 Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

PATRICIA F. TAYLOR, **ARB CASE NO. 05-062**

COMPLAINANT, **ALJ CASE NO. 2004-SOX-43**

v. **DATE: June 28, 2007**

**WELLS FARGO BANK,
NATIONAL ASSOCIATION,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Robert J. Winicki, Esq., Debbie K. Winicki, Esq., ***Winicki Law Firm, P.A.*****, Jacksonville, Florida**

For the Respondent:
A. Martin Wickliff, Jr., Esq., David L. Barron, Esq., ***Epstein Becker Green Wickliff & Hall, P.C.*****, Houston, Texas**

FINAL DECISION AND ORDER

Patricia F. Taylor filed a complaint with the United States Department of Labor in which she alleged that Wells Fargo Bank (Wells Fargo) violated the employee protection provision of the Sarbanes-Oxley Act of 2002 (SOX)[1] when it terminated her employment on August 8, 2003. After a hearing, an Administrative Law Judge (ALJ) concluded that Wells Fargo had not violated the SOX and recommend that we dismiss Taylor's complaint.

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[1] 18 U.S.C.A. § 1514A (West Supp. 2005). Regulations implementing the SOX are found at 29 C.F.R. § Part 1980 (2006).

BACKGROUND

The ALJ thoroughly discussed the facts of this case as presented at the hearing on September 28 and 29, 2004. R. D. & O. at 2-9. We summarize briefly.

Wells Fargo is a publicly-traded bank subject to the SOX's employee protection section. Wells Fargo hired Taylor as a Relationship Manager at its North Houston Regional Banking Office in October 2000 and fired her on August 8, 2003. Tr. 165. On February 5, 2003, Taylor discovered that an original document was missing from the real estate loan file of a commercial client and, according to two witnesses, asked an employee to trace over the signature on the document to make it look like an original. Tr. 177. After the employee brought the forgery incident to the attention of Taylor's supervisor, Jonathan Homeyer, he met with Taylor and asked whether she had requested the employee to forge a document. Taylor became defensive and told him that she was joking. Tr. 351-352. On February 21, 2003, Homeyer issued Taylor a "final warning" for violating the Wells Fargo code of ethics and business conduct. Tr. 187-189. Taylor became angry and refused to sign the warning as he had requested. Tr. 354. She also advised Homeyer and Dorothea Buffington, Wells Fargo's human resources consultant, that she had retained legal counsel. Tr. 444. Thereafter, she began accusing Homeyer and others of harassing her. Tr. 180-181.

Homeyer gave negative performance evaluations to Taylor in March and July 2003 and tried to discuss her performance issues with her several times, but she refused to discuss the evaluations with him. Tr. 356. She later stopped speaking to Homeyer and other employees, who she believed were conspiring with Homeyer to get her fired. Tr. 137-138; 203-205; RX 49.

In July 2003 Taylor complained to Brad Bemis, Wells Fargo counsel, that the bank was backdating letters of credit. She had complained to Homeyer about this practice in 2001, and Homeyer had discussed the backdating with Bemis and other bank officials, all of whom approved the practice. Tr. 365. In response to Taylor's 2003 question about backdating, however, Bemis prepared a legal opinion memo, which he sent to Homeyer, Taylor, and others, advising that the bank could continue backdating only under certain criteria. Tr. 124-125. The bank stopped the practice after the 2003 Bemis memorandum. R. D. & O. at 8.

On August 4, 2004, Taylor met with Homeyer to discuss Wells Fargo's practice of backdating letters of credit. Taylor testified that Homeyer became agitated during the meeting and demanded that she "take the rap" for backdating and give him her emails

concerning the practice. Tr. 133-134. She also testified that Homeyer became angry when she told him that she felt harassed. Tr. 137-138. Homeyer testified that Taylor was "yelling and screaming" during the meeting and that Taylor's behavior was inappropriate and unprofessional. After the meeting, he decided to fire Taylor for her argumentative and combative behavior and insubordination on August 4, 2003. Tr. 361. Homeyer discussed this incident with his immediate supervisor and Buffington, and all agreed that Taylor should be fired. Homeyer gave Taylor a termination letter on August 8, 2003, and had a police officer escort her out of the building. The termination letter stated that Taylor was being fired for "argumentative and combative behavior and insubordination on August 4, 2003." R. D. & O. at 8; Tr. 361.

Taylor filed this whistleblower action with the Occupational Safety and Health Administration (OSHA) in November 2003, alleging that her termination violated the SOX's whistleblower protection provisions. As required by regulation, OSHA investigated Taylor's claim. OSHA found that it lacked merit. R. D. & O. at 1. Taylor then requested a hearing with the Office of Administrative Law Judges. *See* 29 C.F.R. § 24.4. The ALJ conducted a hearing on September 28 and 29, 2004, and issued a Recommended Decision and Order (R. D. & O.) on July 29, 2004. The ALJ concluded that Wells Fargo had dismissed Taylor for reasons unrelated to her protected activity and recommended that the complaint be denied. R. D. & O. at 13-15. Taylor thereafter filed a petition for review of the ALJ's recommended decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the ARB.[2] Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.[3] 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."[4] We must uphold an ALJ's factual finding that is supported by substantial evidence even if

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[2] *See* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1980.110.

[3] *See* 29 C.F.R. § 1980.110(b).

[4] *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), *quoting Richardson v. Perales*, 402 U.S. 389, 401 (1971). *See also Getman v. Sw. Sec., Inc*. ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at 7 (ARB July 29, 2005).

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."[5]

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 …."[6] Therefore, the Board reviews an ALJ's conclusions of law de novo.[7]

DISCUSSION

The SOX protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of the federal mail, wire, radio, TV, bank, and securities fraud statutes (18 U.S.C.A. §§ 1341, 1343, 1344, and 1348), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.[8] The legal burdens of proof set forth in 49 U.S.C.A. § 42121(b), the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), govern SOX actions.[9]

Accordingly, to prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) she engaged in a protected activity or conduct; (2) the respondent knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[10] If the complainant succeeds in establishing that protected activity was a contributing factor, then the respondent may avoid liability by demonstrating by clear and convincing

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[5] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *See also Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 04-SOX-51 (ARB June 29, 2006).

[6] 5 U.S.C.A. § 557(b) (West 1996).

[7] *See Getman*, slip op. at 7.

[8] 18 U.S.C.A. § 1514A(a).

[9] 18 U.S.C.A. § 1514A(b)(2)(C).

[10] *See* 49 U.S.C.A. § 42121 (a) – (b)(2)(B) (iii) – (iv). *See also Getman*, slip op. at 8; *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).

evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[11]

The ALJ found that Taylor demonstrated by a preponderance of the evidence that she engaged in protected activity when she complained to Wells Fargo management about the practice of backdating letters of credit; that Wells Fargo was aware of her protected activity; and that her termination was an unfavorable personnel action. But he found that Taylor had failed to demonstrate that her protected activity was a contributing factor in the unfavorable action. R. D. & O. at 11. Further, he found that, even assuming her complaints contributed to the adverse action taken against her, Wells Fargo had produced clear and convincing evidence that Taylor was terminated because of her work performance and deteriorating relationships with her supervisor and other employees, and for a series of unprofessional and contentions actions, culminating in the argument she had with Homeyer on August 4, 2004. R. D. & O. at 14. Therefore, he recommended that Taylor's complaint be denied. R. D. & O. at 15.

The ALJ's decision is supported by substantial evidence. Moreover, it thoroughly and fairly discusses and evaluates the relevant facts underlying this dispute and correctly applies relevant law.[12] Accordingly, we adopt and attach the ALJ's Recommended Decision and Order and **DENY** Taylor's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

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[11] *See* § 42121(a)-(b)(2)(B)(iv). *See also Getman*, slip op. at 8.

[12] We note, however, that there is one error in the ALJ's decision: his conclusion "that a close proximity between an employee's alleged protected activity and her termination may in certain circumstances be sufficient to establish retaliatory intent." R. D. & O. at 12. Temporal proximity does not establish retaliatory intent, but may establish the causal connection component of the prima facie case. The ultimate burden of persuasion that the respondent intentionally discriminated because of complainant's protected activity remains at all times with the complainant. *Martin v. United Parcel Ser.,* ARB No. 05-040, ALJ No. 2003-STA-9, slip op. at 9 (ARB May 31, 2007). This error had no effect on the outcome of the case and is therefore harmless.