



In the Matter of:

MATTHEW VANNOY,

ARB CASE NO. 09-118

COMPLAINANT,

ALJ CASE NO. 2008-SOX-064

v.

DATE: September 28, 2011

CELANESE CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

F. Benjamin Riek III, Esq., Richardson, Texas

For the Respondent:

**Stephen B. Higgins, Esq., Charles M. Poplstein, Esq., Clayton L. Thompson,
Esq., Thompson Coburn LLP, St. Louis, Missouri**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce,
Administrative Appeals Judge; Lisa Wilson Edwards, Administrative Appeals Judge**

FINAL DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A § 1514A (Thomson/West Supp. 2011) (the “Act” or

“SOX”),¹ and its implementing regulations found at 29 C.F.R. part 1980 (2010). Matthew Vannoy filed a complaint with the Occupational Safety and Health Administration (OSHA) on January 25, 2008, alleging that his employer, Celanese Corporation (Celanese) violated SOX when it terminated his employment. OSHA dismissed the complaint. Vannoy timely requested a hearing before an Administrative Law Judge (ALJ) and filed an amended complaint on December 5, 2008. Prior to hearing, Celanese moved for summary decision and dismissal of the complaint, which the ALJ granted on June 24, 2009. ALJ Recommended Decision and Order Granting Respondent’s Motion for Summary Decision (ALJ Decision). We reverse and remand for an evidentiary hearing.

BACKGROUND

A. Facts

The central facts in this case are quite lengthy, ALJ Decision at 1-8 & n.1, and are summarized below.

A. *Vannoy’s employment at Celanese*

Celanese is an international publicly traded company that manufactures and distributes value-added industrial chemicals. Celanese has a “Business Conduct Policy” (BCP) that governs employee conduct. Under this policy employees may anonymously report suspected misconduct or legal or ethical concerns and are protected from retaliation for good faith reporting of misconduct or participation in investigations. ALJ Decision at 1-2.

Celanese hired Vannoy in September 2004 as a contract employee through Venturi Staffing Resources to assist Celanese in its efforts to catalog and reconcile employee expense reimbursement submissions. Soon after he started working for Celanese, Vannoy noticed potential weaknesses in the company’s U.S. Bank Card program. By early 2005, Celanese senior management were well aware of the potential weaknesses surrounding the U.S. Bank Card program and hired Vannoy as a full-time employee to serve as the Program’s Administrator. *Id.* at 2-3.

In June 2005, Celanese retained Protiviti, a third party consultant, to assist in its analysis of the U.S. Bank Card program and the company’s expense reimbursement system. In September 2005, Protiviti submitted an “Expense Audit and Reconciliation

¹ During the pendency of this appeal, on July 21, 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, 124 Stat 1376 (2010). Sections 922(b) and (c), and 929A of the Dodd-Frank Act amended Section 806 of the SOX, but those amendments are not relevant to this case.

Project Wrap Up” report to Celanese management, detailing its findings and recommendations. In that report, Protiviti recommended that Celanese identify and implement a new electronic system for submitting and reimbursing employee business expenses to address flaws or deficiencies in the system. *Id.* at 3.

During 2006, the weaknesses in the company’s U.S. Bank Card program and steps to remedy the weaknesses were regularly discussed at meetings conducted by Celanese’s Office of the Chairman (OTC). In February 2006, Celanese decided to identify and implement an electronic system for submitting and reimbursing employee business expenses to replace its U.S. Bank Card program. In December 2006, Celanese implemented GELCO, an electronic expense reimbursement system, to replace its U.S. Bank Card program for all U.S. based operations. *Id.*

At some point Celanese provided Vannoy and others in his department with company-issued laptop computers that had remote access capabilities and allowed employees to work from home. Throughout his tenure at Celanese, Vannoy assisted in the company’s “Gap Closure” project, which was designed to identify and collect missing expense report documentation to support employee expenses charged to U.S. Bank credit cards and procurement cards, and for which Celanese paid on each employee’s behalf to U.S. Bank. *Id.* at 3-4. Vannoy was diligent about, and understood the importance of, securing necessary information to substantiate expense report requests that Celanese employees submitted. *See, e.g.,* Vannoy Dep. at 144-149. Some company employees, however, “questioned [Vannoy’s] efforts to secure necessary documentation,” and he was “counseled about not engaging in confrontational behavior with cardholders.” *Id.* at 4.

B. Vannoy’s Initial Business Conduct Policy Complaint

Celanese’s BCP governs employee conduct, and under the policy employees may report suspected misconduct or legal or ethical concerns. On February 15, 2007, Vannoy filed an internal BCP complaint that the company’s system of administering employee corporate credit cards, and the alleged misuse and abuse of employee credit cards, was posing a financial risk to the company. *See* Resp. Motion for Summary Decision at Exh. 17. On March 6, 2007, about three weeks after Vannoy filed his initial BCP complaint, he received a favorable performance review stemming from his work in 2006, and was awarded a bonus exceeding \$6,000. Vannoy also received a salary increase in the form of a Special Performance Award. Vannoy went on short-term disability leave on April 3, 2007. ALJ Decision at 1, 4.

During the spring of 2007, Celanese decided to phase out certain finance positions in the United States and relocate them to Budapest, Hungary. Celanese informed Vannoy then that the transition would include his position and all others in his department. On May 9, 2007, Vannoy signed a retention agreement entitling him to \$7,500 if he remained with the company until it completed the transition to Hungary. Under the agreement, Celanese would give 60 days advance notice to Vannoy (and other affected employees) as to the official employment termination date, e.g., the lay off date. Prior to signing the

Agreement, Vannoy understood that his position with the company would expire within the next six to 18 months. *Id.* at 4.

Vannoy returned from short-term disability leave in October 2007. On his return to work, Vannoy engaged in e-mail communications with employee cardholders regarding their submission of expense reimbursement requests and supporting documentation. However, Donna Tillapaugh, Vannoy's supervisor, had instructed him to refer any inappropriate communications he received from employee cardholders about card charges to her attention, and not to engage in such communications himself. *Id.* at 4.

C. Vannoy's IRS Complaint

In February 2007, around the time Vannoy filed his BCP complaint, Vannoy talked to an attorney about his concerns over Celanese's business practices with respect to its employee credit card use program. In March 2007, Vannoy retained an attorney to represent him in the "IRS Whistleblower Rewards Program." Under this Agreement, Vannoy's attorney would receive 40% of any sum or award that Vannoy received under the rewards program. In June 2007, Vannoy filed a disclosure as part of the IRS Rewards program, that included 33 documents containing Celanese proprietary and confidential information. *Id.* at 6.

D. Vannoy's Suspension With Pay for Improper Communications With Company Employees

At some point, a Celanese employee complained to Tillapaugh about conversations between the employee and Vannoy concerning submission of expense reimbursements. On October 29, 2007, Tillapaugh met with Corey Fox, Celanese's Global Transaction Shared Services Director, to discuss the complaint against Vannoy. Together they decided to review Vannoy's "sent emails" to assess whether he had been communicating inappropriately with employee cardholders in contravention of Tillapaugh's instruction earlier that month. Vannoy did not believe it was inappropriate for Tillapaugh to conduct this review because Vannoy's laptop warned at log-on that employee activities could be monitored and that unauthorized use of the company e-mail system could result in prosecution. Later that day, Celanese suspended Vannoy with pay pending further investigation. *Id.* at 4-5.²

² The record is somewhat unclear on the purpose of the October 29, 2007 meeting. While the ALJ found that the meeting's purpose was to discuss inappropriate communications, the ALJ does not indicate what those communications entailed. Vannoy's deposition states that the purpose of the October 29, 2007 meeting was to discuss Celanese management's preliminary findings that Vannoy had transferred employee personnel data to a computer outside the company. Vannoy Dep. at 202-205; Zarinah Curry Aff. at 1.

E. Vannoy's Suspension Without Pay for Improperly Accessing and Removing Personal Employee Data

In early November 2007, Celanese discovered that Vannoy had sent a document containing 1,600 unique social security numbers of current and former Celanese employees to the personal e-mail account that was in the name of Vannoy's domestic partner. Vannoy admitted in his deposition that in 2005 and then in 2007, he took, either by e-mail or on compact discs, business documents related to company operations and that containing sensitive personal identifying information of former and current company employees. Vannoy Dep. at 194-195; see also ALJ Decision at 5-6. Vannoy did not ask for the company's permission, nor did he inform the company that he had removed confidential and sensitive documents before company officials discovered the data security breach. Vannoy was aware of the confidential nature of the information he had access to, including employee credit card information and personal identifying information such as employee home addresses and social security numbers. *Id.* at 5-6.

Vannoy agreed to the company's confidentiality agreement in May 2005 when he was hired as a full-time employee. Vannoy was also fully aware of the company's BCP and the precaution that employees "use the company's email and Internet access only in accordance with the Company's Electronic Communications Policy." Vannoy was also aware of company policies related to data security and the requirements that employees guard the personal data of employees. *Id.*

On November 5, 2007, Celanese converted Vannoy's suspension to without pay based upon its discovery of evidence that he violated company policies. Vannoy supplemented his BCP complaint with additional information on November 8, 2007. *Id.* at 5.

F. Celanese's Investigation of Vannoy's BCP Complaint

The company investigated Vannoy's BCP complaint and supplemental complaint. Vannoy did not participate in the investigation, and Celanese terminated his employment in January 2008, after he refused for a second time to participate in the investigation. ALJ Decision at 19.

On February 5, 2008, the company sent Vannoy a letter addressing the issues he raised. *Id.* at 7; see also Resp. Mot. For Summary Dec., Exh. 26. The report observed that the company had already acknowledged that the previous expense reporting system was deficient and had taken significant actions to remedy the situation before Vannoy's BCP complaint. The report further observed that management was aware of employee misuse of company credit cards and had given the matter attention, and that Vannoy was aware of the "large number of activities that were going on in the Company to address the issue" in the time before he filed his BCP complaint. The investigation also analyzed Vannoy's supplemental complaint and concluded that the supplement raised no violations of company policy or IRS regulations. *Id.*

Celanese completed the transition of Vannoy's former department to Budapest, Hungary by March 2008. ALJ Decision at 4.

B. Administrative Proceedings Below

The ALJ issued his decision on June 24, 2009, and dismissed Vannoy's complaint.

1. *Protected Activity.* The ALJ determined that Vannoy did not engage in protected activity. The ALJ determined that even though Vannoy filed a BCP complaint, filed a disclosure with the IRS, and voiced several complaints to his managers, he "failed to allege a violation that definitively and specifically relates to one of the six enumerated categories considered under 1514A." The ALJ also determined that Vannoy did not have a reasonable belief that the conduct he was reporting violated one of the enumerated categories. The ALJ found that Vannoy's disclosure to the IRS is not a "complaint to a 'federal regulatory or law enforcement agency' as contemplated by 1514(A)." ALJ Decision at 13. The ALJ determined that Vannoy's complaints to the company centered on "violation[s] of the Internal Revenue Code § 162 and other IRS regulations dealing with business expenses." ALJ Decision at 14-15, citing EX-1, pp. 123, 161-162. The ALJ concluded that Vannoy's reporting was based on his belief that Celanese was engaged in "improper accounting practices, [and that the company] was taking improper business expense deductions which led to a tax windfall," and did not relate to SOX prohibitions. *Id.* at 14.

The ALJ also determined that there was no evidence that Vannoy believed that Celanese had committed fraud when he made his complaints. *Id.* at 14. Based on Vannoy's deposition statement, the ALJ determined that there was no evidence of Vannoy's belief that Celanese was violating any SEC rule or regulation when he filed the complaint, or that Vannoy had any belief that Celanese's actions "amounted to an actual fraud on shareholders." *Id.* The ALJ found that Vannoy's assertions were "based on conduct that could potentially cause fraud." *Id.* The ALJ determined, however, that "the belief and presence of fraud is essential for SOX violations." *Id.*

The ALJ determined that Vannoy failed to allege any violation that would have a "material, adverse outcome to shareholders." *Id.* at 15. The ALJ observed that there "is no mention of any affect on shareholders within [Vannoy's] BCP complaint and no evidence has been provided to suggest that the complaints made to his superiors involved conduct that adversely affected the [Celanese] shareholders" and that "some form of scienter related to fraud against shareholders is required." *Id.* at 15-16.

The ALJ also determined that "reporting to the IRS does not constitute a complaint to a 'federal regulatory or law enforcement agency' as contemplated by 1514(A)." *Id.* at 17. The ALJ observed that while Vannoy's BCP complaint, along with

the verbal concerns that he raised with his supervisors would fall under the auspices of SOX, the IRS complaint would not. *Id.* at 17.

2. *Unfavorable Personnel Action.* The ALJ determined that Vannoy was not terminated because he filed a BCP complaint or complained to his supervisors. *Id.* at 18. The ALJ found that Vannoy “received performance bonuses after he filed his BCP Complaint” and that he “remained with the company for a period of time after” filing the internal complaint and the disclosure to the IRS. *Id.* The ALJ found that the evidence showed that Vannoy’s complaints towards his supervisors “were taken under advisement for over a year, and used to install new policies and programs with regards to the T&E expense reports.” *Id.* The ALJ found that instead, Vannoy was “scheduled to be terminated based on a business decision” to outsource Vannoy’s division and that Vannoy had full notice of this decision prior to his termination. *Id.* The ALJ found that prior to Vannoy’s outsourcing date, he “engaged in conduct that was in direct violation of company policies by misappropriating several employees’ personal identifiable information” in violation of company policies, “which are in line with state and federal law and were known by [Vannoy] at the time of their violation.” *Id.* at 19. Based on these findings, the ALJ concluded that Vannoy “did not suffer an unfavorable personnel action due to a protected activity.” *Id.*

3. *Contributing Factor to Unfavorable Personnel Action.* The ALJ determined that Vannoy failed to show that he engaged in protected activity that was a contributing factor to an unfavorable personnel action. The ALJ determined that there was “insufficient evidence in the record to support an inference of retaliatory discrimination.” *Id.* at 20. In support of that determination, the ALJ found that Vannoy had remained with the company months after he began complaining to his supervisors, that he received bonuses after his initial BCP complaint, that he knew in advance that his position would be outsourced, and that he signed an agreement to remain with the company until the transition process was completed. *Id.* The ALJ determined that Vannoy was instead “terminated based on his own actions,” including inappropriate communications with company employees, and disclosing and attempts at confiscating personal identifying data on thousands of company employees. *Id.* The ALJ found that a “Protiviti Analysis Report” revealed that “a portion of the confidential information that was sent to unauthorized emails and burned to compact discs were not included in [Vannoy’s] disclosure to the IRS.” *Id.* at 20-21. The ALJ noted Vannoy’s deposition statement in which he stated that he “knew of [Celanese’s] policies and procedures prior to his actions, and further knew that he was breaking these procedures by emailing and copying these personal identifying numbers.” *Id.* at 21, citing EX-1, at 194-195.

4. *Same Adverse Action.* The ALJ further observed that even if Vannoy had engaged in protected activity, there is “clear and convincing evidence” that Celanese “would have taken the same unfavorable personnel action” in this case terminating Vannoy, “in the absence of protected behavior.” *Id.* at 21. This determination is based on the ALJ’s finding that Vannoy “participated in a breach of confidential information without [Celanese’s] knowledge or permission” in “direct conflict with [the company’s]

business policies.” *Id.* Vannoy’s actions caused Celanese to “spend sums of money to contact all employees whose information had been breached and to safeguard this information.” *Id.* at 21-22.

The ALJ rejected Vannoy’s “informer’s privilege” defense. The ALJ held that “SOX allows for the reporting of violations but not for illegally obtaining documents.” *Id.* at 22, citing *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 697 (D. Va. 2007). The ALJ observed that the informers’ privilege is “more in line with an employee being able to subpoena for documents that may contain confidential information.” ALJ Decision at 22.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. Secretary’s Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board reviews an ALJ’s grant of summary judgment *de novo*. *Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 3 (ARB July 21, 2011). The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. *Id.* Under 29 C.F.R. § 18.40(d)(2010), the ALJ may issue summary decision “if the pleadings, affidavits, material obtained by discovery of otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”

DISCUSSION

Section 806 of the Sarbanes-Oxley Act, protects from retaliation employees of covered companies who engage in SOX-protected activity. The provision, as amended, reads, in relevant part:

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, . . . or any officer, employee, contractor, subcontractor, or agent of such company, . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of

employment because of any lawful act done by the employee --

(1) to provide information, cause information to be provided, or otherwise assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

(A) a Federal regulatory or law enforcement agency; . . . or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission , or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A.

In *Sylvester v. Paraxel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -42 (May 25, 2011), we addressed factors related to the complainant's burden to establish protected activity under SOX Section 806. The legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) govern SOX Section 806 actions. 49 U.S.C.A. § 42121 (Thomson/West 2007); see 18 U.S.C.A. § 1514A(b)(2)(C). To prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that: (1) he engaged in activity or conduct that § 1514A protects; (2) the respondent took an unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the adverse personnel action. *Inman v. Fannie Mae*, ARB No. 08-060, ALJ No. 2007-SOX-047, slip op. at 5 (ARB June 28, 2011); *Sylvester*, ARB No. 07-123, slip op. at 9.

A. *The ALJ erred in ruling that the reported misconduct must relate to shareholder fraud*

Vannoy challenges the ALJ's holding that he "did not engage in protected activity with respect to any of his actions" in part because he "failed to allege actual fraud, and failed to show any adverse, material affect to shareholders in any of his actions." ALJ Decision at 13; see also *id.* at 15-16 (Vannoy's complaint failed because SOX requires a showing of "some form of scienter related to fraud.").

The ALJ erred in dismissing Vannoy's SOX claim in part based on a finding that he failed to demonstrate a belief that his employer was engaging in fraud that had a material affect on shareholders. ALJ Decision at 13. We observed in *Sylvester* that of the "six categories" set out in SOX Section 806, "only the last one refers to fraud against shareholders." *Sylvester*, ARB No. 07-123, slip op. at 19. "In examining the SOX's language, it is clear that a complainant may be afforded protection for complaining about infractions that do not relate to shareholder fraud." *Id.* at 20 ("When an entity engages in mail fraud, wire fraud, or any of the six enumerated categories of violations set forth in Section 806, it does not necessarily engage in immediate shareholder fraud."). We explained that the "purposes of the whistleblower protection provision will be thwarted if a complainant must, to engage in protected activity, allege, prove, or approximate that the reported irregularity or misstatement satisfies securities law 'materiality' standards, was done intentionally, was relied upon by shareholders, and that shareholders suffered a loss because of the irregularity." *Id.* at 22. "Section 806's plain language contains no requirement that a complainant quantify the effect of the wrongdoing the respondent committed." *Id.*

Here, the record shows that Vannoy alleged accounting discrepancies that he reasonably believed related to noncompliance with federal securities laws and fraud generally. In his BCP complaint, Vannoy complained to Celanese about failures in the company's employee credit card program. Specifically Vannoy expressed concerns about:

[c]ash withdrawals taken on the corp. card without proper substantiating documentation[;] failure to submit required documentation per Celanese and IRS regulations in a timely manner or at all[;] failure to properly document transactions and identify and legitimize the required business purpose for the expense[; and] failure to provide required receipts for corporate and procurement card transactions per IRS regulations.

BCP complaint 4-5 (dated Feb. 15, 2007). Based on these detailed allegations, Vannoy complained to Celanese officials that the company "has misstated their financial records and underestimated their required tax burden potentially in millions of dollars." *Ibid.*

In his Amended Complaint, Vannoy alleged that these practices caused Celanese to “misstate[] its financial records and underestimate[] its tax burden, both violations of company policies and of federal law.” Amended Compl. at 15, ¶ 54. Vannoy also stated in his Amended Complaint that his concerns over the company’s practices centered on its failure to “comply with its obligations under IRS and U.S. securities laws to maintain adequate internal controls and about management circumventing or knowingly failing to implement an effective system of internal accounting controls.” *Id.* at 25, ¶100. In his deposition, Vannoy stated that his belief that the company’s inadequate accounting practices were “based upon the result of the no-submission documentation [and] was potentially a SOX violation” Vannoy Dep. at 125.

In his brief in opposition to summary judgment, Vannoy further stated that his complaints over the company’s record-keeping of employee credit card processes “violated 15 U.S.C. 78m(b)(5) of the Exchange Act which proscribes persons from knowingly circumventing or knowingly falsifying any book, record or account described in 78m(b)(2).” See Complainant’s Opp. at 5.

While Vannoy may not have asserted a claim of shareholder fraud specifically, under SOX he need not do so to sustain his claim of a SOX violation. Vannoy’s complaints concerning Celanese’s business practices, assertions as to misstated financial records, and shortcomings in the company’s “accounting controls” support the reasonableness of his belief that the company was engaging in accounting misconduct in violation of SOX.³ We find that Vannoy alleged facts sufficient to sustain his claim that he engaged in protected activity under Section 806.⁴

³ The ALJ erred in holding that Vannoy’s claim fails because it did not relate “definitively and specifically” to a particular statute enumerated in Section 806. ALJ Decision at 13 (stating that “an employee’s protected communications must relate ‘definitively and specifically’ to the subject matter of the particular statute under which protection is afforded.”). In *Sylvester*, we made clear that the “definitive and specific” standard that had been employed in prior ARB cases and noted by the ALJ in this case, was inconsistent with the statutory language of Section 806. *Sylvester*, ARB No. 07-123, slip op. at 17. We stated that “[n]ot only is it inappropriate, but it also presents a potential conflict with the express statutory authority of § 1514A, which prohibits a publicly traded company from discharging or in any other manner discriminating against an employee for providing information regarding conduct that the employee ‘reasonably believes’ constitutes a SOX violation.” *Id.*

⁴ The ALJ also held that Vannoy failed to demonstrate his belief that Celanese had committed actual fraud at the time of his protected disclosures. ALJ Decision at 14. However, “[a]s we explained in *Sylvester*, disclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is likely to happen.” *Funke v. Federal Express*, ARB No. 09-004, ALJ No. 2007-SOX-043, slip op. 11 (ARB July 8, 2011), citing *Sylvester*, ARB No. 07-123, slip op. 16. “Such a belief must be grounded in facts known to an employee, but an employee need not wait until a law

B. *Disclosures to the IRS may be covered under SOX*

The record reflects that Vannoy was suspended without pay following Celanese's investigation of Vannoy's disclosure of confidential company information – conduct that Vannoy does not dispute. Vannoy stated that he transferred “personal credit information to [his] home computer” in furtherance of his “BCP complaint and related to improper business T&E deductions.” Vannoy Aff. at 3. The purpose of the information was also to further his IRS Whistleblower program complaint. Amended Compl. at 18. While the ALJ concluded that providing information to the IRS did not fall within the realm of SOX, he fails to cite to any legal support for that conclusion. See ALJ Decision at 17 (“the IRS is not the proper federal authority to approach with allegations of fraudulent conduct that affects shareholders.”). The ALJ erred in narrowly construing the statute in this way.

SOX states that a complainant engages in protected activity when he or she complains about a violation of any “rule or regulation of the Securities and Exchange Commission” when the “information or assistance is provided to . . . a Federal regulatory . . . agency.” 18 U.S.C.A § 1514A. The statutory language does not in any way narrow the definition of “federal regulatory . . . agency” to include exclusively the SEC or the Department of Labor. In this case, Vannoy was sharing information with the IRS; information that he believed revealed not only violations of tax laws but also violations that fell within SOX's reach. There is nothing in the statutory language that limits the agencies to which a complainant may report information in furtherance of enforcement of laws that fall within the SOX's coverage. Vannoy reported the alleged misconduct to individuals who had the authority to investigate the misconduct. It would be incompatible with the congressional intent to promote disclosures of corporate misconduct to narrowly construe the statute in such a way that only reports to the SEC warrant its protection.⁵

has actually been broken to register a concern.” *Funke*, ARB No. 09-004, slip op. at 11, citing *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (protection under Surface Transportation Assistance Act not dependent upon whether complainant proves a safety violation); *Crosby v. Hughes Aircraft Co.*, No. 1985-TSC-002, slip op. at 13, 14 (Sec'y Aug. 17, 1993).

⁵ Whistleblower protection statutes “should be liberally interpreted to protect victims of discrimination and to further [their] underlying purpose of encouraging employees to report perceived . . . violations without fear of retaliation.” *Fields v. Florida Power Corp.*, ARB No. 97-070, ALJ No. 1996-ERA-022, slip op. at 11 (ARB Mar. 13, 1998) (decision under the Energy Reorganization Act, 42 U.S.C.A. § 5851, citing *English v. General Elec. Co.*, 496 U.S. 72 (1990)) and *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) (“it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws”).

Vannoy reported his concerns not only to his employer (explicitly protected under SOX), but also to the IRS. The record reflects that the content of his complaint to the IRS included complaints about accounting irregularities that affected the company's reporting requirements under SEC rules. See Vannoy Exh. 3 at p. 1 (Vannoy alleged "improper deductions" stemming from "personal, non-business cash advances and purchases," including expenditures "relating to 'bail and bond,' fines, motorcycle shops, pet shops, cosmetics, dance halls, childcare services, schools/education, casinos, record stores, and clothing."); see also Amended Compl. at 25 (Vannoy "raised concerns to his own management chain" about the company's "failure to comply with obligations under IRS and U.S. securities laws."). Because there is no limiting language in Section 1514A that precludes complaints to agencies other than the SEC and Department of Labor, we find that in these unique circumstances, Vannoy's complaint to the IRS would fall within SOX's coverage.

C. Vannoy suffered an adverse employment action

The ALJ did not explicitly find whether Vannoy's termination constituted an adverse employment action, but concluded that Vannoy "did not suffer an unfavorable personnel action due to protected activity." ALJ Decision at 19. The ALJ observed that Celanese advised Vannoy that his division would be outsourced at some future date, but that prior to the outsourcing date, Celanese first suspended Vannoy and then terminated his employment. See ALJ Decision at 20-21.

Section 806 states that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee." This language explicitly proscribes even non-tangible activity, evincing a congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers. Accordingly, the Board recently ruled that an "adverse action" under SOX refers to any unfavorable employment action that is more than trivial, either as a single event or in combination with other deliberate employer actions.⁶

The ALJ found that "complainant did not suffer an unfavorable personnel action due to a protected activity." ALJ Decision at 19. Because the ALJ conflated the separate elements of "adverse action" and "contributing factor," he did not clearly articulate whether Vannoy's termination constituted an adverse employment action. An adverse action, however, is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action

⁶ See *Menendez v. Halliburton*, ARB No. 09-002, -003, ALJ No. 2007-SOX-005, slip op. at 17 (ARB Sept. 13, 2011).

stage of analysis.⁷ There is no question that complainant suffered an adverse employment action when Celanese terminated his employment (despite the ALJ's subsequent finding that the termination decision was not tied to protected activity).

Following his complaints about the company's employee credit card accounting practices, Celanese suspended Vannoy with pay for a short period, then suspended him without pay, then terminated his employment. See *supra* at 4-5. Although the ALJ did not address Vannoy's claim that his placement on administrative leave constituted adverse action (Amended Compl. at 27, ¶ 104), we note that even *paid* administrative leave may be considered an adverse action under certain circumstances. In *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, ALJ No. 1995-ERA-038, slip op. at 4-5 (ARB Apr. 20, 1998), the Board held that, although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus.

D. *There are genuine issues of material fact requiring an evidentiary hearing*

1. *An evidentiary hearing is necessary to determine whether Vannoy suffered an adverse personnel action due to protected activity*

The ALJ determined that Vannoy did not suffer an adverse personnel action due to protected activity in part because he received a performance bonus after he filed his BCP complaint, and because Vannoy had notice that his position was scheduled for outsourcing. ALJ Decision at 18. While there is undisputed evidence in the record supporting these facts, there is also evidence to support Vannoy's claim that his termination was an adverse action directly linked to his complaints to management and the IRS over the company's failure to adequately substantiate business expense reporting.

For example, Vannoy states that he complained to management on several occasions about the company's business expense reporting practices prior to filing his BCP complaint. Vannoy Br. In Opp. at 7, citing Vannoy Aff. ¶¶ 6, 8. There is also evidence that company managers, in particular Vannoy's supervisor, Tillapaugh, were aware of Vannoy's concerns over, what he alleged to be, the company's inaccurate and unsubstantiated reporting practices. Tillapaugh Dep. at 34-39, 58-60; see also Vannoy Exh. 17 (BCP Complaint). Vannoy alleged that after he returned from medical leave he was told that he was required to continue working on the project, despite his concerns that the project was unethical and possibly illegal. Vannoy Dep. at 84, 220-221. After his return to work, Vannoy rejected a high-ranking official's expense report, despite approval by the CEO, due to insufficient expense documentation, and a week after

⁷ See *Bassett v. Niagara Mohawk Power Corp.*, No. 1985-ERA-034, slip op. at 3 (Sec'y Sept. 28, 1993) (1993 WL 831947 *2) ("The ALJ improperly concentrates on the lack of any adverse economic impact resulting from the 'negative comment,' and appears to improperly consider Respondent's motive, which is irrelevant at this stage of the analysis.").

rejecting the expense report, one of Vannoy's co-workers, Marcy Tarkington, filed a complaint against him. Tillapaugh Dep. at 90-93; Vannoy Dep. at 2, ¶ 9 & PX 3; Tarkington Dep. at 41. Tarkington's complaint against Vannoy preceded by days the company's decision to search Vannoy's e-mail, which ultimately led to the company's decision to suspend Vannoy without pay. See Tillapaugh Aff. at 123.

The temporal proximity between Vannoy's protected activity, the last occurring within weeks of his suspension, and the adverse personnel actions alleged is sufficient to establish the element of causation in a prima facie case of retaliatory discharge.⁸ The temporal inferences in conjunction with the evidence described above create a genuine issue regarding causation, which must be resolved in an evidentiary hearing.

2. *An evidentiary hearing is necessary to determine the circumstances surrounding Vannoy's procurement of sensitive company and employee data and whether those actions that he took for the purpose of distributing the data to the IRS constituted protected activity*

Applying the correct standard for determining protected activity under SOX, *supra*, Vannoy may have engaged in protected activity when he reported concerns over the company's accounting practices with respect to the employee credit card program that he oversaw as Administrator. The ALJ determined, however, that Vannoy "did not suffer an unfavorable personnel action due to protected activity" because he was terminated due to undisputed evidence that he misappropriated employee personnel identifiable information in violation of company policy. ALJ Decision at 19.

The ALJ determined that Vannoy's reporting of information fell outside SOX's protection because it involved information that had been procured in violation of company policy. Senate Report 107-146 states that the SOX's whistleblower provision was intended to enhance protections for employees who suspect misconduct by their employers, and protects employees when they engage in *lawful* conduct to disclose the misconduct. The Senate Report states that Section 806

specifically protects [employees] when they take *lawful* acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud. If the

⁸ See, e.g., *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (temporal proximity of 30 days established nexus); *Nichols v. Bechtel Constr., Inc.*, No. 1987-ERA-044, slip op. 12 (Sec'y Oct. 26, 1992) (1992 WL 752733 *6) (temporal proximity of less than two months established nexus); *Goldstein v. EBASCO Contractors, Inc.*, No. 1986-ERA-036, slip op. at 11-12 (Sec'y Apr. 7, 1992) (1992 WL 752670 *5) (temporal proximity of seven to eight months established nexus).

employer does take illegal action in retaliation for *lawful* and protected conduct, subsection (b) allows the employee to file a complaint with the Department of Labor, to be governed by the same procedures and burdens of proof now applicable in the whistleblower law in the aviation industry.

S. Rep. No. 146, 107th Cong., 2d Sess. 2002 (2002 WL 863249, *8) (emphasis added). While Vannoy's conduct may have violated company policy, the record reflects that the matter was reported and investigated by local police, but no charges were brought. See Vannoy Dep. at 81-82, 108; Complainant's Brief at 19, citing Vannoy Dep. Exh. 30-A.

There is a clear tension between a company's legitimate business policies protecting confidential information and the whistleblower bounty programs created by Congress to encourage whistleblowers to disclose confidential company information in furtherance of enforcement of tax and securities laws. Passage of these bounty provisions demonstrate that Congress intended to encourage federal agencies to seek out and investigate independently procured, non-public information from whistleblowers such as Vannoy to eliminate abuses in the tax realm under the IRS Whistleblower program and now in the securities realm with the SEC Whistleblower program recently enacted in 2010. In 2010, the Dodd-Frank Act established the SEC Investor Protection fund, which is to be used to pay whistleblower claims and is funded with monetary sanctions that the SEC collects in a judicial or administrative action, or through certain disgorgements under the Sarbanes-Oxley Act of 2002. Similar to the IRS Whistleblower bounty program that Vannoy pursued, Section 21F(b) of the Dodd-Frank Act provides that the SEC "shall pay" a whistleblower who voluntarily provides original information to the SEC that leads to the successful enforcement of a covered judicial or administrative action and results in certain monetary sanctions.

Under the SEC bounty program, the whistleblower is entitled to an award of between 10 percent and 30 percent of what the SEC collects in monetary sanctions. However, the whistleblower must provide "*original information* to the SEC relating to a violation of the securities law." 15 U.S.C. 78u-6 (b)(1) (emphasis added). The Act defines original information as information that: (i) "is derived from *the independent knowledge or analysis of the whistleblower*;" (ii) "is not known to the SEC from any other source, unless the whistleblower is the original source of the information;" and (iii) the information "is not derived exclusively from an another allegation contained in a judicial or administrative hearing, in a governmental report, hearing, audit or investigation, or from the news media, unless the whistleblower is a source of the information." 15 U.S.C. 78u-6(a)(3).

Under the terms of the SEC whistleblower bounty program, Congress anticipated that the whistleblower would provide independently garnered, insider information that would be valuable to the SEC in its investigation. Indeed, the recently issued final rule implementing the SEC bounty program contains a provision prohibiting employers from

enforcing or threatening to enforce confidentiality agreements to prevent whistleblower employees from cooperating with the SEC. 17 C.F.R. § 240.21F-17(a).

The IRS whistleblower bounty program Vannoy used, like the SEC program recently established, reflects Congressional recognition of the notable contributions to law enforcement provided by whistleblowers with non public, inside information. Vannoy's allegations must be viewed in light of these significant enforcement interests. Evidence of record supports Vannoy's allegations that he procured employee data in 2005 and in 2007 as part of his efforts to facilitate his complaint with the IRS as to Celanese's accounting practices. In doing so he sent confidential information by e-mail and created compact discs containing confidential information concerning Celanese employees without the company's permission. Indeed the record shows that some of this information was transferred to a personal computer at Vannoy's home. See *supra* at 4. Thus the crucial question for the ALJ to resolve with a hearing on remand is whether the information that Vannoy procured from the company is the kind of "*original information*" that Congress intended be protected under either the IRS or SEC whistleblower programs, and whether the manner of the transfer of information was protected activity within the scope of SOX. These are mixed questions of law and fact for the ALJ to determine in the first instance.

CONCLUSION

Accordingly, we **REVERSE** the grant of summary decision and **REMAND** this case for further proceedings consistent with this order.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge