U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 06 July 2004

CASE NO: 2004-SOX-11

IN THE MATTER OF

KEITH A. KLOPFENSTEIN
Complainant

v.

PCC FLOW TECHNOLOGIES HOLDINGS, INC. and
ALLEN PARROTT
Respondents

RECOMMENDED DECISION AND ORDER

Background

This case arises from a complaint filed by Keith A. Klopfenstein (Complainant) against PCC Flow Technologies Holdings, Inc. (Holdings), alleging violations of the employee protection provisions at Section 806 of the Sarbanes-Oxley Act of 2002, codified in 18 U.S.C. §1514A (Act). Enacted on July 30, 2002, the Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under Section 806. The Act affords protection from employment discrimination to employees of companies with a class of securities registered under Section 12 of the Security Exchange Act of 1934 (15 U.S.C. 781) and companies required to file reports under Section 15(d) of the Securities Exchange of 1934 (15 U.S.C. 780(d)). Specifically, the law protects so-called "whistleblower" employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§1341, 1343, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders. All actions brought under Section 806 of the Sarbanes-Oxley Act are governed by 49 U.S.C. §42121(b). 18 U.S.C. §1514A(b)(2)(B).

On July 3, 2003, the Complainant filed a whistleblower complaint with the Occupational Safety & Health Administration (OSHA), U. S. Department of Labor. After an investigation, OSHA's regional director issued a letter dated October 22, 2003, advising the parties that the complaint lacked merit. On November 21, 2003, Complainant filed his objections with the Office of Administrative Law Judges, U. S. Department of Labor. A formal hearing was conducted before me in Houston, Texas, on April 5-6, 2004, at which times the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Complainant's Exhibits 1-16, Respondent's Exhibits 1-76, and ALJ Exhibits 1-6 were admitted into evidence. The parties submitted post-hearing briefs and proposed findings of facts on June 21, 2004.[1] I have reviewed and considered these briefs and proposed findings and the entire record in making my determination in this matter.[2]

<u>Issues</u>
(ALJ Ex. 4, Tr. 752-757)

1. Whether Allen Parrott is a proper party to the present action by Complainant.

2. Whether the named Respondent, Holdings, has a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934.

3. Whether Complainant's failure to name a publicly traded company in his complaint should result in the dismissal of this claim against Respondent Holdings.

4. Whether, as a subsidiary of a corporation that is a publicly traded company, Respondent Holdings is subject to the whistleblower retaliation provisions of the Sarbanes-Oxley Act.

5. Whether Complainant's failure to name his employer as a Respondent in his complaint should result in the dismissal of his claim.

6. Whether during his employment with PCC Technologies, L.P, Complainant engaged in activity protected by the whistleblower retaliation provisions of the Sarbanes-Oxley Act.

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[1] Throughout these proceedings the parties have waived any time constraints imposed by the Act.
[2] The conclusions that follow are in part those proposed by the parties in their post-hearing proposed findings of fact, for where I agreed with summations I adopted the statements rather than rephrasing the sentences.

7. Whether Respondents had knowledge that Complainant engaged in activity protected by the whistleblowing retaliation provisions of the Sarbanes-Oxley Act during his employment with PCC Flow Technologies, LP.

8. Whether, if protected activity was engaged in by Complainant, said protected activity was a contributing factor in Respondents taking adverse employment action against Complainant.

9. Whether any party is entitled to recover damages from the other.

<u>Stipulated Facts</u>
(Tr. 758, ALJ Ex 4 & 5)

1. PCC Flow, Inc. was a wholly-owned subsidiary of PCC Flow Technologies, Inc.

2. PCC Flow, Inc. was merged into Newmans, Inc. on March 31, 2002, and, immediately thereafter, Newmans, Inc. was converted into a limited partnership, PCC Flow Technologies, LP. (Flow Products)

3. PCC Flow Technologies, LP was and is a limited partnership wholly-owned by PCC FT I LLC and PCC FT II LLC.

4. Effective March 31, 2002, PCC Flow Technologies, Inc. changed its name to PCC Flow Technologies Holdings, Inc. (Holdings)

5. PCC FT I LLC and PCC FT II LLC are wholly-owned subsidiaries of PCC Flow Technologies Holdings, Inc.

6. Neither PCC Flow Technologies, Inc. nor PCC Flow Technologies Holdings, Inc. have a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (hereinafter "SEC Act") nor are they required to file reports under Section 15(d) of the SEC Act.

7. PCC Flow Technologies Holdings, Inc. is a wholly-owned subsidiary of Precision Castparts Corp. (PCC)

8. Precision Castparts Corp. is a company with a class of securities registered under Section 12 of the SEC Act.

9. Complainant was hired by PCC Flow, Inc. as Vice President of Operations on May 14, 2001.

10. From and after April 1, 2002, Complainant was employed by PCC Flow Technologies, LP.

11. Commencing on or about November 21, 2002, Complainant was assigned to perform the duties of Vice President of Strategic Operations of PCC Flow Technologies, LP.

12. Complainant's employment with PCC Flow Technologies, LP was terminated on April 7, 2003.

13. Complainant's earnings with his present employer, T-3 Energy Services, Inc., are $120,000.00 annual salary, $5,000.00 options awarded on June 26, 2003 and $10,000 operations awarded on February 19, 2004, but no bonus was given.

Findings of Facts

1. Complainant earned a Bachelor of Science degree with a major in Industrial Engineering from Texas A&M University in 1988 and a MBA in Finance from Texas Christian University in 1990. Before joining Flow Products, Inc. he worked for more than ten years as a manufacturing engineer and a manufacturing manager for a large valve and controls company in Houston.

2. Complainant began employment with Flow Products, Inc. in Brookshire, Texas on May 14, 2001. he was hired as Vice President of Operations and continued in that role until November 21, 2002, when he became Vice President of Strategic Operations. As Vice President of Strategic Operations, he was no longer directly responsible for the shipping activities at Brookshire but he did become responsible for inventory planning.

3. Flow Products, Inc. consists of three business units, PACO Pumps, General Valve, and Johnston Pumps, which share the facility in Brookshire. PACO manufactures and sells a line of smaller horizontal pumps; Johnson manufactures and sells large vertical pumps; and General Valve manufactures and sells special double-block-and-bleed plug valves.

4. Subsequent to Complainant's employment, the name of Flow Products, Inc. was changed to PCC Flow, Inc. On March 31, 2002, PCC Flow, Inc. was merged into a limited partnership named PCC Flow Technologies, LP (Flow Products). Flow Products is a wholly owned subsidiary of Respondent PCC Flow Technologies Holdings, Inc. (Holdings). Respondent is a wholly owned subsidiary of Precision Castparts Corp (PCC), a company with a class of securities registered under Section 12 of the SEC Act.

5. After becoming Vice President of Strategic Operations, Complainant testified he noticed a discrepancy in the in-transit inventory balances at Flow Products. The balance sheet showed substantially more prepaid inventory in-transit from overseas than shipping documents confirmed were actually in transit. He testified he believed that if the discrepancy in fact existed that there would be a material overstatement of the company's assets on the balance sheet. Complainant said he believed that a write-down to correct the overstatement would have a material effect on the income of Flow Products for the period that the write-down would take place.

6. In November or December 2002, Complainant asked one of his subordinates, Jessica George, to look into the perceived discrepancy. George talked to Mike Kerr, the sourcing agent who had custody of the shipping documents, and then to persons in the finance department, who offered an explanation from their perspective that George did not understand. She reported as much to Complainant, and told him the persons in the finance department did not seem to have the time to explain the details to her. Based on the finance department's assurance that the problem was being addressed, Complainant took no further action.

7. By mid-February 2003, however, Complainant testified he became concerned that the finance department could not or would not resolve the discrepancy. He decided to begin footnoting the perceived problem on the inventory reports he prepared for the weekly managers' meetings attended by representatives of Holdings. Starting with the report dated February 11, 2003, over the next few weeks Complainant noted the in-transit discrepancy and his preceived need to reconcile it. The last such report is dated March 24, 2003. The reports were displayed and discussed at the weekly managers' meetings.

8. Complainant testified he first reported the in-transit inventory discrepancy outside the finance department because he believed that the failure to resolve the matter would both jeopardize the company achieving its financial goals

and surprise other managers. He said he did not believe at the time that anybody was purposefully intending to commit fraud. As the discrepancy continued unresolved, however, he said he became increasingly concerned about a possible serious misstatement of the company's financial results.

9. Leah Sanchez-Arnold, a manager in Flow Product's finance department, acknowledged that accounting for the in-transit inventory discrepancy, the same discrepancy reported by Complainant, was needed to avoid a "massive material misstatement" of the company's balance sheet. Ultimately, Sanchez-Arnold performed a "true-up," meaning in essence that she wiped most of the in-transit inventory discrepancy off the books and started fresh. At the time she performed the "true-up," she used company records showing the discrepancy as totalling approximately \$362,000.00; Complainant's first written report in mid-February listed a discrepancy of \$363,000.00. The "true-up," however, resulted in a \$204,000 loss to Flow Products, of which only \$9,715.66 could not be accounted for in any fashion.

10. In February, 2003, Debbie Kramer, from PCC's finance department, was assigned the task of reconciling the in-transit inventory discrepancy. She worked at Flow Products through mid-June.

11. Allen Parrott, was hired as the Vice President of Finance for Flow Products on July 7, 2002. While on her assignment in Houston, Kramer learned that a substantial amount of PACO products were held at an off site crating company named Coastal Crating, and she informed Parrott that she was going to visit that location to determine if material was being held at Coastal in violation of the Revenue Recognition Policy applicable to Flow Products. Because Kramer felt improper revenue recognition was of greater significance to the financial reports of Flow Products than the project she was assigned to work, she looked into the revenue recognition issue.

12. Based upon Kramer's suspicions, Parrott was subsequently instructed to lead an investigation of the circumstances regarding shipments being held at off site locations. The analysis of the material being held at Coastal Crating and Cargo Freight Forwarding disclosed that a significant amount of revenue had been improperly recognized in months prior to being earned.

13. In 2000, PCC had revised and implemented its Revenue Recognition and Sales Recognition Policies. The revised policy made clear that revenue could only be recognized when title, and therefore risk of loss, had transferred to the

customer. The policy and memorandum transmitting the Sales Recognition Policy made clear that the policy was applicable to all subsidiaries of PCC. Complainant was provided with a copy of the Sales Recognition Policy and accompanying memorandum shortly after he was employed by Flow Products.

14. Kramer discovered in talking with employees involved in the shipping process at Flow Products, including Betty Dixon, instances when shipments were made in violation of the revenue recognition policy. Specifically, Kramer was told about shipments that had gone out on trucks by midnight of the end of the fiscal period only to return a couple of days later; shipments sent over to Coastal Crating if there was no address from the customer as to where to ship the material in order to count the shipment as revenue in the period; shipments put on a truck and "shipped" to the truckers home; shipments sent by hot shot delivery to UPS or FedEx on the last night of the fiscal period, even though neither UPS nor FedEx were open at the time and the shipment could not be transacted until the next Monday.

15. As a result of her investigation, Kramer identified a substantial amount of revenue which had been improperly recognized in an accounting period prior to when the risk of loss had actually passed to the customer, and she surmised that Complainant had been responsible for much of the improper revenue recognition. Based on this information, Kramer and Parrott concluded that Complainant had changed a long standing practice used by PCAO in recognizing revenue on international sales to a procedure which caused the improper recognition of revenue to occur. The procedure adopted by Complainant failed to take into account that risk of loss could not pass to a customer on an international shipment until PACO had the shipment properly packed for export. Likewise, since all export crating was performed for PACO by Coastal Crating, risk of loss could not pass to the customer until Coastal Crating had completed the export packing and the customer or its freight forwarder had been so advised.

16. Complainant admitted to having made the aforementioned change to the PACO practice regarding international shipments.

17. Upon determining that Complainant had implemented the practice of moving shipments to the freight forwarders at month's end in order to claim revenue on those shipments, even though the shipments were not complete or were not actually in transit to the customer, Parrott concluded that the practice had the same effect as claiming revenue on shipments which did not leave the Brookshire facility as those shipments were not, in fact, shipped to the ultimate customer. The

investigation also lead to the conclusion that Complainant had changed the practice which had been used by PACO shipping personnel to wait to transact an international shipment and "will call" or "will advise" shipments. Complainant had instructed that international shipments were to be closed and revenue declared upon the shipment leaving the Brookshire facility.

18. Parrott presented his written report of the investigation to Wayne Robbins, the President of Holdings and Vice President of PCC, John Lilla, the Vice President of Human Resources and Risk Management for Holdings, and Michael Jasperson, Vice President of Finances for Holdings, on March 20, 2003.

19. Robbins, the President of Holdings and Executive Vice President of PCC, on the recommendation of Michael Jasperson, the Vice President of Finance Holdings, with the concurrence of Mark Donegan and Bill Larsson, the Chief Executive Officer and Chief Financial Officer for PCC, made the decision to fire Complainant based on information contained in the investigation report prepared by Parrott, following his and Kramer's investigation. No person who held a position only with Flow Products participated in the firing decision. Jasperson was responsible for ensuring that employees of Flow Products were complying with the policy; and in consultation with Larrson, Jasperson directed and oversaw the investigation led by Parrott into suspected violations of that policy at Flow Products.

20. Parrott did not participate in making the decision to discharge Complainant.

21. Complainant's employment with Flow Products was terminated on April 7, 2003.

22. Regarding the termination, Robbins testified that it was clear to him that Complainant had caused violations of the revenue recognition policy regarding international shipments. However, he said before taking action, he asked Lilla to go to the Brookshire facility and to interview employees to confirm the information included in Parrott's report. Lilla visited the Brookshire facility on April 2 and 3, 2003, and interviewed a number of employees, some of whom had previously been interviewed by Parrott and some that had not. At the conclusion of those interviews, Lilla testified he was convinced that Complainant had directed and fostered an atmosphere that caused and/or allowed violations of the revenue recognition policies. Lilla reported his conclusions to Robbins.

23. Robbins testified it was only then he made the decision to discharge Complainant based upon his admission of having changed a policy regarding the recognition of revenue on international shipments.

24. Robbins and Lilla said they informed Complainant of his discharge from Flow Products on April 7, 2003, in a telephone call. Complainant did not make any reference to in-transit inventory or suggest that he was being discharged because of any inquiry he made regarding in-transit inventory during that telephone conversation. Approximately one month after his termination, Complainant asserted for the first time that he had made reports regarding the need to reconcile the in-transit inventory accounts and that his termination was based upon his having made those reports.

25. At trial Complainant admitted that he did not believe that the "discrepancy" in the in-transit inventory account amounted to fraud. He had made no mention of the in-transit account issue on the monthly inventory reports for February and March, 2003, which he submitted to the President of Flow Products, Mike Clute. Neither did Complainant make mention of the in-transit inventory being an issue on the PCC – 2003 Ethics Questionnaire he signed on March 4, 2003. Complainant did not mention anything about in-transit inventory during his meeting on March 21, 2003, with Robbins, Lilla and Jasperson. Nor did Complainant mention in-transit inventory in the telephone conversation with Robbins and Lilla on April 7, 2003, at the time he was informed of his discharge.

Discussion and Conclusions of Law

Are Respondents covered under the Act?

The parties stipulated that neither Complainant's employer, PCC Flow Technologies, LP, nor the entity sued by Complainant, PCC Flow Technologies Holdings, Inc., is a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), nor is either company required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)). (ALJ Ex. 4, Ex. B; Tr. 758-59).

Section 806, states, in relevant part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange

> Act of 1934 (15 U.S.C. 780(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). . . .

18 U.S.C. §1514A(a)(1); *see also* 29 C.F.R. §1980.102(a),(b)(1).

Based on the plain language of the Act and the stipulations of the parties, Respondent Holdings urges the dismissal of the complaint. In support thereof, Respondent Holdings also points to the recent decision of the Administrative Review Board in *Flake v. New World Pasta Company*, ARB No. 03-126 (February 25, 2004), that ". . . the whistleblower protection provisions of Sarbanes-Oxley cover only companies with securities registered under § 12 or companies required to file reports under § 15(d) of the Exchange Act."

Complainant's argument, without explanation as to why his complaint did not name his actual employer Flow Products or the publicly traded parent company Precision Castparts Corp., too points to the Act as supporting his right to proceed against a subsidiary alone.

Initially, Complainant argues, and I agree, that employees of non-public subsidiaries of publicly traded companies can be covered by the whistleblower protection provisions of the Act. In *Morefield v. Exelon Services, Inc., et al,* 2004 SOX 2 (ALJ January 28, 2004), the ALJ wrote, and I concur:

> The publicly traded entity is not a free-floating apex. When its value and performance is based, in part, on the value and performance of competent entities within its organization, the statute ensures that those entities are subject to internal controls applicable throughout the corporate structure, that they are subject to the oversight responsibility of the audit committee, and that the officers who sign the financials are aware of material information relating to the subsidiaries. A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries. In this context, the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary. It imposed reforms upon the publicly traded company, and through it, to its entire corporate organization.

Therefore, in this instance while Holdings and PCC are apparently separate corporate entities, for purposes of determining whether or not Complainant would be covered under the Act, I find the commonality of management and purpose between the two companies sufficient to most likely bestow whistleblower protection upon Complainant had he sued the parent company. He did not, however.

Complainant was employed by a limited partnership, PCC Flow Technologies, LP (Flow Products), a partnership owned by PCC Flow Technologies Holdings, Inc. (Holdings) who in turn was owned by the publicly traded parent corporation, Precision Castparts Corp. (PCC). The investigation that ultimately lead to Complainant's termination was instituted by Debbie Kramer from PCC's finance department, and the decision to terminate Complainant was made by Wayne Robbins, President of Holdings and Vice President of PCC, with the concurrence of other officers from Holdings and PCC. No person who held a position only with Flow Products participated in the firing decision. Based upon this scenario, it is possible to infer that had Complainant sued PCC, PCC most probably would have been found to be a covered employer within the definition of

§806 of the Act. That said, however, I decline to make such a finding inasmuch as the publicly traded PCC is not a party to this action.

Therefore, the issue remaining is whether PCC Flow Technology Holdings, Inc., who is neither Complainant's employer nor a publicly traded corporation but a subsidiary of a publicly traded corporation, standing alone is a covered party under the Act. In other words, as previously pointed out, Complainant here did not bring his complaint with OSHA or in this forum against PCC, rather he sued Holdings omitting both the limited partnership with whom he was employed and the publicly traded, parent company PCC. Had he brought claim against the latter, the issue could be resolved based upon my previous discussion; however, since he did not I am inclined to find, as did the ARB in *Flake, supra*, that ". . . the whistleblower protection provisions of [the Act] covers only companies with securities registered under §12 or companies required to file reports under §15(d) of the Exchange Act." In other words, the Act clearly identifies employers subject to the employee protection provision of the Act, and the subsidiary here named, Holdings, fails to meet that statutory criteria. Despite the apparent legislative intent to attach liability to publicly traded companies who surround themselves by other entities under their control, it does not seem the Act provides a cause of action directly against such subsidiary alone.

Complainant also argues that as an "agent" of a covered company, Holdings is itself "covered" under the Act and therefore a properly named party even in the absence of the publicly traded company being named. I do not agree. Holdings was more than an agent of PCC, it was an integral part of the publicly traded company with overlapping officers. In other words, if a publicly traded corporation for purposes of the Act is the "sum of its constituent units," Holdings was not an "agent" as referenced in the Act. Besides, in this instance it was as much, if not more, the actions of PCC's management that led to the decision to terminate Complainant than it was Holdings. Debbie Kramer, who started the investigation, was an employee of PCC, Wayne Robbins who made the decision and terminated Complainant occupied the dual roleS of President of Holdings and Vice President of PCC, and the decision was made in concert with other management of PCC, namely Mark Donegan and Bill Larrson. In other words, neither the facts here nor the commonality of management between the two entities support an agent relationship within the meaning of the Act. Therefore, it is my finding that Holdings is not covered under the Act. The proper corporate party to this action would have been PCC, the publicly traded company

Allen Parrott worked for the same limited partnership as did Complainant, Flow Products. He was hired as Vice President of Finance for Flow Products on July 7, 2002. He did not work for either Holdings or PCC. According to his allegations, he was never served with a copy of Complainant's complaint,[3] but he did appear and participate in all pre-trial, trial and post-trial activities. Therefore, I find that he was constructively served and has demonstrated no prejudice that would allow him to be dismissed on these procedural grounds.

I find, however, that, just as with Holdings, Parrott is not a proper party to this action. Parrott was no agent of PCC. He was an employee of Flow Products asked by Holdings' management to investigate revenue recognition violations. He did so, prepared a report, made no recommendations and the actions taken were not of his doing.[4]

In sum, Parrott was not an officer, employee, contractor, subcontractor or agent of the publicly traded parent company nor did he enjoy the privilege of discharging, demoting, suspending, threatening, discriminating against or harassing the Complainant.

<u>Complainant's Discharge</u>

Notwithstanding my previous findings, I will examine the evidence as it relates to Complainant's claim that he was subjected to adverse action due to his protected activity.

In defending a claim, Respondent may set forth, through the introduction of admissible evidence, the reasons for the adverse employment action. The explanation provided must be legally sufficient to justify a judgment for the Respondent. Upon articulating some legitimate, non-discriminatory reason for the adverse employment action or "explaining what it has done," Respondent satisfies its burden, which is only a burden of production, not persuasion. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 256-257; 101 S.Ct. 1089, 1093, 1095-1096 (1981).

Once Respondent has produced sufficient evidence in an attempt to show that Complainant was subjected to adverse action for a legitimate, non-discriminatory reason, it no longer serves an analytical purpose to answer the

[3] The complaint was mailed to the business address.
[4] If Parrott was an "agent" for any entity, it would have been Holdings, and Holdings has been determined not to be a covered employer under the Act.

question whether Complainant presented a prima facie case. Instead, the relevant inquiry is whether the Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If he did not, it matters not at all whether he presented a prima facie case. If he did, whether he presented a prima facie case is not relevant. *Somerson v. Yellow Freight System, Inc.*, Case NO. 98-STA-9 @8 (ARB Feb. 18, 1999).

I find in this instance that a legitimate, non-discriminatory reason for the adverse action against Complainant has been articulated. Complainant violated company revenue recognition policy, and Complainant confessed to so doing. As recited in my findings of fact, Complainant on his own and in contradiction to company policy changed the PACO practice regarding international shipments as well as engaged in the practice of removing from the premises incomplete shipments which were not in transit to the customer.

When a legitimate, non-discriminatory reason for an adverse employment action has been articulated, the burden shifts to Complainant to demonstrate that Respondent's proffered motivation was not its true reason but is pretextual and that its actions were actually based upon discriminatory motive. *Leveille v. New York Air National Guard*, Case Nos. 94-TSC-3 and 94-TSC-4 @4 (Sec'y Dec. 11, 1995); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46 @6 (Sec'y Feb. 15, 1995).

Complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. *Zinn v. University of Missouri*, Case No. 93-ERA-34 @4 (Sec'y Jan. 18, 1996); *Yellow Freight Systems, Inc. v. Reich*, 27 F.3d 133, 1139 (6th Cir. 1994). Complainant retains the ultimate burden of proving that the adverse action was in retaliation for the protected activity in which he allegedly engaged. However, because there is seldom no direct evidence of intent, a complainant is not required to demonstrate specific knowledge that the respondent had the intent to discriminate against him. Instead, a complainant may demonstrate the respondent's motivation through circumstantial evidence of discriminatory intent. *See Frady v. Tennessee Valley Authority,* 92-ERA-19 and 34 (Mar. 26, 1996); *Mackowiak v. University Nuclear Systems, Inc.,* 735 F.2d 1159, 1162 (9th Cir. 1984). Also, the Secretary has noted that, when addressing a complainant's proof of a prima facie case, a factor to consider is the temporal proximity of the adverse action to the time the respondent learned of the protected activity. *Jackson v.*

Ketchikan Pulp Co., 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Instant Oil Change, Inc.,* 91-SWD-4 (Sec'y Jan. 5, 1993).

In sum, where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact-finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action because there will seldom be eyewitnesses to an employer's mental process. A fair adjudication of whistleblower complaints requires a full consideration of a broad range of evidence that may prove or disapprove a retaliatory animus, and its contribution to the adverse action. *See, Timmons v. Mattingly Testing Services,* 95-ERA-40, 5-7 (ARB June 21, 1996).

The thrust of Complainant's claim as set forth in his proposed findings is as follows:

> 22. Parrott's displeasure with Klopfenstein over his reporting of the in-transit inventory discrepancy during troubled times for Parrott and his finance group led Parrott to look for a way to retaliate. With Kramer's help and the support of his friend and mentor Jasperson, Parrott seized on the old "rumors" about revenue-recognition problems as a convenient tool to turn attention away from the finance department and onto the operations department. By providing false information and concealing relevant information, both about the revenue-recognition issues and Klopfenstein's alleged responsibility for "inventory transactions issues," Parrott induced Robbins to fire Klopfenstein. Directly from the monthly meetings, and constructively through Parrott, Robbins had knowledge of Klopfenstein's protected reports.

While there is temporal proximity between November when Complainant said he first became concerned about discrepancies in in-transit inventory and his termination in April, I do not find, viewing the evidence as a whole, that Complainant's concerns played a role in management's decision to terminate him. In other words, I find there existed a legitimate, non-pretextual reason for dismissing Complainant (his violation of the revenue recognition policy), and that Complainant has not demonstrated by a preponderance of the evidence that he was fired because of any concerns over in-transit inventory discrepancies.

Seventeen witnesses testified at the formal trial. Jessica George, who worked under Complainant as a scheduling manager, agreed she was not "upfront" nor cooperative when she met with Parrott and Kramer in February or March concerning the material distribution reports (MDR) involving stock adjustments and the moving of inventory. She also confirmed nothing was mentioned about in-transit inventory in that or subsequent meetings. Cherry Patterson testified about George's February use of her computer to electronically move inventory from one location to another at the direction of and with approval of Complainant. When questioned about that event by Parrott, Patterson said nothing was mentioned about in-transit inventory. Patterson also testified George told her she knew things that could bring Complainant down. She testified too that Betty Dixon was upset at month's end about close outs of unfinished jobs which she was asked to do. Patterson also described Complainant as abusive and said she had witnessed him yelling at others and using profanity. James David Kisner acknowledged closing out jobs that were not billed or shipped at the end of a month at Complainant's instructions.

Betty Dixon, a traffic coordinator with Flow Products, said she was instructed by Doug Myers (who said Complainant had instructed him) to post close outs of jobs that were neither billed nor shipped in order to inflate numbers. Dixon explained that to be a completed job, the product should be crated, a bill of lading issued and the item loaded. She also said by moving out jobs with no addresses, the items were recognized as revenue the month shipped, and then upon return these same items were credited the next month again. She said all this was done in order to give the appearance of increased revenue and "to make numbers." On at least one occasion she told finance not to bill a customer, and she was instructed by Kisner not to talk with finance.

Mike Jasperson was Chief Financial Officer for Holdings. He said he knew from rumours there was a revenue recognition issue dating back to Kathy Matthews' visit to Flow Products in 2002.[5] She reported to Jasperson that she had discovered items and materials on docks shown as shipped which in fact were not. Jasperson said subsequently he instructed Parrott to conduct an investigation concerning the revenue recognition issue. He also got John Lilla of Human Resources involved as well as Debbie Kramer. During an interview with Complainant, Jasperson said Complainant acknowledged he had changed policy

[5] Kathleen Matthews is manager of corporate projects for PCC who visited Flow Products in 2002. When she approached Complainant about shipping and receiving practices he explained this was "his business practice" and said he had authority from division office.

without finance's input by deciding no supporting documentation was necessary before shipping products. Jasperson said he was "disappointed" with Complainant and lost trust in him and recommended Complainant's discharge. He said in-transit inventory never came up on these discussions.

Wayne Robbins, President of Holdings and Vice President of PCC, testified he made the ultimate decision to terminate Complainant following discussions with Parrott, Flores, Jasperson and Lilla. He fired Complainant because of violations of policy. In describing the investigation, Debbie Kramer said she was never told to nor did she direct her investigation of revenue recognition toward Complainant; however, as a result of her investigation she determined Complainant instructed people to violate company policy in that regard. Doug Myers too testified that if items were not off the dock by month's end it should not be recognized as revenue; however, he said Complainant instructed him otherwise to achieve monthly goals. Steve Malkowsky said in December of 2002 he was told to straighten out shipping and receiving transactions, and when he went to Complainant about material he found electronically moved to MRB, Complainant said he would take care of it.

Allen Parrott testified that following Matthews visit he was told to be alert to revenue recognition. He said in October 2002, he found $60,000.00 in inventory on the docks which had been recognized as revenue. He met with Complainant, and Complainant promised it would not happen again. Subsequently, Parrott heard other rumours that items were improperly being moved around electronically, but not physically, for purposes of revenue credit. Complainant was told to stop the electronic relocations. Subsequently, he said Kramer began her inquiry which involved visiting crating companies who told her it was common knowledge Flow Products had a pattern of sending items at the end of the month to get revenue credit. The focus of the investigation that was then undertaken, according to Parrott, was to determine shipment violations. The team formed to do so was Eva Flores with Human Resources, Kramer and Parrott. The report following the investigation (RX 34) was forwarded to Jasperson and Lilla. Parrott said when asked if Complainant should be terminated he had said "no", but Jasperson said otherwise.

John Lilla, Vice President of Human Resources for Holdings, explained that following his investigation, and based on the decision of Robbins, Complainant was terminated because they were convinced Complainant had been at the forefront of and directed and fostered an attitude which caused and permitted violation of revenue recognition policies. As to Jeff Conley and John Hotz, both of whom were implicated in the violations, Lilla testified that they were not fired because each lacked training and understanding of the policy, unlike Complainant. Lilla said in-transit inventory discrepancies were never discussed and he knew nothing about such until Complainant made his post-termination assertions.

As to the matter of in-transit inventory discrepancies, both Parrott and Kramer said it was an insignificant problem when measured against the revenue recognition issue. Mike Kerr explained in-transit inventory as being goods moving by rail or boat from foreign suppliers and said at any time $500,000.00 or less was what was physically in transit.

The most thorough explanation of in-transit inventory from an accounting standpoint came from Leah Sanchez-Arnold, accounts payable-accounts receivable supervisor for Flow Products. Arnold explained that the method used was to pay for goods when on boat, put into accounts payable and when goods were received take a credit. She said this full matching system was acceptable, but confusion existed when invoices did not match on the docks, and a problem existed when in the fall of 2002, the computer system "Oracle" was introduced. Beginning in October 2002, Arnold said she started doing reverse journals which removed inventory in-transit to avoid any material misrepresentation on financial statements until the invoices were reconciled. At the end of 2002 she "trued up" with Mike Kerr what was on the water. "The only piece that was a true complete write off that we could not figure out at all was $9,715.66." She denied a misrepresentation of public financial reports ever occurred.

Conclusion

Based upon the foregoing, it is my finding that Complainant's termination came about for the legitimate, non-pretextual reason that he violated revenue recognition policies, and there has been insufficient evidence offered to demonstrate that the motivation to terminate was discriminatory and based upon any concerns Complainant expressed about in-transit inventory discrepancies. In other words, from the evidence it appears that the same unfavourable personnel action would have been taken in the absence of any protected behaviour on Complainant's part.

As to Parrott, it is unrefuted that Parrott did not initiate the investigation of revenue recognition issues. It was Kramer, an employee of PCC, who determined that issues regarding revenue recognition might exist with respect to materials being held by an off site crating company. Kramer, not Parrott, conducted the initial investigation of the presence of material being held off site. It was only after Kramer determined that some of that material had been claimed improperly as revenue in a prior accounting period that Parrott became involved. His involvement was caused by Michael Jasperson who instructed Parrott to lead an investigation of the revenue recognition issues which Kramer had uncovered. Parrott did so and only reported the factual results of his investigation.

Parrott had no involvement in Complainant's actual discharge. The evidence is undisputed that Parrott was not consulted and did not provide any input into the ultimate decision to discharge Complainant. In fact, when asked, Parrott did not think Complainant should be fired. Complainant presented no evidence that Parrott had any control over the terms and conditions of his employment, or that Parrott himself discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against him in the terms and conditions of his employment.

ORDER

Under the facts, I find that neither Respondents are subject to the provisions of §806 of the Act. Alternatively, I find that Complainant has failed to establish a case for retaliation under the Act. Complainant's complaint is hereby **DISMISSED**. No party shall recover from the other.

So ORDERED this 7th day of July, 2004, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:kw

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).