In the Matter of:

TERESA STEWART,	**ARB CASE NO. 14-033**
COMPLAINANT,	**ALJ CASE NO. 2013-SOX-019**
v.	**DATE: September 10, 2015**
LOCKHEED MARTIN AERONAUTICS CO.,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Dale M. Rodriguez, Esq.; ***Law Office of Dale M. Rodriguez,*** **Plano, Texas**

For the Respondent:
Anthony J. Campiti, Esq.; ***Thompson & Knight LLP*****; Dallas, Texas**

BEFORE: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; E. Cooper Brown,** ***Deputy Chief Administrative Appeals Judge*****; and Luis A. Corchado,** ***Administrative Appeals Judge*****. Judge Brown, concurring.**

FINAL DECISION AND ORDER

This case arises under Section 806, the employee protection provision, of the Sarbanes-Oxley Act of 2002 (SOX)[1] and its implementing regulations.[2] Teresa Stewart filed a complaint alleging that Lockheed Martin Aeronautics Company (Lockheed Martin Aero) violated the SOX

[1] 18 U.S.C.A. § 1514A (Thomson/West Supp. 2015).

[2] 29 C.F.R. Part 1980 (2014).

whistleblower provision. An Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) dismissing her complaint. We summarily affirm.

In summarily affirming the ALJ's D. & O., we limit our comments to the most critical points. Stewart asserts that Lockheed Martin constructively discharged her, denied her request to telecommute regularly, and harassed her because she engaged in protected activity. To prevail on her whistleblower complaint Stewart must prove by a preponderance of the evidence that: (1) she engaged in protected activity; (2) she suffered an adverse action; and (3) protected activity contributed to the adverse action.[3] The failure to prove any one of these elements necessarily requires dismissal of her whistleblower claim.[4] Substantial evidence supports the ALJ's finding that there was no causal link between any alleged protected activity and the alleged adverse actions. We summarily focus only on the causation element as dispositive of Stewart's claim and make no determination about the ALJ's ultimate findings regarding the elements of protected activity or adverse actions.[5] While we provide a brief discussion below, we rely on the ALJ's decision for the comprehensive list of reasons and evidence supporting the ALJ's ultimate finding on causation.

The ALJ found that Stewart failed to prove that her complaints regarding the TLMAL audit contributed to any alleged unfavorable actions. D. & O. at 35. Regarding telecommuting, the ALJ found that Lockheed Martin suspended telecommuting before any protected activity occurred for reasons having to do with team building and efficiency. *Id.* at 17 (supporting evidence at Hearing Transcript at 699-708, RX 6). Additionally, the ALJ found that Lockheed Martin denied Stewart's request for an accommodation that would allow her to regularly telecommute because 1) she was a lead and it was important to have her in the office to train members of her team and 2) it would be easier to repair the communication problem between Ferguson and Stewart, if they were both in the office. *Id.* at 21. Lockheed Martin treated Stewart the same as a similarly situated employee, Garberson, who had not raised the TLMAL concerns Stewart raised. *Id.* Regarding the alleged harassment, the ALJ found that their relationship conflicts arose when Ferguson became Stewart's supervisor and when Lockheed Martin decided to suspend telecommuting, not because of the TLMAL audit concerns. Finally, regarding the alleged constructive discharge, the ALJ found that Stewart voluntarily decided to retire at the end of her medical leave. These findings are supported by substantial evidence in the record, and we affirm them.

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[3] 29 C.F.R. § 1980.109(a).

[4] *See Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Nos. 07-021, 07-022; ALJ No. 2004-SOX-011, slip op. at 3 (ARB Jan. 13, 2010) (stating same principle).

[5] *Cf. Drago v. Jenne,* 453 F.3d 1301, 1308 (11th Cir. 2006) (in affirming the lower court's dismissal of the plaintiff's retaliation claim, the appellate court focused on the plaintiff's failure to present sufficient evidence that the alleged adverse action was causally related to the alleged protected activity, assuming for purposes of the appeal but explicitly not deciding that the plaintiff's conduct constituted statutorily protected activity).

We also reject Stewart's objections to the ALJ's evidentiary rulings, including the ALJ's finding that Stewart was not a credible witness. The ALJ found Stewart to be evasive and less than forthcoming when she testified and that he "did not believe Complainant." D. & O. at 26. The ALJ also found that Stewart was not credible because of inconsistencies between Stewart's testimony and other evidence. None of Stewart's arguments persuade us to reverse the ALJ's findings, as they are supported by substantial evidence. None of her remaining evidentiary arguments demonstrate that the ALJ abused his discretion or that any alleged erroneous rulings would alter our decision to affirm the ALJ's dismissal.

Because the ALJ did not address the issue of clear and convincing, it is improper for us to address such a fact-intensive issue absent rare circumstances, which are not present in this case.[6] We appreciate the concurring opinion pragmatically relying on the unresolved issue of clear and convincing, a liberty we cannot exercise. But we do not understand how the concurring opinion can do so by citing to *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015) and *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012).[7] The ALJs never reached the question of "clear and convincing" in those cases and so neither of those cases provide any relevant guidance whatsoever on such issue, in addition to having fundamentally different facts.

CONCLUSION

The ALJ's Decision and Order dismissing Stewart's complaint is **AFFIRMED.**

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

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[6] *See, e.g., Bobreski v. Givoo Consultants*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 31 (ARB Aug. 29, 2014)(After two evidentiary hearings, the Board permitted additional briefing and oral argument on the issue of clear and convincing, and then "cautiously" viewed the evidence in the employer's favor, ultimately finding there was no evidence that could support the employer's clear and convincing affirmative defense.).

[7] In *Abbs*, unlike the case before us, the complainant never made it to an evidentiary hearing. The Board in *Abbs* affirmed the ALJ's summary decision against the complainant on the issue of contributing factor by relying on the employer's reasons, which directly contradicts the holding in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014). We also view *Powers* as contradicting the holding in *Fordham*.

E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, concurring:

I am of the opinion that *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014) and *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015), dictate a different outcome from that of the majority on the question of whether Ms. Stewart failed to prove that SOX-protected activity contributed to the alleged adverse personnel action taken against her. I nevertheless join with the majority in dismissing Ms. Stewart's SOX complaint because the same factual basis upon which the ALJ relied in finding no "contributing factor" causation also meets the requirements for proving Respondent's statutory affirmative defense.[8]

While it is true that the ALJ did not address the Respondent's statutory affirmative defense, the Board has recognized the propriety of foregoing the formality of remand to permit the ALJ to address an issue not previously decided where the outcome on remand is clear, as it is in the instant case.[9] As the ARB noted in *Powers*, there are instances in which an employer's evidence relied upon by an ALJ in finding "contributing factor" causation "would also constitute 'clear and convincing evidence that [the employer] would have taken the same adverse action in the absence of the protected conduct.'"[10] I am of the opinion that this is such a case, and that Respondent's evidence in support of its action, upon which the ALJ erroneously relied in finding no "contributing factor" causation, clearly and convincingly establishes that Respondent would have taken the same adverse personnel action against Ms. Stewart in the absence of her SOX protected activity. I thus join in affirming the ALJ's decision, albeit for a different reason.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

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8 Under SOX, if the complainant meets his or her burden of proving that protected activity was a contributing factor in the unfavorable personnel action at issue, a respondent may nevertheless avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of that [protected] behavior." 49 U.S.C.A. § 42121(b)(2)(B)(iv); *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011); *Klopfenstein v. PCC Flow Technologies*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 12 (ARB May 31, 2006).

9 *See, Childers v. Carolina Power & Light Co.*, ARB No. 98-077, ALJ No. 1997-ERA-032, slip op. at 15 (ARB, Dec. 29, 2000) (citing *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir.), *cert. denied*, 119 S.Ct. 371 (1998) (remand unnecessary when it is clear that agency would have reached the same result had it applied correct reasoning); *FEC v. Legi-Tech, Inc.* 75 F.3d 704 (D.C. Cir. 1996) (remand is an unnecessary formality where the outcome on remand is clear)).

10 *Powers*, slip op. at 26, n.15 (citing *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037, slip op. at 6, n.5 (ARB Oct. 17, 2012)).