



In the Matter of:

ED HENRICH,

ARB CASE NO. 05-030

COMPLAINANT,

ALJ CASE NO. 04-SOX-51

v.

DATE: June 29, 2006

ECOLAB, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kurt C. Banowsky, Esq., *Banowsky, Betz & Levine, Dallas, Texas*

For the Respondent:

James D. Jordan, *Munsch, Hardt, Kopf & Harr PC, Dallas, Texas*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Sarbanes Oxley Act (the Act or the SOX).¹ Ed Henrich filed a complaint alleging that Ecolab, Inc. retaliated against him in violation of the SOX. On November 23, 2004 an Administrative

¹ 18 U.S.C.A. § 1514A (West Supp. 2005). Title VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 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 any provision of federal law relating to fraud against shareholders. *See* 68 Fed. Reg. 31864 (May 28, 2003). Department of Labor implementing regulations are found at 29 C.F.R. Part 1980 (2005).

Law Judge (ALJ) issued a Recommended Decision and Order recommending dismissal of the complaint. For reasons stated below, we affirm the ALJ's ruling and dismiss the complaint.

BACKGROUND

Ecolab is a publicly traded company with headquarters in St. Paul, Minnesota. Henrich joined Ecolab in July 1997 as an operations manager at Ecolab's plant in Woodbridge, New Jersey. T. 31.² In June 2002 Henrich became the plant manager at Ecolab's plant in Garland, Texas. T. 31, 34-35. Henrich's supervisor at the Garland plant was Roger Zillmer, one of Ecolab's vice presidents for operations. T. 38, 231. Zillmer in turn was supervised by Maurizio Nisita, Ecolab's Senior Vice President for Operations.³ T. 254, 358; R. D. & O. at 2. The Controller at the Garland plant was Robert Peabody. T. 274.

Ecolab's process

One of the products manufactured at the Garland plant was Geo, a commercial dishwashing detergent. Geo was composed of raw materials that were processed, shaped into blocks, labeled, and packaged for shipping. T. 36. During the manufacturing process, some of the materials used to create Geo became "by-product" (material not incorporated into the product). Some by-product was classified as "good bulk" (by-product that could be put back into the manufacturing process at low cost) and some as "inventory at risk" (by-product designated for salvage). T. 65-68.

Prior to Henrich's arrival at the Garland plant, some of Ecolab's customers had complained about flaws in Geo, such as crumbled edges, discolored blocks, shrink wrap tears, and improperly positioned labels. T. 53-54. In response Ecolab implemented various quality-control procedures including a new inspection process, the MIL (military) standard. CX 37, 45. The MIL standard required Ecolab employees to inspect 125 cases from each lot of Geo. A lot consisted of 1,536 cases, on 27 full pallets and one partial pallet. Cases were supposed to be selected for inspection according to a 4-5-4 pattern: four cases from the first pallet, five from the second, four from the third, and so on. If an inspection revealed a specified number of defects in any lot, then the employees were

² We use the following abbreviations: R. D. & O. – Recommended Decision and Order; T. – Hearing Transcript; C. – Complainant; R. – Respondent; CX – Complainant's Exhibit; RX – Respondent's Exhibit.

³ The ALJ stated that Zillmer's supervisor was Paul Anderson, head of Ecolab's North American manufacturing. R. D. & O. at 2. Both Zillmer and Henrich testified, however, that Nisita was Zillmer's supervisor. T. 38, 254, 358. Although Anderson testified that he directed Zillmer to take certain actions, Anderson did not testify that he was Zillmer's "supervisor." T. 402-422.

supposed to inspect every case in that lot. R. D. & O. at 3; T. 86, 171-200, 295; RX 4. Ecolab stopped requiring use of the MIL standard sometime in September or October 2003. R. D. & O. at 3; T. 94, 202, 216, 477.

Labor cost accounting

During the last quarter of 2002, Henrich noticed that some managers at the Garland plant were attributing some of the plant's labor costs to a divisional or corporate expense account. T. 61-64. In March 2003, Henrich expressed concerns about this practice to his supervisors, including Zillmer. Zillmer was aware that managers had abused this practice. T. 64, 284. Ecolab discontinued this practice shortly thereafter, and as a result the Garland plant began to exceed its budget by between \$35,000 and \$40,000 per month in labor charges. T. 64; R. D. & O. at 6. Zillmer testified that Henrich was "instrumental" in helping Ecolab address the labor-costs issue. R. D. & O. at 10.

Inventory accounting

When Henrich arrived at the Garland plant, he observed Ecolab engaging in accounting practices that he believed distorted its internal accounting. Specifically, Henrich believed that Ecolab erroneously tracked as good bulk some by-product that should have been classified as inventory-at-risk, as well as some defective by-product that already had been discarded. T. 64-68, 70-71.

Ecolab employees are governed by a Code of Conduct. RX 1. The Code describes company policies and grounds for discipline, and requires managers to file annual written descriptions of violations of the Code, including accounting irregularities. *Id.*; T. 135, 365-368.⁴ Despite his concerns about the accounting practices, Henrich did not report any violations in his 2003 Code of Conduct certification. RX 3. Henrich testified that he did not do so because he believed that discussing such violations with his supervisors had fulfilled any reporting obligation, and he had done so because he had expressed concern about the accounting practices to Zillmer, Peabody, and Carol Gribble in accounting.⁵ T. 65, 72, 77-78. The ALJ, however, found that "Henrich's testimony that he informed Roger Zillmer, Bob Peabody, and Carol Gribble of the inventory problems [was] less than credible." R. D. & O. at 9.

⁴ See, e.g., RX 1 at 26 ("Committing or contributing to acts of dishonesty against Ecolab, such as fraud, theft, embezzlement or misappropriation of corporate assets, will result in appropriate discipline.").

⁵ Henrich testified that in addition to reporting the labor-cost and inventory accounting practices, he also verbally reported other Code violations, such as the adulteration of products, and the falsification of cap-torque tests. T. 54-60. Henrich does not argue that these violations were the underlying basis for any protected activity.

In February 2003 Paul Anderson, head of Ecolab's North American manufacturing, instructed that certain good bulk inventory be reclassified as salvage inventory, a classification similar to that of inventory-at-risk, in order to address the possible inclusion of unusable inventory in the good bulk classification. T. 65, 69-70, 146-47, 403.

Zillmer's alleged request that Henrich approve a write-off

Regarding the remaining inventory accounting issue – the possible inclusion of already-destroyed inventory in the good bulk account – Henrich testified that although he first raised the issue some time in mid-2002, Ecolab took no action for over a year. T. 72-74. Then, according to Henrich, in October or November 2003 Zillmer asked him to approve writing off 20 percent of the inventory in the good bulk account. *Id.*

Henrich testified that he was uncomfortable with Zillmer's request, because the proposed write-off would not involve the disposition of actual discolored inventory. *Id.*; CX-24. According to Henrich, the real reason for the write-off was to correct the good bulk inventory account to reflect that 20 percent of the inventory did not exist (because it already had been discarded). T. 73. Henrich admitted that performing the write-off would make the accounts more accurate, but felt that it would be "cheating" to give the wrong reason for the write-off. R. D. & O. at 8; T. 75-76, 151-152. For this reason, Henrich testified, he did not approve the write-off. T. 73-75. When asked whether he had "take[n] [his] complaint higher up the chain of command," Henrich testified that he had not done so because, as he explained, he was "hoping they would come around and say, We just can't do this." T. 75, 76.

In contrast, Zillmer testified that he did not ask Henrich to approve writing off any inventory. Zillmer further testified that Henrich did not have the authority to give such approval. T. 280.⁶

Other than his finding that Henrich was not credible in alleging that he had expressed to Zillmer, Peabody or Gribble any concern about Ecolab's "inventory problems," the ALJ did not make any specific findings as to whether Henrich had the authority to approve write-offs and, if so, whether he had refused to make that particular write-off. R. D. & O. at 5-6, 8-11.

Kelso's allegations

Russell Kelso, a supervisor on the Geo production line, gave notice of his resignation in late October 2003. T. 430. On November 7, 2003 during an exit interview Zillmer initiated, Kelso told Zillmer that in July and September 2003, Henrich had asked Kelso and Jarun Chaiyaphan, another Ecolab supervisor, to falsify certain Geo inspection

⁶ Ecolab also presented evidence that the write-off related at least in part to discolored inventory rather than already-destroyed inventory. *See, e.g.*, T. 282.

records. T. 432. Kelso showed Zillmer various notes and reports he had kept as contemporaneous written proof of Henrich's instructions to falsify those records. T. 245-47, 431-443, 448-49; RX 5-10.

On November 10, 2003 Zillmer met with Chaiyaphan. RX 13. Chaiyaphan testified that he told Zillmer that Henrich had several times instructed him to falsify Geo inspection records, on various dates that Chaiyaphan was unable to identify. T. 387. Chaiyaphan also said that in October 2003 Henrich had asked him to send an e-mail to Ecolab's headquarters falsely indicating that the inspection process involved inspecting 125 Geo cases (as the MIL standard required) when the practice at the time was to inspect only 112 cases.⁷ T. 388-391; RX 10, 13. Chaiyaphan's email read, in pertinent part, as follows:

The sample size of a load for Japan (26 pallet (1456 cs)) is 125 cs, we collect 4 samples for the first pallet and 5 samples for the next one and continue until the last pallet which we will collect more samples to make the sample size up to 125 cs.

RX 10 (typos and numerical inaccuracies in original).

On Zillmer's instructions, Kelso then forwarded his documents to Anderson. T. 408, 449. Anderson did some investigation and concluded that the shipments identified by Kelso had contained products that had generated complaints from Ecolab's customers. T. 408-410.

Zillmer and Anderson then discussed Kelso's allegations with Nisita. All three concluded that the allegations described a Code of Conduct violation. T. 253-55, 410-412; R. D. & O. at 3. Zillmer next consulted with Christine Larsen, Vice President of Shared Services, who in turn consulted with Diana Lewis, Senior Vice President of Human Resources. T. 255-56, 358. Following these consultations, Zillmer prepared a "Summary of Findings," which listed seven instances in which Henrich allegedly had engaged in misconduct. RX 15.⁸

⁷ Henrich testified that when he talked with Chaiyaphan about the need to send the email to headquarters, Henrich learned that the managers on the line had not been able to understand the MIL standard's 4-5-4 pattern and had backslid into a 4-4-4 pattern. T. 123-24. Omitting the fifth sample from each of the thirteen even-numbered pallets resulted in a sample size of 112 rather than 125. Henrich further testified that, at the time the email was sent, the managers also were inspecting the last case on some or all pallets as a secondary test. T. 171-200. When those extra cases were added, then the total number of cases tested was more than 125 cases per shipment. T. 123. Henrich further testified that at the time he asked Chaiyaphan to send his email, Ecolab no longer required use of the MIL standard.

⁸ The seven allegations in the Summary of Findings were as follows:

On November 17, 2003 Zillmer met with Henrich and, by telephone, Larsen. Zillmer presented the Summary of Findings to Henrich and asked Henrich to respond. T. 100, 256. Henrich testified that he denied the first six allegations and said there was “more to the story” regarding the seventh, which related to Chaiyaphan’s e-mail, because in the email “the number [of cases inspected – 125 –] was true, but how we got to the number wasn’t.” T. 100-103.⁹ Zillmer testified that Henrich said that “20 percent” of the information was true, that Henrich did not indicate what he meant by “20 percent,” and that Henrich admitted to the seventh allegation without explanation. T. 258-260. At the end of the meeting, Zillmer suspended Henrich. T. 260.

Immediately afterwards, Larsen discussed Henrich’s responses with Nisita, Lewis, and Anderson. Anderson had the ultimate authority to terminate Henrich’s employment. T. 410-12. The four Ecolab executives concluded that Henrich had violated the Code of Conduct, and that the violation was serious enough to justify termination. T. 262-64. Larsen informed Zillmer of the Ecolab executives’ conclusion.

7/6: Supervisors instructed [sic] by you to put the maximum number of failures of each type without triggering 100% inspection. Comment from you was that we could not afford the labor to do the full inspection.

7/14: You told the inspectors to only reject a wrap if the defect was “big”; defined as larger than a dime. This violates the specification.

7/21: You instructed the supervisors to inspect every fourth case on the inspection pallets, which violates the mil standard protocol. Rationale given to the supervisors was that we couldn’t afford the labor.

9/8: Inspection results reported but no inspections done. Per Russ this was done at your direction. Some of the blocks were swollen and this in fact was a complaint that Japan had when they received the load.

9/18: Inspection results were altered after the fact to meet the AQL standards. This instruction came from you.

10/7: Inspection results were altered after the fact to meet the AQL standards. This instruction came from you. Minor defects reduced from 8 to 7 to put below the 100% inspection threshold.

10/16: Jarun writes to Andy Kuo indicating that the sample size for an inspection was incorrectly reported and was actually at standard of 125 units. This was not true and Jarun indicates he was instructed by you to write the email even though you knew this to be the case.

⁹ See note 7.

T. 263. Zillmer then called Henrich and informed him that his employment was being terminated. *Id.*

Henrich filed a SOX whistleblower complaint with the Occupational Safety and Health Commission (OSHA) on February 11, 2004.¹⁰ R. D. & O. at 1. OSHA investigated the complaint and concluded that Ecolab had discharged Henrich for violating its Code of Conduct. *Id.* Henrich requested a hearing, and an ALJ conducted one from August 31, 2004 through September 2, 2004. *Id.* at 2; see 29 C.F.R. §§ 1980.106, 107.

On November 23, 2004 the ALJ recommended dismissal of Henrich's complaint. *Id.* at 11. The ALJ concluded that Henrich had engaged in protected activity when he expressed concern to Ecolab about its labor cost accounting, but that this protected activity had not contributed to Ecolab's termination of Henrich's employment. *Id.* at 10. Henrich appealed to the Administrative Review Board (ARB or Board) pursuant to 29 C.F.R. § 1980.110(a). We issued a briefing schedule on December 9, 2004. Both parties filed briefs.

ISSUES PRESENTED

The issues before the Board are whether the ALJ erred in concluding that Henrich did not engage in protected activity with regard to the inventory accounting issues; whether the ALJ erred in concluding that Henrich failed to prove that his protected activity contributed to Ecolab's termination of his employment; and whether substantial evidence supports those two conclusions.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. *See* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); *see also* 29 C.F.R. § 1980.110.

Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard. *See* 29 C.F.R. § 1980.110(b). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-38, slip op. at 2 (ARB Feb. 19, 2004) (same); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8,

¹⁰ OSHA has authority to investigate SOX complaints. 29 C.F.R. § 1980.104.

slip op. at 7 (ARB July 29, 2005) (same). In assessing the substantiality of evidence, we “must take into account whatever in the record fairly detracts from its weight.” *Universal Camera*, 340 U.S. at 488. We must uphold an ALJ’s factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we “would justifiably have made a different choice had the matter been before us de novo.” *Id.*

In reviewing the ALJ’s conclusions of law the Board, as the Secretary’s designee, acts with “all the powers [the Secretary] would have in making the initial decision” 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews an ALJ’s conclusions of law de novo. *See Getman*, slip op. at 7 (discussing standard of review).

DISCUSSION

A. Governing Law

The employee protection provision of the SOX generally prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to violations of listed laws and SEC rules. Specifically, the provision provides as follows:

(a) Whistleblower Protection For Employees Of Publicly Traded Companies.— No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

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

- (A) a Federal regulatory or law enforcement agency;
- (B) any Member of Congress or any committee of Congress; or
- (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

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

18 U.S.C.A. § 1514A.

Actions brought pursuant to the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005)). *See* 18 U.S.C.A. § 1514A(b)(2) (mandating use of AIR 21 burdens of proof in cases filed in federal court under 18 U.S.C.A. § 1514A(b)(1)(B)); *Getman*, slip op. at 8 (applying AIR 21 burdens of proof to administrative review proceedings of complaint brought under 18 U.S.C.A. § 1514A(b)(1)(A)). Accordingly, to prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) the respondent knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *See Getman*, slip op. at 8; 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iii)-(iv); *see also Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-10 (ARB Jan. 30, 2004). *Cf.* 29 C.F.R. § 1980.104(b) (describing prima facie showing needed before SOX investigation may be conducted).¹¹ If a complainant succeeds in establishing that

¹¹ The ALJ stated that “[u]pon failing to provide the causal nexus between his protected activity and his termination, Complainant could not *prove* his *prima facie* case.” R. D. & O at 10 (first emphasis added). This sentence appears to conflate the burden Henrich might have had, if Ecolab had moved for summary judgment, with Henrich’s actual burden at the hearing. As we have indicated in previous decisions, after a whistleblower case has been fully tried on the merits, the ALJ need not determine whether the complainant presented, or provided evidence sufficient to prove, a prima facie case. Instead, the ALJ must determine whether the complainant has *proven* by a preponderance of the evidence the *elements* of his claim. *See, e.g., Peck*, slip op. at 8-9 (discussing burden-shifting framework); *Martin v. AKZO Nobel Chems., Inc.*, ARB No. 02-031, ALJ No. 2001-CAA-16, slip op. at 3-4 (ARB July 31, 2003) (same).

protected activity was a contributing factor, then the respondent still can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *See Getman*, slip op at 8; 49 U.S.C.A. § 42121(b)(2)(B)(iv); *Peck*, slip op. at 10. *Cf.* 29 C.F.R. § 1980.104(c).

A contributing factor is “any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 04-SOX-11, slip op. at 18 (ARB May 31, 2006) (quoting *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). Therefore, a complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, or that a respondent’s reason was pretext, but rather may prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected” activity. *Id.*, slip op. at 19 (quoting *Rachid v. Jack in the Box*, 376 F.3d 305, 312 (5th Cir. 2004)).¹²

B. Analysis

There is no dispute that the termination of Henrich’s employment was an unfavorable personnel action. There also is no dispute as to whether Henrich engaged in protected activity when he raised the issue of the labor-cost accounting practice, and whether Ecolab knew of that activity.¹³ Henrich does contest the ALJ’s determination that he did not express his concerns relating to the inventory accounting issues. Henrich

¹² The ALJ in the “Applicable Law” section erroneously stated without discussion that a complainant must prove that “the protected activity was *the likely* reason for the adverse action.” R. D. & O. at 7 (emphasis added). But the ALJ subsequently, in the analysis part of a later section called “Causation – Contributing Factor,” includes an entire paragraph discussing the correct “contributing factor” standard and quoting *Marano*. *See* R. D. & O. at 10. Therefore, we understand the ALJ to have applied the correct “contributing factor” standard.

¹³ Ecolab took exception to the ALJ’s rulings on protected activity and knowledge in a cross-petition for review, but the Board dismissed that petition as untimely. *See Henrich v. Ecolab*, ARB No. 05-036, ALJ No. 04-SOX-51, slip op. at 5 (ARB Mar. 31, 2005). The regulations governing SOX cases provide that on review by the Secretary, “[a]ny exception not specifically urged ordinarily will be deemed to have been waived.” 29 C.F.R. § 1980.110(a). Therefore, insofar as Ecolab’s response brief could be understood as making arguments that Henrich’s activities with regard to the labor-cost accounting practices did not constitute protected activity, and that Ecolab did not have knowledge of any protected activity by Henrich, we consider such arguments waived.

also contests the ALJ's conclusion that his protected activity did not contribute to Ecolab's termination of Henrich's employment.

Protected Activity

Henrich argues that he engaged in SOX-protected activity by expressing concern about Ecolab's accounting practices of (1) erroneously attributing some of the plant's labor costs to divisional or corporate expense accounts, and (2) tracking inventory-at-risk and already-disposed of inventory in the good bulk inventory account, which was "overinflating" the value of Ecolab's inventory. C. Brief at 4-8; T. 61-64, 66, 70, 73. Henrich also argues that he engaged in protected activity by allegedly refusing to comply with Zillmer's alleged instruction that Henrich approve a write-off from the good bulk inventory account. T. 73-76; C. Brief 7-9, 14.

1. Labor-cost accounting

With respect to the labor-cost accounting practice, the ALJ concluded both that Henrich reasonably believed this practice was a violation that could give rise to a SOX issue, and that Henrich expressed this concern. Because Ecolab's challenge to this conclusion was untimely, we assume for purposes of review that Henrich engaged in SOX-protected activity when he expressed concern about the labor-cost accounting practice.

2. Inventory accounting

The ALJ found that Henrich's "testimony that he informed Roger Zillmer, Bob Peabody, and Carol Gribble of the inventory problems [was] less than credible." R. D. & O. at 9. The ALJ further found that "Complainant provided no evidence, other than his own testimony at the hearing, that these three individuals had knowledge of his protected activity as to the accounting issues." R. D. & O. at 9.

It appears from the opinion that the ALJ may have concluded that Henrich's "recognition of accounting irregularities ... constitutes protected activity," whether or not Henrich expressed concern about any such irregularities. R. D. & O. at 10. Any such conclusion would be erroneous. A would-be whistleblower must actually express his concerns in order for his activity to be considered protected. *See Knox v. United States Dep't of the Interior*, ARB No. 06-089, ALJ No. 01-CAA-3, slip op. at 5 (ARB Apr. 28, 2006) (ARB finds protected activity only where complainant *both* has reasonable belief *and* "expresses" concern based on that belief). Any such error was harmless, however. Because the ALJ subsequently concluded that "Complainant failed to show that Ecolab had knowledge of his protected activity as to the [inventory accounting issues relating to the] good bulk and material losses," the ALJ did not consider the inventory accounting

issues in determining whether any protected activity had contributed to Ecolab's termination of Henrich's employment. R. D. & O. at 11.

Despite the arguably confusing phrasing and headings in this part of the opinion, we understand the ALJ to have concluded that Ecolab lacked knowledge of Henrich's concerns about the accounting practices because there was no credible evidence that Henrich had expressed his concerns. (As noted above, the ALJ found that Henrich's testimony was not credible, and did not find any other evidence in the record that Henrich expressed his concerns.) In other words, Henrich did not demonstrate that he actually blew his whistle.

Henrich argues that the ALJ erred in making his credibility finding. C. Brief at 3-4. Henrich further argues that there was other evidence that he reported his concerns, including the evidence that he refused to approve Zillmer's requested write-off. *Id.* Finally, Henrich argues that in any case his supervisors were themselves aware of the inventory accounting issues. *Id.* Therefore, he argues, the ALJ erred in finding that Ecolab did not have knowledge of his concerns (or, as we interpret the ALJ's opinion, in finding that Henrich did not express his concerns to Ecolab).

The ALJ's credibility finding

We generally defer to an ALJ's credibility determinations, and Henrich has not suggested any reason why we should not defer to this one.¹⁴ Other than his own belief that his testimony was credible, Henrich has offered no evidence that detracts from the ALJ's finding.¹⁵ Even if there was contrary evidence – even, perhaps, substantial

¹⁴ We give “great deference to an ALJ's credibility determinations that ‘rest explicitly on the evaluation of the demeanor of witnesses.’” *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 99-STA-21, slip op. at 9 (ARB July 31, 2001) (quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983)). The ALJ did not explicitly state that his credibility determination was based on witness demeanor. Therefore, we do not accord his determination such great deference. *Jones v. United States Enrichment Corp.*, ARB Nos. 02-093 and 03-010, ALJ No. 2001-ERA-21, slip op. at 5 (ARB Apr. 30, 2004) (“since the ALJ did not base this credibility determination on demeanor, we are not bound to give substantial weight to Jones's testimony”); *KP&L Elec. Contractors, Inc.*, ARB No. 99-039, ALJ No. 96-DBA-34, slip op. at 4 n.2 (ARB May 31, 2000) (“An ALJ's demeanor-based credibility determinations are entitled to great weight and ‘the Board will not reverse credibility determinations where they are not clearly erroneous’”) (citing *Milnor Constr. Corp.*, WAB Case No., 91-21 (Sept. 12, 1991)). Instead, we treat the determination as an ordinary finding of fact and review it under the substantial evidence standard.

¹⁵ Henrich does not argue that his discussions with Kelso about the inventory accounting practices constituted such evidence, nor does he argue that the ALJ erred in crediting Zillmer's, rather than Henrich's, account of their lunch meeting. *See* R. D. & O. at 4 n.3 and 9 n.8. Henrich does argue that his testimony constituted such evidence, but that testimony does not show that the ALJ erred in finding the Henrich did not express his concerns. Although Henrich testified that he had “tried to push [the issue of the inventory

accounting practices] with the controller from day one,” he provided no details and his answers were inconsistent. The first relevant exchange went as follows:

Q: Any other accounting-type issues that you had with the way the Garland plant was being run?

A: The first couple weeks I was there I was asking the people – you know, they had this garbage going around at the Geo line, and they said, Well, it’s going to be reground [i.e., that it was not good bulk but rather salvage]. I said, I don’t see a part of the salvage inventory.... And then Paul Anderson visited the facility in February 2003, and he says, Hey, where’s this stuff being charged?....

...

Q: Okay. And prior to Paul Anderson coming down and basically clearing that up, had you discussed that or pushed that with anybody?

A: When you become the plant manager of a facility, you want to make sure that all practices – at least you catch as many as you can walking in, so you don’t get accused of starting them or being a participant or whatever, so I had my eyes open and whatever. And we saw that and I identified it real quickly. And Bob Peabody – I think he was Roger’s puppet. He just wouldn’t do it. He – and I was worried about doing it because eventually it was going to be a surprise to somebody, and they were going to say, Hey, Henrich, what’s all this stuff doing over here?

T. 64, 65-66. Later, the following exchange took place:

Q: Did you follow up [on the issue of the inventory accounting practices] with any [of your supervisors]?

A: The only people I followed up with were Carol and Bob and then – made a couple comments to Roger that, You got to look at this issue, this good bulk thing....And they basically – you know, they said they’d take care of that at another time.

Q: Did they – when was this that you were having these discussions with these folks?

A: When I first got there.

evidence – in favor of Henrich’s position that his own testimony was credible, that would not demonstrate that the ALJ’s credibility finding was not supported by substantial evidence. As we have stated, in situations where both parties provide substantial evidence for their position, we uphold the finding of the ALJ. Based on our review of the whole record including the entire hearing transcript, we conclude that the ALJ’s finding that Henrich’s testimony was “less than credible” was supported by substantial evidence. Therefore, we defer to that finding.

The alleged request that Henrich approve the write-off

Henrich argues that the ALJ erred in failing to conclude that his refusal to approve the write-off was protected activity. C. Brief at 14. The ALJ did not determine whether Henrich had authority to approve write-offs and, if so, whether Henrich refused Zillmer’s request that Henrich approve the write-off. R. D. & O. at 5-6, 8-11. No such determinations are necessary, because any refusal to approve the write-off was not protected activity.

In order to establish that he engaged in protected activity, a complainant must prove that he “provide[d] information” about conduct that the complainant reasonably believed constituted one of six violation types enumerated in the SOX. 18 U.S.C.A. § 1514A(a). *See, e.g., Getman*, slip op. at 7-8. Where a complainant refuses to act but does not relate such refusal to a concern about potential fraud or another possible SOX violation, such refusal does not necessarily “provide information” about a SOX violation. *Getman*, slip op. at 9-10 (stock analyst did not “provide information” about SOX violation when, in review committee meeting with supervisor, analyst refused to change her rating but told supervisor to publish changed report without analyst’s name).

Here, other than his own testimony, Henrich points to no evidence that the request or the refusal actually occurred. Although Henrich describes the incident as a “refusal” in his submissions to this Board, he did not provide evidence that any failure to approve a write-off was a “refusal” rather than a task left undone. To the contrary, Henrich testified that during the weeks between Zillmer’s alleged request and the termination of Henrich’s employment, Henrich did not “follow through” and give approval. T. 75. Henrich did not prove, or even allege, that he *told Zillmer* that he *refused* to approve the write-off. Nor did Henrich prove, or allege, that he *told Zillmer why* he was refusing. We therefore

T. 72-73. These answers specified neither a date nor a manner in which Henrich brought the accounting inventory issues to the attention of any supervisor in a way that would have alerted such supervisor to the existence of conduct that Henrich believed “constitute[d] a violation.” 18 U.S.C.A. § 1514A (a)(1). That lack of specificity in Henrich’s testimony, combined with the lack of any other evidence that Henrich reported concerns about the inventory accounting practices, as well as the rest of the evidence in the record, confirms our view that substantial evidence supports the ALJ’s finding that Henrich did not actually report to any supervisor, or person with authority to correct the situation, concerns about the inventory accounting practice.

conclude that Henrich’s refusal, even if it occurred, did not “provide information” to Zillmer about such conduct. Therefore, the refusal did not constitute protected activity and, insofar as Henrich argues that the ALJ erred in not considering whether the write-off incident was an independent instance of protected activity, any error by the ALJ was harmless.¹⁶

Supervisors’ independent knowledge of the inventory accounting issues

Henrich asserts that he provided “clear evidence that his supervisors and others had direct knowledge of the illegal activity in the failure to properly account for material losses during process.” C. Brief at 8. Henrich appears to believe that proving that the Ecolab executives and Zillmer were aware of the inventory accounting issues would constitute proof that the executives and Zillmer “were aware of his protected activity.” C. Brief at 4. But as we explained above, in order for his activity to be protected, a complainant must demonstrate that the activity included an expression of concern – i.e., must demonstrate that he actually blew his whistle. Proof that Ecolab supervisors *shared* Henrich’s concern does not necessarily prove that any supervisor *learned about the concern* from Henrich, and thus does not prove that Henrich *expressed* concern. Therefore, the evidence Henrich highlights for us does not show that the supervisors learned about the concern from him.

The ALJ’s reference to Ecolab’s Code of Conduct

In pointing out that there was no other evidence that Henrich had reported his concerns about the inventory accounting, the ALJ noted that “[w]hen Complainant had the opportunity to report code of conduct violations in writing, he failed to do so.” R. D. & O. at 9. Henrich has brought to our attention his concern that the ALJ “seems to indicate that Henrich failed to comply with the Code of Conduct by not reporting the violations in writing.” C. Brief at 27 (noting that Henrich made verbal reports, which the Code specified as a preferred method of reporting violations).¹⁷ Henrich’s concern is misplaced. The ALJ did not conclude that Henrich’s failure to provide written reports had violated the Code. Rather, the ALJ concluded that Henrich’s failure to provide written reports had deprived Henrich of the opportunity to use such written reports as

¹⁶ Henrich also argues that the refusal was evidence of his prior protected activity informing Zillmer and the management about his concerns with the good bulk inventory accounting practices. C. Brief at 9 (“Based on the single incident of refusing to write-off [sic] invisible inventory as ‘bad color,’ [Henrich] put Ecolab, through his supervisor, on notice of his protected activity”). For reasons expressed in the text, the refusal did not constitute such evidence.

¹⁷ RX 1 at 32 (“A VERBAL OR WRITTEN REPORT TO YOUR SUPERVISOR OR THE GENERAL COUNSEL IS THE PREFERRED METHOD OF REPORTING VIOLATIONS OR OBTAINING GUIDANCE IN COMPLYING WITH THE CODE OF CONDUCT.”).

documentary evidence for his claim that he expressed his concerns about the inventory accounting issues.

Henrich offers us no other evidence contrary to the ALJ's finding that Henrich did not express to Ecolab any concerns about the inventory accounting. Therefore, and based upon our review of the entire record, we conclude that substantial evidence supports the ALJ's implicit determination that Henrich did not provide information to Ecolab about his inventory accounting concerns. The ALJ concluded that Henrich's failure to express his concerns meant that Ecolab did not have knowledge of any protected activity related to the inventory accounting practices. We agree, but also conclude (based upon the ALJ's factual finding) that Henrich did not engage in protected activity related to these practices.

Causation – Contributing Factor

The ALJ concluded that “no evidence whatsoever tended to show that [Henrich's] protected activity contributed in any way to his termination.” R. D. & O. at 10. Henrich raises multiple arguments taking issue with this conclusion. As we explain, none have merit.

1. Henrich's legal arguments

Henrich makes two legal arguments, which we discuss in turn.

Burden-shifting

Henrich contends that the way a complainant must meet his burden to “demonstrate by a preponderance of the evidence that protected activity was a contributing factor in the unfavorable action” is “through the *presentation* of a *prima facie* case.” C. Brief at 25 (first emphasis added). Henrich further contends that “[o]nce a complainant meets this burden, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity.” *Id.* Based upon this understanding of the burden-shifting framework, Henrich argues that that the ALJ erred in “finding that Complainant failed to” “me[e]t the *prima facie* standard” and further erred in failing to conduct a mixed motive analysis. *Id.* at 26.

Henrich's understanding of the burden-shifting framework is incorrect. A complainant does not need to *prove* a *prima facie* case (although if the respondent moves for summary judgment, the complainant must present evidence *sufficient* to prove it). Nor does the presentation of a *prima facie* case entitle a complainant to prevail. Rather, presenting a *prima facie* case merely entitles a complainant to force a respondent to articulate its reason(s) for an unfavorable personnel action. Once the respondent has articulated a reason and a full hearing has been held, there is no longer any purpose in

determining whether the complainant presented a prima facie case because the purpose of presenting a prima facie case – forcing the respondent to articulate its reason(s) – already has been fulfilled. Ultimately, whether or not the respondent has articulated a reason, the complainant in order to obtain relief must *prove* each *element* of his case by a preponderance of the evidence. *See Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 5-8 (ARB Sept. 30, 2003) (discussing burden-shifting framework under the Energy Reorganization Act, 42 U.S.C.A. § 5851 (2003)). Only if the complainant so proves must the ALJ apply a mixed motive analysis and determine whether the complainant’s employment would have been terminated anyway.

Although the ALJ stated that Henrich “did not prove his *prima facie* case,” we read the ALJ’s opinion to indicate that the ALJ found that Henrich failed to prove the elements of his claim because he failed to prove an essential element – namely, that protected activity was a contributing factor in the termination of his employment. R. D. & O. at 10; *see also* note 10. Because Henrich failed to prove all the elements of his claim, mixed motive analysis did not apply. Therefore, Ecolab had no obligation to prove that Henrich “would have been terminated anyway,” and the ALJ did not err in declining to engage in a mixed motive analysis.

Causation – Contributing Factor

The ALJ found that “none of the [accounting practices about which Henrich was concerned] rose to a level of illegality.” R. D. & O. at 11. The ALJ further concluded that “[a]s such, there is no indication that Complainant’s perception of Ecolab’s practices would have motivated Ecolab’s executives to terminate him.” R. D. & O. at 11.

Henrich argues that the ALJ erred in using the legality of the accounting practices as a basis for the conclusion that Henrich’s protected activity did not contribute to the Ecolab executives’ termination decision.¹⁸ According to Henrich, the ALJ’s statement “eviscerate[s] the ‘reasonable belief’ standard required under the statute” because under the ALJ’s approach “unless a complainant can show actual illegality, there is no possible way for a complainant to actually *be* protected.” C. Brief at 22.

It is not clear whether the ALJ actually found that the accounting practices were not illegal, or merely repeated an assumption – apparently shared by both parties¹⁹ – that

¹⁸ Henrich also argues that the ALJ erred in finding that Ecolab’s accounting practices did not rise “to a level of illegality,” because in Henrich’s view the inventory accounting practices were “a violation of SEC law or regulations.” C. Brief at 23. Because Henrich’s only protected activity related to the labor-cost accounting practice, the legal status of the inventory accounting practices is irrelevant.

¹⁹ Ecolab, of course, did not argue that any of its practices were illegal. Henrich argued that the inventory accounting practices violated “SEC Rules,” and made no argument regarding the legality of the labor cost accounting practices. C. Post-Hearing Brief at 35-38.

the accounting practices were not illegal. In any case, the ALJ properly focused upon whether Henrich had a reasonable belief that the labor-cost accounting practice was a violation of a SOX-listed law or regulation, and whether Henrich's expression of that belief contributed to Ecolab's termination of Henrich's employment. *See* R. D. & O. at 8, 10-11.

Contrary to Henrich's argument, in drawing his conclusions the ALJ did not create a universally-applicable rule for the analysis of SOX cases. In other words, the ALJ did not conclude that where a company's conduct is legal, the company never can be found to have discriminated against an employee for expressing concern about such conduct. Rather, the ALJ concluded that because in this case Henrich's concerns about the labor-cost accounting practice did not result in the exposure of illegal conduct, the Ecolab executives' decision could not be explained as a hostile reaction to such exposure.

2. Henrich's substantial evidence arguments

Henrich argues that the ALJ's decision is not supported by substantial evidence because the ALJ failed to discuss, and therefore must have ignored, multiple important pieces of evidence showing that Henrich's protected activity was a contributing factor in the termination of his employment. As we stated above, however, a party cannot prevail on appeal simply by demonstrating that substantial evidence supports his view. Rather, in order to convince us not to adopt an ALJ's recommendation a party must demonstrate that substantial evidence did *not* support the findings necessary to that recommendation. Although Henrich highlights numerous pieces of "potential evidence," he fails to explain how these pieces of evidence undermine or cast doubt upon the evidence that the ALJ relied upon in concluding that Henrich's protected activity did not contribute to Ecolab's termination of Henrich's employment. We discuss each piece in turn.

Temporal proximity

Henrich contends that the ALJ did not "*properly* consider the temporal proximity of the protected activity and adverse action." C. Brief at 13 (emphasis added). There is no evidence for a contention that the ALJ did not take account of the sequence of events and the time periods between the relevant events. The ALJ noted, for example, that Henrich's "termination *immediately followed* the discovery of" the falsified inspection records. R. D. & O. at 11 (emphasis added). Instead, Henrich appears to be suggesting that the ALJ did not consider the temporal proximity issue "properly" because the ALJ does not appear to have shared Henrich's premise that Henrich's "refusal" to approve the write-off constituted protected activity. Based on his premise, Henrich asserts that there was a very short time gap between his "protected activity" in October or November 2003 and the termination of his employment on November 17, 2003, and argues that this short time gap strongly suggests that protected activity was a contributing factor in that termination. C. Brief at 13-17. As we discussed above, however, the alleged refusal was not protected activity. Henrich's only protected activity was his expression of concern about the labor-cost accounting.

The probative value of temporal proximity decreases as the time gap lengthens, particularly when other precipitating events have occurred closer to the time of the unfavorable personnel action. *See, e.g., Poll v. R. J. Vynhalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 7 (ARB June 28, 2002) (intervening event means “evidence of timing is inadequate to sustain [complainant’s] ultimate burden of pro[ving causation] by a preponderance of the evidence”); *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001) (“intervening event of sufficient weight [can] preclude any inference of causation which otherwise would have been drawn from the nearness of [complainant’s] protected activity to his layoff”).

Henrich’s protected activity occurred in the last quarter of 2002. The termination of Henrich’s employment did not occur until November 2003, around a year later. Moreover, that termination occurred in the same week that the Ecolab executives learned about the irregularities in Henrich’s inspection procedures. Therefore, in the circumstances of this case, substantial evidence supports the ALJ’s implicit conclusion that any temporal proximity between Henrich’s protected activity and Ecolab’s termination of his employment about a year later did not tend to show that Henrich’s protected activity contributed to that termination.

“Potential evidence of retaliatory animus stemming from Henrich’s complaints”

Henrich argues that the ALJ “failed to reconcile the conflicting testimony of Ecolab’s witnesses with regards to the accounting for material losses,” that “the testimony regarding the classification of rework material is conflicting,” and that the ALJ also did not discuss or resolve “the inconsistent testimony regarding the dates and details of some of the allegations brought forth by Kelso.” C. Brief at 10-12.

Presumably, Henrich believes that the ALJ’s failure to resolve all disputed factual questions caused the ALJ erroneously to conclude that Henrich’s protected activity did not contribute to Ecolab’s decision to terminate Henrich’s employment. But Henrich neither specifies how the ALJ should have resolved these disputes, nor explains how those resolutions would support the conclusions Henrich believes should have been drawn. Resolving the disputed evidence relating to the inventory accounting practices became unnecessary once the ALJ concluded that Henrich did not report his concerns about these practices. Similarly, the issues relating to Kelso’s evidence²⁰ do not cast

²⁰ Henrich points to evidence that Kelso did not know the MIL standard had been discontinued; that some of the incidents about which Kelso complained had occurred after such discontinuation; and that Kelso said he had reported one concern to Don Tarrt even though Tarrt was no longer the quality manager. C. Brief at 12. But there also was evidence presented tending to show that Tarrt still was involved in quality control throughout the relevant time period, even if he was no longer the manager, T. 74; and that the incidents of which Kelso complained – for example, Chaiyaphan’s email – were perceived as serious violations of the Code of Conduct by the Ecolab executives, even if they did not involve

such doubt upon Kelso's central contention (that Henrich asked him to alter inspection records) as to suggest a lack of substantial evidence for the ALJ's conclusion that "the cause of Complainant's termination was the Code of Conduct violation brought to the company's attention by Russ [Kelso]." R. D. & O. at 11.

"Potential falsity" of Ecolab's reasons for terminating Henrich's employment

Henrich asserts that "the ALJ failed to fully analyze the reasons for termination and the potential falsity of those reasons," in that the ALJ "failed to note Respondent's lack of supporting evidence relating to the allegations that formed the basis of the termination." C. Brief at 12-13; Reply at 8. Henrich further asserts that "the seven reasons given by Respondent were untrue or at least unsubstantiated and therefore cannot support Mr. Henrich's termination." Reply at 10.

Henrich does not appear to link these assertions with any particular argument. Insofar as he is arguing that Ecolab needed substantial evidence to "support" its termination decision, that argument has no merit. The SOX does not require an employer to collect "substantial evidence" before making its termination decisions. Indeed, in an at-will employment situation, an employer need not have any reason whatsoever for such a decision, so long as the employer does not act for a prohibited reason.

Insofar as Henrich is attempting to prove that Ecolab's articulated reason is false, we note that Ecolab's articulated reason is *not* Kelso's allegations per se, but rather is the Ecolab executives' belief, based on those allegations, that Henrich violated Ecolab's Code of Conduct. Henrich does not argue that substantial evidence did not support the ALJ's conclusions that the Ecolab executives were "outraged" by those allegations, and that the executives terminated Henrich's employment based upon the allegations and

violations of the MIL standard. In his Reply, Henrich asserts that the ALJ also ignored "evidence of Mr. Kelso's potential motivations," Reply at 1-5, and "evidence to explain why Mr. Chaiyaphan would be likely to shade the truth to support Respondent, if not lie." Reply at 5-7. Even if these arguments are not waived due to Henrich's failure to raise them in his opening brief, they are meritless because they do not cast doubt upon the ALJ's conclusion that the cause of the termination of Henrich's employment was the Ecolab executives' discovery of Henrich's "Code of Conduct violation." R. D. & O. at 11. Moreover, although Henrich argues that Kelso may have disliked Henrich because Henrich had forced Kelso to adhere to punctuality requirements and had taken some actions against Kelso's mentor (Tartt), Henrich does not argue that any such dislike on Kelso's part for Henrich was in any way related to Henrich's protected activity. *See* Reply at 1-5. Similarly, Henrich does not suggest Chaiyaphan was motivated to "shade the truth" because of Henrich's protected activity. Henrich's assertions that Chaiyaphan and Kelso were biased thus become no more than an argument that the ALJ should not have relied upon their testimony. Yet Henrich offers no evidence or argument significant enough to warrant the conclusion that substantial evidence did not support the findings that were based upon the testimony of Chaiyaphan and Kelso.

Henrich's lack of satisfactory response to them. Therefore, Henrich's argument that Kelso's allegations were false is not relevant. Even if Henrich were correct about the falsity of Kelso's allegations – a matter on which we express no opinion – the ALJ did not need to determine the truth or falsity of Kelso's allegations in order to determine that the Ecolab executives relied upon them in deciding to terminate Henrich's employment. *Accord EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles d/b/a Phoenix Coca-Cola Bottling Co.*, ___ F.3d ___, 2006 WL 145501 (10th Cir. 2006), slip op. at 13, 21 (except where plaintiff has proven that “subordinate bias” caused higher-level decision to terminate, courts generally should determine whether employer had discriminatory intent by evaluating “facts as they appear[ed] to the person making the decision to terminate”).

We interpret the ALJ's statement that the executives were “outraged by Henrich's admitted violation” as a finding that the executives genuinely believed that Henrich's inspection procedure irregularities were offenses warranting termination. R. D. & O. at 11. As we discuss below, Henrich did not prove that Zillmer had retaliatory animus and thus did not prove that any animus should be imputed to the Ecolab executives. Absent proof that Zillmer had retaliatory animus and influenced the decision, evidence showing that Kelso's allegations were false or misleading does not demonstrate a lack of substantial evidence for that finding.

“Potential retaliatory animus” of Zillmer

Henrich does not appear to take issue with the ALJ's implicit finding that Ecolab's executives believed that he had violated Ecolab's Code of Conduct. Rather, Henrich argues that the executives developed such belief because Zillmer, who had developed retaliatory animus against Henrich because of Henrich's protected activity, took the opportunity provided by Kelso's allegations to present to the executives a biased case against Henrich. Henrich argues that Zillmer thereby induced the executives to terminate Henrich's employment when they otherwise would not have, and that Henrich's protected activity thus contributed to that termination.

Henrich contends that the ALJ “failed to consider ... the potential retaliatory animus of Roger Zillmer,” and asks us to rule differently based upon the “[s]ubstantial evidence of Mr. Zillmer's retaliatory intent [that was] provided in Complainant's [filings on appeal].” C. Brief at 9; Reply at 7. Henrich further argues that Zillmer's “misrepresented facts and Zillmer's tainted interview investigation were relied upon by the decision makers in their termination of Henrich,” and thus “Zillmer was ultimately the ‘man behind the curtain’ in Mr. Henrich's termination.” Reply at 8, 9.

Arguably, this argument is waived because Henrich did not clearly indicate in his opening brief why the alleged retaliatory animus of Zillmer was relevant. In any case, the evidence Henrich highlights does not demonstrate retaliatory animus. In contrast to mere dislike or need to find a scapegoat, retaliatory animus by definition must arise from and be based upon protected activity. *See, e.g., Jones*, slip op. at 13 (“even if [supervisor's] attitude could be deemed antagonistic, Jones has not adduced sufficient facts for us to infer that this enmity existed because of his protected activity”). The

evidence Henrich brings to our attention does not demonstrate any link between Zillmer's alleged animus and Henrich's protected activity.

"First," Henrich points to evidence "that Zillmer's performance was partly tied to the success of th[e Geo] line," that this line was having "quality issues," and that "Zillmer [was] looking for a scapegoat for the Geo issues." C. Brief at 17. But even if Zillmer intended to use Henrich as a scapegoat, that intent does not itself indicate that Zillmer had retaliatory animus against Henrich based upon Henrich's reports of the labor-cost accounting problems. Henrich speculates that his protected activity reporting the labor-cost issues contributed to the management's subsequent correction of those issues, which in turn allowed the inefficiencies in the Geo production line to become more apparent, which in turn caused Ecolab executives to perceive the Geo problems as more serious, which in turn caused Zillmer to become concerned about possible repercussions if those problems were not corrected, which in turn caused Zillmer to develop retaliatory animus towards Henrich. Even if correct, in the absence of any other evidence this causation chain is too attenuated and too speculative to support an inference that Zillmer had retaliatory animus based upon Henrich's reports about the labor-cost accounting.

"Second," Henrich alleges that Zillmer failed to conduct an adequate investigation of Kelso's allegations.²¹ But evidence showing that Zillmer's investigation was poorly conducted, or even deliberately biased against Henrich, does not itself demonstrate that such inadequacy or bias stemmed from retaliatory animus. *Cf. Mullin v. Gettinger*, ___ F.3d ___, 2006 WL 1549050 (7th Cir. 2006), slip op. at 10 ("[t]he fact that [employer representatives] may have calculated [plaintiff's] benefits incorrectly is not evidence that their errors were motivated by [employer's] protected speech"). While an inadequate investigation potentially could corroborate other evidence of animus, no such evidence is adduced here. Thus, in the circumstances of this case, any inadequacies in Zillmer's investigation do not constitute sufficient evidence to suggest that Zillmer had animus. Indeed, Henrich primarily appears to argue that the manner in which Zillmer conducted the investigation demonstrates that Zillmer was "clearly interested in protecting his own interests rather than discovering the truth." C. Brief at 19-20. But again, absent other evidence, Zillmer's desire to protect his own interests does not itself demonstrate retaliatory animus based upon Henrich's report (a year previously) of the labor-cost issues.

²¹ Specifically, Henrich alleges that Zillmer "did not research, speak to inspectors or the qualify [sic] supervisor, or provide a full explanation of the allegations against Henrich"; that Zillmer's "summarized version of Russ Kelso's allegations contained misleading statements and outright misrepresentations pertaining to dates and statements"; and that in the meeting with Larsen "when Henrich denie[d] the allegations, Zillmer refuse[d] to believe him without providing Henrich an opportunity to gather any information" and indeed "was quick to interrupt when Henrich did attempt to offer explanations and ended the meeting without further investigation." C. Brief at 18-19; R. Brief at 8.

Henrich reminds us that he also reported many other problems at the Garland plant – such as the accounting inventory issues, the adulteration of products and the falsification of cap-torque tests – and argues that these other reports played a role in the development of Zillmer’s “retaliatory animus.” But retaliatory animus by definition can arise only from protected activity. Because Henrich’s only protected activity was his reports of the labor-cost accounting issue, only those reports can be considered in determining whether Zillmer had retaliatory animus. Henrich does not appear to argue that Zillmer’s “animus” was based in any significant way upon Henrich’s having reported concerns about the labor-cost accounting practice, but insofar as he does the argument has no merit in light of the length of time that passed between those reports and Zillmer’s subsequent actions in investigating Kelso’s allegations.²²

Henrich makes two further arguments premised upon his assertion that he engaged in protected activity related to the accounting inventory issues.²³ Because that activity was not protected, those two arguments have no merit.

²² Because Henrich did not prove that Zillmer had retaliatory animus, we need not determine whether Zillmer’s influence on the investigation was significant enough to indicate that any such animus was a contributing factor in the termination decision.

²³ Henrich argues that Zillmer was motivated to act against Henrich because, as Henrich summarizes it, “Zillmer testified that he would be held accountable *if* [the] practices [reported by Henrich] were *discovered*” [by Ecolab executives]. (Tr. 279).” C. Brief at 19 (emphasis added). But the hearing transcript contains no such statement by Zillmer. To the contrary, on the page indicated, although Zillmer does discuss his initial concern that the accounting inventory problems “didn’t indicate that I’d been keeping very good track of it,” he immediately indicated that he “was a little bit relieved” when, after Anderson discovered the issue, Anderson simply indicated that Anderson and Zillmer should work together to solve the problem. T. 279. Thus far from being concerned about what *might* happen *if* the practice were to be discovered, Zillmer indicated his relief about what *did* happen *after* the practice was discovered.

Henrich also asserts that “Zillmer attempted to conceal the fact that material losses were not reported when he testified that the CASBO report did account for Geo material losses,” and that by requesting that Henrich approve the write-off Zillmer engaged in another “intentional attempt to hide the fact that the Geo line was not reporting material losses as they were incurred.” C. Brief at 21. Henrich contends that this “circumstantial evidence of Zillmer’s mind set provides evidence that Zillmer was more interested in retaliating against Henrich than finding out of [sic] Kelso’s complaints were true or even relevant.” *Id.* Even if Zillmer was attempting to conceal such information – a matter on which we express no opinion – such attempted concealment would not constitute evidence of any retaliatory animus on the part of Zillmer because it relates only to the accounting inventory issues.

CONCLUSION

Substantial evidence supports the ALJ's factual findings, and there is no merit in Henrich's legal arguments that the ALJ erred in finding that Henrich did not report his concerns about the accounting inventory practices and in concluding that Henrich failed to prove by a preponderance of the evidence that his protected activity contributed to the termination of his employment. We therefore affirm the ALJ's decision and **DISMISS** Henrich's complaint.

SO ORDERED.

A. LOUISE OLIVER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge