting the complainant's claims or the respondent's defenses.[62]

We agree with Respondent. The ALJ advised the parties at the outset of the hearing that he would ask questions to gather all the information he needed to make and write a decision.[63] The ALJ also stated that his questions were "not to interrupt, not [to] be difficult, but" to get all the information needed to make a decision.[64] Complainant's blanket argument that the ALJ's questions were prejudicial and severely impacted him throughout the hearing fails to address how the ALJ abused his discretion, fails to identify which questions were prejudicial, and fails to cite precedent addressing this concern. Moreover, the ALJ gave Complainant the opportunity to present thirty minutes of additional uninterrupted testimony at the end of the hearing—an uncommon benefit that most litigants do not receive before the OALJ or other proceedings. Accordingly, we find that the OALJ hearing was not prejudicial to Complainant and that the ALJ did not abuse his discretion by asking Complainant questions during the hearing.

4. The ALJ did not err in assessing Complainant's credibility

Complainant asserts that the ALJ erred in finding him "purposefully evasive" and "attempting to hide the substantial deficiencies of his proof."[65] Instead, Complainant claims that the ALJ was "highly prejudicial toward Complainant [before the hearing even started]."[66] Conversely, Respondent contends that the ALJ was in the best position to observe witnesses and make credibility determinations during the course of the hearing.[67]

We agree with Respondent. The Board will uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable."[68]

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62 Resp. Br. at 18.

63 D. & O. at 11.

64 *Id*.

65 Comp. Br. at 22-23.

66 Comp. Br. at 23.

67 Resp. Br. at 20.

68 *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-0007, slip op. at 2 (ARB Apr. 30, 2009) (quotations omitted).

In *Folger v. SimplexGrinnell, LLC*, the Board stated that "[m]aking credibility determinations of this sort is exactly why ALJs hold elaborate, trial-like hearings . . . and exactly why we afford great deference to an ALJ's credibility determinations."[69] On appeal, Complainant has failed to provide any explanation why the ALJ's credibility determinations were erroneous; rather, he simply disagrees with them. Consequently, we find that the ALJ did not err in assessing Complainant's credibility.

5. The ALJ did not err in dismissing Complainant's complaint

Section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer or a federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.[70]

To prevail on the merits of a Section 806 case, a covered employee must prove "by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint."[71] If the complainant establishes by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action, then the respondent can only 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.[72]

The ARB has interpreted the concept of "reasonable belief" to require a complainant to have a subjective belief that the complained of conduct constitutes a violation of relevant law. The belief must also be objectively reasonable, meaning that the belief must be reasonable for an individual in the employee's circumstances

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69 *Folger v. Simplexgrinnell, LLC*, ARB No. 2015-0021, ALJ No. 2013-SOX-00042, slip op. at 4 (ARB Feb. 18, 2016).

70 18 U.S.C. § 1514A(a)(1).

71 29 C.F.R. § 1980.109(a).

72 29 C.F.R. § 1980.109(b).

having his training and experience.[73] A reasonable but mistaken belief that the respondent's conduct constitutes a violation of the applicable law can constitute protected activity.[74]

After reviewing the record below, we agree with the ALJ's conclusion that Complainant did not engage in protected activity. Initially, we note that adjudicators must accord a party appearing pro se fair and equal treatment, but a pro se litigant "cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance."[75] Thus, although an ALJ has some duty to assist pro se litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the pro se litigant.[76] In the end, pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel.[77]

In this case, Complainant argued that courts and other ALJs have construed the definition of protected activity to include reporting violations of internal policies and controls.[78] However, after addressing this point, Complainant failed to support his argument with evidence or material from the record to show how his activity raised complaints concerning internal controls protected by SOX. Instead, Complainant shifted his focus to the next section in his brief, "*Subjectively Reasonable belief*."[79] Here, too, Complainant included legal citations but failed to apply them to his case. While we are aware that pro se litigants are entitled to some

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[73] *See Melendez v. Exxon Chems.*, ARB No. 1996-0051, ALJ No. 1993-ERA-00006, slip op. at 28 (ARB July 14, 2000).

[74] *Sylvester v. Parexel Int'l LLC*, ARB. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 16 (ARB May 25, 2011).

[75] *See Pik v. Credit Suisse AG*, ARB No. 2011-0034, ALJ Case No. 2011-SOX-00006, slip op. at 4 (ARB May 31, 2012).

[76] *Id*. at 5.

[77] *Id.*; *see also Young v. Schlumberger Oil Field Serv.*, ARB No. 2000-0075, ALJ No. 2000-STA-00028, slip op. at 10 (ARB Feb. 28, 2003).

[78] Complainant's Post Hearing Brief Before the Honorable Judge Steven D. Bell at 20.

[79] *Id*.

leeway, they are still required to make legal arguments and support those arguments with material from the record.[80]

Even if Complainant had demonstrated a subjective belief that his reports were protected by SOX, the record contains no evidence showing that he had an objective reasonable belief that he engaged in protected activity. During Complainant's tenure with Respondent, he alleged that he engaged in protected activity on two separate occasions. First, Complainant alleged that he informed Johnson and Bornholdt that there were not enough processes and process management resources within the LaunchPad program. Second, Complainant alleged that he told Blenkush that employees should not put untested computer code into production on the Gateway project. The Complainant has failed to show how his reporting concerning on the LaunchPad program or the Gateway project would have an adverse effect on Respondent's shareholders or its financial condition. Complainant's issues with Launchpad and Gateway are not in themselves mail, wire, radio, TV, or bank fraud and have no bearing on financial matters. Complainant has failed to develop a complaint concerning a reasonable belief of a violation of a rule or regulation of the SEC.

Since Complainant has failed to establish that he engaged in protected activity, one of the required elements of a SOX complaint, his complaint must be dismissed. Accordingly, we **AFFIRM** the ALJ's D. & O. and **DISMISS** the complaint.

SO ORDERED.

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[80] *See Dev. Res., Inc.*, ARB No. 2002-0046, slip op. at 4 (ARB Apr. 11, 2002) (citing *Tolbert v. Queens C.*, 242 F.3d 58, 75-76 (2d Cir. 2001) (noting that in the Federal Courts of Appeals, it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.")); *see also U.S. v. Hayter Oil Co.*, 51 F.3d 1265, 1269 (6th Cir. 1995) (holding "[i]t is not our function to craft an appellant's arguments."); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (stating "[a] skeletal 'argument,' really nothing more than an assertion, does not a preserve a claim [for appellate review] . . . Judges are not like pigs, hunting for truffles buried in briefs.")).