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MEMORANDUM* ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (OCTOBER 18, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIK LECKNER,

Petitioner,

v.

GENERAL DYNAMICS INFORMATION TECHNOLOGY; ET AL.,

Respondents.

No. 21-70284

ARB Case No. 2020-0028

On Petition for Review of an Order of the Department of Labor

Submitted October 12, 2021**

Before: TALLMAN, RAWLINSON, and BUMATAY, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Erik Leckner petitions pro se for review of the Department of Labor's Administrative Review Board's ("ARB") final decision and order, and denial of Leckner's motion for reconsideration, affirming the Administrative Law Judge's ("ALJ") summary dismissal of Leckner's whistleblower retaliation complaint against his former employers under the Clean Air Act ("CAA"), 42 U.S.C. § 7622, the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9610, the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971, the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622, the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1367, the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, and the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A. We have jurisdiction under 42 U.S.C. § 7622(c)(1) (CAA), 42 U.S.C. § 9610(b) (CERCLA), 42 U.S.C. § 6971(b) (SWDA), 15 U.S.C. § 2622(c)(1) (TSCA), 33 U.S.C. § 1367(b) (FWPCA), 42 U.S.C. § 5851 (c)(1) (ERA), and 18 U.S.C. § 1514A(b)(2)(A) (SOX). We review the ARB's decisions pursuant to the standard established in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Under the APA, "we will reverse an agency's decision only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Coppinger-Martin v. Solis*, 627 F.3d 745, 748 (9th Cir. 2010) (citation and internal quotation marks omitted). We review *de novo* an agency's interpretation or application of a statute. *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006). We deny the petition.

The ARB properly affirmed the dismissal as untimely of Leckner's retaliation claims under the CAA, CERCLA, SWDA, TSCA and FWPCA because

Leckner failed to raise a genuine dispute of material fact as to whether he filed his whistleblower complaint within 30 days of his employers' alleged retaliatory decisions. *See* 29 C.F.R. § 24.103(d)(1) (requiring a complainant file an administrative complaint within 30 days after an alleged violation of the employee protection provisions of the CAA, CERCLA, SWDA, TSCA and FWPCA).

The ARB properly affirmed the dismissal of Leckner's retaliation claim under the SOX because Leckner failed to raise a genuine dispute of material fact as to whether he engaged in protected activity under the SOX. *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996-97, 1000-01 (9th Cir. 2009) (to be protected activity an employee must have a subjective and objectively reasonable belief that the reported conduct violated one of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)).

The ARB properly denied Leckner's request to admit new evidence because Leckner failed to demonstrate that the evidence could not have been discovered with reasonable diligence before the record closed. *See* 29 C.F.R. § 18.90(b)(1) ("No additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed.").

We do not consider Leckner's contentions concerning his ERA claim, or his other arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Leckner's motion to supplement the record (Docket Entry No. 11) is denied.

Leckner's motions to expedite (Docket Entry No. 21) and to file an oversized reply in support of the motion to supplement the record (Docket Entry No. 25) are denied as unnecessary.

Leckner's motions to file a corrected and oversized reply brief (Docket Entry Nos. 55, 57, 59 and 60) are granted. The Clerk will file the corrected reply brief at Docket Entry No. 59-2.

PETITION FOR REVIEW DENIED.

DECISION AND ORDER OF U.S. DEPARTMENT OF LABOR (OCTOBER 22, 2020)

U.S. DEPARTMENT OF LABOR
Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of: ERIK LECKNER,

Complainant,

v.

GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC. (formerly CSRA),

and

APEX SYSTEMS, LLC,

Respondents.

ARB Case No. 2020-0028

ALJ Case No. 2019-SOX-00028

Date: October 22, 2020

Before: James D. MCGINLEY, Chief Administrative Appeals Judge and Randel K. JOHNSON, Administrative Appeals Judge.

This case arises under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C.A.

§ 7622 (1977); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (1980); Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (1980); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (1986); Federal Water Pollution Control Act (WPCA), 33 U.S.C. § 1367 (1972) (collectively, the Environmental Acts); Energy Reorganization Act (ERA), 42 U.S.C. § 5851 (2005); and Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A (2010).

Erik Leckner filed a complaint alleging that Respondents General Dynamics Information Technology, Inc. (GDIT) and Apex Systems, LLC (Apex) violated those laws by discharging him from employment. On January 23, 2020, an Administrative Law Judge (ALJ) dismissed the complaint in a Decision and Order (D. & O.) granting Respondents' Motions for Summary Decision. For the following reasons, we affirm the ALJ.

BACKGROUND

GDIT provides information technology services to government contractors. It acquired CSRA, also a provider of information technology services, in 2018. Apex is a staffing agency. In 2017, the U.S. Environmental Protection Agency (EPA) contracted with CSRA for work on an "Emergency Management Portal" project. CSRA contacted Apex to obtain a lead Java developer for the project. Apex referred Leckner to CSRA, and CSRA hired Leckner in January 2018 for the position. His duties included designing, writing, testing, documenting, and maintaining computer software, as well as mentoring a junior Java developer.

In January 2018, Leckner asked CSRA supervisor Ed Campbell for access to the project's full source code repository. The repository is a software system that records changes to source code files and thereby provides a history of all of the revisions in the development of the source code. Campbell was unable to provide the access. Leckner also opined that CSRA had failed to complete a formal transition of the project.

Between January and March 2018, Leckner's CSRA supervisors concluded that Leckner was involved in several "defensive and aggressive interactions with team members and management."[1] On April 9, 2018, GDIT notified Apex that it was removing Leckner from the project and wanted Apex to find a replacement.

On April 13, 2018, Leckner emailed Rob Thomas, CSRA's contact at EPA, and complained that the GDIT development team was being denied access to portions of the project code. Leckner also expressed this concern to Campbell, who thereafter told Dominique Reed, an Apex Account Executive, that Leckner had discussed "alleged project inefficiency and other project matters" with EPA. On April 16, 2018, Leckner sent a series of emails to Reed in which he complained about "productivity and responsiveness on his assignment."[2] Apex found a replacement and on May 29, 2018, Reed notified Leckner that his employment was terminated and that he must return his badge and laptop.[3]

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[1] D. & O. at 7.

[2] Declaration of Dominique Reed at 4.

[3] *Id.*

On July 18, 2018, Leckner initiated a SOX complaint before the Occupational Safety and Health Administration (OSHA). He amended the complaint to include allegations that his discharge violated the Environmental Acts and ERA. According to Leckner, Respondents retaliated against him for complaining that his lack of access to the repository was a cybersecurity risk that caused a waste of federal funds, and the failure to complete a formal transition allowed a former contractor to retain access to the project.[4]

OSHA concluded that the claims under the Environmental Acts were untimely. OSHA also concluded that Respondents were not covered employers under the ERA, and that Leckner did not engage in SOX-protected activity prior to his discharge. Leckner requested a hearing before an ALJ but, prior to any hearing, GDIT and Apex submitted motions for summary decision. On January 23, 2020, the ALJ granted the motions, and Leckner appealed the ALJ's ruling to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board his authority to review ALJ decisions under the Environmental Acts, ERA, and SOX.[5] The ARB reviews an ALJ's grant of summary decision de novo

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[4] D. & O. at 12; *see, e.g.*, Complainant's Opposition to Respondent CSRA's Motion for Summary Decision at 3-5.

[5] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

under the same standard the ALJ applies. Summary decision is permitted where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."[6] The ARB views the record on the whole in the light most favorable to the non-moving party.[7]

DISCUSSION

1. Leckner's Claims Under the Environmental Acts Were Untimely

A complainant must file a complaint of unlawful discrimination under the Environmental Acts within thirty days of a discrete adverse action.[8] The thirty-day limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action. Respondents submitted evidence that Apex notified Leckner of his discharge on May 29, 2018. The 30-day limitations period ended on June 28, 2018. The ALJ held that Leckner initiated his complaint with OSHA on July 18, 2018.[9] Because Leckner failed to file his OSHA complaint within 30 days after he was

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[6] 29 C.F.R. § 18.72(a).

[7] *Micallef v. Harrah's Rincon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015-SOX-00025, slip op. at 3 (ARB July 5, 2018).

[8] 29 C.F.R. § 24.103(d)(1) (implementing the timeliness provisions of the CAA (42 U.S.C. § 7622(b)(1)), CERCLA (42 U.S.C. § 9610(b)), SWDA (42 U.S.C. § 6971(b)); TSCA (15 U.S.C. § 2622(b)(1)), and WPCA (33 U.S.C. § 1367(b)).

[9] D. & O. at 10. In his response to GDIT/CSRA's Motion, Leckner states that he first contacted OSHA on May 31, 2018, but he provided no documentation that supports this claim.

notified of his discharge, his claims under the Environmental Acts were untimely.[10]

2. Respondents Are Not Employers Under the ERA

Congress passed the ERA in 1974 as part of its continuing effort to regulate nuclear energy. In 1978, Congress amended the ERA to prohibit employers from discriminating against employees who report violations of the ERA or the Atomic Energy Act or who participate in any other action to carry out the purposes of those acts. For purposes of the ERA, the term "employer" includes these entities:

> (A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. § 2021);
>
> (B) an applicant for a license from the Commission or such an agreement State;
>
> (C) a contractor or subcontractor of such a licensee or applicant;

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[10] Leckner was represented by counsel before the ALJ but did not present any exhibits in responding to Respondents' Motions for Summary Decision. Now appearing pro se before the Board, Leckner moves to present exhibits that he contends establish the timeliness of his complaint as well as coverage under the ERA and SOX. However, he does not explain why he was unable to present these exhibits (in contrast to those he asserts were requested pursuant to FOIA) to the ALJ. We therefore will not consider this new evidence on appeal and those motions are denied. *See, e.g., Aityahia v. Air Line Pilots Assoc.*, ARB No. 2019-0037, ALJ No. 2018-AIR-00042, slip op. at 3, n.2 (ARB May 19, 2020).

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210 (d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344;

(E) a contractor or subcontractor of the Commission;

(F) the Commission; and

(G) the Department of Energy.[11]

Leckner did not rebut Respondents' assertions before the ALJ that they are not employers under the ERA, and the ALJ held that the record was devoid of any evidence that would bring either Respondent within the ERA's coverage. The record supports the ALJ.

3. Leckner Did Not Engage in Protected Activity Under the SOX

The SOX prohibits covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer or a federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or

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[11] 42 U.S.C. § 5851(a)(2).

any provision of Federal law relating to fraud against shareholders.[12]

Reporting an actual violation is not required; a complainant can engage in protected activity when he reports a belief of a violation that is about to occur or is in the stages of occurring.[13] A complainant need not establish the various elements of securities fraud to prevail, and a communication is protected where it is based on a reasonable, but mistaken, belief that the employer's conduct constitutes a violation of one of the six enumerated categories of law under Section 806.[14] Additionally, a respondent is not shielded from liability because it was already aware of problems reported by the complainant.[15]

During his employment on the Emergency Management Portal project, Leckner expressed concerns about computer software. There is no evidence that he had an objectively reasonable belief that Respondents violated any SEC rule or regulation or otherwise engaged in securities fraud when he communicated his concerns about computer software. And he failed to set forth any regulation, rule, or Federal law that

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[12] 18 U.S.C. § 1514A(a)(1); *see, e.g.*, *Xanthopoulos v. Marsh & McClennan Cos.*, ARB No. 2019-0045, ALJ No. 2019-SOX-00008 (ARB June 29, 2020).

[13] *Barrett v. e-Smart Techs., Inc.*, ARB Nos. 2011-0088, 2012-0013, ALJ No. 2010-SOX-00031 (ARB Apr. 25, 2013).

[14] *Zinn v. Am. Commercial Lines Inc.*, ARB No. 2010-0029, ALJ No. 2009-SOX-00025 (ARB Mar. 28, 2012).

[15] *Gunther v. Deltek, Inc.*, ARB Nos. 2013-0068, -0069, ALJ No. 2010-SOX-00049 (ARB Nov. 26, 2014).

an objectively reasonable person would think the Respondents violated.

In sum, we hold that there is no genuine issue of material fact as to whether Leckner timely filed his complaint under the Environmental Acts, worked for an entity defined as an employer under the ERA, or engaged in protected activity under the SOX.

CONCLUSION

We AFFIRM the ALJ's Decision and Order Granting Summary Decision and DENY Leckner's complaint.

SO ORDERED.

DECISION AND ORDER GRANTING SUMMARY DECISION OF U.S. DEPARTMENT OF LABOR (JANUARY 23, 2020

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516
(415) 625-2200
(415) 625-2201 (FAX)

In the Matter of: ERIK LECKNER,

Complainant,

v.

GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC. (formerly CSRA),

Respondent,

and

APEX SYSTEMS, LLC,

Respondent.

Case No. 2019-SOX-00028

Issue Date: January 23, 2020

Before: Steven B. BERLIN, Administrative Law Judge.

This is a whistleblower retaliation claim brought under the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, and six different environmental protection statutes. The environmental statutes are: the Energy Reorganization Act, 42 U.S.C. § 5851; the Federal Water Pollution Control Act, 33 U.S.C. § 1367; the Clean Air Act, 42 U.S.C. § 7622; the Toxic Substances Control Act, 15 U.S.C. § 2622; the Solid Waste Disposal Act, 42 U.S.C. § 6971; and the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9610.[1] Respondents General Dynamics Information Technology and Apex Systems, LLC each move for summary decision. I will grant the motions.

Undisputed Material Facts[2]

Respondent parties. Apex Systems is a staffing agency. G.D.Ex. 4 ¶ 3.[3] General Dynamics Information

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[1] The implementing regulations for the Sarbanes-Oxley Act are at 29 C.F.R. Part 1980. The implementing regulations for the environmental statutes are at 29 C.F.R. Part 24.

[2] As I recite the facts for purposes of summary decision in the light most favorable to the non-moving party (Complainant), drawing all reasonable inferences in his favor, making no credibility determinations adverse to him, and without weighing the evidence, this fact finding is for purposes of this motion only.

[3] "A.Ex." refers to Apex Systems' exhibits. "G.D.Ex." refers to General Dynamics's exhibits. Complainant did not submit any exhibits.

Each Respondent submitted a copy of Dominique Reed's declaration. *See* A.Ex. C; G.D.Ex. 4. I will cite throughout only the copy that General Dynamics submitted (G.D.Ex. 4). Each Respondent also submitted a copy of Alison Page's deposition transcript. *See* A.Ex. D; G.D.Ex. 3. I will cite throughout only the copy that General Dynamics submitted (G.D.Ex. 3).

Technology, Inc. is a wholly-owned subsidiary of General Dynamics Corporation. It provides information technology services to government contractors for purposes such as defense, intelligence, and other government requirements. CSRA was a publicly-traded corporation, listed on the New York Stock Exchange. On or about April 2, 2018, General Dynamics Corporation acquired CSRA and placed it within General Dynamics Information Technology, Inc. CSRA was then delisted from the New York Stock Exchange. General Dynamics Information Technology, Inc. does not dispute for present purposes that it is liable for any adverse decision. At times in this Order, I therefore refer to CSRA and General Dynamics Information Technology, Inc. together as "General Dynamics."

In 2017, the U.S. Environmental Protection Agency contracted with CSRA for certain work on an "Emergency Management Portal." CSRA contacted staffing agency Apex Systems to provide a lead Java developer for the project. G.D.Ex. 4 ¶ 6.

The legal technicalities of the relationship between CSRA (and then General Dynamics Information Technology) and Apex are vague, but not in a way that affects summary decision. It appears that, when Apex received a request from a client, it would find someone whom it believed was a good candidate. *See* G.D.Ex. 1 at 162. It would refer that person to the client for an interview. *Id.* at 163. If the client

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General Dynamics's Exhibit 1 is a draft transcript of Edward Campbell's deposition testimony. A certified court reporter did not certify this draft transcript. As no party disputes the authenticity of the draft, I admit it for purposes of this motion.

approved, Apex hired the applicant and assigned him or her to the client's project. *See id.* The person performed all work under the direction and supervision of Apex' client, but Apex also had an "account executive" with whom the hired person communicated about the employment. *See* G.D.Ex. 4 ¶ 4. The client paid Apex under a contract, and Apex paid the employee. The employee was hired to work on the client's particular project; if the client no longer required the employee's work, Apex would terminate the employment. G.D.Ex. 4 ¶ 5. In some cases, after about six months, the client would hire the person as its own employee. *See* A.Ex. D at 23; G.D. Ex. 1 at 163-64.

For purposes of this motion, I avoid delving into the intracacies [sic] of the relationship between Apex and its clients by inferring that Apex and General Dynamics Information Technology were joint employers. As such, each is responsible for compliance with all applicable employment law requirements.

Apex' hire of Complainant to work at CSRA. Apex referred Complainant to CSRA for an interview for the Java development position; CSRA approved Complainant for the job; and Apex hired complainant. A.Ex. A at 3; A.Ex. D at 72; G.D.Ex. 4 ¶ 6. Complainant began to work at CSRA in January 2018. A.Ex. A at 3-4; G.D.Ex. 3 at 72-73; G.D.Ex. 4 ¶ 6. He reported to CSRA supervisors Alison Page and Ed Campbell. G.D.Ex. 4 ¶ 7. He also communicated about his employment with Apex account executive Dominique Reed. G.D.Ex. 4 ¶ 7.

Complainant was to write Java code for the Emergency Management Portal project; modify, enhance, and debug the software; communicate technical information to non-technical people; and mentor a junior

Java developer. G.D.Ex. 3 at 21-22; G.D.Ex. 1 at 46, 158, 165. He soon discovered that he did not have access to all of the Portal project's source code repository. The repository provides a history of all of the revisions in the development of the source code. A.Ex. A at 6; G.D.Ex. 1 at 65, 73, 155-56.

Access to source code repository. Complainant asked CSRA supervisor Ed Campbell for access to the full repository. G.D.Ex. 1 at 61-62. Campbell was unable to provide the access. The Environmental Protection Agency owned the repository, but it was stored in the servers of Salient, which had worked on the project before CSRA. G.D.Ex. 1 at 67-68; G.D.Ex. 3 at 60.

The "EPA had asked Salient to provide [CSRA with] everything that they had with regards to the source code" early on during Complainant's employment. G.D.Ex. 1 at 76-77. This should have occurred during a 90-day transition period, during which Salient would transfer its contract-related information. G.Ex. 1 at 29-30, 79-80. But no formal transition had occurred; CSRA got only limited information, which included a "limited code base and only access to the production server"; it did not have the complete source code. A.Ex. D at 19, 37; G.D.Ex. 1 at 30, 64, 67-68; G.D.Ex. 3 at 19, 37.

When Complainant asked for the complete source code repository, CSRA Supervisor Campbell tried to get it from another source, but that source too had never received it from Salient. G.D.Ex. 1 at 63. The best he could get was a "snapshot" of the code, which would show the code on a single day and not throughout its history. G.D.Ex. 1 at 157. Campbell gave that to Complainant and directed Complainant to recreate

the repository from the "snapshot." G.D.Ex. 1 at 63, 97-98. Campbell made this assignment at the direction of the EPA. G.D.Ex. 3 at 42.

Within a week or two, Complainant again requested the complete source code repository. G.D.Ex. 1 at 63-64. Campbell contacted a manager at Salient and asked for "a more complete version" of the source code repository "if it existed," but Salient did not provide it. *Id.* at 64.

Complainant soon asked Campbell for the complete repository yet again. *Id.* at 69. Campbell again emailed the Salient manager without success. *Id.* at 72. Each time Campbell made a request to Salient for the repository, he copied the CSRA's contact at the EPA, Rob Thomas. G.D.Ex. 1 at 72, 75, 98; G.D.Ex. 3 at 40.

Although, as directed, Complainant was using the "snapshot" to recreate the source code repository, he persisted in making weekly requests for the complete repository. A.Ex. A at 6; G.D.Ex. 3 at 26, 42-43. Nothing on the record states specifically why Complainant believed he needed access to the complete repository; it would seem that Complainant believed it would increase his efficiency for code development and was needed for cybersecurity. *See* A.Ex. A at 1; G.D.Ex. 1 at 74.

Complainant's CSRA supervisors later testified that they did not believe Complainant needed the repository. As Complainant's other CSRA manager, Alison Page, testified, "We had access to the production application, so it was just a matter of taking additional time to re-create what we needed." G.D.Ex. 3 at 40-41. She added, "I don't think [Rob Thomas of the EPA] was concerned enough about [access to the

source code repository] to pursue it any further than he did. He was willing to fund us to re-create what we needed." *Id.* at 41.

Campbell also believed that CSRA didn't need the complete repository. G.D.Ex. 1 at 72-73. He acknowledged that it would be useful but thought the snapshot was sufficient. As he testified: "[C]ertainly if there was a source code with version history, it would have given some context to where the applications were. It was a nice to have at most, though. It was certainly not required." *Id.* at 73.

Mentoring duties with junior developer. Meanwhile, Complainant was expressing frustration with the junior Java developer whom he was supposed to mentor, Rakhi Madhavan Nair. He seemed uncertain what his role was supposed to be. In a February 23, 2018 email to CSRA supervisor Page, Complainant stated:

> The types of questions [she is] asking are very junior–almost as if she has no relevant engineering experience. [Nair] is having difficulty finding things like basic jars even though every project always has files in different places–first thing an engineering learns in any programming environment from day one, be it C, C++, or Java. She considered it "wrong" location.
>
> We both have the same emails from others, same source code, same access, yet she needed help with even what FTP, files, setup (although exclaiming it was junior developer knowledge out of the blue when I wanted to trace her steps when she said she

> was commenting out code–no developer ever in history of working with at least 50,000+ engineers has ever commented out production level code to make their own environment work). [¶] [Nair] also makes requests for things which are obvious in nature (not anything complex).
>
> I saw a discussion from Ed in Lead role and I thought that was somewhat odd considering I was placed as a Lead from the start and then downgraded and replying to [Nair's] requests on very simple things.

G.D.Ex. 5.

Page discussed the email with Complainant's other supervisor, Ed Campbell. They "were kind of taken aback to [Complainant's] inclusion of the reference to the 50,000-plus engineers." G.D.Ex. 3 at 78. They thought Complainant this was an exaggeration and was unprofessional. G.D.Ex. 3 at 78. The two of them spoke, first with Complainant, and then with Complainant and Nair together. *Id.* They reminded Complainant that he was in a mentor role and that Nair was early in her career and at the beginning of her employment. *Id.* But the reminder brought about no change in Complainant's behavior toward Nair.

As Campbell observed during teleconferences he had with Complainant and Nair,

> Frequently . . . [Nair] would begin to answer a question and [Complainant] would cut her off stating that she was giving an incorrect status and that she needed to . . . wait her turn and that she would be explained by him the details of something down the road.

G.D.Ex. 1 at 174-75. Campbell testified that Complainant "struggled from the outset to communicate effectively with his colleagues" and that Complainant "was at times monopolizing on phone calls, cutting folks off abruptly, raising his voice periodically to talk over individuals and at times corresponding via email in a manner that did not lend itself to productivity and a good work environment." *Id.* at 173. Similarly, Page thought that during team meetings, Complainant "acted as if his concerns were the most important and would speak over others and . . . not follow the agenda that was laid out." G.D.Ex. 3 at 81.

Two weeks later, on March 9, 2018, Complainant again complained about Nair in an email to Campbell and Page:

> I wouldn't have brought this up again as I had to several weeks ago, but it hasn't changed–in fact, it's been happening regularly on calls, emails, and so forth. So I would like for it to stop so I can focus on the tasks I am working on. [¶] Even in discussions with Nair, I am hearing very junior levels of knowledge [giving an example].

G.D.Ex. 6.

Around March 2018, Nair called Campbell and Page; she was "highly upset" and "in tears." G.D.Ex. 3 at 79, 82; G.D.Ex. 1 at 175. She said that Complainant had been "quite hostile" toward her over the phone. She requested that Campbell and Page take her off the Portal project. G.D.Ex. 1 at 175. Page contacted account executive Reed at Apex and related Nair's complaint. G.D.Ex. 3 at 82; G.D.Ex. 4 ¶ 8. Reed counseled Complainant. G.D.Ex. 4 ¶ 8.

Complainant's interactions with other co-workers. In addition to Nair, two of Complainant's team members (Jennifer Morgan and Colleen McCarthy) complained to Campbell that Complainant "was difficult to correspond with, sometimes difficult to feel that it was an even playing field conversation where there would be a, you know, statement and a response and that he was at times assertive, bordering on aggressive when spoke to them." G.D.Ex. 1 at 173, 176-77. Page stated that everyone on the team[4] had communication problems with Complainant. G.D.Ex. 3 at 73-75. Campbell himself observed or received reports from others that Complainant had communication issues with other colleagues outside of his immediate team, including Paula Childers, Jay Waldo, and LeAnn Spradling. G.D.Ex. 1 at 173.

Complainant next complained that security administrator Paula Childers took too long to retrieve passwords for him. Campbell emailed Complainant:

> I received the following reply from Paula [Childers] this morning in regards to your punch-list requests from last night. Just so you know; my assessment of this reply is not that [Childers] is blocking or silo-ing. She appears to be doing what she can to help us within the confines of the NCC procedures she has to adhere to.

G.D.Ex. 7. Complainant replied:

> Thanks about the [passwords] list. *She can make it up* to me by sending the passwords

---

[4] Swetha Chilivery, Cindy Fan, Lawanna Goods, and Colleen McCarthy.

> right away without me having to find them. Please ask her to do this or I can directly to her. Nice talk below [referring to an email by Childers] but no passwords as of yet.
>
> I want access to those directions if it means zipping it all up in one package from each machine. I do not want her explanations any longer–just the zipped packages. I have gone enough with her filtering of what I need. I care less of what she thinks I need.

Id. Campbell responded: "I am not understanding this nastiness I'm sensing from you towards Paula. I'm not seeing anything that warrants it." *Id.*

Complainant resumed his complaints about Childers a couple weeks later. Starting in the middle of the night, he wrote three emails to Campbell, questioning her decision-making and management skills. G.D.Ex. 2. In the first, sent at 3:14 a.m., he wrote:

> For [Childers] today, to spend 30 minutes of a one hour meeting explaining development processes at EPA which she deliberately and intentionally obstructs access for developers is beyond my comprehension. . . . That is why I realized in our meeting aht [sic] she could just go on and talk for an hour over nothing that really what the intent of the meeting was. This is not the first time and I am really concerned about this repetitive Paula obstructive actions for silo purposes.. . .

G.D.Ex. 2. In the second email, sent eight minutes later, at 3:22 a.m., Complainant wrote:

> Just one other note is what really is disturbing is the fact that in the meeting she said looked at those . . . directories and said some directories are missing yet she is the one who blocked read access to those files that were missing . . . . Its not the fact that they were 100% restrictive, it's the fact that she knew because she those permissions that they were the same directories/files that had their read permissions revoked. That is beyond comprehension.
>
> Example as provided earlier circled in red as one example in one directory for fr [sic] application. They are all like that in the other directories too with some permissions with no read access. Anyways, I think you should address this with her up. . . . Anyways.

Id. In the third email, sent at 7:46 a.m., Complainant wrote:

> For tomorrow then with Rob, we should say that Paula should provide the first install while I watch all the steps. She refused in a previous meeting to discuss this in the past. . . . [¶] We also need to ensure [Childers] doesn't hijack meetings giving a lecture about dev processes. . . .

Id.[5]

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[5] Complainant's grievances with Childers continued as long as he remained at the Company. For example, on May 18, 2018, he emailed Campbell: "Not even a single thank you from Paula's team for 5 emails of advice and research. Waste of time so in the future I will not provide them any advice or recommendations." G.D.Ex. 8.

Termination of employment. On April 9, 2018, Page and Campbell notified Apex (through account executive Reed) that the General Dynamics was removing Complainant from the Portal project and wanted Apex to find a replacement. G.D.Ex. 3 at 66, 82; G.D.Ex. 4 ¶ 9.[6] They gave as reasons that Complainant was:

> (1) disruptive, domineering and aggressive demeanor during team calls and other meetings; (2) [had] defensive and aggressive interactions with team members and management; and (3) [was] perceived [as] "overstepping" such as repeated and escalating requests and demands for access to servers and information.

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[6] Complainant questions the date of this notice to Apex, asserting that there should be an Outlook calendar invitation for the date and that General Dynamics did not produce that kind of Outlook entry during discovery. On November 6, 2019, General Dynamics moved for leave to file a reply brief because it had just received a copy of the Microsoft Outlook calendar invitation through a Freedom of Information Act request to the EPA; the Outlook invitation was on the EPA's server. I allowed General Dynamics to file the reply.

On November 7, 2019, General Dynamics submitted a copy of the Outlook invitation from Page to Campbell and Reed for the meeting on April 9, 2018. The subject of the meeting was: "Java Dev's discussion." Complainant was a Java Developer. I therefore find, as confirmed in the Outlook entry, that the undisputed facts show that the meeting described in the text above did occur on April 9, 2018.

G.D.Ex. 4 ¶ 9. Page and Campbell gave additional details at their depositions; the details are consistent with the reasons recited in the quote above.[7]

On April 13, 2018, four days after General Dynamics notified Apex that it was removing Complainant from the job, Complainant emailed Rob Thomas at the EPA. Request for a Hearing at 18.[8] He reported that the Salient development team still had access to portions of the Portal project code, when instead the development team at General Dynamics IT needed that access:

> [I]f you look at the bottom right of the BEFORE image inserted here, you will see that prior to the change, I ran a group info

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[7] Page testified that they decided to remove Complainant because of "[t]he issues with meshing with the team, the consistent requests for access that he didn't need, and then—the issues with Rakhi, the other developer." G.D.Ex. 3 at 83. Campbell testified that Complainant "had some real issues communicating and collaborating productively with his immediate colleagues and extended colleagues at General Dynamics." G.D.Ex. 1 at 198. He explained that Complainant "was a poor fit for the team. He did not communicate well. He was hostile to his immediate and extended colleagues and did not represent a good fit for the project moving forward." *Id.* at 202-03.

[8] Although Complainant's email to Thomas is not on the record of this motion, it appears to be the communication to a government agency that Complainant contends was protected under the various statutes on which he relies. Complainant's failure (through counsel) to put the email on the record and cite to it is a basis to disregard it. *See* 29 C.F.R. § 18.72(c)(1)(i), (3). Nonetheless, as the applicable rule allows the ALJ to "consider other material in the record," *see* 29 C.F.R. § 18.72(c)(3), (e), and I found a copy of the email in Complainant's request for hearing before an ALJ, I will consider the email for purposes of these motions.

> linux command and saw that salient development team was still on the group (but new dev wasn't). That was one of the issues. So if you recall, you, I, and Ed all requested to the NCC that we needed access. . . . "

Id. EPA's Thomas replied ten minutes later. He advised Complainant to tell Campbell about this so the Salient employees' access could be removed as soon as possible. *Id.* He stated that leaving the names of the Salient team with access violated security controls. *Id.* Complainant answered that he would notify Campbell immediately. *Id.* at 17. Thomas commented, "This is something I need to speak to Ed about and then go up their chain of command. This makes EPA looks more than bad . . . they're burning federal resources and what is the result." *Id.*

On April 16, 2018, Campbell told Apex's Reed that Complainant had discussed "alleged project inefficiency and other project matters" with the EPA on April 13, 2018. G.D.Ex. 4 ¶ 11. Reed stated in a declaration that Apex's employees are expected to raise their concerns with Apex; in some cases, they can discuss concerns with their supervisor at the client. *Id.* Campbell requested that Reed counsel Complainant about speaking directly with EPA. *Id.* Reed complied: she told Complainant to bring any project management concerns to Campbell and Reed. *Id.*

Later that afternoon, Complainant wrote four emails to Reed. At the outset (12:26 p.m.), he thanked Reed "for the update" and said that he "definitely prefer[red] not to be in the cross fires of this," and "I prefer to stay out of politics." A.Ex. C1. But then he

continued over the next six hours to send Reed complaints about Campbell and others. *Id.*

On May 29, 2018, after Apex found a replacement for Complainant, Page told Apex (through Reed) that Complainant was off the project. G.D.Ex. 4 ¶ 13. On the same day, Reed notified Complainant that his employment was terminated and that he must return his badge and laptop. A.Ex. A at 6; A.Ex. C2; G.D.Ex. 4 ¶ 13. Complainant filed a complaint with OSHA on July 18, 2018. A.Ex. A; A.Ex. B.[9]

Discussion

Legal requirements for summary decision. On summary decision, I must determine if, based on the evidence in the record, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 18.72. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under FED. R. CIV. P. 50 and 56).

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[9] There are indications on the record that Complainant did not file his OSHA complaint until September 8, 2018. But an OSHA cover letter dated September 11, 2018, referred to a SOX complaint that Complainant filed with OSHA on July 18, 2018. A.Ex. A. For purposes of summary decision, I accept as undisputed that Complainant filed the SOX complaint on July 18, 2018; that he amended the complaint to assert claims under the other statutes; and that the amendments relate back to the July 18, 2018 filing date.

> A moving party without the ultimate burden of persuasion at trial . . . has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact.
>
> If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything.

Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000) (citations omitted).[10]

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[10] As the court further explains: "If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense. If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment. But if the nonmoving party produces enough evidence to create a genuine issue of material

I. Certain of Complainant's Environmental Whistleblower Complaints Are Time-Barred.

"[W]ithin 30 days after an alleged violation . . . , an employee who believes that he or she has been retaliated against . . . may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation" with OSHA. 29 C.F.R. § 24.103(d)(1) (implementing the timeliness provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1367(b); the Clean Air Act, 42 U.S.C. § 7622(b)(1); the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1); the Solid Waste Disposal Act, 42 U.S.C. § 6971(b); and the CERCLA (Superfund Act), 42 U.S.C. § 9610(b)).

Here, Apex Systems notified Complainant of his termination from employment on May 29, 2018. The 30-day limitations period ran on Thursday, June 28, 2018. At the earliest, Complainant filed a complaint with OSHA on July 18, 2018. Because Complainant failed to file his OSHA complaint within 30 days after he was notified of the termination, Complainant's complaint under these several statutes was untimely.

Complainant misplaces his reliance on *Passaic Valley Sewerage Comm. v. U.S. Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993). That case concerns the entities and persons to whom a person may blow the whistle and be protected under the statute. The issue here is not what activity is protected; the issue is whether Complainant timely filed with OSHA a complaint that his rights as a whistleblower had been violated.

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fact, the nonmoving party defeats the motion." *Nissan Fire & Marine Ins. Co.*, 210 F.3d at 1103 (citations omitted).

I therefore find time-barred Complainant's claims under the Federal Water Pollution Control Act, the Clean Air Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, and CERCLA.[11]

II. Respondents Are Not Employers Within the Energy Reorganization Act.

The obligation to protect whistleblowers under the Energy Reorganization Act applies only to certain entities or persons to which the Act refers as an "employer." *See* 42 U.S.C. §§ 5851(a)(1) ("No employer may discharge any employee or otherwise discriminate against any employee . . . because [he has engaged in protected activity]"). "Employer" is defined as:

> (A) a licensee of the [Nuclear Regulatory] Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);
>
> (B) an applicant for a license from the Commission or such an agreement State;
>
> (C) a contractor or subcontractor of such a licensee or applicant;
>
> (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344;

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[11] Represented by counsel, Complainant offers no facts or argument to demonstrate an entitlement to equitable tolling.

(E) a contractor or subcontractor of the Commission;

(F) the Commission; and

(G) the Department of Energy.

42 U.S.C. §§ 5851(a)(2)(A)-(G).

Both Apex Systems and General Dynamics argue that they are not employers within the statutory definition. Complainant does not dispute this. The record is devoid of any evidence that would bring either Respondent within the ERA's coverage. Complainant's claim under the Energy Reorganization Act therefore must be denied.[12]

III. Complainant's SOX Claim Fails.

The Sarbanes-Oxley Act protects employees of publicly traded companies and their contractors and agents. The Act prohibits these companies from retaliating against employees who report certain specified forms of fraud or violations of rules or regulations of the Securities and Exchange Commission. To be protected activity, the reports must be made to federal regulatory or enforcement agencies, members of Congress, or supervisors or other company officials who can address the reported concerns. *See* 18 U.S.C. § 1514A(a)(1); 29 C.F.R. § 1980.102(b)(1). The Act incorporates the procedures and burden-shifting framework of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR-21"). *See* 18 U.S.C. § 1514A(b)(2).

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[12] Complainant's claims under the ERA also fail for the same reasons as does his claim under Sarbanes-Oxley. *See* text below. In the alternative, I therefore also deny this claim on that basis.

Under the AIR-21 framework, a complainant must demonstrate by a preponderance of the evidence that:

> (1) he engaged in protected activity or conduct; (2) his employer knew or suspected, actually or constructively, that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable action.

Tides v. Boeing Co., 644 F.3d 809, 814 (9th Cir. 2011).[13] If the complainant meets his burden, then "the employer assumes the burden of demonstrating by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the [complainant's] protected activity." *Id.* (quoting *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989 (9th Cir. 2009).

A. Complainant Did Not Engage in Protected Activity before the Termination.

Protected activity. To be protected activity, the employee need not make a report that "definitively and specifically" states how the company's actions are fraud (within the statute) or a violation of the

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[13] Ninth Circuit law is controlling. AIR-21 rules and procedures apply to SOX. *See* text, *supra*. Under AIR-21, an appeal from a final order of the U.S. Department of Labor is to the U.S. Court of Appeals for the circuit in which the violation allegedly occurred or where the complainant resided on the date of the violation. 49 U.S.C. § 42121(b)(4)(A). Complainant resided in California at the relevant time, and he received notice of the termination in California. This places any appeal in the Ninth Circuit.

securities rules and regulations. *Sylvester v. Paraxel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-29, 2007-SOX-42, PDF at 17 (ARB May 25, 2011).[14] The

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[14] There is no requirement that the employee's communication "definitively and specifically" relate to one of the listed categories of fraud or securities violations. *See Sylvester v. Parexel Int'l LLC*, ARB Case No. 07-123 (May 25, 2011), slip. op. at 14-15, 2011 WL 165854 (2011). In *Sylvester*, the Administrative Review Board overruled its previous decision in *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27 (Sept. 29, 2006). As the Board explained, *Platone* erroneously imported the "definitively and specifically" requirement from the Energy Reorganization Act, 42 U.S.C.A. § 5851, where certain broad, ill-defined language necessitated a more specific showing to link the subject of the employee's complaint to the purposes of the statute. In the Board's view, Sarbanes-Oxley's language is better defined and does not require further specific or definitive connection to the statutory purpose.

In the only available post-*Sylvester* decision to address the issue in the Courts of Appeals, the Third Circuit accorded *Sylvester* deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), and no longer requires a showing that the communication relate "definitively and specifically" to a listed category of fraud or securities violations. *See Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013) ("We conclude that the ARB's rejection of *Platone's* "definitive and specific" standard is entitled to *Chevron* deference").

I am aware that, before *Sylvester*, the Ninth Circuit, which is controlling here, joined other Circuits in according deference to the ARB's holding in *Platone*. *See Van Asdale, supra*, 577 F.3d at 996. I conclude that, as did the Third Circuit, the Ninth Circuit, if addressing this issue post-*Sylvester*, would continue to follow the Supreme Court's deference doctrine, would defer to the Administrative Review Board's more recent *Sylvester* decision, and would reject any requirement that a complainant must show that her complaint relates "definitively and specifically" to one of the six listed categories of fraud or securities violations.

In this case, however, if I am in error about the Ninth Circuit's view of *Sylvester*, the error is harmless. My error

crux of the inquiry is "whether the employee reported conduct that he or she *reasonably believes*" is a SOX violation. *Id.* at 19.

"Reasonable belief" of a violation requires a complainant to hold (1) "a subjective belief that the complained-of conduct constitutes a violation of relevant law" and (2) an "objectively reasonable" belief. *Id.* at 14. Under the subjective component of this "reasonable belief" test, "the employee must actually have believed that the conduct he complained of constituted a violation of relevant law." *Id.* "In this regard, 'the plaintiff's particular educational background and sophistication [is] relevant.'" *Id.* at 14-15 (citation omitted). The objective component "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." *Id.* at 15. "Often the issue of 'objective reasonableness' involves factual issues and cannot be decided in the absence of an adjudicatory hearing." *Id.*

Here, Complainant asserts as protected activity his contact with Rob Thomas at EPA on April 13, 2018. Complainant's Brief at 4 (citing an exhibit not on the record). He argues that his communications with Thomas on that day reported a cybersecurity risk and also again discussed how a lack of access to the source code repository was wasting federal funds because the repository had to be recreated. But SOX

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would advantage Complainant because the *Sylvester* analysis lessens the burden for complainants. As I am granting summary decision, the result would be the same under *Van Asdale* and *Platone*.

whistleblower protection does not extend to cybersecurity risks or a waste of government funds.

As the First Circuit explained:

> The plain language of SOX does not provide protection for any type of information provided by an employee but restricts the employee's protection to information only about certain types of conduct. Those types of conduct fall into three broad categories: (1) a violation of [certain] specified federal criminal fraud statutes . . . ; (2) a violation of any rule or regulation of the SEC; and/or (3) a violation of any provision of federal law relating to fraud against shareholders. The first and third categories share a common denominator: that the conduct involves "fraud," and many of the second category claims (violations of SEC rules or regulations) will also involve fraud.
>
> [* * *]
>
> "Fraud" itself has defined legal meanings and is not, in the context of SOX, a colloquial term. "The hallmarks of fraud are misrepresentation or deceit." That is the dictionary definition, as well. *See* Black's Law Dictionary 685 (8th ed. 2004) (defining fraud as the "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment").

Day v. Staples, Inc., 555 F.3d 42, 54-55 (1st Cir. 2009) (citations omitted).

Complainant did not need to use words such as "securities fraud" or "mail fraud" or "wire fraud." He did not need to say he thought this was a violation of "SEC Rule 10b-5" or of "17 C.F.R. § 240.10b-5" or of any other enumerated regulation or statute. *See Sylvester, supra.* But, as the emails establish, Complainant wrote to the EPA only about a cyber-security concern and perhaps about government waste. He alleged nothing about those concerns that is suggestive or fraud or a violation of securities laws. Indeed, the EPA's Thomas knew about and directed CSRA to reconstruct the repository despite the cost; he was not deceived.[15]

Complainant offers no evidence and does not argue in his opposition to summary decision that he engaged in any other protected activity. Indeed, Complainant did not submit any evidence whatever with his opposition to summary decision.[16] He did not even submit

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[15] EPA's Thomas was kept informed throughout about the difficulty CSRA was having in getting the complete repository from Salient. Campbell copied Thomas on emails. It was Thomas who requested of CSRA that Complainant be assigned to reconstruct the repository; *i.e.*, the government knew what it was paying for and why, but it chose to pay anyway. Even if that was wasteful, there was no fraud in which CSRA or anyone could be involved.

[16] In his brief, Complainant cites evidence which Respondents submitted. He also cites exhibits that neither he nor any other party put on the record. On summary decision, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact," the ALJ may "[g]rant summary decision if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it. . . . " 29 C.F.R. ¶ 18.72(e)(3).

a declaration, reciting his account of the relevant events.

B. If Complainant Engaged in Protected Activity, That Activity Was Not a Contributing Factor in the Termination.

There is no dispute that General Dynamics decided by April 9, 2018, that it would remove Complainant from the Portal project. It informed Apex of the decision on that date. It asked Apex to find a replacement. Under Apex's policies, the effect of Complainant's removal from the Portal project was the termination of his employment with Apex: As a staffing agency, Apex hired people to work on a particular project for a particular client, and when the client removed the person from the project, that ended the employment. G.D.Ex. 4 ¶ 5. The termination was not effectuated until May 29, 2018, when Apex found a replacement. But General Dynamics conclusively communicated the decision to Apex on April 9, 2018.

Complainant offers no evidence or argument to show protected activity before April 13, 2018.[17] Thus, even if Complainant engaged in protected activity, the activity was *after* the decision to terminate and could not have contributed to that decision. As it is Complainant's burden to establish by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action and Complain-

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[17] The record also includes Complainant's continuing complaints after his actual termination on May 29, 2018. These complaints even more obviously could not have contributed to the decision to terminate, a decision that had already been made *and implemented.*

ant has failed to offer any evidence to raise a genuine issue of fact in this regard, his SOX-based claim fails.

CONCLUSION AND ORDER

For the foregoing reasons, Respondents' motions for summary decision each are GRANTED. Complainant's complaint is DENIED in its entirety.

SO ORDERED.

/s/ Steven B. Berlin
Administrative Law Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (JANUARY 25, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIK LECKNER,

Petitioner,

v.

GENERAL DYNAMICS INFORMATION TECHNOLOGY; ET AL.,

Respondents.

No. 21-70284

ARB Case No. 2020-0028

Before: TALLMAN, RAWLINSON, and BUMATAY, Circuit Judges

To the extent Leckner requests that any member of the panel be recused from this matter, the request is denied. *See* Code of Conduct for U.S. Judges Canon 3C(3)(c)(i) ("ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates

in the management of the fund"). No judge so participates.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. *See* Fed. R. App. P. 35.

Leckner's petition for panel rehearing and petition for rehearing *en banc* (Docket Entry No. 63) are denied.

No further filings will be entertained in this closed case.

ORDER OF THE U.S. DEPARTMENT OF LABOR DENYING RECONSIDERATION (DECEMBER 15, 2020)

U.S. DEPARTMENT OF LABOR
Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of: ERIK LECKNER,

Complainant,

v.

GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC. (formerly CSRA),

and

APEX SYSTEMS, LLC,

Respondents.

ARB Case No. 2020-0028

ALJ Case No. 2019-SOX-00028

Date: December 15, 2020

Before: James D. MCGINLEY, Chief Administrative Appeals Judge and Randel K. JOHNSON, Administrative Appeals Judge.

The Complainant, Erik Leckner, filed a retaliation complaint alleging that Respondents General Dynamics

Information Technology, Inc. (GDIT) and Apex Systems, LLC (Apex) violated the employee protection provisions of the Clean Air Act,[1] Comprehensive Environmental Response, Compensation, and Liability Act,[2] Solid Waste Disposal Act,[3] Toxic Substances Control Act,[4] Federal Water Pollution Control Act[5] (collectively, the Environmental Acts), Energy Reorganization Act (ERA),[6] and Sarbanes-Oxley Act (SOX)[7] by discharging him from employment.

On January 23, 2020, an Administrative Law Judge (ALJ) dismissed the complaint in a decision granting Respondents' Motions for Summary Decision. On October 22, 2020, we issued a Decision and Order (Decision) affirming the ALJ's conclusions that there was no genuine issue of material fact as to whether Leckner (1) timely filed his complaint under the Environmental Acts; (2) worked for an entity defined as an employer under the ERA; or (3) engaged in protected activity under the SOX. On October 30, 2020, Leckner filed a Petition for Reconsideration (Petition) seeking reconsideration of our Decision.

The ARB is authorized to reconsider a decision upon filing of a motion for reconsideration within a

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[1] 42 U.S.C. § 7622 (1977).

[2] 42 U.S.C. § 9610 (1980).

[3] 42 U.S.C. § 6971 (1980).

[4] 15 U.S.C. § 2622 (1986).

[5] 33 U.S.C. § 1367 (1972).

[6] 42 U.S.C. § 5851 (2005).

[7] 18 U.S.C. § 1514A (2010).

reasonable time of the date of which the decision was issued.[8] We will reconsider our decisions under limited circumstances, which include: (i) material differences in fact or law from those presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, or (iv) failure to consider material facts presented to the court before its decision.[9]

Leckner asserts that we should reconsider our Decision because we failed to consider evidence he presented on appeal.[10] As we explained, he did not present any exhibits in responding to Respondents' Motions for Summary Decision and he did not explain why he was unable to do so.[11] Leckner also asserts that he engaged in SOX and ERA-protected activities and his claims under the Environmental Acts were timely.[12] We considered and rejected those arguments in our Decision.[13]

In sum, none of Leckner's arguments fall within any of the four limited circumstances under which

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[8] *Rosenfeld v. Cox Enters., Inc.*, ARB No. 2016-0026, ALJ No. 2014-SOX-00033, slip op. at 2 (ARB May 26, 2017) (citing *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 2-4 (ARB May 30, 2007)).

[9] *Id.* at 2-3.

[10] Petition at 5, 34.

[11] Decision at 5, n.10.

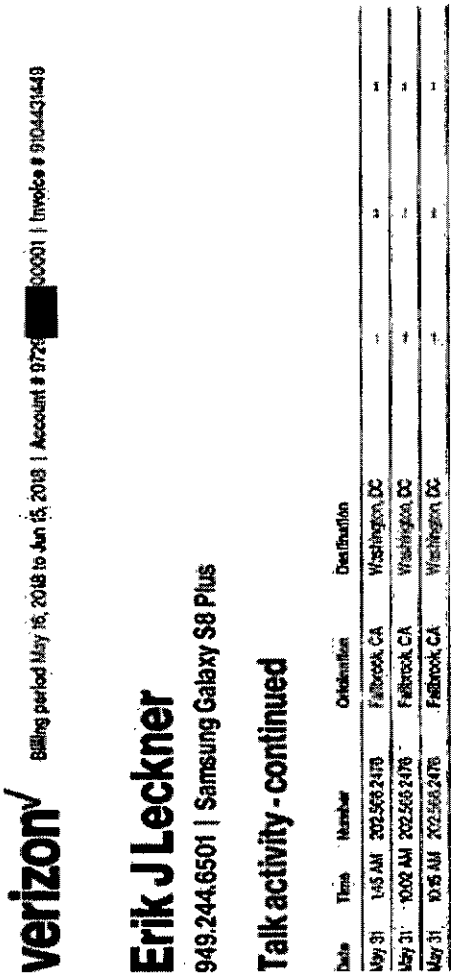
[12] Petition at 22, 30.

[13] Decision at 4-7.

we will reconsider our decisions. Therefore, we DENY his Petition. Leckner may appeal our Decision as described in the regulations at 29 C.F.R. §§ 24.112 (judicial review under the Environmental Acts and ERA) and 1980.112 (judicial review under the SOX).

SO ORDERED.

EXHIBIT I
INITIAL COMPLAINT



verizon Billing period May 16, 2018 to Jun 15, 2018 | Account # 972[redacted]00001 | Invoice # 9104431449

Erik J Leckner

949.244.6501 | Samsung Galaxy S8 Plus

Talk activity - continued

Date	Time	Number	Origination	Destination				
May 31	1:45 AM	202.566.2478	Fallbrook, CA	Washington, DC			1	
May 31	10:02 AM	202.566.2478	Fallbrook, CA	Washington, DC			1	
May 31	10:15 AM	202.566.2478	Fallbrook, CA	Washington, DC			1	

EPA (OSHA FEDERAL PARTNER AGENCY)
WHISTLEBLOWER CALLS (MAY 31, 2018)

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Washington, D.C. 20460

June 7, 2018

Memorandum

Subject: Office of Inspector General Hotline
Complaint 2018-0285

From: [redacted]
Special Agent, Hotline Manager
Headquarters, Office of Inspector General

To: Patrick Sullivan
Assistant Inspector General
Office of Investigations

The Environmental Protection Agency (EPA), Office of Inspector General (OIG), Hotline received a telephone from an unknown EPA contractor. The caller wanted to report contract fraud for a CSRA contract in RTP. The caller sent an electronic message detailing concerns with the contractor's activities.

The caller email is imetro@yaboo.com and the phone number he called from is 949-244-6501. The caller resides in California and is being sent an email informing that this has been sent to the RTP Field Office.

Please inform the Hotline within the next 5 calendar days that this referral was received. If you have any further questions, please call me at [redacted].

From: I Metro <imetro@yahoo.com>
Sent: Tuesday, June 05, 2018 6:39 PM
To: [redacted]
Subject: Re-EPA OIG Hotline Point of Contact
Special Agent: [redacted]
US EPA. OIG. Office of Investigations HQ
1200 Pennsylvania Ave NW Mailcode 2431T
Washington. DC 20460
[redacted]

Dear [redacted],

I have extensive experience in software engineering with over 23 years of post-university experience, plus 3 years of work while in graduate school at NRL/NASA in software engineering. There is nothing that can go undetected or that I have a lack of experience of in the particular technology stack being used at the EPA.

1. CSRA is over billing the EPA in Durham NC/Raleigh NC on government contracts. In writing from Project Managers via epa.gov emails, in skype meetings, and on telephone calls, the PM is allowing for this activity to occur. In emails and in discussions, the PM has gone as far as stating it is the practice of charging more than is legally or ethically acceptable on work related items, The EPA Project Leader is an EPA employee. I know for fact that the EPA project leader is not responsible for this and tried unsuccessfully at times to see certain work orders performed with proper SLA terms. On this one project alone. CSRA now has a history of over-billing the EPA federal government agency, has questionable internal business practices and failed to provide quality service

that seriously undermines its ability to perform the EPA contract

2 EPA has numerous security vulnerabilities that have been at least one of the following:

a) gone undetected for years (up to perhaps 14 years);

b) un-escalated when discussed in emails and meetings and IIRA tickets by myself when I detected these vulnerabilities which can occur in development, staging, and product servers like lava and fractal;

c) ignored by CSRA PM; and

d) improperly handled by resolution.

The also include security vulnerabilities for DDoS attacks Given that CSRA manages the Oracle Access and Identity Management systems, these vulnerabilities may even apply to projects outside of the project in question

3. CSRA does not meet the integrity and business ethics for the EPA EMP project. Several of CSRA's employees come from CSC, which also has a history and CSC has been criminally convicted for lying to other agencies including the FAA regarding security issues, and was found to have over-billed the FAA.

4. 14 years of code base disappeared by CSRAs failure to retrieve the proper source code repository from Salient CGRT which was the prime contractor prior to CSRA. Prior to Salient, Lockheed was on the project. Under my recommendations, CSRA intentionally failed to retrieve the code. EPA Project Leader had to force CSRA PM to get it from Salient

and after the last attempt to get the right thing, failed to go on my next recommendation which was where I would give Salient step by step instructions on how to recover the code that has riot been retrieved from previous contractor.

5. CSRA has a resource which lacks the credentials to perform the right duties in her role and has cost the government 4.5 months of labor (being billed but no work being produced).

If interested, we can discuss further.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL
109 TW Alexander Drive
Research Triangle Park, NC 27711

Case #: OI-RTP-2018-
Title: CSRA LLC, Falls Church, VA
Prepared by: SA [redacted]

CASE INITIATION

Subject(s)	Location	Other Data
CSRA LLC	Durham, NC	

Narrative:

On June 7, 2018, the Environmental Protection Agency, Office of Inspector General (EPA OIG), Hotline received a telephone call from an unknown EPA contractor (complainant). The complainant alleged contract fraud by CSRA LLC, an EPA contractor in Research Triangle Park (RTP), NC. The complainant then sent an email detailing his concerns (see attachment). In his email the complainant alleged CSRA was "over billing the EPA in Durham NC/Raleigh NC on government contracts". No details and/or evidence regarding the "over billing" was provided. The complainant also alleged "EPA has numerous security vulnerabilities". The complainant provided a phone number and email address.

Attachment:

1. Hotline Referral #2018-0285
2018-0285 referral.pdf

EXHIBIT II
OBJECTIONS TO THE FINDINGS AND REQUEST FOR A HEARING, RELEVANT EXCERPTS ("REQUEST")

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ADMINISTRATIVE LAW JUDGE
(ALJ)

ERIK LECKNER,

Complainant,

v.

GENERAL DYNAMICS (GD), GENERAL DYNAMICS INFORMATION TECHNOLOGY (GDIT), CSRA, AND APEX SYSTEMS,

Respondents.

Case No. 4-3750-18-155

OBJECTION TO THE FINDINGS AND REQUEST FOR A HEARING

To great relief, Erik Leckner (hereinafter "Complainant") hereby files the Complainant's objections to the findings and requests for a hearing by the ALJ in California where Complainant resides and worked at all times during employment of Apex / General

Dynamics / CSRA. Complainant had worked out of the San Diego EPA office and his own company's office.

FILING OF RETALIATION COMPLAINTS

Complainant was retaliated against by Respondents in violation of at least the following regulatory acts:

i) Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A (SOX);

ii) Section 211 of the Energy Reorganization Act (ERA), 42 U.S.C. Section 5851;

iii) Section 507(a) of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. Section 1367;

iv) Section 322(a) of the Clean Air Act (CAA), 42 U.S.C. Section 7622;

v) Section 32(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. Section 2622;

vi) Section 7001(a) of the Solid Waste Disposal Act (SWDA), 42 U.S.C. Section 6971; and

vii) Section 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Section 9610.

Complainant filed United States (U.S.) Department of Labor (DOL) Occupational Safety and Health Administration (OSHA) complaints in one in June 2018, one in September 2018, two in January 2019, and one in February 2019 both orally and in writing. Complainant received back only two case acknowledgements by U.S. DOL OSHA although four or more

were filed as two were filed the same day in January 2019 as we will be demonstrated below via evidence. Between said first and second complaint, Complainant further filed a complaint with the EPA Office of Inspector General (OIG) and the SEC. Complainant further filed a complaint with the NRC, the FBI, and the DOJ.

EPA OIG (where Complainant discussed with EPA OIG on June 12, 2018, that he had contacted OSHA prior to even opening the EPA OIG investigation):

On Tuesday, June 12, 2018 5:08 PM,
I Metro <imetro@yahoo.com> wrote:

> Home Page | Whistleblower Protection Program
>
> File a complaint if your employer has retaliated against you for exercising your rights as an employee.
>
> [. . .]

. . . investigation as evidence will be presented in the President's investigation, regardless of OSHA, in public hearings, and in ALJ hearing.

Furthermore, the OSHA Region 4 investigation simply ignored that Complainant was specifically required to not whistle blow above Campbell immediately following Complainant 's whistle blowing to the EPA for which he was instructed to officially request that Campbell and Childers and Spradling perform their obligations and duties to the EPA:

> Dominique N. Reed <dreed@apexsystems.com>
> To: I Metro, Dominique N. Reed
> Apr 16 at 8:48 PM

> Christian,
> Thank you for your emails. I informed the team that we spoke and let them know you would go to Ed for any escalation.
> Please Cc me on communication. I will review your emails.
> Thank you,
> Dominique
>
> Sent from phone please excuse autocorrect.

Yet even furthermore, Complainant had whistle-blown the failure of CSRA/General Dynamics to perform their obligations of retrieving the source code repository both in the transition period and in the project period (highlighted below) and failure to provide required access, over billing, charging even on simple development machine setup, charging for idle time–all of which is fraud/false claims, whilst harassing and retaliating against Complainant–as General Dynamics and CSRA staff were fully aware of the implications of billing for no services being provided by certain EMP team members:

> From: Thomas, Rob
> Sent: Friday, April 13
>
> . . . I figured as much for the repository. That's the Government's code. We are owed that code.
>
> . . .
>
> This has to be noted on their lack luster approach to support EMP.
>
> . . .
>
> Thanks.
> Rob

From: Thomas, Rob
Sent: Friday, April 13, 2018 6:21 PM
To: Leckner, Erik
<Leckner.Erik@usepa.onmicrosoft.com>
Subject: RE: Group emp on staging access for eleckner, Rakhi

Hey Christian.

I read the email thread, it's unacceptable of the responses you and Ed received. People are in these Federal Contract positions and you have to see responses like you're in high school. There should be set procedures and communication templates with a hard line stance on usage. They make difficult for themselves. This is something I need to speak to Ed about and then go up their chain of command. This makes EPA looks more than bad . . . they're burning federal resources and what is the result. Thanks.

Rob

From: Thomas, Rob
Sent: Friday, April 13, 2018 6:14 PM
To: Leckner, Erik
<Leckner.Erik@usepa.onmicrosoft.com>
Subject: RE: Group emp on staging access for eleckner, Rakhi

Hi Christian.

Awesome! After 2 or 3 times with a hour or so gap in between them . . . you level up to the chain of command that you speak of via Ed. I want those names gone like yesterday . . . this is unacceptable.

I picked that up when I spoke to you. I'm the same way . . . there are milestones, protocols, and procedures to almost everything. This NCC group has broken them and it showed on the survey I completed. I'm pushing for SLA on inside technical support.

Thanks.

From: Leckner, Erik
Sent: Friday, April 13, 2018 6:02 PM
To: Thomas, Rob <Thomas.Rob@epa.gov>
Subject: RE: Group emp on staging access for eleckner, Rakhi

Hi Rob,

I shall do ASAP (next email out now). I mentioned this several times to them in emails. As you can see names are still there.

. . .

My recommendation between you and I is this:

Someone from CSRA is appointed high up that can make sure NCC/WAM perform things that are required much faster. This way they can coordinate with EMP CSRA team and get things done fast (like I am accustomed to in the F500 world and the tech startup world. My background is with Verizon, Boeing, NASA, NRL, Google Digital Marketing Partner, Nissan/Infiniti, ATT/ iPass, Tango.me (mobile app similar to skype) with 400M+ in funding, TIBCO, Seagate Technology, Ericsson, Fujitsu, ADP, United Health, Capital Group Companies (managing

$3T in assets for mutual funds), and others

. . .

Between you and I, never seen anything this slow.

At United Health, for example, 1 hour to get up and running but diff situation. We were writing code the first day (all experienced engineers).

At ADP, 1 day (because we had to integrate Eclipse with Websphere)

At Capital Group, no time (since it was setup prior to me starting)

. . .

Christian Leckner
Principal Engineer ITS-EPA | CSRA
San Diego, CA 92028 | PDT
949-244-6501 | leckner.erik@epa.gov

From: Thomas, Rob
Sent: Friday, April 13, 2018 5:50 PM
To: Leckner, Erik
<Leckner.Erik@usepa.onmicrosoft.com>
Subject: RE: Group emp on staging access for eleckner, Rakhi
Hi Christian.
Make sure you inform Ed of this behavior from NCC. So he can have those names removed. Their contract was cancelled and some of those 5 user name need to removed, yesterday. This violates FISMA NIST 800-53 Rev 4 Security Controls on proper user access. Thanks.

Rob

From: Leckner, Erik
Sent: Friday, April 13, 2018 5:40 PM
To: Thomas, Rob <Thomas.Rob@epa.gov>
Subject: RE: Group emp on staging access for eleckner, Rakhi

Hi Rob

One other thing to note–if you look at the bottom right of the BEFORE image inserted here, you will see that prior to the change, I ran a group info linux command and saw that salient development team was still on the group (but new dev wasn't).

That was one of the issues. So if you recall, you, I, and Ed all requested to the NCC that we needed access. Initially it was sudo jdaemon priv, then it was an alternative user, and also group access.

Christian Leckner
Principal Engineer
ITS-EPA | CSRA
San Diego, CA 92028 | PDT
949-244-6501 | leckner.erik@epa.gov

From: Thomas, Rob
Sent: Thursday, April 5, 2018 5:10 PM
To: Leckner, Erik
<Leckner.Erik@usepa.onmicrosoft.com>
Subject: RE: Group emp on staging access for eleckner, Rakhi

Keep me posted for any actions I need to approve of. I agree we need to have the same rights, access, permissions at the previous

> contractor. Even as they developed offsite. LOL.
>
> Rob
>
> From: Leckner, Erik
> Sent: Thursday, April 5, 2018 5:04 PM
> To: Thomas, Rob <Thomas.Rob@epa.gov>
> Subject: FW: Group emp on staging access for eleckner, Rakhi
>
> Hi Rob
>
> I put you on bcc for this thread, since it has been very difficult getting Dan/Paula to properly grant us staging access to see the files there. We're working on it steadfast here, just wanted to keep you in the loop (in bcc).
>
> Christian Leckner
> Principal Engineer
> ITS-EPA | CSRA
> San Diego, CA 92028 | PDT
> 949-244-6501 | leckner.erik@epa.gov

Furthermore, it is obvious that Complainant had whistle blown the destruction of the source code repository by Page and Campbell or otherwise Thomas (EPA) would never have written the following:

> From: Thomas, Rob
> Sent: Friday, April 13
>
> I figured as much for the repository. That's the Government's code. We are owed that code

"I figured as much" is clearly a response to Complainant's whistle blowing. Complainant made it very clear numerous times in his original complaints and

responses. In addition to this, Thomas (EPA) clearly stated the following, and was provided as evidence in numerous places in Response, Addendum, and Final Supplemental Response:

> Hey Christian.
>
> You'd be surprised why they wouldn't. Glad to read progress is being made finally. SMH. So we still have keys to be reset?
>
> It should not have taken 2 months to get access to those accts.
>
> From: Thomas, Rob
> Sent: Friday, April 13
>
> That's good to know. That's correct. I figured as much for the repository . . .

Clearly, simple access for already authorized accesses in order for Complainant to perform his required duties which had taken 2 months, and other intentional and deliberate delays is considered false claims to the Federal Government (EPA), as the EMP team depended on said accesses to perform their work. Without a new repository which Complainant had to reconstruct without version history, certain EMP staff such as Rakhi Nair, and others could not have performed any actual development, nor delivered any new additional code, and therefore, could not have even billed the government for EMP software development work as code is designed, developed, tested at unit level, system level, and actual staging/production level and none of it

[. . . .]

EXHIBIT III
RETALIATION

Evidence that termination is based on employer knowledge of EPA customer communications on a protected channel.

From: Page, Alison <Page.Alison@epa.gov>
Sent: Monday, April 16, 2018 1:55 PM
To: Bennett, Jerry <Jerry.Bennett@csra.com>
Subject: FW: Christian Escalation

Hey Jerry,

Just wanted to give you a heads up that we're looking to replace Christian Leckner–he's really gotten out of control with his communications and it's overflowing to the customer at this point. We're working with Dominique on this process.

Thanks,

Ali Page
ITS-EPA III CSRA
79 TW Alexander Dr, Bid 4401, NC 27713
page.alison@epa.gov I (o) 919.200.7283
http://intranet.epa.gov/webdev

Evidence that termination is based on employer knowledge.

From: Leckner, Erik
Sent: Monday, April 16, 20181:14 PM
To: Campbell, Ed <Campbell.Ed@epa.gov>
Subject: RE: NCC

On Friday, he sent that to me. It was end of week so I guess he wanted to reach out to discuss his thoughts on the NCC.

Christian Leckner
Principal Engineer
ITS-EPA | CSRA
San Diego, CA 92028 J PDT
949-244-6501 | leckner.erik@epa.gov

From: Campbell, Ed
Sent: Monday, April 16, 2018 9:40 AM
To: Leckner, Erik
<Leckner.Erik@usepa.onmic:rosoft.com>
Subject: RE: NCC

Christian,

Where are you quoting this from? Is this some correspondence with Rob that I didn't see?

From: Leckner, Erik
Sent: Friday, April 13, 2018 6:05 PM
To: Campbell, Ed <Campbell.Ed@epa.gov>
Subject: NCC
Importance: High

Hello Ed,

Rob mentioned to me that NCC needs to remove from all groups on all machines Salient developers and was asked by Rob to inform you of this. Salient is still in Linux groups even though they are most likely to have their access/login revoked when they left.

"Their contract was cancelled and some of those 5 user name need to removed, yesterday. This violates FISMA NIST 800-53 Rev 4 Security Controls on proper user access."

Christian Leckner
Principal Engineer

From: Campbell, Ed
Sent: Monday, April 16, 2018 1:44 PM
To: Leckner, Erik
<Leckner.Erik@useoa.onmicrosoft.com>
Cc: Page, Alison <Page.Alison@epa.gov>
Subject: RE: NCC

Christian,

To be clear. Please do not communicate to Rob without me/Colleen CC-ed. It's not okay for you to escalate your problems with the staff directly to our customer without running your thoughts/questions through us first. Paula asked for 20 hours to do the initial configuration on our server and she has not had 20 hours yet. She was working on this on Friday.

Ed Campbell
ITS-EPA III GDIT
79 TW Alexander Dr, Bid 4401, NC 27713
campbell.ed@eoa.gov | (o) 919.200.7243
http://intranet.epa.gov/webdev

From: Leckner, Erik
Sent: Monday, April 16, 2018 1:22 PM
To: Campbell, Ed <Campbell.Ed@epa.gov>
Subject: RE: NCC

Hi Ed

Please ask NCC remove all references to previous developers from groups where lanids are present. Rob asked me to tell you this on Friday afternoon, along with his many thoughts on how NCC is responding to our simple requests. In summary, he asked:

a) NCC immediately remove all lanids from Salient on all systems

b) NCC stops replying to you and I like they were in high school (this is reference to LeAnn and Paula)–he mentioned if they do this again, he will call a meeting with Paula, Ali, etc and other EPA staff (either that he works with or higher up)

c) He wants much better SLA response times–they should be acting on our EMP requests within 1-2 hours ideally, not as it has been.

Christian Leckner
Principal Engineer
ITS-EPA | CSRA

Evidence before April 9 that termination is based on employer knowledge–note here also how Page refers to required accesses as battles, causing occupational safety and health heart related issues, using language such as ass and incorrect on items–Page is a supervisor–protected activity.

From: Page, Alison
Sent: Monday, April 6, 2018 2:38 PM
To: Campbell, Ed <Campbell.Ed@epa.gov> Leckner, Erik <Leckner.Erik@useoa.onmicrosoft.com>

Cc: Madhavan Nair Kamala Devi Rakhi
<madhavan-nair-kamala-devi.rakhi@epa.gov>
Subject: RE: EMP dev box

Hey Christian,

Sorry I'm very busy right now so I can't chat about it over the phone but in re reading what LeAnn sent below–I think you're getting more than the norm already . . . I've noted some things below for your consideration here:

- Middleware team will build patch, configure, updated the middleware–Deliberative Process / Ex.5 Java. Requested (in our Monday meeting)—Sounds like this one is good to go.

- Middleware team will not provide further documentation/README on the install and configuration of these environments, beyond what has already been supplied. There is no point to spend time and customer dollars to document task which can be handed by the middleware team. Specific question can be emailed to cam.middleware@epa.gov, or Paula/CC LeAnn.

No, we need to know what they are doing on our dev box. Will need README.–README file will not be created. Paula send out a quarterly with the updated that will be made. You'll see the changes before they're made so you can ask questions at that point.

- Read-only access to middleware config files, log files will be provided either via group membership or adding world-read in the staging and dev environment; the mechanism

by which to provide this will be up to the middleware team.

No not on dev.–Read only access is all that's ever provided to non-middleware members even on dev boxes. As long as the dev box paid for by an NCC customer and managed by NCC, this is the process and it will not change.

- A ticket has been opened with WAM to add EMP developers to the EMO group.

Completed by WAM–I had request this–Done, excellent!

- Middleware team manager will not approve any sudo to administrative user used to build or configure middleware such as Deliberative Process / Ex.5 and potentially others.

We're not trying to build it. We need Sudo for other things.–You already have root access so I'm not understanding the issue here? You don't need sudo for anything if you have root.

- Middleware team recommends that if EMP developers do have full root or sudo all on the dev box, that this be removed This is for their protection. The use of sudo is closely tracked by the hosting team and security tickets can be raised or opened.

Nope (dev)–Rob already approved of this–Correct, this is approved and your already have the access needed. She's not going to remove it, she's just making a recommendation to cover her ass (battle won)

- If it is not removed, middleware team request and required that communication in writing

> be given to EMP developers stating clearly that they are not to attempt to change the middleware environment in any way. Any such changes which cause security problems, config drift issue with production, etc will require additional hours–which cannot be determined–to correct

We are not attempting to change middleware–Not removing your access, she's just covering her ass again here (Battle won)

- Middleware team will recommend and facilities sudo rights to stop and restart Apache and Tomcat and deploy code.

Nope–absolutely not (dev). We will be restarting Tomcat regularly–She is giving you sudo rights to restart XXXXX regularly (battle won)

Thanks,

Ali Page
ITS-EPA III CSRA

Employer knowledge of protected activity before April 9.

From: Leckner, Erik
Sent: Friday, April 6, 2018 2:52 PM
To: Page, Alison <Page.Alison@epa.gov> Campbell, Ed <Campbell.Ed@epa.gov>
Cc: Madhavan Nair Kamala Devi, Rakhi <madhavan-nair-kamala-devi.rakhi@epa.gov>
Subject: RE: EMP dev box

You must realize that we didn't discuss with Salient deployment. They modified files. I'll play forensics if I need to if they don't provide, But why? I spent many hours to even determine that Paula had sabotaged the projects (changed permission to normal files so only she could see them). Rakhi and I had countless hours of frustration trying to get things to work because file and directories were being intentionally hidden from our view–the developers. Even Rob has stated the following:

> Keep me posted for any action I need to approve of. I agree we need to have the same rights, access, permission at the previous contractor. Even as they developed offsite. LOL.

That should be grounds for getting a README or I need to play forensics. I Even requested EMP access 20 times since Feb, Rob twice, and not until I finally Let LeAnn know that it is needed did Paula act on it.

Christian Leckner
Principal Engineer
ITS-EPA | CSRA
San Diego, CA 92028 | PDT
949-244-6501 | leckner.erik@epa.gov

From: Leckner, Erik
Sent: Friday, April 6, 2018 2:47 PM
To: Page, Alison <Page.Alison@epa.gov> Campbell, Ed <Campbell.Ed@epa.gov>
Cc: Madhavan Nair Kamala Devi, Rakhi <madhavan-nair-kamala-devi.rakhi@epa.gov>
Subject: RE: EMP dev box

I need to show what a README is. SO here is reference.

https://en.wikipedia.org/wiki/README
Deliberative Process / Ex.5

A readme taken an extra 10 seconds per major step. A readme Is required idf they are touching files in development box that isn't standard install and it isn't. I gave case and points the other day to Ed.

Christian Leckner
Principal Engineer
ITS-EPA | CSRA
San Diego, CA 92028 | PDT
949-244-6501 | leckner.erik@epa.gov

EXHIBIT IV
OFFICIAL DATE OF DISCHARGE
(JUNE 13, 2018)

Apex Employment Notification

Yahoo/Angel

Julie Davis <jadavis@apexsystems.com>
To: 'christian@mobilet.com'

Wed, Jun 13, 2018 at 2:10 PM

Hello!

Attached you will find a document indicating your employment with Apex Systems/Apex Life Sciences has come to an end, which is required by state law. Should you have any questions regarding this notice, please contact the number as indicated on the form.

Thank you for working with Apex.

Regards,

Contractor Care

Julie Davis , Contractor Care Specialist
Apex Systems | Apex Life Sciences
5020 Sadler Place, Glen Allen, Virginia 23060
Office. 866-612-2739 | Fax. 804-545-4634
jadavis@apexsystems.com
www.apexsystems.com | www.apexlifesciences.com

APEX EMPLOYMENT NOTIFICATION

Yahoo/Angel

Wed, Jun 13, 2018 at 2:10 P.M.

From: Julie Davis <jadavis@apexsystems.com>
To: 'christian@mobileti.com'

Hello!

Attached you will find a document indicating your employment with Apex Systems/Apex Life Sciences has come to an end, which is required by state law. Should you have any questions regarding this notice, please contact the number as indicated on the form.

Thank you for working with Apex.

Regards,
Contractor Care

Julie Davis, Contractor Care Specialist
Apex Systems | Apex Life Sciences
5020 Sadler Place, Glen Allen, Virginia 23060
Office 866-612-2739 | Fax: 804-545-4834
jadavis@apexsystems.com
www.apexsystems.com | www.apexlifesciences.com

EXHIBIT V
U.S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) COORDINATION WITH FEDERAL PARTNER AGENCIES
(OCTOBER 3, 2017)

U.S. Department of Labor
Occupational Safety and Health Administration
Washington, D.C. 20210
Reply to the attention of:

MEMORANDUM FOR:
REGIONAL ADMINISTRATORS
WHISTLEBLOWER PROGRAM MANAGERS

THROUGH:
LOREN SWEATT
Acting Assistant Secretary

THROUGH:
THOMAS GALASSI
Acting Deputy Assistant Secretary

FROM:
FRANCIS YEBESI, Acting Director
Directorate of Whistleblower Protection Programs

SUBJECT:
Coordination with Federal Partner Agencies

The purpose of this memorandum is to explain the process for working relationships between the Occupational Safety and Health Administration (OSHA) Whistleblower Protection Program (WPP) and the Partner Agencies to ensure effective coordination in their respective enforcement of OSHA's whistle-

blower protection provisions and the underlying public protection statutes. This memorandum . . .

[. . .]

IV. PROCEDURES FOR HANDLING COMPLAINTS FROM PARTNER AGENCIES

1. DWPP will transmit any complaints received from the Partner Agency to the appropriate Regional Office's Assistant Regional Administrator (ARA) for WPP.

2. The Regional Office's WPP will review the referral from the Partner Agency.

3. The Regional Office's WPP will contact Complainant to determine whether there is a prima facie allegation of retaliation and verify Complainant's intent to file a retaliation complaint.

4. OSHA will use the date that the complaint was submitted to OSHA as the date of filing for the retaliation complaint, unless the complaint was submitted to OSHA after the whistleblower provision's filing period. In the latter case, the date the complaint was filed with the Partner Agency will be used if the complaint was filed within the whistleblower provision's filing period.

V. EFFECTIVE DATE

The effective date for implementation of this procedure is October 1, 2017.

Appendix A

Statutes	Partner Agencies
Environmental and Nuclear Safety	
Asbestos Hazard Emergency Response Act (AHERA) Clean Air Act (CAA) Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Safe Drinking Water Act (SDWA) Federal Water Pollution Control Act (FWPCA) Toxic Substances Control Act (TSCA) Solid Waste Disposal Act (SWDA)	Environmental Protection Agency (EPA)
Energy Reorganization Act (ERA)	Nuclear Regulatory Commission (NRC) Department of Energy (DOE)

[. . .]