No. 18-10038-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANITA JOHNSON,
Petitioner-Appellant,

v.

U.S. DEPARTMENT OF LABOR,
Respondent-Appellee,

ANTHEM, INC.
f.k.a. WellPoint, Inc.,
Intervenor,

On Petition for Review of a Decision of the
United States Department of Labor's Administrative Review Board

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BRIEF FOR THE RESPONDENT U.S. DEPARTMENT OF LABOR

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rules 26.1 and 27-1(a)(9), counsel for Respondent U.S. Department of Labor certifies that the following persons and entities have or may have an interest in the outcome of this appeal:

Acosta, R. Alexander, Secretary of Labor, U.S. Department of Labor;

Anthem, Inc. (f/k/a The WellPoint Companies, Inc.), Intervenor;

Bergstrom, Alan L., Administrative Law Judge, U.S. Department of Labor;

Brand, Jennifer, Associate Solicitor, Fair Labor Standards Division, Office of the Solicitor, U.S. Department of Labor;

Brown, E. Cooper, Administrative Appeals Judge, Administrative Review Board, U.S. Department of Labor;

Bryson, Amelia B., Counsel for the U.S. Department of Labor, Office of the Solicitor, U.S. Department of Labor;

Guenther, Megan, Counsel for Whistleblower Programs, Fair Labor Standards Division, Office of the Solicitor, U.S. Department of Labor;

Howie, Leonard J., Administrative Appeals Judge, Administrative Review Board, U.S. Department of Labor;

Igasaki, Paul M., Chief Administrative Appeals Judge, Administrative Review Board, U.S. Department of Labor;

Johnson, Anita, Petitioner-Appellant;

Lesser, William C., Deputy Associate Solicitor, Fair Labor Standards Division, Office of the Solicitor, U.S. Department of Labor;

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Wright, Crystal S., Counsel for Anita Johnson.

/s/ Amelia B. Bryson
Counsel for Respondent-Appellee

Dated: December 13, 2018

STATEMENT REGARDING ORAL ARGUMENT

Although the Respondent U.S. Department of Labor will gladly participate in any oral argument scheduled by this Court, we do not believe that oral argument is necessary in this case because the issues may be resolved based on the briefs submitted by the parties.

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STATEMENT OF JURISDICTION

This case arises under the employee protection provision of the Sarbanes-Oxley Act of 2002 ("SOX" or "the Act"), 18 U.S.C. 1514A, and its implementing regulations, 29 C.F.R. Part 1980. The Secretary of Labor ("Secretary") had subject matter jurisdiction based on a complaint filed on January 20, 2009 with the Occupational Safety and Health Administration ("OSHA") by Anita Johnson ("Johnson") against her former employer, WellPoint, Inc., ("WellPoint"),[1] under 18 U.S.C. 1514A.

On August 31, 2017 the Administrative Review Board (the "Board" or the "ARB") issued a Final Decision and Order affirming the Administrative Law Judge's ("ALJ") denial of Johnson's complaint. On November 7, 2017, the Board issued an Order Denying Reconsideration, denying Johnson's motion for reconsideration of the August 31 order.[2] On January 3, 2017, Johnson filed a timely Petition for Review with this court,[3] which has jurisdiction to review the

[1] WellPoint, Inc. is now known as Anthem, Inc. This brief will refer to Johnson's former employer as WellPoint.

[2] The Secretary has delegated authority to the Board to issue final agency decisions under the employee protection provision of SOX. *See* Sec'y's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 - 69,380, 2012 WL 5561513 (Nov. 16, 2012); *see also* 29 C.F.R. 1980.110(a).

[3] Further discussion of the timeliness of Johnson's Petition for Review was included in the Secretary's May 10, 2018 response to the court's jurisdictional question. The Secretary's position detailed in that response remains the same.

Secretary's final order because at the time of the alleged violation Johnson resided in Georgia, which is also where the alleged violation occurred. *See* 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(4) (review of final order of the Secretary may be obtained in the court of appeals of the circuit in which the violation allegedly occurred or in which the complainant resided on the date of the violation); *see also* 29 C.F.R. 1980.112(a).[4]

STATEMENT OF THE ISSUE

Whether substantial evidence supports the ALJ's decision, affirmed by the Board, that Johnson did not demonstrate she engaged in SOX-protected activity.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

SOX prohibits an employer from retaliating against an employee for providing information to a person with supervisory authority over the employee or another person specified in the statute about conduct that the employee reasonably believes constitutes a violation of 18 U.S.C. 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), or 1348 (securities fraud); any rule or regulation of the Securities and Exchange Commission ("SEC"); or any provision of federal law

[4] Proceedings under the SOX employee protection provision are governed by the rules, procedures, and burdens of proof of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121(b). *See* 18 U.S.C. 1514A(b)(2)(A) and (C).

relating to fraud against shareholders. *See* 18 U.S.C. 1514A. An employee who believes that she has been subjected to retaliation for lawful whistleblowing under SOX may file a complaint with the Secretary. *See* 18 U.S.C. 1514A(b)(1)(A). Following an investigation of the complaint,[5] either the complainant or the employer may file objections and request a *de novo* hearing before a Department of Labor ALJ. *See* 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.106. The ALJ's decision is subject to discretionary review by the ARB. *See* 29 C.F.R. 1980.110. The ARB's decision is the final order of the Secretary, unless and until a party files a motion with the ARB for reconsideration. *See, e.g., Stone v. INS*, 514 U.S. 386, 391 (1995). If a motion for reconsideration is filed, the time for filing an appeal is tolled while the motion is pending. *Id.*; *see also Aeromar v. Dep't of Transp.*, 767 F.2d 1491, 1493 (11th Cir. 1985); *Lewis v. U.S. Dep't of Labor*, 368 F. App'x 20, 29 (11th Cir. 2010). The ARB's ruling on a motion for reconsideration is final and is reviewable in the court of appeals for the circuit in which the violation allegedly occurred or in which the complainant resided on the date of the alleged violation. *See* 49 U.S.C. 42121(b)(4)(A); 29 C.F.R. 1980.112(a).

[5] The Secretary has delegated responsibility for receiving and investigating whistleblower complaints under SOX to the Assistant Secretary for Occupational Safety and Health. *See* Sec'y's Order No. 01-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912-3913, 2012 WL 194561 (Jan. 25, 2012); *see also* 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(2)(A).

In this case, Johnson filed a timely complaint with OSHA alleging WellPoint engaged in conduct that was fraudulent and violated federal mail and wire fraud statutes. Following OSHA's dismissal of her complaint, Johnson requested a hearing before a Department of Labor ALJ. In 2011, the ALJ granted WellPoint's motion for summary decision and dismissed her case. Johnson timely appealed to the ARB, which as described in more detail below, found genuine issues of material fact that precluded the ALJ from ruling on summary decision that Johnson had not engaged in SOX-protected activity. The ARB remanded the case to the ALJ for a hearing, which was held in 2014. Following the hearing, the ALJ again ruled that Johnson had not engaged in SOX-protected activity because she had not demonstrated that she reported conduct that she reasonably believed violated one of the provisions of law enumerated in SOX. Johnson appealed to the ARB, which affirmed the ALJ's decision, and later denied Johnson's request that it reconsider its decision. This appeal followed.

B. STATEMENT OF FACTS

During 2007 and 2008, WellPoint managed the provision of Medicaid benefits to more than 34 million clients under contracts with 15 states. (Suppl. App. Tab 9 p. 5; Suppl. App. Tab 11 p. 2).[6] Complainant, Anita Johnson, began

[6] The citations to the administrative record in this brief are to the documents listed in the Department of Labor's Supplemental Appendix.

working for WellPoint in 2002 and was promoted to the position of the Director of Customer Care within WellPoint's State Sponsored Business unit where she served from May 2007 until her employment was terminated on October 21, 2008. (Suppl. App. Tab 9 p. 4-5). In this role, Johnson oversaw correspondence processing in WellPoint's Savannah, Georgia and Camarillo, California facilities, working out of the Savannah facility. (Suppl. App. Tab 9 p. 4-5). This included overseeing the processing of inquiries and correspondence related to contracts with state-run Medicaid programs. (Suppl. App. Tab 9 p. 77). The inquiries and correspondence typically included questions from members and providers regarding subjects such as requests for new ID cards, questions about benefits and copays, questions regarding prior authorization requirements, and requests from providers to verify a patient's membership. (Suppl. App. Tab 9 p. 32, 77; Suppl. App. Tab 8 p. 341). The call centers were not responsible for making decisions on original claims, and only a small subset of inquiries might involve refund requests or overpayments. (Suppl. App. Tab 9 p. 34-35, 39; Suppl. App. Tab 8 pp. 378-79).

As Director of Customer Care, Johnson reported to Jennifer Wade, Vice President of Consumer Operations. (Suppl. App. Tab 9 p. 4). From May 2007 through September 2008, Johnson and Wade had regular monthly telephonic meetings to discuss matters related to Johnson's role as Director of Customer Care. (Suppl. App. Tab 9 p. 5). During these meetings Johnson shared a variety of

concerns with Wade relating to WellPoint's system for processing correspondence and the technology used to keep track of where claims were in the system. (Suppl. App. Tab 9 pp. 34-5; Suppl. App. Tab 8 p. 359; Suppl. App. Tab 7 pp. 204-09)). These concerns focused on a variety of design flaws and technical problems with the D950 correspondence processing system WellPoint used and delays in processing claims due to high volume. (Suppl. App. Tab 9 pp. 11-13, 34-5; Suppl. App. Tab 8 pp. 360-62; Suppl. App. Tab 7 pp. 205-09). Wade recognized that the D950 system was not the most robust or efficient of systems, as many employees complained to her about it, but it "got the job done" and met the requirements for processing Medicaid-related inquiries and correspondence. (Suppl. App. Tab 9 p. 39; Suppl. App. Tab 8 pp. 360-62, 415). However, according to Wade, at no point during this time did Johnson raise any concerns with Wade that problems with the D950 system amounted to a SOX violation, a breach of state contracts, fraud on shareholders, or securities fraud. (Suppl. App. Tab 9 p. 35-36; Suppl. App. Tab 8 pp. 380-81; Suppl. App. Tab 7 pp. 243-44; 295-96).

Wade also had regular discussions with Johnson concerning the "stop light report," which detailed the age of open correspondence in the system, and together they developed action plans to address any delays or backlogs. (Suppl. App. Tab 9 p. 37; Suppl. App. Tab 8 pp. 371-72). Under the terms of WellPoint's contracts with states, WellPoint was required to respond to correspondence within specific

time frames so as not to hold up the processing of claims. (Suppl. App. Tab 9 p. 34; Suppl. App. Tab 8 pp 343-44, 368). WellPoint owed performance penalties if claims were not processed under time frames agreed to by contract. (Suppl. App. Tab 9 pp. 40-41; Suppl. App. Tab 8 pp. 368, 434-37). During the relevant time period, there were instances where WellPoint paid performance penalties because of delays in processing claims. (Suppl. App. Tab 9 pp. 40-41; Suppl. App. Tab 8. pp. 434-37). However, no evidence was presented that Johnson ever raised concerns during her conversations with Wade connecting problems with the D950 system or delays in processing correspondence to performance penalties.

Johnson also reported to Wade in September 2007 that 8,000+ pieces of correspondence were found in a file cabinet that had not been logged into the D950 system. (Suppl. App. Tab 9 p. 10; Suppl. App. Tab 8 p. 364; Suppl. App. Tab 7 pp. 202-03). Johnson and Wade discussed a plan for processing the 8,000+ pieces of correspondence, overtime was approved, and the issue was resolved before August 2008. (Suppl. App. Tab 9 pp. 14, 18, 34; Suppl. App. Tab 8 pp. 365-67; Suppl. App. Tab 7 pp. 233-34, 245). According to Wade, at no point during this time period did Johnson discuss with Wade any concerns about fraud or SEC violations related to the processing of inquiries and correspondence. (Suppl. App. Tab 9 p. 34; Suppl. App. Tab 8 pp. 367-68; Suppl. App. Tab 7 pp. 243-44; 295-96).

In August 2008, Nathan Hunt a manager in WellPoint's Ethics and Compliance Division, visited the Savannah facility after his division received three complaints related to problems with contact log processes in the Savannah facility. (Suppl. App. Tab 9 p. 51; Suppl. App. Tab 8 pp. 463, 470-72). These complaints all included concerns about closing contact logs prematurely. (Suppl. App. Tab 9 p. 51; Suppl. App. Tab 8 p. 472). During his visit, Hunt met with and interviewed the staff of the Savannah facility, including Johnson, but did not tell anyone in the Savannah facility that he was conducting an ethics and compliance investigation. (Suppl. App. Tab 9 pp. 51-2; Suppl. App. Tab 8 pp. 473-75; Suppl. App. Tab 7 pp. 236). Johnson mentioned problems with the D950 system during their meeting, but, according to Hunt, at no point did she connect the problems with the D950 system to any concerns related to fraud, an absence of internal controls, or negative impacts on shareholders. (Suppl. App. Tab 9 pp. 12, 52; Suppl. App. Tab 8 pp. 481-83; Suppl. App. Tab 7. pp. 258-59). During his conversations with staff at the Savannah facility, Hunt heard from "at least two individuals" that "they had been advised to close contact logs" prematurely and that at least one of the individuals said that it was Johnson who had directed them to do so. (Suppl. App. Tab 9 p. 52; Suppl. App. Tab 8 pp. 487-88).

In September 2008, while Hunt's investigation was still ongoing, Johnson learned that she was a subject of the investigation. (Suppl. App. Tab 9 pp. 12, 36;

Suppl. App. Tab 8 p. 486; Suppl. App. Tab 7 pp. 226-27). Upon learning this, Johnson called Wade and told her that the allegation that she was instructing individuals to prematurely close contact logs was not true, that "it didn't make sense," and that she "had no motive to do that" because the open contact logs "weren't being counted" as part of the reporting the office did. (Suppl. App. Tab 9 pp. 12-13; Suppl. App. Tab 8 pp. 212-13). At no point did Johnson raise any concerns to Wade or Hunt that not counting open contact logs in reports could amount to fraud or a violation of a SEC rule or regulation.[7] (Suppl. App. Tab 9 p. 36; Suppl. App. Tab 8 pp. 393-94, 495-96, 509; Suppl. App. Tab 7 pp. 283-84).

Hunt's investigation found that Johnson had directed employees to close contact logs prematurely and contact logs were in fact closed prematurely. (Suppl. App. Tab 9 p. 57; Suppl. App. Tab 8 pp. 385-86, 503). Accordingly, the investigation report recommended the termination of Johnson as well as another supervisor responsible for overseeing part of the process, Carolyn Harper-Mickle. (Suppl. App. Tab 9 p. 57; Suppl. App. Tab 8 pp. 385-86, 506-07). Wade followed

[7] During the hearing before the ALJ, Johnson testified that while defending herself against allegations of closing open contact logs prematurely she expressed to Wade that she believed there was no reason to close the logs prematurely because the open, unworked correspondence was not counted in reporting or added to WellPoint's pending inventory such that it was "a fraudulent activity…[which] impacted the stockholders from a SEC standpoint…[and had] an impact on the financial statements because of the way they was containing all those claim correspondence not being counted." (Suppl. App. Tab 7 pp. 218-21). However, the ALJ did not credit that testimony.

the recommendations in Hunt's report and terminated Johnson and Harper-Mickle. (Suppl. App. Tab 9 p. 37; Suppl. App. Tab 7 p. 391). Wade informed Johnson of her termination on October 21, 2008. (Suppl. App. Tab 9 p. 5). At her termination meeting, Johnson indicated that she would sue, but did not raise any concerns about fraud or a violation of a SEC rule or regulation. (Suppl. App. Tab 9 p. 37; Suppl. App. Tab 8 p. 398). After Johnson was terminated, WellPoint received a letter from Johnson's counsel, but that letter did not allege that the company had engaged in fraud or violations of any of the categories of law listed in SOX. (Suppl. App. Tab 9 p. 38; Suppl. App. Tab 8 pp. 398-99).

C. COURSE OF PROCEEDINGS

On January 20, 2009, Johnson filed a SOX complaint with OSHA alleging her employment was terminated in retaliation for engaging in protected activity. *See* 18 U.S.C. 1514A(b)(1)(A); (Suppl. App. Tab 1). In her complaint, Johnson alleged that "WellPoint's practice in excluding the open correspondence inquiries from its reports to the state government entities with whom WellPoint maintained contracts was fraudulent" and amounted to mail and wire fraud. (Suppl. App. Tab 1 p. 10). Johnson's complaint included no reference to any other protected activity. (Suppl. App. Tab 1). On May 19, 2010, OSHA dismissed the complaint, finding that WellPoint fired Johnson after an internal investigation revealed that she instructed associates to close correspondence logs without complete resolution

in violation of company policy. (Suppl. App. Tab 1 p. 4). OSHA also found that Johnson's complaints to WellPoint could not have been a contributing factor in WellPoint's decision to terminate her as they were raised after Johnson was terminated. (Suppl. App. Tab 1 pp. 3-4).

1. The ALJ's Decision Granting Respondent's Motion for Summary Decision

Johnson timely requested a hearing pursuant to 29 C.F.R. 1980.106. (Suppl. App. Tab 4 p. 1). A formal hearing in front of the ALJ was scheduled for March 8, 2011. WellPoint filed a Motion to Dismiss Complaint on November 23, 2010 and a Motion for Summary Decision on January 28, 2011. (Suppl. App. Tab 2; Suppl. App. Tab 3). On February 25, 2011, after Johnson responded to both motions and filed a Correction of Deficiencies in Pleadings, the ALJ issued an order granting both motions, cancelling the hearing, and dismissing Johnson's complaint. (Suppl. App. Tab 4). In that decision, the ALJ found, *inter alia*, that Johnson failed to establish (1) that she communicated to appropriate personnel that fraudulent activity within the scope of SOX had occurred, (2) that she engaged in protected activity as required by SOX, and (3) that WellPoint knew of activity engaged in by Johnson that would be protected by SOX. (Suppl. App. Tab 4 pp. 32-33).

2. Johnson's Appeal to the Administrative Review Board

On March 11, 2011, Johnson filed a Petition for Review of the ALJ's February 25, 2011 decision with the ARB. (Suppl. App. Tab 5). On February 25, 2013, the Board reversed the ALJ's order granting the motion to dismiss and motion for summary judgment and remanded the case for further proceedings. (Suppl. App. Tab 6). In that decision, the Board held that in granting the motion to dismiss, the ALJ applied an incorrect standard for review of a complaint filed in an administrative proceeding under SOX. (Suppl. App. Tab 6 p. 7). The ARB explained that administrative complaints filed with the Department of Labor "are informal documents that initiate an investigation into allegations of unlawful retaliation" and that there was sufficient information in Johnson's complaint to satisfy the threshold requirements to survive a motion to dismiss. (Suppl. App. Tab 6 p. 7). The ARB further held that the ALJ's grant of summary decision was in error, because the ALJ improperly required Johnson to prove, on motion for summary decision, elements of securities fraud as part of her SOX complaint and to show that her complaint implicated fraud against shareholders. (Suppl. App. Tab 6 p. 9). The ARB explained that to withstand a motion for summary decision, Johnson need only show "a reasonable belief of a violation of law that falls within the scope of SOX." (Suppl. App. Tab 6 p. 9). That is, to survive summary decision motion the complainant must show that a genuine issue of material fact exists regarding whether the complainant reported conduct that she reasonably

believed implicated any of the provisions of law that fall within the scope of SOX. (Suppl. App. Tab 6 p. 9). In particular, the Board's recent decision in *Sylvester v. Parexel International LLC*, ARB Case No. 7-123, 2011 WL 2165854 (May 25, 2011), had "made clear that a reasonable belief about a violation of 'any rule or regulation of the Securities and Exchange Commission' could encompass a situation in which the violation, if committed is completely devoid of any type of fraud." (Suppl. App. Tab 6 p. 9 (*citing Zinn v. Am. Commercial Lines, Inc.*, ARB No. 10-029, 2012 WL 1102507, at *4 (March 28, 2012) (*quoting Sylvester*, ARB No. 07-123, 2011 WL 2165854, at *17))). Furthermore, "an allegation of shareholder fraud is not a necessary component of protected activity under SOX Section 806." (Suppl. App. Tab 6 p. 9). Thus, in the Board's view, the disputed material facts in this case stemmed from the communications between Johnson and Wade in their monthly meetings and whether Johnson in fact raised concerns in the meetings regarding conduct that she reasonably believed violated any of the six categories of law referenced in SOX. (Suppl. App. Tab 6 p. 10). Resolution of the disputed facts turned on the ALJ's assessment of Johnson and Wade's credibility regarding their communications. (Suppl. App. Tab 6 p. 10-11). Accordingly, the Board remanded for further proceedings. (Suppl. App. Tab 6 p. 11).

3. The ALJ's Decision and Order on Remand

Following the Board's remand, the ALJ conducted a full hearing from April 28-29, 2014. On October 30, 2015, the ALJ issued a Decision and Order on Remand denying Johnson's complaint. (Suppl. App. Tab 9). In that decision, the ALJ explained that to have engaged in protected activity under SOX, Johnson must establish that she had a subjective and objective belief that a violation of mail, wire, bank, or securities fraud statutes, a rule or regulation of the SEC, or a federal law relating to fraud against shareholders had occurred, was occurring, or was about to occur. (Suppl. App. Tab 9 p. 81). In evaluating whether Johnson established this, the ALJ implicitly credited the repeated testimony of Jennifer Wade and Nathan Hunt, who both testified that "Complainant never described activities by management as fraud on stockholders or SOX violations." [8] (Suppl. App. Tab 9 p. 82). Ultimately, the ALJ held that the evidence of record showed that Johnson failed to establish she engaged in protected activity within the meaning of SOX. (Suppl. App. Tab 9 p. 82).

4. The Board's Decision Affirming the ALJ's Decision and Order on Remand

[8] The ARB took issue with this statement to the extent the ALJ required "intent by WellPoint to defraud shareholders," as discussed *infra* in footnote 10. (Suppl. App. Tab 11 p. 5, n. 13). However, the ARB agreed with the ALJ's credibility determination. (Suppl. App. Tab 11 p. 5).

On November 19, 2015, Johnson filed a Petition for Review of the ALJ's decision with the ARB. (Suppl. App. Tab 10). On August 31, 2017, the ARB issued a Final Decision and Order summarily affirming the ALJ's dismissal of Johnson's complaint. (Suppl. App. Tab 11). While the Board took issue with some aspects of the ALJ's legal analysis, [9] it ultimately affirmed the ALJ's determination that Johnson failed to prove she engaged in SOX-protected activity. (Suppl. App. Tab 11 p. 2 n. 5, pp. 5-6). The ARB "focuse[d] on Johnson's failure to establish that her belief that WellPoint's activity of which she complained violated SOX was both subjectively and objectively reasonable." (Suppl. App. Tab 11 p. 5). The Board explained that Johnson's burden to prove she had a reasonable belief of conduct that violated one of the six categories of law listed in SOX "implicates factual questions about her understanding of the financial impact of WellPoint's policy of not counting open claims as part of inventory." (Suppl. App. Tab 11 p. 5). In evaluating the record evidence relating to Johnson's

[9] The ARB noted that while they were affirming the ALJ's dismissal of Johnson's complaint it did "not endorse every collateral issue in the ALJ's legal analysis." (Suppl. App. Tab 11 p. 2, n. 5). Specifically, the Board took issue with the ALJ's statement that he "found no evidence of intent by WellPoint to defraud stockholders," when noting that "Wade and Hunt both testified that Johnson never described management's activities as fraud on stockholders or SOX violations." (Suppl. App. Tab 11 p. 5, n. 13). The Board reiterated its earlier statement that under *Sylvester v. Parexel*, the reasonable-belief standard requires only a "reasonable belief about a violation of" one of the SOX-enumerated statutes and "an allegation of shareholder fraud is not a necessary component of protected activity under section 806." (Suppl. App. Tab 11 p. 5, n. 13).

reasonable belief, the Board found that substantial evidence of record supported the ALJ's implicit crediting of Wade's testimony that Johnson failed to raise any concerns about any violations of the SOX-enumerated categories of law and that the concerns Johnson did raise were instead "operational in nature and related to policy and procedure." (Suppl. App. Tab 11 p. 5). Accordingly, the Board affirmed the ALJ's conclusion that Johnson failed to demonstrate that she engaged in protected activity under SOX, and thus affirmed the ALJ's decision denying Johnson's complaint. [10] (Suppl. App. Tab 11 pp. 5-6).

SUMMARY OF ARGUMENT

For an activity to be protected under SOX, an employee must provide information to the federal government, Congress, or a person with supervisory authority over the employee or other person listed in the statute concerning conduct that she "reasonable believes" constitutes a violation of mail, wire, bank, or securities fraud statutes, an SEC rule or regulation, or any provision of federal

[10] On October 2, 2017, Johnson filed a Motion for Reconsideration with the Board. (Suppl. App. Tab 12). On November 7, 2017, the Board denied her motion, finding that Johnson had not demonstrated that any of the provisions of the Board's four-part test for reconsideration applied: (1) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (2) new material facts that occurred after the court's decision, (3) a change in the law after the court's decision, or (4) failure to consider material facts presented to the court before its decision. (Suppl. App. Tab 13 pp. 2-3). Instead, the Board held that Johnson merely reiterated the arguments she previously made before the ARB. (Suppl. App. Tab 13 p. 2).

law relating to fraud against shareholders. *See* 18 U.S.C. 1514A(a)(1). This "reasonable belief" requirement has two components: the employee must show that she both subjectively believed her employer's conduct violated the law and that this belief was objectively reasonable. Substantial evidence supports the ALJ's determination, affirmed by the Board, that Johnson did not engage in protected activity. The Board correctly affirmed the ALJ's conclusion that the evidence of record did not support a finding that Johnson subjectively believed WellPoint was violating any of the SOX-enumerated laws or regulations or that such a belief would have been objectively reasonable.

Johnson alleges that WellPoint terminated her employment in October 2008 because from May 2007 through September 2008 she raised a variety of concerns about WellPoint's handling of Medicaid claims correspondence and its reporting practices. Although Johnson couched these issues as violations of the fraud laws, SEC rules or regulations, or Federal laws related to fraud against shareholders in her OSHA complaint and when she testified before the ALJ, she presented no clear evidence that she subjectively believed that to be the case at the time she raised the concerns or that such a belief would have been objectively reasonable. As the fact finder, the ALJ made a credibility determination and implicitly credited the testimony of Johnson's supervisor, Jennifer Wade and the ethics and compliance investigator, Nathan Hunt, over the testimony of Johnson, regarding whether

Johnson raised concerns that WellPoint's tracking and reporting regarding its handling of Medicaid-related correspondence was fraudulent or violated SEC rules. The ALJ also found, based on the testimony about Johnson's communications with Wade and Hunt and based on Wade's testimony about the absence of any direct relationship between WellPoint's handling of Medicaid-related correspondence and its financial reporting, that Johnson did not reasonably believe that WellPoint's conduct of which she complained violated any of the SOX-enumerated laws. Substantial evidence in the record supports these conclusions. Accordingly, the Board correctly affirmed the ALJ's determination that Johnson did not engage in protected activity under SOX.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S RULING, AFFIRMED BY THE BOARD, THAT JOHNSON DID NOT ENGAGE IN PROTECTED ACTIVITY.

A. STANDARD OF REVIEW

Judicial review under SOX is governed by the Administrative Procedure Act, 5 U.S.C. 706(2). *See* 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(4)(A); *see also Fields v. U.S. Dep't of Labor Admin. Review Bd.*, 173 F.3d 811, 813 (11th Cir. 1999). Under the APA, the Court reviews the ARB's findings of law *de novo* according due deference to the Board's interpretation of the employee protection provisions set forth in SOX, and upholding the Board's findings unless they are

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. 706(2)(A); *see Fields*, 173 F.3d at 813 (citations omitted). "This standard is exceedingly deferential." *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996). "The court's role is to ensure that the agency came to a rational conclusion, 'not to conduct its own investigation and substitute its own judgment for the administrative agency's decision.'" *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1360 (11th Cir. 2008) (quoting *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1246 (11th Cir. 1996)).

The court "conduct[s] a *de novo* review of the Secretary of Labor's legal conclusions, but [it] test[s] the Secretary's factual findings for substantial evidence." *Stone & Webster Constr., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1132 (11th Cir. 2012). In the present case, the ARB's determination that Johnson failed to demonstrate that she engaged in protected activity under SOX should be reviewed for substantial evidence. Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1133. Accordingly, "substantial evidence exists even when two inconsistent conclusion can be drawn from the same evidence. *Id.* (citing *Zahnd v. Sec'y of Dep't of Agric.*, 479 F.3d 767, 771 (11th Cir. 2007)). "The substantial evidence standard limits the reviewing court from 'deciding the facts anew, making

credibility determinations, or re-weighing the evidence.'" *Id.* (citing *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005)).

B. BURDEN TO PROVE PROTECTED ACTIVITY UNDER SOX

SOX prohibits publicly traded companies from retaliating against an employee because of any protected whistleblowing activity. *See* 18 U.S.C. 1514A(a). Activities protected by SOX include providing information to a person with supervisory authority over the employee "regarding any conduct which the employee reasonably believes constitutes a violation" of federal mail, wire, bank, or securities fraud statutes, any SEC rule or regulation, or any provision of federal law relating to fraud against shareholders. *See* 18 U.S.C. 1514A(a)(1).

To establish a claim of retaliation under SOX, a complainant must prove by a preponderance of the evidence that: (1) she engaged in protected activity, (2) the employer was aware of the protected activity, (3) she suffered an adverse employment action, and (4) the protected activity was a contributing factor in the adverse action. *See* 18 U.S.C. 1514A(b)(2)(C) (incorporating 49 U.S.C. 42121(b)(2)(B)(iii)); *see also* 29 C.F.R. 1980.109; *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008). Once the complainant has proved retaliation, a respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action notwithstanding the protected activity. *See* 49 U.S.C. 42121(b)(2)(B)(iv); 29 C.F.R. 1980.109; *see also Welch*, 536 F.3d at 275.

In this case, the ALJ correctly concluded, and the ARB affirmed, that Johnson could not succeed in her SOX retaliation claim because she did not establish that she engaged in protected activity within the meaning of SOX.

C. JOHNSON FAILED TO SHOW THAT SHE ENGAGED IN PROTECTED ACTIVITY

In order to prevail on her claim of retaliation in this case, Johnson must demonstrate that she provided information to a person at WellPoint with supervisory authority over her or another person indicated by the statute regarding conduct that she reasonably believed was a violation of federal mail, wire, bank, or securities fraud statutes, an SEC rule or regulation, or any provision of federal law relating to fraud against shareholders. *See* 18 U.S.C. 1514A(a)(1). To satisfy the "reasonable belief" requirement, an employee must show that she both subjectively believed that the conduct that she complained of violated the law and that such a belief was objectively reasonable. *Welch*, 536 F.3d at 275; *see Gale v. U.S. Dep't of Labor*, 384 F. App'x 926, 929-30 (11th Cir. 2010). Adopting the reasoning of multiple other circuits that have ruled on the subject, this Circuit explained, "[t]o 'reasonably believe' that company conduct 'constitutes a violation' of law as those terms are used in § 1514A(a)(1), [an employee] must show not only that he believed that the conduct constituted a violation, but also that a reasonable person in his position would have believed that the conduct constituted a violation." *Gale*, 384 F. App'x at 929 (quoting *Welch*, 536 F.3d at 277).

In this case, the Board properly concluded that, based on the evidence of record, Johnson did not engage in protected activity. Specifically, substantial evidence supports the ALJ's conclusion that Johnson failed to establish that she subjectively believed that WellPoint's activity of which she complained violated any of the provisions of law listed in SOX. Nor did she show that such a belief would have been objectively reasonable. (Suppl. App. Tab 11 p. 5).

1. The ARB Properly Affirmed the ALJ's Conclusion that Johnson Failed to Show That She Subjectively Believed That WellPoint Was Violating Any of the Categories of Law Listed in SOX.

To evaluate whether Johnson had a subjective belief that WellPoint's conduct violated one of the provisions listed in SOX, the ALJ and the Board relied primarily on the testimony of Johnson, Wade, and Hunt regarding Johnson's communications. As the ALJ and the Board noted, Johnson's own accounts regarding the significance of WellPoint's allegedly inadequate procedures for tracking and reporting on Medicaid-related correspondence varied over time. At the hearing, Johnson's testified that upon learning she was the subject of Hunt's investigation, she told Wade that she believed that open correspondence was not being accounted for in financial statements and that WellPoint's failure to do so was "a fraudulent activity … [which] impacted the stockholders from a SEC standpoint … [and had] an impact on the financial statements because of the way they was [sic] containing all those claim correspondence not being counted."

(Suppl. App. Tab 9 p. 81; Suppl. App. Tab 7 pp. 218-21). However, Wade's testimony presented different facts. Wade testified that during that conversation "the Complainant did not say she was a whistleblower, or mention concerns of security fraud, or of stockholder fraud" and her "statements were more in defense of her actions than someone reporting some other fraud." (Suppl. App. Tab 9 p. 36, Suppl. App. Tab 8 pp. 387-88). In fact, Wade testified that at no point did Johnson "indicate[] to her WellPoint was engaged in securities fraud, shareholder fraud, violations of SOX, [or] breach of state contracts." (Suppl. App. Tab 9 p. 36; Suppl. App. Tab 8 pp. 380-81, 389-90, 393-94, 398-99). According to Wade, "Johnson's concerns like hers were operational in nature and related to policy and procedure." (Suppl. App. Tab 11 p. 5).

Similarly, Hunt and Wade both testified that when confronted with the results of Hunt's investigation, Johnson told them that she had no motive to prematurely close out pending correspondence because WellPoint did not count these cases as part of the internal and external reporting of its inventory, suggesting that Johnson did not believe that there was any violation of law associated with the handling of the Medicaid correspondence. (Suppl. App. Tab 11 p. 5). However, as the Board noted, "following her discharge Johnson alleged in her OSHA complaint that the very wrongdoing that she denied happening in the call centers she

supervised was the same activity that violated the SOX provisions." (Suppl. App. Tab 11 p. 5).

With contradictory testimony, the ALJ, as the fact-finder, had to make a credibility determination regarding whether Johnson expressed concerns regarding conduct that she actually believed violated any of the laws listed in SOX. *See, e.g.*, *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008) (noting that employee could not make out a SOX whistleblower claim "if he himself did not hold the belief required by the statute"). Implicitly crediting Wade's testimony over Johnson's, the ALJ found that Johnson did not report conduct that she subjectively believed violated any of the provisions of law listed in SOX. (Suppl. App. Tab 9 p. 82; Suppl. App. Tab 11 p. 5). The ALJ's decision to credit Wade over Johnson in finding that Johnson lacked a subjective belief that WellPoint was violating any of the provisions listed in SOX is due substantial deference and should be upheld as long as it is reasonable. *See N.L.R.B. v. McClain of Ga., Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998) (holding in an appeal of an National Labor Relations Board decision affirming an ALJ's decision, that the court must "give special deference to the ALJ's credibility determinations, which will not be disturbed unless they are inherently unreasonable or self-contradictory.").

Notably, SOX does not require Johnson to have used the word "fraud" or to have cited any provision of law in raising her concerns. *See Van Asdale v. Int'l Game Tech.,* 577 F.3d 989, 997 (9th Cir. 2009); *Welch*, 536 F.3d at 276 ("An employee need not 'cite a code section he believes was violated' in his communications to his employer . . . ."); *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) (noting that to be protected under the SOX whistleblower provision "The employee is not required to provide the employer with the citation to the precise code provision in question."). Similarly, she was not required to communicate the reasonableness of her belief to management. *See Sylvester*, 2011 WL 2165854, at *12 (*citing Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006)). However, a complainant's communications to management do provide evidence regarding her belief. *Id*. (*citing Collins v. Beazer Homes USA, Inc.*, 334 F.Supp. 2d 1365, 1377-78 (N.D. Ga. 2004)). Thus, the fact that Wade and Hunt credibly testified that they did not perceive Johnson to have raised any concerns regarding violations of the law, together with the inconsistencies in Johnson's own accounts of her concerns, support the ALJ's determination that Johnson did not believe that WellPoint's conduct violated any of the provisions of law listed in SOX. Based on this evidence in the record, the ARB was correct to affirm the ALJ's conclusion that Johnson did not show that she had a subjective belief that WellPoint was violating one of the provisions of law listed in SOX.

2. The ARB Properly Affirmed the ALJ's Conclusion That Johnson Did Not Have an Objectively Reasonable Belief That WellPoint was Violating any Relevant Provision of Law.

In evaluating whether Johnson demonstrated that any belief WellPoint was violating one of the SOX-enumerated provisions in its correspondence processing and financial reporting practices would have been objectively reasonable, the ALJ and the Board again looked to the testimony of Johnson and Wade.[11] (Suppl. App. Tab 9 pp. 81-2). Like in evaluating a complainant's subjective belief, when evaluating the objective reasonableness of a belief, the Board has recognized that the complainant need not have actually communicated the reasonableness of her beliefs to management, but those communications with management "may provide evidence of reasonableness or causation." *Sylvester*, 2011 WL 2165854 at *12.

After considering Wade's testimony of what Johnson actually communicated to her as well as Wade's testimony regarding the absence of any direct connection between the handling of Medicaid-related correspondence and WellPoint's reporting to shareholders or the states, the ALJ concluded that Johnson did not demonstrate that her alleged belief would have been objectively reasonable. (Suppl. App. Tab 9 p. 82). The ALJ noted evidence from Wade's testimony that "management supervisors reallocated personnel assets and funding to address [any]

[11] The ALJ also referenced Hunt's testimony, which was consistent with Wade's. (Suppl. App. Tab 9 p. 82).

unworked and untimely processed claims correspondence," "oversaw the progress on completing the correspondence in a timely manner," and "worked closely with representatives for the respective [state Medicaid] contracts." (Suppl. App. Tab 9 p. 82). Overall, the ALJ found no evidence indicating Johnson's belief that WellPoint's conduct violated a SOX-enumerated law was objectively reasonable.

The ARB agreed, noting that evaluating the reasonableness of Johnson's belief implicated factual questions about her understanding of the financial impact of WellPoint's policies and practices. (Suppl. App. Tab 11 p. 5). In affirming the ALJ's conclusion, the ARB properly accepted the ALJ's crediting of Wade's testimony, and Johnson makes no persuasive argument for this court to disturb that credibility determination. *See Stone & Webster Constr., Inc.*, 684 F.3d at 1133 ("[t]he substantial evidence standard limits the reviewing court from deciding the facts anew, making credibility determinations, or re-weighing the evidence."); *see also Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1132 (10th Cir. 2013) (finding that the ALJ's finding was heavily based on a credibility determination and the appealing party made "no sufficiently persuasive argument for this court to take the extraordinary step of disturbing that credibility determination").

Beyond Johnson's complaints regarding WellPoint's failure to account for open correspondence in its financial reports, which was the focus of her original

OSHA complaint, Johnson's other concerns that she alleged before the ALJ amount to protected activity were vague criticisms of WellPoint's business operations. *See generally Allen v. Admin. Review Bd.*, 514 F.3d 468, 482 (5th Cir. 2008) (in ruling for the employer in a SOX case where fraud was alleged, the court concluded in part that "[a]t most, [the employer] inadequately responded to three unintended problems that arose in the regular course of business…."). The ALJ found that Johnson "established that poor management oversight practices permitted claim correspondence to experience delays" and that "[s]ome delay was by local management failing to timely enter received correspondence into the [data management] system and route to associates to properly work the correspondence in a timely manner." (Suppl. App. Tab 9 p. 82). However, neither Wade nor Johnson testified that Johnson ever connected these general concerns about delayed processing of correspondence to any of SOX's enumerated fraud statutes, SEC rules or regulations, or any Federal law relating to fraud against shareholders. Further, as the ARB noted, "[a]ny time the standard metrics, such as timeliness, inventory levels, average speed of answering telephone calls, and the volume and age of open inquiries fell below target, Wade and her management team would remedy the problems." (Suppl. App. Tab 11 p. 6). The ALJ properly concluded, and the Board affirmed, that Johnson did not have an objectively reasonable belief

that these concerns implicated violations of one of the SOX-enumerated statutes. Accordingly, these complaints did not amount to protected activity under SOX.

D. THE ARB APPLIED THE CORRECT LEGAL STANDARDS IN CONCLUDING THAT JOHNSON FAILED TO DEMONSTRATE THAT SHE ENGAGED IN SOX-PROTECTED ACTIVITY.

Notwithstanding the substantial evidence supporting the agency's determination that Johnson failed to show that she subjectively believed WellPoint violated any of the six categories of law enumerated in SOX or that such a belief would have been objectively reasonable, Johnson argues that the ARB's decision in this case should be reversed because the ARB wrongly required her to use the word fraud in her communications to WellPoint and to plead and prove the elements of securities fraud. *See* Appellant's Br. 7-8, 25, 28, 34. In fact, that is not what the ARB did.

The Board, in its order of remand, meticulously stated what the standards for SOX-protected activity were. The Board explicitly recognized that "[r]ather than prove an actual violation of shareholder fraud . . ., Johnson must instead show a 'reasonable belief' of a violation of law that falls within the scope of SOX." (Suppl. App. Tab 6 p. 9 (citations omitted)). The Board also noted that "a complainant may be afforded protection for complaining about infractions that do not relate to shareholder fraud" and in particular "a reasonable belief about a violation of 'any rule or regulation of the Securities and Exchange Commission'

could encompass a situation in which the violation, if committed is completely devoid of any type of fraud." (Suppl. App. Tab 6 p. 9 (citations omitted)). And, the Board explained that "[t]he concept of 'reasonable belief' includes both an objective and subjective component. . . . The objective component of reasonable belief 'is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee'. . . . To satisfy subjective reasonableness, the employee must actually have possessed the belief that the conduct he complained of constituted a violation." (Suppl. App. Tab 6 p. 9 (citations omitted)).

The Board then directed the ALJ on the precise issue that it believed needed to be resolved on remand to determine whether Johnson had engaged in SOX-protected activity. In particular, the Board noted that "[t]he disputed material facts as to protected activity in this case stem from the communications between Johnson and Wade during their monthly meetings from May 2007 until September 2008." (Suppl. App. Tab 6 p. 10). According to the Board, "[w]hether Johnson engaged in protected activity under the SOX turns on credibility. . . . . Here Johnson states that she discussed the fraudulent implications of the correspondence backlog and the inadequate internal controls, while Wade states that no such discussions occurred. The ALJ must resolve these contradictory facts. . . ." (Suppl. App. Tab 6 p. 11).

Pursuant to the Board's Order of Remand, the ALJ held a two-day hearing at which he heard extensive testimony from Johnson, Wade, and Hunt regarding their communications in the months leading to Johnson's termination and the context of those communications. Based on that testimony, the ALJ concluded that Johnson had not engaged in SOX-protected activity.

On appeal, the Board examined the record developed before the ALJ and applied the proper test for protected activity under SOX. Although the Board recognized that Johnson herself framed her whistleblower complaint as one alleging retaliation for raising concerns related to shareholder fraud and violations of SEC rules, the Board specifically rejected any implication from the ALJ's decision that Johnson was required to allege or prove shareholder fraud. (Suppl. App. Tab 11 p. 5 n.13). Instead, the Board reiterated that to establish that she engaged in SOX-protected activity, Johnson had to establish by a preponderance of the evidence that she provided information regarding conduct that she subjectively believed violated any of the six categories of law listed in SOX and that such a belief was objectively reasonable. (Suppl. App. Tab 11 p. 4-5). Applying this test, the Board agreed that substantial evidence supported the ALJ's conclusion that Johnson did not show that she had a reasonable subjective or objective belief that WellPoint was violating any of the SOX-enumerated fraud statutes, SEC rules or regulations, or any Federal law relating to fraud against shareholders. (Suppl. App.

Tab 11 p. 6). As such, the Board properly affirmed the ALJ's decision finding that Johnson failed to establish that she engaged in protected activity within the meaning of SOX and consequently, denied her complaint.

CONCLUSION

Substantial evidence supports the ALJ's holding, affirmed by the ARB, that Johnson failed to demonstrate she engaged in protected activity. This Court should accordingly affirm the ARB's decision denying Johnson's complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 7,684 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Word 2016 using plain roman style, with exceptions for case names and emphasis, and using Times New Roman 14-point font, which is a proportionately spaced font, including serifs.

Date: December 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2018, the foregoing was electronically filed and served through the Court's CM/ECF system on the following counsel of record:

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