U.S. Department of Labor

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

In the Matter of:

THOM THIBODEAU,

COMPLAINANT,

v.

WAL-MART STORES, INC.,

RESPONDENT.

ARB CASE NO. 2017-0078

ALJ CASE NO. 2015-SOX-00036

DATE: December 17, 2020

Appearances:

For the Complainant:
Lynne Bernabei, Esq. and Alan R. Kabat, Esq.; *Bernabei & Kabat, PLLC*; Washington, District of Columbia

For the Respondent:
Jane W. Duke, Esq. and Scott D. Provencher, Esq.; *Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.*; Little Rock, Arkansas

For the Solicitor of Labor, Amicus Curiae:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah H. Marcus, Esq.; Megan E. Guenther, Esq.; Sarah Y. Caudrelier, Esq.; *United States Department of Labor*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge;* James A. Haynes, Thomas H. Burrell, and Randel K. Johnson, *Administrative Appeals Judges*, presiding en banc

DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002,

Title VIII of the Sarbanes-Oxley Act (SOX), and its implementing regulations.[1] Complainant Thom Thibodeau alleges that Respondent Wal-Mart Stores, Inc. violated SOX by terminating his employment because he engaged in activity protected by the statute. On September 11, 2017, a United States Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) dismissing the claim. Complainant appealed to the Administrative Review Board (ARB or the Board). For the reasons that follow, we affirm the ALJ's decision.

BACKGROUND[2]

1. Complainant's Employment and the Change Request Process

Complainant began working for Respondent as a Senior Estimator in its Estimating Department in 2007.[3] One of Complainant's core responsibilities was to evaluate and provide recommendations on change requests submitted by contractors who were building or remodeling stores for Respondent.[4] Change requests are requests for additional payment for expenses not included in the original contract.[5]

The change request process began when a contractor submitted a proposal to Respondent's Construction Department outlining the proposed scope of work along with a cost estimate.[6] If the Construction Department approved the work, it authorized the contractor to begin.[7] The contractor then submitted a change request for the actual value of the work.[8] When the size of the change requests exceeded a certain dollar threshold or when the Construction Department wanted extra input, it sent the change request to the Estimating Department for review.[9] Estimators, like Complainant, then reviewed the submissions and made recommendations to the Construction Department on the "validity and fair market value" in order to

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1 18 U.S.C. §1514A (2010); 29 C.F.R. Part 1980 (2020).

2 In reciting this background, the Board draws from the ALJ's recitation of facts and information in the record, and is not making findings of fact.

3 Hearing Transcript (Tr.) at 16-17.

4 Complainant's Exhibit (CX) 3; Tr. at 17-19.

5 Tr. at 17-19.

6 *Id.* at 429-30, 490-92.

7 *Id.*

8 *Id.*

9 *Id.* at 432-33, 491. At the times relevant to this case, the threshold for submissions to the Estimating Department was $50,000. *Id.* at 59.

help mitigate construction costs.[10] However, Estimators' recommendations were non-binding; the Construction Department made the final decision on change requests and had the discretion to reject Estimators' advice.[11]

2. Cancellation of Estimating Software

In November 2013, Jason Cantey, Complainant's supervisor, considered whether to cancel licenses for certain estimating software because of price increases for the products.[12] Complainant wanted to keep the software because he believed it was essential to his ability to review change requests.[13] Nevertheless, Cantey cancelled the licenses after determining that most Estimators did not consistently use the software.[14]

Complainant escalated his concerns to Volker Heimeshoff, the Vice President for Prototype and New Format Development, on January 10, 2014, and reiterated his belief that he needed the software to perform reviews.[15] After further discussion in early 2014, Cantey asked Complainant to negotiate a lower license rate on the software.[16] Complainant succeeded and Respondent renewed the software.[17]

3. Complainant's First Coaching

On March 21, 2014, Cantey and Kevin Ruehle, Complainant's second-level supervisor, met with Complainant to discuss a number of recent performance issues.[18] First, they criticized Complainant for an email he copied to an outside contractor on March 20, 2014.[19] Cantey was concerned Complainant's email was not focused on customer service and reflected the existence of friction between the

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10 CX 3; Tr. at 17-18, 20-21, 353.

11 Tr. at 111-12, 433.

12 *See* CX 43, 44; Tr. at 34.

13 *See* CX 43, 44; Tr. at 45-49. Complainant used the software to compare contractor costs with market rates and to verify submissions regarding labor quantities or equipment required for the work. CX 43; Tr. at 45-46.

14 CX 44; Tr. at 253-54.

15 CX 45; Tr. at 49-51. Heimeshoff was Cantey's second-level supervisor. Tr. at 174-75.

16 CX 50, 52; Tr. at 132-33, 254-55. Cantey testified he was not aware that Complainant had escalated his concerns to Heimeshoff when he asked Complainant to renegotiate the licenses. Tr. at 254-55.

17 CX 50, 52; Tr. at 132-33, 324.

18 CX 54; Tr. at 174, 268-69.

19 CX 53.

Construction and Estimating Departments.[20] Cantey and Ruehle also criticized Complainant for two instances in which they considered him to have been insubordinate. In the first instance, Complainant refused Cantey's request to review a change request outside of Complainant's territory.[21] In the second instance, Complainant discussed a topic at an inter-departmental meeting despite Cantey's prior instruction not to do so.[22] Complainant also made a comment during the March 21, 2014 meeting that his female colleague counted as "half" of an estimator.[23] Complainant claimed that he was merely referring to her part-time status, but Cantey and Ruehle regarded Complainant's phrasing as inflammatory and belittling.[24]

After the meeting, Cantey consulted with Respondent's Human Resources Department and issued Complainant a second-level coaching under Respondent's progressive discipline policy.[25] After the first coaching, Cantey also issued Complainant his annual performance review, in which Cantey stated that Complainant struggled with communication and needed to improve his delivery with customers and contractors.[26] Over the years, communication and interactions with others had often been identified as areas in which Complainant needed to improve, and witnesses testified that Complainant could be abrasive, unprofessional, and offensive.[27]

4. The Marysville Project and Complainant's Second Coaching

One project to which Complainant was assigned was the construction of a new store in Marysville, Washington (the Marysville Project), which was beset by

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20 CX 53, 54; Tr. at 211-14, 216.

21 CX 54; Tr. at 257-58.

22 CX 54; Tr. at 266-67.

23 CX 54; Tr. at 258-62.

24 CX 54; Tr. at 258-60.

25 CX 54, 57; Tr. at 268-69. Respondent's policy provided three levels of progressive coaching, although levels could be skipped depending on the severity of conduct. CX 11; Tr. at 564-65. Cantey, Ruehle, Heimeshoff, and a Human Resources representative determined Complainant's conduct warranted skipping the first level. Tr. at 269. Any discipline after the third level automatically resulted in termination of employment. CX 11; Tr. at 573, 590.

26 CX 59. Cantey originally gave Complainant an overall rating of "development needed." Complainant appealed the review to Heimeshoff, who increased the overall rating to "solid performer," but left the criticisms regarding Complainant's communications skills intact. CX 59; Tr. at 277-80, 325-26.

27 CX 25-27; Tr. at 239-40, 618-19.

overages and delays.[28] On September 4, 2014, Complainant sent an email with detailed spreadsheets and other documents concerning the Marysville Project to Cantey, Ruehle, and Heimeshoff, among others.[29] The email and documents identified the results of change requests, and touted the savings generated from rejecting or vigorously negotiating poorly documented or unreasonable submissions from contractors.[30]

In response to Complainant's email, Cantey told Complainant that, moving forward, Complainant should get Cantey's approval before communicating with upper-level management.[31] Cantey testified that he wanted to ensure that discussions with management were effective and efficient.[32] Complainant agreed to Cantey's instruction, but days later, on September 16, 2014, he sent a nearly identical email about the Marysville Project to two other Vice Presidents, without asking permission or even copying Cantey on the email.[33] Cantey consulted with the Human Resources Department and issued Complainant a third-level coaching for disobeying his instruction.[34] The coaching notified Complainant that his employment would be subject to termination if the behavior continued.[35]

5. The Glendora Project and Complainant's Termination

Another project to which Complainant was assigned was the remodeling of a store in Glendora, California (the Glendora Project).[36] On March 4, 2015, Complainant had a telephone conversation with the Senior Project Manager for the contractor on the Glendora Project regarding a change request that Complainant believed was deficient.[37] Among other things, Complainant expressed his concern that the Senior Project Manager was charging his entire salary to Respondent even though he split his time among other projects.[38]

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28 CX 73; Tr. at 36-37.

29 CX 73.

30 *Id.*; CX 82; Tr. at 70.

31 CX 74, 81.

32 Tr. at 280-85.

33 CX 75; Tr. at 68.

34 CX 81, 83, 92; Tr. at 225-27, 285-86, 587-90.

35 CX 83.

36 *E.g.,* CX 89, 94, 96; Tr. at 75-76.

37 Tr. 86-89.

38 *Id.* at 75, 88-89.

The call became contentious. Evidence shows that Complainant asked the Senior Project Manager if he thought he was worth what he was being paid.[39] After learning about the manner in which Complainant had spoken to the contractor, Cantey conferred again with Respondent's Human Resources Department.[40] Because Complainant had already received a third-level coaching, his employment was terminated on March 11, 2015.[41]

6. Procedural History

Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) on August 27, 2015, alleging that Respondent terminated his employment in violation of SOX. OSHA dismissed the complaint on September 16, 2015, and Complainant requested a hearing with the Department of Labor's Office of Administrative Law Judges. The ALJ conducted a hearing from January 10 to 12, 2017, and issued the D. & O. dismissing Complainant's complaint on September 11, 2017. This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under SOX.[42] The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if 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] The Board will also uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable."[45]

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[39] CX 106; Tr. at 485, 519-23; Deposition of William Ross at 35. Complainant disputed what Respondent asserted transpired on the call. The ALJ weighed the evidence and made reasonable credibility determinations, and found that Respondent's version of events was more believable than Complainant's. D. & O. at 7 n.6.

[40] CX 106, 107.

[41] CX 11, 108; Tr. at 234, 573, 590.

[42] 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).

[43] 29 C.F.R. § 1980.110(b); *Johnson v. The Wellpoint Cos., Inc.*, ARB No. 2016-0020, ALJ No. 2010-SOX-00038, slip op. at 3 (ARB Aug. 31, 2017).

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

[45] *Wong v. Sumitomo Mitsui Banking Corp.*, ARB No. 2018-0073, ALJ No. 2016-SOX-00005, slip op. at 3 (ARB Oct. 26, 2020) (quoting *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STAA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019)).

DISCUSSION

SOX prohibits covered employers, like Respondent, from discharging or otherwise discriminating against an employee for "provid[ing] information . . . regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . . ."[46] To prevail on his SOX claim, Complainant must prove by a preponderance of the evidence that (1) he engaged in activity that SOX protects; (2) Respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the adverse personnel action.[47] If Complainant can establish each of these elements, Respondent will nevertheless prevail if it proves by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant's protected activity.[48]

The ALJ determined that Complainant did not prove that he engaged in protected activity. The ALJ also found that Respondent proved by clear and convincing evidence that it would have terminated Complainant's employment in the absence of his alleged protected activity. The ALJ's opinion is well-reasoned, is supported by substantial evidence, and is in accordance with applicable law. Therefore, we affirm.

1. Complainant Did Not Engage in Protected Activity

Complainant asserts he engaged in protected activity by reporting conduct which he believed violated a "rule or regulation of the Securities and Exchange Commission."[49] Specifically, he stated that he believes the Estimating Department's review of change requests was a part of the company's internal controls over financial reporting.[50] Complainant argues he provided information concerning the circumvention of these controls, and therefore engaged in protected activity, when he complained about Respondent's decision to cancel the estimation software and

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46 18 U.S.C. § 1514A(a)(1).

47 29 C.F.R. § 1980.109(a); *see also* 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 49121(b)); *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 9-10 (ARB May 25, 2011).

48 29 C.F.R. § 1980.109(b); *see also* 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 49121(b)); *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Nos. 2007-0021, -0022, ALJ No. 2004-SOX-00011, slip op. at 6 (ARB Aug. 31, 2009).

49 *See* 18 U.S.C. § 1514A(a)(1).

50 Complainant's Post-Hearing Brief at 42.

when he reported and protested poorly documented and unjustified change requests on the Marysville and Glendora Projects.[51]

The ALJ found that the Estimating Department's review of change requests was not a part of Respondent's internal controls under SEC rules. The ALJ also determined that it was not objectively reasonable for Complainant to believe such controls were violated.

A. The Estimating Department's Change Request Reviews Were Not Internal Controls over Financial Reporting

SEC regulations require certain publicly traded companies, like Respondent, to establish, maintain, and provide public reports concerning "internal controls over financial reporting."[52] Internal controls over financial reporting are defined as processes under the supervision of a company's principal executive and financial officers that "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 . . . ."[53] Such controls are defined to include 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
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> (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.[54]

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51 *Id.* at 46-50.

52 15 U.S.C. §§ 78m(B)(2)(b), 7241(a)(4), 7262(a); 17 C.F.R. § 240.13a-15(a).

53 17 C.F.R. § 240.13a-15(f)

54 *Id.*; *accord* 15 U.S.C. § 78m(b)(2)(B) (defining internal accounting controls).

In adopting this definition, the SEC distinguished internal controls over financial reporting from other internal operational and managerial controls, with which SEC rules are not concerned:

> A few of the commenters urged us to adopt a considerably broader definition of internal controls that would focus not only on internal control over financial reporting, but also on internal control objectives associated with enterprise risk management and corporate governance. While we agree that these are important objectives, **the definition that we are adopting retains a focus on financial reporting** . . . .[55]

The SEC further clarified that internal controls over financial reporting do not encompass other processes related to the "effectiveness and efficiency of a company's operations and a company's compliance with applicable laws and regulations, with the exception of compliance with the applicable laws and regulations **directly related to the preparation of financial statements** . . . ."[56] Thus, the SEC's requirements for internal controls are concerned specifically with ensuring the accuracy, completeness, and integrity of financial statements and public companies' accounting and auditing functions.

In light of the foregoing, the ALJ reasonably concluded that the Estimating Department's change request reviews were not part of an "internal control over financial reporting" as that term is defined by the SEC. Complainant did not present evidence that the Estimating Department's reviews ensured, or were intended to ensure, that transactions were recorded fairly, accurately, and in compliance with generally accepted accounting principles (GAAP) and other financial reporting rules, or that the evaluations otherwise affected the accurate and fair recording of Respondent's assets and transactions, or related to the company's accounting and audit functions. Heimeshoff testified, without contradiction, that Estimating's reviews did not affect the integrity of the reported construction numbers and the fact that "we are paying and we report what we pay."[57]

The record supports the ALJ's conclusion that Estimating's reviews were, instead, a cost-saving endeavor that was not involved in controlling or ensuring the

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55 *In re Mgmt.'s Report on Internal Control Over Fin. Reporting & Certification of Disclosure in Exch. Act Periodic Reports*, S.E.C. Release Nos. 33-8238, 34-47986, IC-26068; 80 S.E.C. Docket 1014 (June 5, 2003) (emphasis added).

56 *Id.* (emphasis added).

57 Tr. at 354-57.

fair and accurate reporting of Respondent's financials.[58] Complainant referred to himself as a "cost-analyst," and his position description states that he was responsible for "mitigat[ing] cost of construction claims," "making recommendations for claim mitigation or cost avoidance," "provid[ing] cost estimates," and "driving initiatives to minimize these costs."[59] Heimeshoff and other witnesses also confirmed that Complainant's department was a cost-control center meant to give advice on costs and value and help Respondent save money.[60] Complainant may have helped Respondent make wise economic decisions, but saving Respondent on construction costs is outside of the scope of the SEC's rules for internal controls over financial reporting.[61]

B. It Was Not Objectively Reasonable for Complainant to Believe Internal Controls Over Financial Reporting Were Being Violated

As the ALJ noted, although the Estimating Department's reviews were not actually internal controls over financial reporting, Complainant might nevertheless be protected by SOX if he reasonably, albeit mistakenly, believed the conduct about which he complained constituted a violation of such controls.[62] This reasonable belief standard includes subjective and objective components. The subjective component is met if the employee actually believed that the conduct complained of constituted a violation of relevant law.[63] The objective component is met if the totality of the circumstances known or reasonably perceived by the complainant at the time of the complaint, analyzed in light of his training and experience, would lead a reasonable person to believe that the conduct complained of constituted a violation of relevant law.[64]

The ALJ determined that, without question, Complainant subjectively believed Estimating's reviews were part of Respondent's internal controls over financial reporting. However, the ALJ determined that Complainant's belief was not objectively reasonable and that a person in Complainant's circumstances would

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58 *See* D. & O. at 18.

59 CX 3, 72.

60 Tr. at 352-53, 388, 431-32.

61 Notably, throughout his appellate briefs, Complainant refers to "internal controls," rather than "internal controls **over financial reporting.**" Complainant's omission helps illustrate the disconnect between the conduct with which Complainant was concerned (cost-management controls) and the specific controls with which SEC rules are concerned (financial reporting).

62 *Sylvester*, ARB No. 2007-0123, slip op. at 16.

63 *Id.* at 14 (citing *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009)).

64 *Id.* at 15 (citing *Harp*, 558 F.3d at 723).

not have believed such controls were being violated. Substantial evidence supports these conclusions.

i. Estimating Software

Although Complainant subjectively believed that the Estimating Department's reviews of change requests were internal controls over financial reporting, the ALJ determined that it was not objectively reasonable for Complainant to believe that Respondent violated such controls by temporarily cancelling the software Complainant used in the review process. Evidence showed that only four of the twelve Estimators consistently used the software.[65] The ALJ concluded that if the majority of Estimators performed reviews without the software, it was not objectively reasonable for Complainant to believe that losing the software would render the alleged internal control ineffective.[66]

Complainant does not dispute that only four of the twelve Estimators used the cancelled software. However, he contends that the four Estimators who used the software were the only four Estimators who performed change request reviews. He asserts that this demonstrates the importance of the software to the review function, specifically.[67] The evidence Complainant cites does not support this assertion. Although it may be true that only four Estimators performed change request reviews, the testimony cited by Complainant does not show that these were the same Estimators who used the cancelled software.[68]

Moreover, other evidence bolsters the ALJ's conclusion that it was not reasonable for Complainant to conclude that the software was critical to the alleged controls. Cantey testified that although some other Estimators used the software, no other Estimator felt that he or she could not do the job without it.[69] Complainant also acknowledged that no other Estimator complained about losing the software to the same level and degree as Complainant.[70] In an email discussing the efficacy of one of the software products, Complainant also stated "[i]t is my impression that the program is underutilized by this department . . . "[71] This suggests that Complainant understood the software was not regarded by others as a critical component of the review process, although he felt it was. This evidence

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65 Tr. at 253-54.

66 D. & O. at 20.

67 Complainant's Brief (Compl. Br.) at 19-21.

68 Compl. Br. at 19-20 (citing Tr. at 57-58; CX 9).

69 Tr. at 253.

70 *Id.* at 136-37.

71 CX 43.

substantiates the ALJ's conclusion that the software was not essential to Estimating's reviews. As a result, it was not objectively reasonable for Complainant to believe the temporary loss of the software violated or circumvented the alleged internal controls over financial reporting.

ii. Marysville and Glendora Projects

The ALJ also determined that it was not objectively reasonable for Complainant to believe that Respondent was violating internal controls over financial reporting when he reported and protested inadequately documented and unjustified change requests on the Marysville and Glendora Projects.[72] Complainant argues the ALJ erred because evidence adduced at the hearing showed that a purpose of having Estimators review change requests was to collect sufficient documentation to substantiate and validate costs and to create a "paper trail."[73] It is not clear, but Complainant seems to suggest that he reasonably believed that this review function was necessary to protect against the unauthorized use or disposition of Respondent's assets.[74] However, substantial evidence supports the ALJ's finding that a reasonable person in Complainant's circumstances would not have believed that the Estimating Department provided that accountability, in light of its limited role.

Although it is true that Complainant and other Estimators requested documentation to validate costs, the ALJ recited evidence that Complainant knew Estimators did not have authority over Respondent's expenditures, the disposition of Respondent's assets, or the accurate or complete recording of Respondent's transactions. Evidence showed, for example, that Estimators merely provided recommendations on particular projects and that the Construction Department and other managers retained complete discretion with respect to change requests, and had the authority to reject Estimators' advice.[75] Evidence also showed that decisions on change requests were made by balancing many factors that were beyond the scope of an Estimator's reviews.[76] A reasonable person in Complainant's

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[72] D. & O. at 20-23.

[73] Compl. Br. at 20-22.

[74] *See* 17 C.F.R. 240.13a-15(f)(3) (defining an internal control over financial reporting as a process designed to 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."). Beyond general assertions that he believed reviews were part of internal controls, Complainant did not identify which type of controls he believed Respondent was violating with respect to the Marysville and Glendora Projects.

[75] *See* D. & O. at 17-18, 21-22.

[76] D. & O. at 16, 21-22.

circumstances would have known that although the Estimating Department gathered documents to validate costs, it lacked the ability to actually account for Respondent's expenditures or ensure the accuracy of financial reporting.[77]

iii. The ALJ Did Not Require Complainant to Prove an Actual Violation of Internal Controls Over Financial Reporting

Complainant also contends that the ALJ erroneously required him to prove that Respondent actually violated the SEC's rules governing internal controls over financial reporting, rather than merely that he reasonably believed such rules were being violated. We must disagree. The ALJ repeatedly cited the reasonableness standard and correctly applied it throughout the D. & O.[78] For the reasons set forth above, we affirm the ALJ's decision that Complainant not only failed to prove an actual violation of the rules governing internal controls over financial reporting, but also that it was not reasonable for a person in Complainant's circumstances to believe such rules were being violated.

iv. The ALJ Did Not Err by Considering Materiality When Assessing the Reasonableness of Complainant's Belief

As quoted above, internal controls over financial reporting include those processes which "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."[79] Therefore, in addition to the reasons cited above, the ALJ also considered the materiality of Complainant's concerns when assessing the reasonableness of Complainant's belief that Respondent violated internal control rules. The fact that the savings generated by the Estimating Department's reviews were only a fraction of one percent of Respondent's total construction and operating costs supported the ALJ's conclusion, when weighing the totality of the circumstances, that Complainant could not have

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[77] This is not to say that Respondent was not required to, or did not, have internal controls over financial reporting concerning its construction expenditures. We note that the ALJ determined that Respondent's Evoco system, which was used to maintain records for all change request expenditures and record who authorized them, was an internal control that contrasted with Estimating's more limited cost review-and-recommendation function. Complainant did not challenge this finding. Because it was not raised on appeal, we offer no opinion on whether the Evoco system or any other process or function employed by Respondent outside of the Estimating Department's change request reviews were internal controls over financial reporting. Our opinion is limited to the specific facts of this case and issues presented on appeal.

[78] *See* D. & O. at 9, 12-13, 20-23.

[79] 17 C.F.R. § 240.13a-15(f)(3) (emphasis added).

objectively believed they had a material effect on Respondent's financial statements.[80]

Principally relying on the Board's decision in *Sylvester v. Parexel Int'l LLC*, Complainant argues that the ALJ erred as a matter of law by considering the negligible impact of Estimating's reviews on Respondent's financial condition or financial reports.[81] In *Sylvester*, an ALJ granted the respondent's motion to dismiss a SOX claim in which the complainants alleged their employment had been terminated for reporting fraud. Among other reasons, the ALJ dismissed the claim because the conduct with which the complainants were concerned was not material to shareholder interests, which was an element of the underlying fraud claim. The ALJ reasoned that "[t]he alleged fraudulent conduct must 'at least be of a type that would be adverse to investors' interests' and meet the standards for materiality under the securities laws . . ." for the complainants to prevail on a SOX claim.[82]

On appeal, the Board reversed. Recognizing that the statute protects a complainant's reasonable, even if erroneous, belief that an enumerated law has been violated, the Board determined that the ALJ had improperly merged the elements required to prove fraud with the requirements that a whistleblower must allege or prove to engage in protected activity. The Board held that a whistleblower can engage in SOX protected activity even if the whistleblower fails to allege each element of a fraud claim as required by securities laws.[83] While we continue to adhere to this holding, we acknowledge that it covers a lot of ground as does the statute itself. In light of subsequent positions taken by the courts and by litigants like Complainant, we modify or clarify our position. While an employee need not plead or prove each element of a securities fraud claim or other enumerated law to gain protection under SOX, SOX is not a general anti-retaliation statute. The requirements a complainant must satisfy to gain protection cannot be diminished to such a degree that they are divorced from the statute's text. A complainant complaining about personnel actions, race discrimination, or corporate expenditures, for example, are not covered under SOX.

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80 D. & O. at 18-19, 22-23.

81 Compl. Br. at 22-25.

82 *Sylvester v. Parexel Int'l LLC*, ALJ No. 2007-SOX-00039, -00042, slip op. at 2 (ALJ Aug. 31, 2007) (citing *Platone v. FLYi*, ARB No. 2004-0154, ALJ No. 2003-SOX-00027, slip op. at 15 (ARB Sept. 29, 2006)).

83 *Id.*; *see also Wiest v. Lynch*, 710 F.3d 121, 134 (3d Cir. 2013) (limiting an employee's protected activity "because the communication did not recite facts showing an objectively reasonable belief in the satisfaction of each element of one of the listed anti-fraud provisions would eviscerate Section 806. An employee may not have access to information necessary to form a judgment on certain elements of a generic fraud claim, such as scienter or materiality, and yet have knowledge of facts sufficient to alert the employer to fraudulent conduct.").

A complainant is protected only if the complainant supplies information concerning conduct that the complainant reasonably believes constitutes a violation of one of the specifically enumerated categories. Thus, a complainant's complaint must contain some approximation or tethering to the enumerated categories.[84] The reasonableness of an employee's belief must be considered in the context of what is required to establish a violation of the fraud statutes or a rule or regulation of the SEC.[85] However, as stated above, a complainant does need to provide the specificity that a violation of the underlying securities law claim requires.[86] One of Congress's goals in protecting corporate whistleblowers is to address problems before investors are affected. "Requiring an employee to essentially prove the existence of fraud before suggesting the need for an investigation would hardly be consistent with Congress's goal of encouraging disclosure."[87]

Moreover, our holding in *Sylvester* did not forbid the ALJ from considering evidence of materiality, among other relevant factors, in this case.[88] *Sylvester* does not operate to exclude relevant facts or to limit the ALJ's consideration of the facts or the law. The fact that a complainant need not prove each element of the underlying law to establish that he reasonably believed the law was violated does not render the elements of the underlying law irrelevant, as suggested by Complainant. Therefore, an ALJ may, depending on the particular facts and circumstances of the case, consider and weigh, among the other factors, evidence

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84 *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 n.6 (2d Cir. 2014) ("We are less certain whether the ARB was correct [in *Sylvester*] in concluding that a § 1514A complaint need not even 'approximate specific elements' of the enumerated provisions allegedly violated, or that there is no requirement that the violation must be 'material.' We note that the statute does require plausible allegations that the whistleblower reported information based on a reasonable belief that the employer violated *one of the enumerated provisions* set out in the statute. Thus, the statutory language suggests that, to be reasonable, the purported whistleblower's belief cannot exist wholly untethered from these specific provisions." (emphasis original)) (citations omitted); *see also Lamb v. Rockwell*, 249 F.Supp.3d 904, 912 (E.D. Wis. 2017), citing *Rocheleau v. Microsemi Corp., Inc.*, No. 15–56029, 680 Fed. Appx. 533, 535, 2017 WL 677563, at *1 (9th Cir. Feb. 21, 2017) (quoting *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1001 (9th Cir. 2009)).

85 *Northrop Grumman Sys. Corp. v. U.S. Dep't. of Labor, Admin. Rev. Bd.*, 927 F.3d 226, 234-35 (4th Cir. 2019).

86 *See, e.g., Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (listing the elements of a fraud claim). The SEC does not necessarily require a quantitative threshold in assessing materiality under securities law, though it may be useful first step. SEC, Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,151, available at 1999 WL 625156 (Aug. 19, 1999).

87 *Van Asdale*, 577 F.3d at 1002-03.

88 *Beacom v. Oracle Am. Inc.*, 825 F.3d 376, 381 (8th Cir. 2016).

relevant to particular elements of the enumerated law when determining if it was reasonable for a complainant to believe that law had been violated.[89]

Accordingly, we find no error in the ALJ's consideration of materiality in this case.[90] The ALJ fairly concluded that the concerns expressed by Complainant were so small relative to the overall construction and operational costs that Complainant could not have reasonably believed that the amounts at issue could have materially affected Respondent's financial statements. Importantly, the ALJ did not hold that the absence of materiality was determinative, or was a threshold deficiency in Complainant's claim. The lack of materiality was just one factor that the ALJ considered in deciding that Complainant's belief that Respondent violated rules concerning internal controls over financial reporting was objectively unreasonable.

In fact, the D. & O. suggests that the ALJ would have determined that Complainant's belief was not objectively reasonable even without reference to the relative impact of the potential savings generated by Estimating on Respondent's overall operating costs.[91] Similarly, we hold that the other evidence referred to above is substantial, and supports the conclusion that it was not objectively reasonable for Complainant to believe that Respondent was violating internal control rules. Therefore, even if we were to hold that the ALJ erred in considering materiality, the error would be harmless.

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89 *Sylvester*, 2007-0123, slip op. at 48-49 (J., Brown, concurring in part and dissenting in part).

90 As Complainant has argued, some definitions of internal controls over financial reporting do not include a materiality element, and there is no independent materiality requirement built into Section 806 of SOX. *See* 17 C.F.R. § 240.13a-15(f)(1)-(2); *Sylvester*, ARB No. 2007-0123, slip op. at 22 (citing *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008)). However, as previously stated, the thrust of Complainant's argument appears to be that he believed the Estimating Department's reviews were controls as defined by Section 240.13a-15(f)(3), which does include a materiality element.

91 *See* D. & O. at 19 ("though Estimating's role vis-à-vis the Evoco system interacted with an internal control (Evoco), Estimating's actual evaluation of [change order requests] was not an internal control. **Additionally**, Estimating's effect on Respondent's financial statements was not material." (emphasis added)), 22 ("However, given the clarity of Estimating's cost-cutting purpose, I find that the undisputed training language is not enough, in the wake of the other evidence, to persuade a reasonable person that Estimating was an internal control. **Additionally**, the extent of Estimating's savings compared to Respondent's construction spend . . . renders it unreasonable to assume that Estimating had an effect on Respondent's financial statements." (emphasis added)).

2. Respondent Proved It Would Have Terminated Complainant's Employment in the Absence of His Alleged Protected Activity

The ALJ also found that Respondent proved by clear and convincing evidence that it would have terminated Complainant's employment in the absence of his alleged protected activity. Substantial evidence supports this conclusion. The ALJ thoroughly recounted the evidence and explained the credibility findings which establish a history of poor communication, brusque and unacceptable interactions with both colleagues and contractors, and multiple instances of disobeying his supervisor's instructions or requests. The ALJ also found substantial evidence demonstrating Respondent's measured progression through a discipline policy that ended with the termination of Complainant's employment.

A. Complainant's First Coaching

The record shows Respondent first coached Complainant under its progressive discipline policy in March 2014 for conduct unrelated to any alleged protected activity. The ALJ relied on evidence showing Complainant had exposed inter-departmental friction in an email with a contractor, refused to conduct a review requested by his supervisor, discussed a topic at an inter-departmental meeting after being told by Cantey not to raise it, and referred to his female colleague in a belittling manner. Complainant claims that the ALJ erred because Respondent "admitted" that it exaggerated the bases for this first coaching.[92] We find no error in the ALJ's analysis or consideration of the evidence.

Complainant asserts that Cantey admitted at the hearing that Complainant's March 20, 2014 email contained nothing more than what had already been shared with the contractor and should not have precipitated a coaching. Although Cantey acknowledged that Complainant clarified some information with his email, Cantey stated that he was concerned because Complainant's email did not help resolve the situation. Cantey felt the email was not focused on customer service, and that it suggested that there was friction within Respondent's operation.[93] We believe Complainant's appeal ignores this further explanatory evidence.

Complainant also contends that Cantey admitted that Complainant's female colleague, to whom he referred as "half" an estimator, was, in fact, a part-time employee. Complainant's female colleague may have worked part-time, but, as the ALJ found, Cantey's concern was with Complainant's inflammatory phrasing.[94] In

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92 Compl. Br. at 28.

93 CX 63; Tr. at 211-14, 216.

94 CX 54; Tr. at 258-60.

fact, Cantey's contemporaneous notes, which the ALJ credited, reflect that Complainant admitted that his comment was inappropriate at the time.[95]

Complainant has also ignored on appeal the two acts of insubordination—first, refusing to do a change request review, and second, sharing information at the inter-departmental meeting—upon which the first coaching was also based. This conduct further shows that the first coaching would have occurred even in the absence of Complainant's alleged protected activity.

B. Complainant's Second Coaching

The ALJ also aptly noted evidence showing that Respondent coached Complainant a second time in September 2014 for sending an email about change requests on the Marysville Project to upper-level management, despite Cantey's direct instruction, only days prior, not to do so without approval. Complainant contends on appeal, as he did below, that his September emails "provid[ed] information to senior management about serious problems with the Change Requests" on the Marysville Project.[96] Complainant argues, therefore, that the coaching was an attempt to stifle his ability to report violations of internal controls and was, in itself, retaliatory.

As quoted by the ALJ in the D. & O., Complainant's testimony at the hearing contradicts his more recent characterization of his emails on the Marysville Project.[97] Complainant testified at the hearing that the emails were only meant to emphasize the effectiveness of the change request review process and to show that he was providing value to Respondent. He testified at the hearing that his emails were a "celebration of the construction team working together. Estimating, the directors, the construction managers had all worked together, and we realized the savings on a very difficult project with a difficult subcontractor and contractor. It wasn't meant as anything else."[98] This evidence substantially supports the ALJ's finding that Thibodeau sent the email to "demonstrate [his] worth to upper management," and not to report any conduct which he believed violated securities laws.[99] The evidence cited by the ALJ supports the conclusion that Complainant disregarded a clear instruction from his supervisor when he sent his email to management. Therefore, we affirm the ALJ's finding that Respondent would have issued Complainant's second coaching for insubordination regardless of any alleged protected activity.

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95 CX 54.

96 Compl. Br. at 28.

97 D. & O. at 25.

98 Tr. at 70; *accord* Tr. at 287-88; CX 82.

99 D. & O. at 25.

C. Termination of Complainant's Employment

The ALJ found that Respondent offered clear and convincing proof that it would have terminated Complainant's employment regardless of his alleged protected activity because of his disrespectful conversation with the Senior Project Manager on the Glendora Project. Although Complainant disputed what transpired on the call, the evidence and the ALJ's reasonable credibility determinations support the conclusion that Complainant asked if the Senior Project Manager thought he was worth what he was being paid. This violated Respondent's core principles regarding respect and prompted Complainant's automatic third-strike-and-out termination.

On appeal, Complainant justifies the way he spoke with the Senior Project Manager.[100] Complainant submits that he had to take a "hard-line" approach only after the Senior Project Manager ignored Complainant's instructions on how to properly submit change requests. Complainant also cites evidence that he was not alone in finding problems with the change requests submitted by the contractor.[101] Complainant may have been justifiably displeased with the Senior Project Manager's work, but that does not excuse Complainant's disrespectful verbal interaction. We find no error in the ALJ's finding that Respondent proved it would have terminated Complainant's employment as the final step under its progressive discipline policy for Complainant's misconduct, even absent his alleged protected activity.

D. Evidence of Complainant's History of Poor Communication

In addition to the foregoing misconduct, the ALJ also concluded that Respondent's decisions to discipline and terminate Complainant were reinforced by Complainant's history of poor communication and brusque manner of speaking with colleagues and contractors. Complainant argues that the ALJ erred by "uncritically" relying on Respondent's subjective assertions regarding Complainant's

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[100] Complainant's Reply Brief (Compl. Reply Br.) at 10. Although Complainant attempted to defend his call with the Senior Project Manager in his reply brief, he did not offer any argument regarding the call in his petition for review or opening brief. Typically we do not consider arguments raised for the first time in a reply. *In re Palisades Urban Renewal Enterprises, LLP*, ARB No. 2007-0124, ALJ No. 2006-DBA-00001, slip op. at 8 (ARB July 30, 2009). For the sake of completeness, we affirm the ALJ's well-reasoned analysis regarding the call and Complainant's third-strike termination as a result thereof.

[101] Compl. Reply Br. at 10.

communication skills.[102] Beyond a general assertion that evaluating Complainant's "communication style was inherently subjective," Complainant did not elaborate on this argument or direct the Board's attention to any specific portion of the D. & O. that places excessive weight on subjective criteria.[103] The ALJ cited to Respondent's well-documented history of identifying Complainant's communication style as an area of concern in past performance reviews, and also included specific examples of Complainant's rude or brusque communications in the record.[104] We note that the ALJ also relied heavily on evidence of Complainant's insubordination and his failure to follow his supervisor's instructions. Therefore, we find no error in the ALJ's analysis or assessment of the evidence.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's D. & O., and the complaint in this matter is **DENIED.**

SO ORDERED.

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102 Compl. Br. at 29-30.

103 Complainant cited generally to pages 24 to 27 of the D. & O. which encompass nearly all of the ALJ's discussion and analysis of the explanation offered by Respondent for Complainant's discipline and termination. Compl. Br. at 30.

104 D. & O. at 26-27.