U.S. Department of Labor

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

IN THE MATTER OF:

FABFABIO WILLIAMS,

COMPLAINANT,

v.

QVC, INC.,

RESPONDENT.

ARB CASE NO. 2020-0019

ALJ CASE NO. 2018-SOX-00019

DATE: January 17, 2023

Appearances:

For the Complainant:
Fabfabio Williams; *pro se*; Fairburn, Georgia

For the Respondent:
Sarah E. Bouchard, Esq.; Brandon J. Brigham, Esq.; *Morgan, Lewis, & Bockius LLP*; Philadelphia, Pennsylvania

Before BURRELL and PUST, Administrative Appeals Judges

DECISION AND ORDER

BURRELL, Administrative Appeals Judge:

This case arises under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX or Section 806), as amended, and its implementing regulations.[1] Complainant Fabfabio Williams (Complainant) filed a complaint against QVC, Inc. (Respondent or QVC), alleging that Respondent terminated

[1] 18 U.S.C. § 1514A; 29 C.F.R. Part 1980 (2022).

Complainant's employment and subjected him to other adverse employment actions because he engaged in conduct protected by SOX. On December 2, 2019, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Denying Complaint (D. & O.) because Complainant did not establish that he engaged in protected activity or that his alleged protected activity was a contributing factor to the termination of his employment. We affirm the ALJ's decision for the reasons set forth below.

BACKGROUND

Beginning in April 2015, Complainant worked for QVC as a contractor, performing work as an IT security architect.[2] Complainant's employer at that time was SyZyGy Risk Sciences (SyZyGy).[3] Subsequently, QVC hired Complainant on October 14, 2015, and he began working as an employee on November 16, 2015.[4] Complainant worked as an IT security architect, performing substantially the same work as when he was a contractor.[5] On February 8, 2016, QVC terminated Complainant's employment.[6]

1. Complainant's Employment at QVC and Alleged Protected Activity

As an IT security architect, Complainant helped incorporate necessary technology security controls in the design phase of software projects.[7] Complainant's role included review of software application code for security vulnerabilities.[8] In addition to QVC's internal code review conducted by IT security architects, QVC hired an outside vendor, WhiteHat, to examine software program code, identify vulnerabilities, and provide reports on vulnerabilities.[9]

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2 D. & O. at 4. QVC is a global retailer that sells products through its website and through television programming. *Id.* at 3-4.

3 *Id.* at 4. SyZyGy provided consulting services to QVC while QVC developed its own internal IT security capabilities. *Id.*

4 *Id.*

5 *Id.*

6 *Id.* at 9.

7 *Id.* at 4.

8 *Id.*

9 *Id.* at 4-5.

In late 2015, Complainant noticed irregularities in WhiteHat's reports.[10] Complainant and Patrick Angel, a SyZyGy contractor for QVC, discovered that the WhiteHat reports were shorter (reporting fewer vulnerabilities) and included invalid vulnerabilities (reporting vulnerabilities for code that was not part of the software being reviewed).[11] At some point no later than December 2015, Complainant verbally raised his concerns about WhiteHat to Michael Hoehl (Hoehl), Complainant's direct supervisor and QVC's Director of Security.[12] As a result, Hoehl and Complainant held a teleconference with WhiteHat staff to discuss the issues Complainant had identified with the WhiteHat reports.[13]

In 2015, Complainant also participated in several panel interviews of IT security job candidates.[14] Complainant expressed his belief that three of the job candidates were unqualified and should not be hired.[15] Nonetheless, QVC decided to hire two of the three candidates.[16]

On December 13, 2015, Complainant sent an e-mail to Scott Sarris, Complainant's former supervisor at SyZyGy, and Roseann Larson, QVC's Chief Information Security Officer, in which Complainant explained that he felt "pressured" to act in a way that was "not in the best interest of QVC" or its shareholders.[17] Complainant raised several allegations, including that: (1) he "felt pressured to cover up the truth and support security technologies and architecture," which Complainant considered "fraud to QVC and shareholder interests;"[18] and (2) he felt pressured to hire unqualified personnel.[19]

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10 *Id.* at 5.

11 *Id.*

12 *Id.* at 4-5.

13 *Id.* at 5.

14 *Id.*

15 *Id.*

16 *Id.*

17 Respondent's Exhibit (RX) 7; D. & O. at 5-6. Complainant was unclear in his e-mail regarding who pressured him, but he referred to Mr. Hoehl in the letter. RX 7; D. & O. at 5-6. Complainant later clarified that his allegations related to Mr. Hoehl's actions. D. & O. at 11, 17, 19; Hearing Transcript (Tr.) 70, 72.

18 Complainant later clarified that this allegation related to QVC's use of WhiteHat as a vendor. D. & O. at 11; Tr. 67.

19 D. & O. at 5-6.

On December 15, 2015, Scott Jensen, QVC Vice Present and Chief Compliance Officer, and QVC's outside counsel interviewed Complainant and began to investigate Complainant's fraud allegations from his December 13, 2015 e-mail.[20] On January 20, 2016, QVC finished the investigation and determined that Complainant's allegations were without merit.[21]

2. Complainant's Insubordinate Conduct

On January 19, 2016, Complainant refused to relocate offices. Hoehl e-mailed Complainant to explain that the IT security team was moving offices, which Complainant knew prior to accepting employment.[22] Complainant responded, "I'm not relocating."[23]

In addition, on two occasions, Regina Wheat-Gbadouwey (Wheat-Gbadouwey), a representative of QVC's Employee Relations Office (ERO), attempted to schedule meetings with Complainant and Hoehl, but Complainant refused to attend. First, Wheat-Gbadouwey scheduled a meeting for January 8, 2016, for Complainant and Hoehl.[24] On January 7, 2016, Complainant e-mailed Wheat-Gbadouwey, stating that "QVC attorneys … [directed Complainant] not to engage with" Hoehl, and on January 11, 2016, Complainant e-mailed "I do not agree to the meeting and I will not be attending."[25] Second, on January 20, 2016, Wheat-Gbadouwey tried to organize another meeting with Complainant and Hoehl, informing Complainant that "we have consent from the attorneys you met" to have Complainant meet with Hoehl and Wheat-Gbadouwey. Complainant responded, "I don't work for Michael Hoehl nor report to him."[26]

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20 *Id.* at 7-8.

21 *Id.*

22 *Id.* at 7.

23 *Id.*

24 *Id.* at 7; RX 10.

25 D. & O. at 7; RX 11.

26 D. & O. at 8; RX 14.

Similarly, in a January 22, 2016 meeting with QVC's outside counsel and Kathy McGeary (McGeary), a Senior Manager of ERO, Complainant stated he did not and would not work for Hoehl.[27]

3. QVC's Suspension and Termination of Complainant's Employment

On January 28, 2016, in a meeting with McGeary and another ERO representative, Complainant claimed he was in charge of the IT security team.[28] At the end of the meeting, QVC suspended Complainant's employment.[29] On February 8, 2016, QVC terminated Complainant's employment. Hoehl and QVC's ERO were responsible for the decision.[30]

4. Procedural History and ALJ Decision

On March 10, 2016, Complainant filed his SOX complaint.[31] The Occupational Safety and Health Administration (OSHA) investigated and dismissed the complaint on February 6, 2018. Complainant filed objections with the Office of Administrative Law Judges on March 14, 2018, requesting a hearing.[32]

The ALJ held a hearing and thereafter issued the D. & O. on December 2, 2019, finding in QVC's favor. The ALJ determined that: (1) Complainant did not engage in protected activity when he sent an e-mail on December 13, 2015, raising allegations related to WhiteHat and QVC's hiring of unqualified IT staff;[33] (2) QVC subjected Complainant to adverse actions by suspending him on January 28, 2016, and terminating his employment on February 8, 2016;[34] (3) Complainant's alleged protected activity did not contribute to the adverse actions;[35] and (4) QVC had

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27 D. & O. at 9.

28 *Id.*

29 *Id.*

30 *Id.* Hoehl and McGeary were the decisionmakers. *Id.* at 28.

31 *Id.* at 1.

32 *Id.*

33 *Id.* at 20.

34 *Id.* at 21. Complainant also claimed he suffered other adverse actions, including demotion and forced relocation of his work area. The ALJ assumed without deciding that each of these events constituted adverse employment actions. *Id.* at 21.

35 *Id.* at 36.

proven that it would have taken the same action even in the absence of Complainant's alleged protected activity.[36]

Complainant appealed to the Board on December 4, 2019.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to review ALJ decisions under SOX.[37] The ARB reviews questions of law presented on appeal de novo but is bound by the ALJ's factual determinations if they are supported by substantial evidence.[38] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[39]

DISCUSSION

SOX is governed by the burdens of proof set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[40] To prevail, a SOX complainant must establish by a preponderance of the evidence that: (1) a complainant engaged in activity that SOX protects; (2) the respondent took an unfavorable personnel action against the complainant; and (3) the protected activity was a contributing factor in the adverse personnel action.[41] If a complainant meets this burden of proof, the employer may avoid liability only if it proves its affirmative defense, which requires demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.[42]

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36 *Id.* at 36-37 n.29.

37 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

38 29 C.F.R. § 1980.110(b); *Leviege v. Vodafone US, Inc.*, ARB No. 2019-0058, ALJ No. 2016-SOX-00001, slip op. at 3 (ARB Mar. 19, 2021) (citations omitted).

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

40 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)).

41 *See Yadav v. Frost Bank*, ARB No. 2020-0048, ALJ No. 2020-SOX-00017, slip op. at 4 (ARB June 24, 2021) (citation omitted); *see also* 29 C.F.R. § 1980.109(a); 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)).

42 29 C.F.R. § 1980.109(b).

On appeal, Complainant argues that the ALJ erred in concluding that: (1) Complainant did not engage in protected activity; (2) Complainant's alleged protected activity was not a contributing factor; and (3) Respondent proved its same action defense.[43] Upon consideration of the parties' briefs and arguments on appeal, and having reviewed the evidentiary record, we conclude that the ALJ's decision in favor of QVC is legally correct and supported by substantial evidence in the record.

1. Substantial Evidence Supports the ALJ's Ruling that Complainant Did Not Engage in Protected Activity

An employee engages in protected activity when the employee "provide[s] information" to the government or a supervisor "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . . ."[44]

To demonstrate that complainant engaged in SOX-protected activity, a complainant must prove that she "reasonably believes" she reported a violation. "Reasonably believes" includes a subjective and objective component: "(1) she subjectively believed that the conduct complained of constituted a violation of one of the laws listed in Section 806, and (2) a reasonable person of similar experience, training, and factual knowledge would objectively believe that a violation had occurred."[45] "A complainant need not cite a specific code provision she believes was violated to engage in protected activity, but nonetheless has to complain or provide information about conduct that she reasonably believes concerns one of the six

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[43] In his Petition for Review, Complainant does not clearly state that the ALJ erred or clarify what objections he is raising regarding the ALJ's ruling. Under 29 C.F.R. § 1980.110, a petition for the Board's review "should identify . . . the legal conclusions or orders to which they object, or the objections may be deemed waived." Nonetheless, the "ARB construes arguments for self-represented litigants liberally in deference to their lack of training in the law," while also "refrain[ing] from becoming an advocate for the pro se litigant." *Davenport v. LTI Trucking Services Inc.*, ARB No. 2017-0070, ALJ No. 2016-STA-00015, slip op. at 6 (ARB Oct. 31, 2019) (citations and quotations omitted). Here, the Board liberally construes Complainant's Petition for Review as objecting to the ALJ's legal conclusions regarding protected activity, contributing factor, and the same action defense.

[44] 18 U.S.C. §1514A(a)(1); *see also Leviege*, ARB No. 2019-0058, slip op. at 3 (citations omitted).

[45] *Id.* at 4 (citation omitted).

specifically enumerated categories in the statute."[46] "General assertions of wrongdoing untethered from these enumerated categories are not protected, nor are general inquiries."[47] "Moreover, although a complainant need not prove an actual violation of law, she must do more than speculate, argue theoretical scenarios, or share mere beliefs that some corporate activity is wrong and may theoretically affect the corporation's financial statements and its shareholders."[48]

The ALJ ruled that Complainant's December 13, 2015 e-mail did not constitute protected activity.[49] In the e-mail, Complainant had claimed that he felt pressured to (1) "cover up the truth and support security technologies and architecture that I consider fraud to QVC and shareholder interests" (Complainant later clarified this allegation related to QVC's use of WhiteHat as a vendor[50]), and (2) "hire people that are not qualified."[51] The ALJ concluded that it was not objectively reasonable for Complainant to believe that the conduct Complainant reported in his December 13, 2015 e-mail constituted a SOX violation.[52]

On appeal, Complainant argues that the ALJ erred because Complainant engaged in protected activity under SOX by reporting "financial abuses and shareholder fraud to management."[53] Specifically, Complainant alleges his December 13, 2015 e-mail highlighted how he believed Hoehl engaged in fraud by (1) utilizing IT funds on "valueless" WhiteHat reports and (2) hiring unqualified staff.[54] Complainant's arguments do not convince us to overrule the ALJ's determination that Complainant did not engage in any protected conduct, which

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46 *Id.* (citing *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 n.6 (2d Cir. 2014) (other citations omitted)).

47 *Id.* (citing *Welch v. Chao*, 536 F.3d 269, 277 (4th Cir. 2008) (other citation omitted)).

48 *Id.* (citing *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 355 (4th Cir. 2008) (other citation omitted)).

49 D. & O. at 10-11.

50 *Id.* at 11; Tr. 67.

51 D. & O. at 10. Complainant later explained that the WhiteHat and hiring allegations related to Hoehl's actions. *Id.* at 11, 17, 19; Tr. 70, 72. 79, 84.

52 D. & O. at 17, 20.

53 Petition for Review (Pet. Review) at 1.

54 *Id.* at 5.

determination we find to be legally correct, well reasoned, and supported by substantial evidence in the record.[55]

A. WhiteHat

On appeal, Complainant argues that the ALJ erred because Complainant engaged in protected activity when he sent a December 13, 2015 e-mail alleging "cover up" and fraud related to WhiteHat.[56] Complainant claims he believed he was reporting Hoehl in his e-mail for "fraud against shareholders" and "financial abuse" because Hoehl was using QVC's IT security funds for WhiteHat's "valueless" services.[57]

To demonstrate a reasonable belief that they engaged in protected activity, "complainant[s] need not prove an actual violation of law, [but they] must do more than speculate, argue theoretical scenarios, or share mere beliefs that some corporate activity is wrong."[58] Here, Complainant's allegations of protected activity amount to speculation, unsupported assertions, or disagreements with QVC's business decisions and expenditures. In addition, Complainant has not presented evidence of any wrongdoing, let alone evidence that could have a connection to a SOX violation.[59] Therefore, we affirm the ALJ that it was not objectively reasonable for Complainant to believe he was reporting a SOX violation.[60]

Complainant's allegations of a "cover up" and fraud in his December 13, 2015 e-mail do not constitute protected activity because Complainant's beliefs are

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55 On appeal, Complainant alleged other incidents of protected activity in addition to the December 13, 2015 e-mail. *Id.* at 5-6. However, we affirm the ALJ's finding that these other allegations raise the same complaint as the December 13, 2015 e-mail, which the ALJ correctly concluded was not protected activity. D. & O. at 20-21. The ALJ also correctly concluded that Complainant did not raise any protected allegations in the January 28, 2016 meeting. *Id.* at 20-21, 26.

56 Pet. Review at 5.

57 *Id.*

58 *Leviege*, ARB No. 2019-0058, slip op. at 4 (citations omitted).

59 *Nielsen*, 762 F.3d at 221 n.6 (SOX's "statutory language suggests that, to be reasonable, the purported whistleblower's belief cannot exist wholly untethered from these specific provisions.").

60 The Board affirms the ALJ's ruling that Complainant's belief was not objectively reasonable. Therefore, the Board does not decide whether Complainant satisfied the subjective element of the reasonable belief test.

speculative and unsupported by the record. Complainant does not clarify or explain how Hoehl engaged in "cover up" of the WhiteHat issues.[61] In fact, Complainant's own testimony undermines his allegations of Hoehl's alleged "cover up." Complainant testified that, upon learning of the errors in the WhiteHat reports, Hoehl "made an effort" and held a conference call with WhiteHat personnel to attempt to address the problem.[62] Complainant's testimony shows that Hoehl did not attempt to "cover up" issues with WhiteHat. Instead, Hoehl took steps to address the issues when Complainant raised them. In addition, Complainant testified that he had no knowledge of any misstatement to shareholders.[63] Again, Complainant's testimony undermines his allegations of "cover up" or fraud.

Complainant also claims that he was reporting "financial abuse" in his December 13, 2015 e-mail, but the allegation does not constitute protected activity.[64] A complainant "must do more than . . . share mere beliefs that some corporate activity is wrong and may theoretically affect the corporation's financial statements and its shareholders."[65] Complainant argues that Hoehl engaged in "financial abuse" by spending QVC funds on "valueless" and "fake" reports from WhiteHat, which Complainant reported to management to "stop future financial abuses because it was fraud against shareholders."[66] However, rather than reporting a SOX violation, Complainant merely reported his disagreements with QVC's business decision to use WhiteHat and shared his belief that QVC's use of WhiteHat may affect QVC's financial statements and shareholders.[67] Accordingly, it was not objectively reasonable for Complainant to believe he had reported a SOX violation.

Finally, Complainant does not provide a connection between his allegations and SOX's enumerated provisions. While a complainant does not need to prove the

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61 D. & O. at 15.

62 *Id.*; Tr. 102.

63 D. & O. at 15; Tr. 139.

64 Pet. Review at 5.

65 *Leviege*, ARB No. 2019-0058, slip op. at 4 (citations omitted).

66 Pet. Review at 5, 15.

67 The cost of WhiteHat's services to QVC was approximately $75,000, with yearly recurring obligations of approximately $15,000 to maintain the software. D. & O. at 4. QVC's operating expenses were over $700 million. *Id.* at 16 n.16. QVC also disclosed to shareholders the online security risks of the type identified by WhiteHat, as well as the need to spend money on minimizing those risks. *Id.* at 14, 16.

specific elements of fraud,[68] "[g]eneral assertions of wrongdoing untethered from these enumerated categories are not protected."[69] Complainant asserts he reported SOX violations, but Complainant's underlying allegations of wrongdoing and "cover up" have no support in the record, let alone evidence of a connection to a SOX violation.[70] Complainant has only demonstrated that WhiteHat may have provided an imperfect product, and he disagreed with Respondent's business decision to utilize WhiteHat. Therefore, Complainant's claims amount to unsupported assertions of wrongdoing untethered from SOX's enumerated categories. Accordingly, substantial evidence supports the ALJ's ruling that Complainant's belief was not objectively reasonable that he had reported a SOX violation regarding WhiteHat.

B. Hiring Unqualified People

On appeal, Complainant argues that the ALJ erred because Complainant engaged in protected activity when he sent the December 13, 2015 e-mail reporting how Hoehl "intentionally hired unqualified security staff."[71] We agree with the ALJ that Complainant's actions do not constitute protected activity.

The record does not support Complainant's allegations that Hoehl manipulated hiring. In fact, Hoehl only hired two of the three allegedly unqualified candidates, and Hoehl decided not to hire one of the candidates in part due to

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[68] A complainant can prove that they engaged in protected activity under SOX, "even if the complainant fails to allege, prove, or approximate specific elements of fraud." *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 22 (ARB May 25, 2011).

[69] *Leviege*, ARB No. 2019-0058, slip op. at 4 (citations omitted); *see also Nielsen*, 762 F.3d at 221 n.6 ("We note that [SOX] does require plausible allegations that the whistleblower reported information based on a reasonable belief that the employer violated *one of the enumerated provisions* set out in the statute. Thus, the statutory language suggests that, to be reasonable, the purported whistleblower's belief cannot exist wholly untethered from these specific provisions." (emphasis original) (citations omitted)).

[70] On appeal, Complainant claimed his allegations show potential violations of 17 C.F.R. § 240.10b-5, a regulation prohibiting the employment of manipulative and deceptive devices in connection with the sale of securities. Pet. Review at 7. However, it was not objectively reasonable for Complainant to believe he had reported a SOX violation regarding 17 C.F.R. § 240.10b-5. Complainant's underlying allegations have no clear relation to the use of manipulative and deceptive devices in connection with the sale of securities.

[71] Pet. Review at 2.

Complainant's concerns about the candidate.[72] In addition, the Board agrees with the ALJ that, even if the hired individuals were unqualified, hiring an unqualified individual is not fraud.[73] Complainant has not presented an argument or evidence to reach a different conclusion. Accordingly, substantial evidence supports the ALJ's ruling that it was not objectively reasonable for Complainant to believe that he reported a SOX violation regarding hiring unqualified candidates.

2. Complainant's Alleged Protected Activity Was Not a Contributing Factor to the Termination of His Employment or Other Alleged Adverse Actions

A complainant may be entitled to remedies if protected activity was a contributing factor in an adverse action.[74] In this case, the ALJ found, and we affirm, that Complainant did not engage in any protected activity. Nonetheless, we have addressed Complainant's contributing factor arguments for the sake of clarity and transparency.

The ARB has held that a contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.[75] Employees may meet their evidentiary burden with circumstantial evidence.[76] Circumstantial evidence may include, but is not limited to, temporal proximity, inconsistent application of an employer's policies, pretext, shifting explanations by the employer, or antagonism.[77]

The ALJ ruled that Complainant's report of fraud did not play any role in the termination of his employment or other alleged adverse actions.[78] The ALJ found that temporal proximity was insufficient to establish that it was a contributing factor and that Respondent's decisionmakers had no knowledge of Complainant's

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[72] D. & O. at 19.

[73] *Id.*

[74] 18 U.S.C. § 1514A(b)(2)(A) (citing AIR 21's burdens of proof, 49 U.S.C. § 42121(b)).

[75] *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, 2014-FRS-00154, slip op. at 53 (Sept. 30, 2016) (citations and inner quotations omitted).

[76] *Id.* at 55 (citations omitted).

[77] *Acosta v. Union Pacific R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 8 (ARB Jan. 22, 2020) (citing *Loos v. BNSF Ry. Co.*, 865 F.3d 1106, 1112-13 (8th Cir. 2017), *rev'd on other grounds*, 139 S. Ct. 893 (Mar. 4, 2019)).

[78] D. & O. at 21, 23.

alleged protected activity.[79] Furthermore, the ALJ found that Respondent terminated Complainant's employment for insubordination, and there is no evidence that Complainant's fraud allegations played any role in the termination of his employment.[80]

On appeal, Complainant argues that the ALJ erred in her contributing factor ruling. Complainant claims that his alleged protected activity was a contributing factor to the termination of his employment because (1) a close temporal proximity existed between his alleged protected activity and the termination of his employment; and (2) the decisionmakers' had knowledge of his alleged protected activity.[81] Although Hoehl knew of Complainant's complaints about WhiteHat and his disagreement with certain hiring decisions,[82] the record does not support a finding that McGeary had knowledge of these complaints.[83] Even if knowledge had been established, we would affirm the ALJ's determination that Complainant's reporting of these concerns was not a contributing factor to the adverse action taken against his employment.

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79 *Id.* at 23, 28-29, 36.

80 *Id.* at 23, 36. The ALJ also addressed Complainant's argument that the termination of his employment was "inextricably intertwined" with his alleged protected activity. "The thrust of Complainant's argument seems to be that his fraud allegation necessitated his insubordinate conduct; therefore his termination is inextricably linked to his fraud allegation." *Id.* at 33. The ALJ disagreed because Complainant's fraud allegation did not necessitate his unacceptable behavior. *Id.* On appeal, Complainant has not clearly contested the ALJ's ruling on this issue. Even if Complainant had raised it, the Board could not apply the inextricably intertwined analysis in favor of Complainant because the Board has ruled that the analysis constitutes reversible error. *See Klinger v. BNSF Ry. Co.*, ARB No. 2019-0013, ALJ No. 2016-FRS-00062, slip op. at 9 (ARB Mar. 18, 2021) ("[S]ince *Thorstenson*, the Board has repeatedly held that applying the inextricably intertwined or chain of events analyses constitutes reversible legal error.").

81 Pet. Review at 4, 12-14.

82 D. & O. at 15, 19.

83 Complainant argues that McGeary had knowledge because she "admitted receiving the email which lead [sic] to the investigation" of fraud against shareholders. Pet. Review at 12. Complainant seems to be referring to his December 13, 2015 e-mail, but McGeary never stated she received the December 13, 2015 e-mail, and Complainant has not cited to evidence to suggest otherwise. McGeary testified that she was aware of a different e-mail that Complainant had sent, but that e-mail was unrelated to the December 13, 2015 e-mail. D. & O. at 29. Also, McGeary testified that the compliance department handled complaints of fraud, not her department, which indicates she would not have been involved in the investigation related to Complainant's December 13, 2015 e-mail. *Id.* at 25.

We disagree with Complainant's claims that temporal proximity raises a causal inference of contributing factor because, between Complainant's alleged protected activity (the December 13, 2015 e-mail detailing his concerns related to WhiteHat and hiring decisions) and the termination of his employment, Complainant engaged in several intervening events of insubordinate conduct. "The insufficiency of temporal proximity as a basis for proving causation is even more apparent when the facts reveal an *intervening event* occurring between the protected activity and the adverse personnel action."[84]

Here, Respondent's decisionmakers—Hoehl and McGeary—noted several instances of insubordinate conduct that served as intervening events.[85] McGeary noted that the decision to terminate Complainant's employment was based on "his refusal to work for [Hoehl] and his refusal to move his office."[86] Hoehl highlighted how he decided to terminate Complainant's employment because of Complainant's "unacceptable and insubordinate behavior."[87] Hoehl listed several reasons, including how Complainant "was becoming less and less available to me for conversation. . . . We would try to have a conversation and either he wasn't available or he would arrive late for the meeting."[88] Hoehl also noted that Complainant refused to relocate his office.[89] These intervening events demonstrate the insufficiency of temporal proximity to establish a causal connection.

Based on the foregoing, we conclude that substantial evidence supports the ALJ's ruling as to the contributing factor issue.[90] Accordingly, we affirm the ALJ.

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84 *Acosta*, ARB No. 2018-0020, slip op. at 8 (emphasis added).

85 The ALJ found that Hoehl and McGeary were the relevant decisionmakers. D. & O. at 28. Complainant has not contested the ALJ's finding.

86 *Id.* at 26 (alteration in original).

87 *Id.* at 24.

88 *Id.* at 25.

89 *Id.*

90 Similarly, substantial evidence supports the ALJ's conclusion that Complainant's alleged protected activity did not play any role in the other adverse actions alleged by Complainant. *Id.* at 36. The ALJ assumed without deciding that Complainant's demotion, forced relocation of his work area, and referral to an entity for a risk assessment were also adverse personnel actions. *Id.* at 21. As the ALJ concluded, Complainant's insubordinate conduct was the sole reason for the suspension and termination. *Id.* at 21, 23-25, 30-33. On appeal, Complainant claims that he was demoted, forced to relocate, and forced to undergo a fitness evaluation but does not explain how protected activity contributed to these events.

3. Respondent Established Its Same-Action Defense by Substantial Evidence

The ALJ ruled that, even if Complainant had established the elements of his claim, the ALJ would conclude that Respondent had proven, by clear and convincing evidence, that it would have terminated Complainant's employment even absent his alleged protected activity due to Complainant's insubordinate behavior.[91] We agree and affirm the ALJ. As discussed in the foregoing sections, Complainant engaged in repeated insubordination and substantial evidence supports the ALJ's conclusion that Respondent would have terminated Complainant even absent Complainant's alleged protected activity.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's D. & O. and the complaint in this matter is **DENIED**.[92]

SO ORDERED.[93]

[redacted]
THOMAS H. BURRELL
Administrative Appeals Judge

[redacted]
TAMMY L. PUST
Administrative Appeals Judge

Pet. Review 4-5. Furthermore, the ALJ found and we affirm that Complainant's complaints about WhiteHat and poor hiring decisions were not protected activity. Accordingly, protected activity did not contribute to any of these other alleged adverse actions.

[91] D. & O. at 36-37 n. 29.

[92] To the extent Complainant has raised other arguments not specifically addressed herein, the remainder of Complainant's arguments and contentions on appeal are denied.

[93] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.