U.S. Department of Labor

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

IN THE MATTER OF:

ANSON TSE,

COMPLAINANT,

v.

EBAY, INC.,

RESPONDENT.

ARB CASE NO. 2024-0018

ALJ CASE NO. 2019-SOX-00013
ALJ THERESA C. TIMLIN

DATE: August 31, 2026

Appearances:

For the Complainant:
Adam Augustine Carter, Esq. and R. Scott Oswald, Esq.; *The Employment Law Group, P.C.*; Washington, District of Columbia

For the Respondent:
Thomas A. Linthorst, Esq. and Tova Katims, Esq.; *Morgan, Lewis & Bockius, LLP*; Princeton, New Jersey

Before JOHNSON, Chief Administrative Appeals Judge, and BURRELL and KIKO, Administrative Appeals Judges

DECISION AND ORDER

This case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX), as amended, and its implementing regulations.[1] On June 9, 2015, Complainant Anson Tse filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent eBay, Inc. took adverse actions against him, including termination, because he had engaged in protected activity under SOX.[2] Subsequently, Complainant amended his complaint and included allegations that

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[1] 18 U.S.C. § 1514A; 29 C.F.R. Part 1980 (2026).

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

Respondent had provided an inaccurate and negative reference to a prospective employer.[3] On November 15, 2018, OSHA issued a determination letter, finding no violation of SOX and dismissing the complaint.[4] Complainant requested a formal hearing before the Office of Administrative Law Judges.[5]

On January 12, 2024, a United States Department of Labor Administrative Law Judge (ALJ) issued a D. & O. after a hearing, in which the ALJ denied Complainant's claim.[6] In the D. & O., the ALJ found Complainant's credibility "somewhat impaired" and therefore afforded his testimony "less evidentiary weight."[7] Furthermore, the ALJ ruled that Complainant "proved that he engaged in protected activity,"[8] but "he did not show that this protected activity contributed to his adverse action."[9] Finally, the ALJ ruled that Respondent proved by clear and convincing evidence it would have taken the same actions in the absence of any protected activity.[10] On January 26, 2024, Complainant filed a Petition for Review with the Administrative Review Board (Board or ARB).

For the reasons set forth below, we affirm the ALJ's D. & O.

BACKGROUND AND PROCEDURAL HISTORY

1. Background

A. *Overview of eBay Motors and Complainant's Employment*

Complainant worked for Respondent from July 30, 2007, until April 3, 2015, when Respondent terminated his employment as part of a reduction in force (RIF).[11]

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3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.* at 1, 45.

7 *Id.* at 20.

8 *Id.* at 45. While the ALJ found Complainant engaged in protected activity, the ALJ also rejected several of Complainant's other alleged protected activities.

9 *Id.*

10 *Id.* at 39-45.

11 *Id.* at 2-3, ¶¶1, 22-23.

During his time at eBay, Complainant worked at eBay Motors.[12] In February 2012, Complainant became the interim head of Parts & Accessories (P&A), a sub-department of eBay Motors.[13] In April 2012, eBay acquired WHI Solutions (WHI), which became a business unit of eBay motors,[14] and, in March 2013, Brian Murphy, WHI's former CEO, became head of eBay Motors and Complainant's supervisor.[15]

Complainant had served as the interim head of P&A, but Respondent did not select Complainant for the role of P&A Director.[16] Instead, in February 2014, Respondent hired Sree Menon for the role of P&A Director and Menon became Complainant's supervisor.[17]

B. *Famous Rhodes & David Thawley*

In 2010 and 2012, Complainant provided information to eBay's legal team about misconduct by Famous Rhodes—an eBay employee—and David Thawley—an independent contractor.[18] In February 2012, Respondent terminated Rhodes and Thawley after an internal investigation concluded that they had misused Company funds and engaged in a conflict of interest.[19]

C. *Performance Reviews*

Respondent evaluated employees using a five-point scale: Exceeds Most, Exceeds Some, Meets, Meets Some, and Does Not Meet.[20] During Complainant's tenure, his reviews reflected both positive recognition and recurring areas for improvement.

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[12] *Id.* at 5.

[13] *Id.* at 5, 8.

[14] *Id.* at 8-9.

[15] *Id.* at 8-10.

[16] *Id.* at 13-14.

[17] *Id.* at 3, ¶21; *Id.* at 14. Complainant also worked at Jet after Respondent. The ALJ noted that "[t]he records regarding Complainant's work at Jet are sealed and the reason for his termination is not relevant to the instant matter, which involves only his employment at eBay." *Id.* at 20 n.4.

[18] *Id.* at 6-7, 27.

[19] *Id.* at 3, ¶¶11-12.

[20] *Id.* at 5.

Complainant received favorable evaluations in 2011 and 2012, including ratings of "Exceeds Some" and "Exceeds Most." For example, in his 2012 mid-year review, his former supervisor, Kristine Chin, complimented his "exceptional" performance and "automotive expertise."[21] In 2012, Complainant received a "Critical Talent Award," which was "conferred to the top one percent of all eBay employees."[22] Respondent also placed Complainant in the "Emerging Leadership Program" (ELP), which was "a program for very promising individuals" to assess their leadership potential.[23]

At the same time, Complainant received recurring feedback over the years highlighting areas for improvement related to communication, leadership, and problem-solving. For example, in a 2008 mid-year evaluation, Curtis Kroeker, a former supervisor of Complainant, noted that Complainant could "exude a negative attitude" and urged Complainant to focus on "bringing ideas and finding solutions rather than primarily pointing out problems."[24] In Complainant's 2010 reviews, Rainer Leeb expressed that "occasionally [Complainant's] communication style [was] too strong" and "demotivating" towards his team members and that he should be "more cautious with the style of communication" he used.[25] Furthermore, in Complainant's 2011 mid-year evaluation, Leeb noted Complainant's "limited potential as a people manager unless he [changed] his leadership and communication style."[26]

Murphy and Menon later noted similar areas for improvement in their evaluations of Complainant. In Complainant's 2013 year-end review, Murphy noted three areas for development: "[m]anaging team to deliver results, [o]perating across the organization to deliver results, [m]oving from problem identification to

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21 *Id.* at 8.

22 *Id.*

23 *Id.*

24 *Id.* at 6; Joint Exhibit (JX) 4. Rainer Leeb, another former supervisor of Complainant, rated Complainant for this performance review, but it appears that the specific notes highlighted here were from Curtis Kroeker.

25 D. & O. at 6.

26 *Id.*

solution."[27] In Complainant's 2014 mid-year review, Menon provided feedback about his "people management skills," explaining that he needed to "figure out how to communicate" about issues "without sounding like he [was] being overtly critical" and advising him to be "able to take a tough situation and see it [as] a challenge to surmount versus seeing it as an [unsolvable] issue."[28] In Complainant's 2014 year-end review, Menon assigned Complainant a "Does Not Meet" rating and noted that "[h]is 360 feedback is mostly that he has huge domain experti[se] but [is] unable to drive change and projects and initiative[s] forward."[29]

D. eBay Reduction in Force

In 2015, Respondent implemented a RIF that impacted approximately 2,400 employees.[30] Management eliminated forty-one positions in Verticals, approximately 20% of Verticals, the division that housed eBay Motors, including Complainant.[31]

Jeff Somers, Vice President of Verticals, was "ultimately responsible for making the RIF decisions for Verticals," with Angela Skubovius, an HR specialist, "providing data and making recommendations."[32] One of the "key changes" within Verticals was "[r]educing some roles in Motors and WHI to enable more efficiency."[33] Regarding P&A, Somers and Skubovius determined that P&A "did not require both a senior manager and a director within the [P&A] business." [34] Menon was director of P&A. Therefore, they "decided to eliminate Complainant's senior

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27 *Id.* at 11.

28 *Id.* at 15.

29 JX 3; *see also* D. & O. at 18, 41.

30 D. & O. at 5, 18.

31 *Id.* at 18. Complainant highlights that the ALJ incorrectly stated that "Vehicles" terminated 41 employees, instead of "Verticals." Complainant Brief (Comp. Br.) at 42. It appears that the ALJ made a typographical error. Respondent Response Brief (Resp. Response Br.) at 39 ("The ALJ referenced Somers eliminating 41 roles from the Vehicles Department, but this was simply a typographical error, as Somers eliminated 41 roles from the Verticals Department.").

32 D. & O. at 10, 12, 17.

33 *Id.* at 17.

34 *Id.*

manager role."[35] P&A also lost another position in the RIF, reducing its headcount from six to four.[36]

On February 2, 2015, Respondent notified Complainant that his employment would be terminated as part of a RIF, and that the termination of Complainant's employment would be effective on April 3, 2015.[37]

E. <u>Post-Employment Email from Menon to Rothman</u>

On April 6, 2016, Simon Rothman, founder of eBay Motors, messaged Menon's personal email about Complainant, asking "What's [h]is story? Is he Talented?"[38] On the same day, Menon messaged the following back to Rothman:

> Anson knows parts in and out. He understands parts more than sellers, knows how ecommerce works. But the cons are that his social skills are very low. He always finds issues with things which is great from a risk mitigation perspective, but teams find it hard to function with that kind of attitude. If it is an [individual contributor] role with not much influencing to do but more [subject matter expert] requirement, it would work.[39]

2. ALJ Decision

In 2021, the ALJ held a hearing on June 1-4 and June 23-24.[40] Subsequently, on January 12, 2024, the ALJ issued a D. & O. The ALJ found Complainant had engaged in protected activity, but that Complainant did not prove that the protected activity contributed to any adverse actions.[41] Furthermore, Respondent proved, by

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35 *Id.*

36 *Id.* at 42.

37 *Id.* at 3, ¶¶22-23; *Id.* at 35, 42.

38 *Id.* at 18.

39 JX 298; D. & O. at 18-19.

40 D. & O. at 2.

41 *Id.* at 45.

clear and convincing evidence, that Respondent would have taken the same actions in the absence of any protected activity.[42]

A. Credibility Determinations

The ALJ found Complainant's credibility "somewhat impaired" and therefore afforded his testimony "less evidentiary weight," particularly "when contradicted by the testimony of more credible witnesses."[43] The ALJ highlighted that Complainant "was not forthright when cross-examined by Respondent's counsel," that Complainant "was frequently cagey and evasive, manifesting a clear desire to avoid conceding unfavorable facts," that his testimony "about his interactions with others lacked self-awareness," and that "[h]is testimony frequently lacked any corroborating evidence or other witnesses directly contradicted him."[44] By contrast, the ALJ afforded "full evidentiary weight" to the testimony of Chin, Vibhute, Tominaga, Perkin, Murphy, Skubovius, Menon, and Somers.[45]

B. Protected Activity

The ALJ explained that, to establish protected activity under SOX, Complainant had to show that he provided information regarding conduct that he reasonably believed—based on a belief that was both subjectively held and objectively reasonable—violated one of the categories of conduct covered by SOX.[46]

The ALJ found that Complainant engaged in protected activity on three occasions, including: (1) "Complainant's communication in 2010 with in-house lawyer Adrienne Go regarding Rhodes and Thawley," (2) "Complainant's communication in 2012 with in-house lawyer Amyn Thawer regarding Rhodes and Thawley," and (3) "Complainant's filing [a complaint] with OSHA in 2015."[47]

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[42] *Id.* at 39-45.

[43] *Id.* at 20.

[44] *Id.* at 20-23.

[45] *Id.* at 23-25. The ALJ noted that some of these witnesses had only limited relevance to the issues in the case.

[46] *Id.* at 26-27, 30.

[47] *Id.* at 34. The ALJ noted that Respondent also conceded that Complainant engaged in protected activity for these three allegations. *Id.* at 27.

The ALJ also explained that "Complainant assert[ed] six further protected activities."[48] However, as recounted in the following paragraphs, the ALJ concluded that none of these six additional asserted activities qualified as protected activity under SOX.[49]

First, Complainant contended he engaged in protected activity when he reported "conquest selling" to eBay's Legal Department as conduct "violating antitrust and anti-competition laws."[50] However, the ALJ rejected Complainant's contention, highlighting how Complainant's only support for the claim came from Complainant's Declaration and testimony, which the ALJ found unpersuasive because Complainant was not a credible witness.[51] The ALJ further concluded that Complainant's allegation centered on anti-competition rules untethered to a potential SOX violation of the enumerated categories of protected activity under SOX.[52]

Second, after Murphy reacted negatively upon learning of an alleged communication Complainant sent Somers, Complainant contended that he engaged in protected activity by forwarding the underlying communication to Murphy.[53] The ALJ disagreed because Complainant provided noncredible testimony and there was no documentation supporting that Complainant forwarded the communication to Murphy.[54]

Third, Complainant argued that he engaged in protected activity when he reported fear of retaliation to eBay's Legal Department.[55] The ALJ rejected that

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48 *Id.*

49 *Id.* at 27-33.

50 *Id.* at 28. In his post-hearing brief to the ALJ, Complainant explains "Conquest selling" as "essentially using very aggressive sales tactics to shift business away from a competitor which may involve questionable methods that may be anti-competitive or otherwise tortious." Complainant Closing Brief (Comp. Closing Br.) at 53 n.25.

51 D. & O. at 28.

52 *Id.*; 18 U.S.C. § 1514A (enumerated categories include a reasonable belief of a violation of mail fraud, wire fraud, bank fraud, securities fraud, any rule or regulation of the SEC, or any other federal law related to fraud against shareholders).

53 D. & O. at 28.

54 *Id.*

55 *Id.*

argument, explaining that "Complainant does not assert this to be a report of potential fraud or an SEC violation, but instead a report of his belief he would be retaliated against for prior reports."[56] Accordingly, Complainant failed to demonstrate how this was protected activity under § 1514A(a)(1).[57]

Fourth,[58] Complainant contended that, in May 2013, he told Somers that the original WHI synergy goals may not be achievable.[59] Complainant argued that if WHI synergies could not be met, Respondent should have impaired the goodwill from the WHI acquisition.[60] The ALJ rejected this contention, explaining: "To the extent Complainant asserts he believed not reaching the goal would require a goodwill impairment that Respondent was failing to report, Complainant has failed to show any relationship between this communication and the implication that Respondent should record a goodwill impairment."[61] The ALJ further found that Complainant had failed to present "evidence that could lead him to believe Respondent did not accurately report any impairment of goodwill" or that Complainant "believe[d] *at the time* of the communication that Respondent had not noted a goodwill impairment."[62] Thus, Complainant failed to show that he had a subjective belief of a SOX-related violation.

Fifth, in early 2014, Complainant communicated to Menon similar sentiments regarding his concerns about WHI's synergy goals and a seller's negative review of WHI.[63] The ALJ rejected Complainant's contention and found Complainant failed to show that he had a subjective belief of a SOX-related violation.[64] Similar to the findings regarding communications to Somers in 2013, the ALJ found that Complainant had not presented any evidence that he

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56 *Id.* at 29.

57 *Id.*

58 The remaining three alleged instances of protected activities related to WHI following eBay's acquisition of it. *Id.*

59 *Id.*

60 *Id.* at 30-31.

61 *Id.* at 31.

62 *Id.* (emphasis in original).

63 *Id.* at 29, 31.

64 *Id.* at 31.

communicated regarding goodwill impairment to Menon in early 2014.[65] The ALJ explained that "Complainant did not raise goodwill impairment in these communications," and "on their face, [the communications to Menon] debriefed [her] in a newly assumed position, to help her better understand the WHI progress (or lack thereof)."[66]

Sixth, in October 2014, Complainant alleged protected activity based on his forwarding of an email Murphy sent to the Motors team, in which Murphy "indicat[ed] WHI was meeting its [performance] targets."[67] Specifically, "Complainant forwarded the email to Linda Shan, questioning how these positive reports are possible if WHI was 'behind by 5.5M,'" and then Complainant also "forwarded Murphy's email to Menon, raising the same question."[68]

With respect to forwarding the email to Shan, the ALJ found that Complainant had "a subjective belief that a SOX related violation was ongoing or imminent."[69] However, Shan corrected Complainant's understanding of the figures and Complainant acknowledged the error.[70] The ALJ found that Complainant's October 2014 email to Shan did not evince an objectively reasonable belief that the numbers were inaccurately reported because Complainant "compared incorrect metrics over an incorrect period."[71] The ALJ also relied on the testimony of Vibhute,

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65 *Id.*

66 *Id.*

67 *Id.* at 29.

68 *Id.* at 29-30. In other words, "Complainant communicated to Shan and Menon that Murphy reported falsely positive data, inaccurately measuring the true success of the WHI acquisition." *Id.* at 31.

69 *Id.* at 30. The ALJ's findings here appear to be inconsistent. The ALJ first stated that "Complainant *did have a subjective belief* that a SOX related violation was ongoing or imminent at the time Complainant forward[ed] Murphy's email to Shan in October 2014." *Id.* (emphasis added). Later, however, the ALJ stated that she "*does not find Complainant had a subjective belief* . . . when he forwarded Murphy's email to Shan in October 2014." *Id.* at 32 (emphasis added). Despite the apparent inconsistency, the ALJ expressly found that Complainant had a subjective belief regarding this communication. Therefore, we construe the ALJ as finding Complainant had a subjective belief when he forwarded Murphy's email to Shan.

70 *Id.* at 31.

71 *Id.* at 33.

who was responsible for calculating WHI synergies.[72] The ALJ afforded Vibhute's testimony "full evidentiary weight"—noting that he "did not testify to finding or ever being concerned about any errors in the synergy calculations."[73]

With respect to the Menon communication, the ALJ found Complainant had not shown he had a subjective belief.[74] The ALJ noted how, after Complainant forwarded Murphy's email to Shan, Shan had replied to Complainant's email, clarifying the data.[75] Complainant now had a corrected understanding of Murphy's analysis. Nonetheless, Complainant still proceeded to forward Murphy's email to Menon with concerns despite Shan's clarification.[76]

C. Adverse Actions

Complainant filed his SOX complaint on June 9, 2015, alleging numerous adverse actions. The ALJ noted that any adverse actions must have occurred on or after December 11, 2014, to be timely (180 days prior to June 9, 2015),[77] because a SOX action "shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation."[78] Thus, the ALJ found three alleged adverse actions as timely: (1) Complainant's 2015 termination in the reduction in force, (2) the denial of the 2014 bonus due to a "Does Not Meet" rating in his 2014 year-end review, and (3) Menon's April 6, 2016 email to Rothman.[79]

However, the ALJ also found six of Complainant's alleged actions to be untimely, including that (1) Murphy and Menon failed to complete Complainant's

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[72] *Id.*

[73] *Id.*

[74] *Id.* at 31.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 35.

[78] 18 U.S.C. § 1514A(b)(2)(D); *see also* 29 C.F.R. § 1980.103(d) ("Within 180 days after an alleged violation of the Act occurs or after the date on which the employee became aware of the alleged violation of the Act, any employee who believes that he or she has been retaliated against in violation of the Act may file, or have filed on the employee's behalf, a complaint alleging such retaliation.").

[79] D. & O. at 35.

performance reviews on time or in full, (2) Murphy reprimanded Complainant for reaching out to Somers, (3) Murphy and Complainant stopped meeting in-person in 2013, (4) Murphy expressed annoyance about Complainant's participation in the Vertical Career Pathing project, (5) Respondent hired Menon as Director of P&A instead of Complainant, and (6) Menon questioned the entire P&A team in Las Vegas and sent them all development plans.[80] Likewise, the ALJ found that Complainant failed to show by a preponderance of the evidence that any actions taken before December 11, 2014, establish a continuing hostile work environment.[81]

D. Contributing Factor

Because only three protected activities and three timely adverse actions remained at issue, the ALJ noted "Complainant must show that one of the three identified protected activities contributed to any of the three adverse employment actions."[82] The ALJ reasoned that Complainant's 2010 and 2012 protected activities, related to the Rhodes and Thawley investigation, were too distant in time to establish temporal proximity to the timely adverse actions that occurred between 2014 and 2016: the RIF, the loss of the bonus, and the Rothman email.[83] The ALJ further found that the record did not otherwise establish a causal connection between those protected activities and the adverse actions.[84]

As to the remaining protected activity, Complainant's filing of his SOX Complaint on June 9, 2015, the ALJ noted that the only adverse action that occurred after this filing was Menon's email to Rothman, dated April 6, 2016.[85] The ALJ highlighted how "Menon testified that she did not recall being aware of Complainant's filing at the time of the exchange."[86] Relying on Menon's testimony,

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80 *Id.*

81 *Id.* On appeal, Complainant objects to the ALJ's ruling that the actions before December 11, 2024, were not actions constituting a hostile work environment. Petition for Review at 5. However, outside of the objection in the Petition for Review, Complainant does not appear to have articulated why the ALJ erred on this point. We agree with the ALJ's ruling on this issue and we affirm it.

82 D. & O. at 37.

83 *Id.*

84 *Id.*

85 *Id.* at 38.

86 *Id.*

the ALJ found that Complainant failed to prove the 2015 SOX Complaint contributed to Menon's 2016 email to Rothman.[87]

E. Affirmative Defense

The ALJ concluded that the case could be resolved on causation grounds because Complainant "failed to show how any of the three protected activities were a contributing factor to any of the three adverse employment actions he faced as an employee or former employee of Respondent."[88] Nonetheless, the ALJ still addressed "Respondent's affirmative defense, *assuming arguendo* that Complainant had proven that his protected activity contributed to his RIF and other acts of retaliation."[89]

First, the ALJ found that Respondent avoided liability for Menon's email to Rothman because Menon was not acting as an agent of the company when she sent it.[90] The ALJ further held that, even assuming Menon had been acting as an agent, she still provided an "unambiguous and highly probable explanation" for sending the communication that did not relate to Complainant's protected activity.[91] In particular, the ALJ relied on Menon's testimony that she was unaware of Complainant's SOX Complaint at the time, and the ALJ noted that the content of the email was consistent with Complainant's documented strengths and weaknesses in his performance history.[92]

Second, the ALJ found that Respondent provided clear and convincing evidence that Tse's performance reviews would have been the same (negative or mixed) in the absence of his protected activity. The ALJ pointed out that "Complainant had consistently received managerial feedback about his leadership skills, communication style, and problem-solving, as reflected in his 2013 and 2014 ratings."[93]

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[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 43-44.

[91] *Id.* at 43.

[92] *Id.* at 44.

[93] *Id.* at 40.

Third, Respondent established with clear and convincing evidence that it had legitimate business reasons for including Complainant in the RIF, and Complainant's protected activity, known or unknown, would not have changed its decision.[94] In particular, Somers and Skubovius determined that P&A was a small business unit that did not need two senior employees, and decided to eliminate Complainant's position, as the less senior of the two employees.[95] Moreover, the RIF impacted more than Complainant, as Respondent eliminated 41 roles in the Verticals department.[96]

Fourth, the ALJ found that Respondent provided unambiguous and highly probable explanations for its decision to hire Menon as the director of P&A.[97] Namely, Somers prioritized candidates with leadership capability, not subject matter expertise, and "Complainant had consistently received poor reviews of his leadership and communication skills."[98]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review ALJ decisions and issue agency decisions in cases arising under SOX.[99] 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.[100] Substantial evidence "means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[101] "[T]he threshold for such evidentiary sufficiency is not high."[102] The substantial evidence standard "limits the reviewing court from 'deciding the facts anew, making credibility determinations, or

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94 *Id.* at 42-43.

95 *Id.* at 42.

96 *Id.*

97 *Id.* at 41.

98 *Id.*

99 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).

100 29 C.F.R. § 1980.110(b); *Leviege v. Vodafone US, Inc.*, ARB No. 2019-0058, ALJ No. 2016-SOX-00001, slip op. at 3 (ARB Mar. 19, 2021) (citations omitted).

101 *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019) (quotations and citation omitted).

102 *Id.*

re-weighing the evidence.'"[103] If substantial evidence supports the ALJ's conclusion, the ALJ's decision must be upheld even if it is "possible that a reasonable mind could have come to a different finding."[104] The Board generally defers to an ALJ's credibility findings "unless they are inherently incredible or patently unreasonable."[105]

DISCUSSION

SOX is governed by the rules and procedures set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21).[106] To prevail, a SOX complainant must establish by a preponderance of the evidence that: (1) the complainant engaged in activity that SOX protects; (2) the respondent took an adverse action against the complainant; and (3) the protected activity was a contributing factor in the adverse action.[107] If a complainant meets this burden of proof, the employer may avoid liability only if it proves its affirmative defense, which requires demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.[108]

On appeal, Complainant primarily argues: (1) the ALJ's credibility findings were improper; (2) the ALJ erred in determining that certain allegations did not constitute protected activity; (3) the ALJ erred in finding that Complainant failed to prove his protected activity was a contributing factor in the adverse actions with Complainant primarily focusing on the ALJ's determination regarding Menon's email to Rothman; (4) the ALJ erred in finding that Menon was not acting as an agent of Respondent when she emailed Rothman and that the ALJ erred in finding that eBay avoided liability because more controlling than agency law analysis is SOX; and (5) the ALJ erred in finding that Respondent proved by clear and

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[103] *Stone & Webster Constr., Inc. v. U.S. Dep't of Lab.*, 684 F.3d 1127, 1133 (11th Cir. 2012) (quoting *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005)).

[104] *Clem v. Comput. Sci. Corp.*, ARB No. 2020-0025, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 17 (ARB Mar. 10, 2021).

[105] *Young v. CSX Transp.*, ARB Nos. 2023-0028, -0029, ALJ No. 2021-FRS-00001, slip op. at 8 (ARB Mar. 27, 2025) (citation and inner quotations omitted).

[106] 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)).

[107] 29 C.F.R. § 1980.109(a); 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)); *Williams v. QVC, Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 6 (ARB Jan. 17, 2023) (citation omitted).

[108] 29 C.F.R. § 1980.109(b).

convincing evidence its affirmative defense as to Menon's email, Complainant's performance reviews, Complainant's selection for the RIF, and Respondent's hiring of Menon.

Upon review of the ALJ's D. & O., the parties' arguments on appeal, and the record, the Board affirms the ALJ's rulings.

1. Credibility Determinations

Complainant argues that the "ALJ's determination that Tse was a less than credible witness was patently unreasonable because her reasons for discrediting Tse were not supported by the record."[109] Complainant further argues that the "ALJ's decision to afford eBay's witnesses full evidentiary weight was improper because Menon, Murphy and Somers were impeached" and "their testimony was at times incoherent and implausible," inconsistent, and contradicted by other evidence.[110]

"It is the ALJ's function to weigh the evidence and determine witness credibility."[111] The Board generally defers to an ALJ's demeanor-based credibility findings "unless they are inherently incredible or patently unreasonable."[112]

Having reviewed the evidentiary record and the parties' briefs on appeal, we conclude that the ALJ's credibility findings are neither inherently incredible nor patently unreasonable, and we therefore affirm them as supported by substantial evidence. Notably, the ALJ highlighted that she closely observed Complainant's demeanor during his testimony and found that Complainant "was not forthright when cross-examined" and "was frequently cagey and evasive."[113]

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[109] Comp. Br. at 33.

[110] *Id.*

[111] *Young*, ARB Nos. 2023-0028, -0029, slip op. at 12 (citation omitted).

[112] *Id.* at 8 (citation and inner quotations omitted); *see also Garrett v. Bigfoot Energy Servs., LLC*, ARB No. 2016-0057, ALJ No. 2015-STA-00047, slip op. at 5 (ARB May 14, 2018) ("The ARB typically gives high deference to an ALJ's credibility determinations.") (citations omitted); *Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 2002-0108, 2003-0013, ALJ No. 1997-SDW-00005, slip op. at 27 (ARB Dec. 30, 2004) ("And we generally defer to ALJ findings of fact when based on the credibility of witnesses as shown by their demeanor or conduct at the hearing.") (citation omitted); *Kopack v. N.L.R.B.*, 668 F.2d 946, 954 (7th Cir. 1982) ("To the extent that the ALJ's decision rests explicitly on his evaluation of demeanor, we are required to weigh those particular findings more heavily.").

[113] D. & O. at 20-21.

Likewise, we affirm the ALJ's decision to afford full evidentiary weight to other witnesses, including Murphy, Skubovius, Somers, and Menon. The ALJ found that these witnesses testified in good faith, and with respect to Murphy and Menon, the ALJ noted that any inconsistencies resulted only from lapses in memory after several years.[114] The ALJ's findings are supported by substantial evidence. None of Complainant's arguments establish that the ALJ's credibility determinations are inherently incredible or patently unreasonable.

2. Protected Activity

The ALJ found Complainant engaged in protected activity but also rejected several other alleged protected activities. On appeal, Complainant challenges the ALJ's determination that certain allegations did not constitute protected activity.[115]

An employee engages in protected activity when the employee "provide[s] information" to the government or a supervisor "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."[116]

"Reasonable belief" has both subjective and objective components.[117] A subjective belief is satisfied when the employee holds an actual belief in good faith that the conduct complained of constitutes a violation of one of the enumerated

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114 *Id.* at 24-25.

115 Comp. Br. at 43-48.

116 18 U.S.C. §1514A(a)(1).

117 *Sylvester v. Parexel Int'l, LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 14-15 (ARB May 25, 2011) ("[T]he legislative history of Sarbanes-Oxley makes clear that its protections were 'intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise.'" (quoting *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1002 (9th Cir. 2009)).

provisions in Section 806.[118] Objective reasonableness is evaluated based on whether "a reasonable person of similar experience, training, and factual knowledge would objectively believe that a violation had occurred."[119]

The ALJ found that Complainant engaged in protected activity on three occasions, including: (1) "Complainant's communication in 2010 with in-house lawyer Adrienne Go regarding Rhodes and Thawley," (2) "Complainant's communication in 2012 with in-house lawyer Amyn Thawer regarding Rhodes and Thawley," and (3) "Complainant's filing with OSHA in 2015."[120] The parties do not dispute these findings on appeal, and they will be considered further in analysis related to contributing factor.

However, Complainant contests the ALJ's findings that Complainant did not engage in protected activity regarding the remaining allegations of protected activity. As detailed in Background and Procedural History Section 2(B) of this decision, the ALJ ruled that Complainant did not engage in protected activity regarding any of the following allegations: (1) reporting an issue of "conquest selling,"[121] (2) forwarding communications with Somers to Murphy,[122] (3) reporting to Respondent's Legal Department that he feared retaliation,[123] (4) reporting in May 2013 to Somers his belief that the "original WHI synergy goals may not be achievable,"[124] (5) reporting in early 2014 to Menon his belief that the WHI acquisition was unlikely to meet synergy goals,[125] and (6) communicating with Shan

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118 *Id.*; *see also Williams*, ARB No. 2020-0019, slip op. at 7 (citation omitted); *Schaefer v. New York Cmty. Bancorp, Inc.*, ARB No. 2022-0050, ALJ Nos. 2018-SOX-00048, -00051, slip op. at 15 (ARB June 22, 2023) (citations omitted) ("Before the ALJ, Complainants bore the burden of establishing that they subjectively believed their reports related to conduct which constituted bank fraud, a violation of one of the laws listed in SOX, and that they held their actual subjective beliefs in good faith.").

119 *Williams*, ARB No. 2020-0019, slip op. at 7 (citation omitted).

120 D. & O. at 34.

121 *Id.* at 28.

122 *Id.*

123 *Id.*

124 *Id.* at 29-31.

125 *Id.*

and Menon that Murphy reported falsely positive data.[126] Complainant has appealed the ALJ's findings that these allegations were not protected activity.[127]

Having reviewed the evidentiary record and considered the parties' briefs on appeal, we conclude that the ALJ's decision regarding these allegations of protected activity is supported by substantial evidence. None of Complainant's arguments concerning these other six alleged protected activities demonstrate that the ALJ abused her discretion or committed reversible error regarding the ALJ ruling. We therefore affirm the ALJ's ruling that Complainant did not engage in protected activity with respect to these allegations of protected activity. As the ALJ found, some allegations were not established by sufficient or credible evidence, and some alleged communications did not concern conduct relating to any SOX violation.

The ALJ found that Complainant's concern regarding conquest selling was based on Complainant's own testimony, which the ALJ found unpersuasive because Complainant was not credible.[128] Further, the subject of conquest selling was antitrust related and not tethered to the enumerated categories of SOX.[129] For Complainant's communications regarding WHI synergies, the ALJ found they failed to satisfy either the subjective component or objective components of the reasonable-belief standard.[130] We affirm those findings as supported by substantial evidence. The ALJ observed that Shan corrected complainant's misunderstanding regarding the perceived inaccuracies.[131] The ALJ correctly credited Vibhute's testimony that he was not concerned with errors in the WHI synergy calculations.[132]

Complainant argues that his report that he feared retaliation for reporting SOX protected activity to Respondent's legal department is itself SOX protected activity.[133] We might agree with this statement if the reported fear constitutes a source communicating SOX protected activity to the employer. Here, however,

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[126] *Id.* at 29-33.

[127] Comp. Br. at 43-48.

[128] D. & O. at 28.

[129] *Id.*

[130] *Id.* at 29-34.

[131] *Id.* at 31.

[132] *Id.* at 33.

[133] Comp. Br. at 45.

we have an alleged fear of retaliation for *prior* reports. As the ALJ found, Complainant has not argued how communication of a fear of retaliation for prior reports constitutes protected activity.[134] The ALJ discussed the prior reports as: (1) the Rhodes investigation; (2) the 2012 communication with in-house counsel concerning Rhodes; and (3) Complainant's communication regarding conquest selling.[135] The first two the ALJ found to be protected activity.[136] The third, the ALJ did not deem protected. Thus, the "fear of retaliation" activity concerns matters the ALJ has already deemed protected or not protected.

Moreover, Complainant's claim appears to be asserting that the communication of fear itself is protected activity. Complainant argued "because retaliation for a SOX disclosure is a clear violation of SOX, reporting potential retaliation constitutes a report of a potential SOX violation and is therefore also protected activity."[137] If Complainant's theory of protected activity is that the fear itself is protected regardless of the content underlying the fear this would create a new category of SOX protected activity. A complainant could have no subjective or objectively reasonable belief of a violation of SOX's categories of fraud, a rule or regulation of the SEC, or any federal law related to fraud against shareholders, but yet report an untethered fear of retaliation and be protected. We think this muddies the waters and bypasses Congress's careful enumeration of SOX protected activities.

3. Contributing Factor

On appeal, Complainant contests the ALJ's contributing factor finding, primarily disputing the ALJ's determination that his SOX Complaint was not a contributing factor in Menon's email to Rothman and claiming that "the ALJ's determination that eBay did not blacklist [Complainant] is not supported by substantial evidence."[138]

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[134] D. & O. at 29.

[135] *Id.* at 28-29.

[136] *Supra* Background and Procedural History Section 2(B).

[137] Comp. Br. at 45.

[138] *Id.* at 26.

To prevail, a complainant must prove that protected activity was a contributing factor in an adverse action.[139] The ARB has held that a contributing factor is any factor, which alone or in combination with other factors, affects the outcome of the decision.[140] Employees may meet their evidentiary burden with circumstantial evidence.[141] Circumstantial evidence may include, but is not limited to, temporal proximity, inconsistent application of an employer's policies, pretext, shifting explanations by the employer, or antagonism.[142]

Because we affirm the ALJ's protected-activity rulings, only three protected activities, together with the three timely adverse actions, remain at issue. The protected activities include Complainant's 2010 and 2012 activities related to Rhodes and Thawley and Complainant's 2015 SOX complaint, while the timely adverse actions include the Complainant's selection for the RIF, denial of the 2014 bonus due to a "Does Not Meet" rating in his 2014 year-end review, and Menon's email to Rothman. As the ALJ noted, "Complainant must show that one of the three identified protected activities contributed to any of the three adverse employment actions."[143]

On appeal, Complainant principally contests the ALJ's determination that his SOX Complaint was not a contributing factor in Menon's email to Rothman. In reaching that determination, the ALJ relied on Menon's testimony that she did not recall being aware of Complainant's SOX Complaint when she emailed Rothman.[144] Complainant disputes that finding, claiming the record shows Menon was aware of Complainant's June 9, 2015 SOX Complaint when she emailed Rothman on April 6, 2016. In support, Complainant cites two email cover sheets that provide metadata that, according to him, show that "Menon communicated with the legal department specifically regarding her management of Tse on

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[139] 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)); 29 C.F.R. § 1980.109(a); *Williams*, ARB No. 2020-0019, slip op. at 6.

[140] *Williams*, ARB No. 2020-0019, slip op. at 12 (citation omitted).

[141] *Id.* (citation omitted).

[142] *Id.* (citation omitted).

[143] D. & O. at 37.

[144] *Id.* at 38.

September 17, 2015."[145] In response, Respondent notes that these two cover sheets "were never offered or admitted into the record in this case."[146]

We agree with Respondent that these cover sheets are not part of the record. Complainant argues the cover sheets are intrinsic to the admitted emails but fails to explain or cite to case law that demonstrates an intrinsic standard for deeming adjacent or related material as part of the record.[147] Nonetheless, even assuming arguendo that they were part of the record, the documents do not establish that Menon was informed of Complainant's SOX Complaint. The documents would merely show that Menon provided documents related to her work with Complainant to other eBay personnel. We have already expressed agreement with the ALJ's decision to afford Menon's testimony full evidentiary weight. Therefore, we affirm the ALJ's determination that Complainant failed to establish that his SOX Complaint was a contributing factor in Menon's email to Rothman.[148]

Regarding the remaining contributing-factor findings, we find that substantial evidence supports the ALJ's determination that Complainant's protected activity related to the Rhodes and Thawley investigation in 2010 and 2012 did not contribute to any of the timely adverse actions.[149] The mere circumstance that protected activity precedes an adverse personnel action is not proof of a causal connection between the two.[150] As the ALJ explained, the significant time gap between the Rhodes and Thawley protected activity and the timely adverse actions occurring between 2014 and 2016—the RIF, denial of the

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145 Comp. Br. at 25, 27.

146 Resp. Response Br. at 43.

147 Comp. Closing Br. at 38; Comp. Br. at 25, 27.

148 Regarding the SOX complaint, we only need to evaluate whether the SOX complaint was a contributing factor to Menon's email because the other timely adverse actions occurred prior to the SOX complaint—thus, the SOX complaint could not be a contributing factor to their occurrence.

149 D. & O. at 36-38. Complainant argues that the ALJ's finding that Complainant's termination was a result of a reduction in force is not supported by substantial evidence. Comp. Br. at 41-43. We disagree. As we state *infra* Discussion Section 4(B), we affirm that finding as supported by substantial evidence. The ALJ highlighted the large number included in the RIF and the decisionmakers' rationale to reduce the number of senior employees in Complainant's division.

150 *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, 2016-FRS-00082, slip op. at 8 (ARB Jan. 22, 2020) (citing *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998)).

2014 bonus, and the Rothman email—fails to establish temporal proximity. The insufficiency of temporal proximity as a basis for proving causation is even more apparent when the facts reveal an intervening event occurring between the protected activity and the adverse personnel action.[151] As the ALJ found, Complainant had performance reviews highlighting problems throughout his employment.[152] Numerous supervisors concluded that while Complainant had mastery of technical material and subject matter, he lacked people skills and leadership skills.[153] These repeated performance problems support the ALJ's findings that protected activity was not a contributing factor in the adverse actions.[154]

4. Affirmative Defense

The ALJ found that Complainant did not establish his alleged protected activities were a contributing factor to any of the timely adverse actions. Nonetheless, the ALJ still addressed "Respondent's affirmative defense, *assuming arguendo* that Complainant had proven that his protected activity contributed to his RIF and other acts of retaliation."[155] The ALJ ruled that Respondent proved by clear and convincing evidence it would have taken the same actions in the absence of any protected activity, including Menon's email to Rothman, Complainant's performance reviews, Respondent's selection of Complainant for termination in the RIF, and Menon's hiring.[156] On appeal, Complainant contests these findings.

Under SOX, a respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.[157] Under Board precedent, it is not enough for an employer to show that it *could* have taken the same adverse action; it must show

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151 *Id.* at 9 (citing *Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014) (other citations omitted)).

152 D. & O. at 6-8, 11, 15, 18, 40-41 (citing performance problems in reviews).

153 *Id.*

154 *Id.*

155 *Id.* at 38.

156 *Id.* at 39-45.

157 29 C.F.R. § 1980.109(b); 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)).

that it *would* have done so even in the absence of protected activity.[158] The ALJ must be persuaded that "it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity."[159]

Here, we affirm all of the ALJ's affirmative defense findings as supported by substantial evidence.

A. *Menon's Email to Rothman*

The ALJ found that Respondent avoided liability for Menon's email to Rothman because, based on an assessment under the Third Restatement of Agency, Menon was not acting as an agent of the company when she sent it.[160] The ALJ highlighted how "Menon testified that she sent this email in her personal capacity, from her personal email address, not speaking on behalf of Respondent nor as an official response to an inquiry about a former employee, as company procedures would control that."[161] In addition, the ALJ "consider[ed] Menon's testimony and the close friend/mentor relationship Menon and Rothman maintained."[162]

The ALJ further held that, even assuming Menon had been acting as an agent, she still provided an "unambiguous and highly probable explanation" for sending the communication that does not relate to Complainant's protected activity and noted that "the text of the email aligns with Complainant's work record."[163]

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[158] *See, e.g., Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 57 (ARB Sept. 30, 2016, reissued with full dissent Jan. 4, 2017) (citing *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 2013-0074, ALJ No. 2005-ERA-00006, slip op. at 11 (ARB Apr. 25, 2014)). For example, the Board has recognized that an employer cannot carry its burden by showing that it might have taken the same adverse action against an employee. *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 2008-0070, -0074, ALJ No. 2006-AIR-00014, slip op. at 17 n.108 (ARB Sept. 30, 2009).

[159] *Palmer*, ARB No. 2016-0035, slip op. at 52-53.

[160] D. & O. at 43-44.

[161] *Id.*

[162] *Id.* at 44.

[163] *Id.* at 43-44.

i. Was Menon an Agent for Respondent?

We first address agency. Under the Third Restatement of Agency, there are a few bases connecting the acts of agent to principal, including the actual authority of the agent and the doctrine of respondeat superior.[164] Under actual authority, the "focal point for determining whether an agent acted with actual authority is the agent's reasonable understanding at the time the agent takes action."[165] Under respondeat superior, an employer may be liable for the agent employee's "acts or omissions" committed within "the scope of employment."[166] "An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control," while "[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."[167] "If an employee undertakes a course of work-related conduct for the sole purpose of furthering the employee's interests or those of a third party, the employee's conduct will often lie beyond the employer's effective control."[168]

Complainant argues that the ALJ erred in finding that Menon was not acting as an agent of Respondent when she emailed Rothman and in "finding that eBay has avoided liability for Menon's behavior under actual authority of an agent because more controlling than an agency law analysis is the text of the SOX statute itself" because SOX forbids an "agent from retaliating against an employee for SOX-protected activity."[169] It is clear that an agent is prohibited from retaliating against an employee for SOX-protected activity. However, the relevant first question is whether "Menon was acting as an agent of Respondent *at the time* of the email."[170]

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164 Restatement (Third) of Agency Intro. (2006).

165 *Id.* § 2.01 cmt. c. The ALJ highlighted how the "ARB has followed the general law of agency in determining if such relationship exists." D. & O. at 44 (citing *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 2004-0149, ALJ No. 2004-SOX-00011, slip op. at 14 (ARB May 31, 2006)).

166 Restatement (Third) of Agency § 2.04 cmt. b.

167 *Id.* § 7.07.

168 *Id.* § 7.07 cmt. b.

169 Comp. Br. at 30-32.

170 D. & O. at 44.

The record shows that Menon's understanding was that she was acting in a personal capacity at the time of the email. Menon sent the email from her personal email, not a work email, and Menon also credibly testified that she "was writing individually at a personal level,"[171] that she did not speak with anyone at eBay about Rothman's request before she responded,[172] and that "we had met professionally, but he was like a mentor to me . . . a friend and a mentor."[173] Respondent had a neutral reference policy and Menon made no attempt to follow that policy. Complainant counters that "there is no indication in the record that eBay's neutral reference policy did not apply to non-official [*i.e.* personal] requests for references."[174]

ii. Even assuming Menon was an agent, Menon's communication does not relate to Complainant's protected activity

We need not reach a resolution of Menon's status as an agent at the time of the email to Rothman. Even if Menon were acting as an agent, we find that substantial evidence supports the ALJ's finding that "Respondent has offered unambiguous and highly probable explanations for the response unrelated to the protected activity."[175]

We agree with the ALJ that Menon's email "aligns with Complainant's work record."[176] First, Menon positively stated in the email, "Anson knows parts in and out. He understands parts more than sellers, knows how ecommerce works."[177] Next, Menon explained "[b]ut the cons are that his social skills are very low. He always finds issues with things which is great from a risk mitigation perspective, but teams find it hard to function with that kind of attitude."[178] Finally, Menon noted what roles Complainant would be well suited for: "If it is an [individual contributor] role with not much influence to do but more [subject matter

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171 Hearing Transcript at 842.

172 *Id.*

173 *Id.* at 841.

174 Comp. Br. at 31-32.

175 *Id.* at 44.

176 *Id.*

177 *Id.* at 18.

178 *Id.*

expert] requirement, it would work."[179] Complainant disputes that the description in the email was accurate,[180] but, as detailed elsewhere, the record is clear that Complainant had received feedback related to his managerial and communication skills, including from Kroeker, Leeb, and Murphy. The record supports that Menon would have sent this email in the absence of any protected activity.

Complainant argues that Menon "could have told Rothman of [eBay's] neutral reference policy."[181] While it is true that Menon could have told Rothman about the neutral reference policy, the ALJ noted, "Menon testified that she chose to answer the email rather than ignore it, for fear that no response would leave a negative impression for Complainant that Menon did not want to relay."[182] We have already affirmed the ALJ's credibility determination and agree with the ALJ's assessment here.

In sum, we agree with the ALJ that Complainant provided "unambiguous and highly probable explanations for the response unrelated to the protected activity."[183] Respondent has proven by clear and convincing evidence that Menon would have sent the email in the absence of any of Complainant's protected activity. Thus, we affirm the ALJ's affirmative defense finding.[184]

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179 *Id.* at 18-19.

180 Comp. Reply Br. at 6. Complainant also argues that even if accurate, SOX prohibits retaliation "for SOX-protected activity" and the "statute does not carve out an exception for communications that are truthful or accurate." *Id.* Complainant has provided no evidence that Menon responded to the email because of protected activity. Respondent has provided abundant evidence that Menon would have sent the same response absent protected activity. Menon did not randomly volunteer negative information in a retaliatory manner. Menon responded to Rothman's question accurately. Given the abundant evidence of Complainant's performance history, including evidence of his strengths and weaknesses, Menon's response was logical and reasonable. Menon was also a credible witness. Substantial evidence supports the ALJ's finding.

181 Comp. Br. at 29.

182 D. & O. at 44.

183 *Id.*

184 Complainant also argued that the "ALJ failed to acknowledge important evidence in the record that pointed to blacklisting" because "Jet enthusiastically pursued hiring Tse, but abruptly changed its mind when Hilton received negative feedback about Tse from a Jet venture capitalist." Comp. Br. at 28. Even if this negative feedback somehow related to Menon's email, we have already found Menon's email was not related to protected activity and was reflective of Complainant's work record.

B. Performance Reviews, Termination of Employment by RIF, and Hiring of Menon

Complainant also contests the ALJ's affirmative defense rulings that Respondent proved by clear and convincing evidence it would have taken the same action absent protected activity regarding Complainant's performance reviews, Complainant's termination by RIF, and Respondent's hiring of Menon. We disagree and affirm the ALJ's rulings.

First, Complainant argues that "substantial evidence does not establish that Tse was a poor performer."[185] We disagree. The record contains abundant evidence concerning Complainant's performance.

Date / Review Period	**Supervisor / Source**	**Summary of Evaluation / Feedback**
2008 Mid-Year Review	Curtis Kroeker	Kroeker noted that Complainant could "exude a negative attitude" and urged Complainant to focus on "bringing ideas and finding solutions rather than primarily pointing out problems."[186]
2010 Mid-Year and Year-End Reviews	Rainer Leeb	Rainer Leeb expressed that "occasionally [Complainant's] communication style [was] too strong" and "demotivating" towards his team members and that he should be "more cautious with the style of communication" he used.[187]
2011 Mid-Year Review	Rainer Leeb	Leeb noted Complainant's "limited potential as a people manager unless he [changed] his leadership and communication style."[188]
2011 Year-End Review	Famous Rhodes	Rhodes noted that Complainant "clearly contributed to the phenomenal growth rate in the business."[189] Rhodes also compiled peer feedback reflecting "continued

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185 Comp. Br. at 42.

186 D. & O. at 6; JX 4.

187 D. & O. at 6.

188 *Id.*

189 *Id.* at 7.

		communication challenges," which described Complainant as "condescending in his communication and management style," an approach that could "damage relationships and perceptions long term."[190]
2012 Mid-Year Review	Kristine Chin	Chin complimented Complainant's "exceptional" performance and "automotive expertise," while also noting that Complainant needed to "develop the group" and "empower some of his team" because they needed "more guidance."[191]
2012 Emerging Leadership Program	eBay leadership program	Respondent placed Complainant in the "Emerging Leadership Program," which was "a program for very promising individuals" to assess leadership potential.[192] In the ELP feedback, Complainant received his lowest ratings in "Developing Direct Reports and Others," "Building Effective Teams," and "Listening."[193]
2012 Year-End Review	Kristine Chin	Chin assigned Complainant a favorable overall evaluation, rating him "Exceeds Some."[194]
2013 Year-End Review	Bryan Murphy	Murphy noted three areas for development: "[m]anaging team to deliver results, [o]perating across the organization to deliver results, [m]oving from problem identification to solution."[195]
2014 Mid-Year Review	Sree Menon	Menon provided feedback about his "people management skills," explaining that he needed to "figure out how to communicate" about issues "without sounding like he [was] being overtly critical" and advising him to be "able to take a tough situation and see it [as] a challenge to surmount versus seeing it as an [unsolvable] issue."[196]

190 *Id.*

191 *Id.* at 8.

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.* at 11.

196 *Id.* at 15.

2014 Year-End Review	Sree Menon	Menon assigned Complainant a “Does Not Meet” rating and noted that“[h]is 360 feedback is mostly that he has huge domain experti[se],” but he was “unable to drive change and projects and initiative[s] forward.”[197]

Murphy and Menon identified areas for improvement—including communication, leadership, and problem-solving—that were consistent with concerns previously documented by Kroeker, Leeb, and Rhodes, including some feedback before the relevant protected activity. And even though Kristine Chin provided positive feedback of Complainant, she still noted that Complainant needed to “develop the group” and “empower some of his team” because they needed “more guidance.”[198] Similarly, in the ELP, Complainant received his lowest ratings in “Developing Direct Reports and Others,” “Building Effective Teams,” and “Listening.”[199]

Although the performance reviews were not treated as timely adverse actions, the performance reviews were relevant to certain timely adverse actions, including “the denial of the 2014 bonus due to a ‘Does Not Meet’ rating in his 2014 year-end review”[200] and Menon’s email to Rothman highlighting some of Complainant’s performance. The performance reviews are centered on non-retaliatory perceptions of Complainant’s communication skills. Substantial evidence supports the ALJ’s findings that the Respondent would have taken the same action absent protected activity regarding those actions.

Next, Complainant argues that substantial evidence does not support the ALJ’s finding Respondent would have selected Complainant for the RIF absent his protected activity.[201] We disagree. Substantial evidence substantiates the ALJ’s ruling that “Respondent has established, with clear and convincing evidence, that the decision in removing the senior management, level 27 position from the [P&A] team had legitimate business reasons behind it and Complainant’s protected activity, known or unknown, would not have changed their decision.”[202] Here, the

[197] JX 3; *see also* D. & O. at 18, 41.

[198] D. & O. at 8.

[199] *Id.*

[200] *Id.* at 35.

[201] Comp. Br. at 41-43, 49.

[202] D. & O. at 43.

record supports the ALJ's finding. The RIF was widespread, impacting 2,400 people at eBay, including 41 roles in verticals and two of the six employees in P&A.[203] As the ALJ noted, Respondent "demonstrated in testimony that the selection process focused on eliminating positions for business efficiency."[204] Somers and Skubovius identified a legitimate business reason to include Complainant in the RIF and they would have done so even if Complainant had not engaged in protected activity. Respondent explained that "P&A was a small business unit that did not need two senior employees," and they therefore "chose to eliminate Complainant's position, as the less senior of the two employees."[205] Accordingly, the ALJ's findings are supported by substantial evidence and we affirm them.

Finally, Complainant argues that "the ALJ erroneously found that eBay proved by clear and convincing evidence that it would have hired Menon despite Tse's protected activity."[206] We first note that Respondent's decision to hire Menon instead of Complainant was already deemed an untimely adverse action by the ALJ—a determination we have affirmed. Thus, it cannot form the basis of SOX liability. In any event, we affirm the ALJ's ruling as supported by substantial evidence that Respondent would have hired Menon in the absence of any protected activity. As discussed above, the record shows Respondent had concerns with Complainant's management abilities, and Somers prioritized candidates with leadership capability.

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[203] *Id.* at 18, 42.

[204] *Id.* at 42.

[205] *Id.*

[206] Comp. Br. at 49. To the extent Complainant has raised other arguments not specifically addressed herein, the remainder of Complainant's arguments and contentions on appeal are deemed moot given our conclusions affirming the ALJ's factual findings as supported by substantial evidence and conclusions of law as legally sound.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's D. & O.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge