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Issue Date: 14 February 2005

Case No.: 2004-SOX-0043

In the Matter of:

PATRICIA TAYLOR,
Complainant,

v.

WELLS FARGO, TEXAS,
Respondent.

Before:
LARRY W. PRICE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises from a claim filed by Patricia F. Taylor (Complainant) against Wells Fargo Bank of Texas (Respondent) alleging violations of the employee protection provisions at Section 806 of the Sarbanes-Oxley Act of 2002, codified in 18 U.S.C. § 1514A (the 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 1(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). See 18 U.S.C. § 1514A(b)(2)(B).

On November 4, 2003, 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 March 25, 2004, advising the Parties that the complaint lacked merit. On April 21, 2004, Complainant filed her objections with the Office of Administrative Law Judges, U.S. Department of Labor. A formal hearing was conducted before me in Houston, Texas, on September 28 and 29, 2004, at which time the Parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Complainant's Exhibits A – Z, AA, BB, and Respondent's

Exhibits 1 – 90 were admitted into evidence. The Parties submitted post hearing briefs and proposed findings of facts on November 30, 2004. Pursuant to a motion from Complainant, the Court agreed to reserve ruling on the case until after January 14, 2005.

Based on the evidence introduced, and the arguments presented, I find as follows:

ISSUES

1. Whether Complainant engaged in protected activity under the Act?

2. Whether Respondent actually or constructively knew of or suspected such activity?

3. Whether Complainant suffered an unfavorable personnel action?

4. Whether Complainant's activity was a contributing factor in the unfavorable personnel action taken against her?

5. Would Respondent have taken the same unfavorable personnel action against Complainant in the absence of her protected activity?

STATEMENT OF THE CASE

A. Testimony of Patricia Taylor

Taylor works as a commercial lending officer at the Community Bank of the South in Florida. (Tr. 53). She graduated from Smith College with a degree in economics in 1974 and from the University of Rochester with an MBA in finance in 1976. (Tr. 54). Taylor went to work at Southeast Bank in Miami, where she originated, underwrote and was responsible for business development for three years. (Tr. 54-55). Taylor's husband was transferred to Jacksonville, Florida in 1979 and she was hired to work at Barnett Bank as Vice President of Commercial Lending. (Tr. 55-56).

In 1984, Taylor and her husband divorced and she was offered a job with Florida National Bank near Tampa Bay as a team leader responsible for large national accounts. Taylor was rehired by Barnett Bank in 1986 and worked there until 1992. She held various positions from commercial lending officer to Senior Vice President in charge of corporate banking. (Tr. 56-57). Taylor was hired by Spencer Stewart, an international recruiting firm, in 1992 to work in New Orleans, Louisiana for Whitney Bank as a vice president and to reorganize their loan department. She worked there for five and a half years. (Tr. 58-59).

In 1998, Complainant went to work at Merrill Lynch in New Orleans in their business financial services unit. She was responsible for originating loans and supporting their capital market products. This was a non-traditional banking job and Taylor had to get her securities

license. (Tr. 60). She was offered a position with Wells Fargo in Houston, Texas and began working there in October of 2000. (Tr. 63-64). She was last at the Houston office of Wells Fargo on August 8, 2003 when she was escorted from the premises by a police officer. (Tr. 64-66).

Taylor received her 2001 performance review signed by Jonathan Homeyer in May of 2002. (CX B). She received an overall rating of four on a scale of one to five with five being the highest possible rating. (Tr. 69-71). Jonathan Homeyer wrote "Patty's experience is invaluable to the office and her efforts to mentor the less experienced members of the team are applauded and valued." (Tr. 71). Objective 2 of the review was business development. Complainant's supervisor stated that she had put in a lot of effort to develop new business clients and she received a rating of three in this category. Objective 3 of the review was customer service relationship management. Taylor received a rating of four in this category and stated that she is a strong customer advocate but that she needed to continue to familiarize herself with client service processes at Wells Fargo. (Tr. 75-77).

In March, 2003, Taylor received her performance evaluation for 2002. (CX F). It was completed by Homeyer and her overall grade was a three minus. (Tr. 80-81). A grade of three means all requirements were met and performance demonstrates a confident execution of responsibilities. Taylor felt the requirement for her to make 20 calls a month as stated in her performance review was unrealistic but she did her best to meet these goals. (Tr. 237-39). She contacted Greg Gates at Employee Relations to dispute not only her 2002 performance evaluation but also a final warning that had been placed in her file due to an alleged tracing incident. (Tr. 81-83). Complainant also spoke with Jackie Sun, senior council for Wells Fargo who works in the San Francisco office. (Tr. 83-84).

Gates reviewed Taylor's dispute of her 2002 performance evaluation and warning but she is unaware of who Gates spoke with. (Tr. 86-87). Taylor requested a copy of all documents Gates relied on for his finding but he refused to provide any such documentation. (Tr. 93-94). She wanted an unbiased review because she felt the 2002 performance evaluation was retaliatory due to her complaints of abuse, harassment and fraudulent practices. (Tr. 94-95).

In July of 2003, Complainant began reviewing the HCC relationship and found that Wells Fargo was continually backdating millions of dollars worth of letters of credit. (Tr. 102-04). A bank issues a letter of credit when it guarantees the credit of another entity or business. Backdating these letters can affect the capital or ability of the bank to cover the guarantee. (Tr. 103-06). No financial institution that Taylor has ever worked for has backdated letters of credit. On July 25, 2003, Taylor contacted Brad Bemis, an attorney for Wells Fargo, about the backdated letters. (Tr. 107-10). Bemis was upset to find out an e-mail he issued two years prior (CX I) allowing Homeyer to backdate a letter of credit, was being used on a continuous basis as a legal opinion. (Tr. 111). Taylor sent a memo to Homeyer (CX J) stating her concern over the backdated letters and Homeyer told her to "take the rap for the backdating incidents." (Tr. 116). Bemis issued a legal opinion memo (CX L) stating that backdating letters can not involve meeting regulatory or internal requirements. (Tr. 124-25).

On August 4, 2003, Taylor was sitting at her desk in her office when Homeyer came in

and demanded she "take the rap" for the backdating of credit letters for HCC. (Tr. 130-31). He told her to contact HCC and inform them of the change in policy regarding letters of credit. She asked him to put that directive in writing. (Tr. 242-44). Complainant told Homeyer she would not "take the rap" and that she had copies of e-mails he sent her telling her to backdate the letters. Homeyer became agitated and demanded copies of the e-mails which Taylor said were at home. After looking through her office and not finding the e-mails, Homeyer sat down across from Taylor and told her he would attend a meeting with HCC to clear up the credit letters. (Tr. 132-33). Taylor checked her availability for the week but Homeyer needed to check his calendar which was in his office so she followed him there. (Tr. 133-34).

Homeyer got to his office and checked his calendar on his computer for available meeting dates which he gave to Taylor. (Tr. 136-37). As Complainant was leaving, she mentioned that she felt harassed during the Innova closing by Homeyer and Patterson. Homeyer became angry and showed Taylor two e-mails he was copied on by Patterson. He told Taylor she had no credibility with loan supervision to which Taylor replied that Homeyer had damaged the relationship. (Tr. 137-38). Homeyer told Complainant she was out of line and asked her loudly to leave his office.

Taylor left Homeyer's office and met a potential client who had been sitting in the reception area waiting for her. (Tr. 142). Taylor and the potential client went to lunch and he drove her back to the office afterward. (Tr. 144). She has not spoken with him since that day.

On August 5, 2003, Taylor brought a copy of the e-mails from Homeyer to work with her and put them in the HCC 2001 credit file which she put in Homeyer's office. (Tr. 147). On August 8, 2003, Taylor had a meeting scheduled at 9:00 a.m. for what she believed to be her termination. (Tr. 148). Homeyer and Chereck did not meet with Taylor until around noon at which time she was given a termination letter. (CX P). Taylor was told that her behavior was unacceptable and someone would escort her out. (Tr. 150-52).

Taylor applied to numerous jobs over the next few months but when asked if she'd been terminated from Wells Fargo, she answered yes and was not given the position. (Tr. 154). She was hired to work for A1A Mortgage in March of 2004 as a mortgage broker on commission. (Tr. 156-57). In June, 2004, Taylor went to work for Community Bank of the South making $72,000.00 per year. (Tr. 158). She was making $108,000.00 at Wells Fargo plus commission and in 2003 made approximately $140,000.00. (Tr. 158-59).

Taylor admitted under cross examination that although she testified her August 4, 2003 conversation with Homeyer was just a disagreement, she wrote on her calendar (RX 78) on August 5 that "yesterday was hell." (Tr. 163-65). She received her performance evaluation for 2001 and Homeyer mentioned in the comments that she needed to "continue to develop her understanding of Wells Fargo processes" and "work the system, don't fight it." (Tr. 166-67). Taylor told Connie Ortega that she was unhappy with the way she was being treated at Wells Fargo by Homeyer and requested a transfer to another branch in 2002. (Tr. 168-69).

Taylor also requested a transfer to the Denver office in 2003 but the request was denied. She believed Homeyer's attitude toward her changed in the beginning of 2003 and that he wanted

to terminate her employment. (Tr. 170-73). In February 2003, Ortega advised Taylor that the loan center required an original signature on a loan document. The original document had been lost and there was only a copy of the document in the file. (Tr. 174-75). Taylor told Ortega that it looked like an original to her and she asked McCaslin if it looked like an original to him. He stated that the document was definitely a copy. (Tr. 175-76). Taylor jokingly asked McCaslin if he could trace over it to look like an original signature but she does not recall saying she was kidding. (Tr. 177).

On February 13, 2003, Homeyer met with Taylor and asked her to explain what happened regarding the forgery incident. Taylor realized at this time that a complaint had been made and she told Homeyer that she was just joking. Taylor admitted that this was not an appropriate comment to make as the senior relationship manager. (Tr. 178-79). That same day, Taylor lodged a harassment complaint with Chereck against Homeyer. (Tr. 180-81).

Chereck advised Taylor that someone would contact her from human resources but no one called and Taylor had to set up a meeting with Buffington herself the following day. (Tr. 181-82). During the meeting, Taylor told Buffington she felt Homeyer was harassing her because she was a woman with stronger banking background than him. (Tr. 182-83). Taylor's attorney contacted Buffington but she refused to speak with him. (Tr. 184). Taylor also did not submit her expense reports because she thought they would be denied by Homeyer. She felt human resources should offer a special procedure for her to submit her expenses but they did not. (Tr. 185-86).

On February 21, 2003, Taylor met with Homeyer and Buffington. She was issued a final warning for violating the Wells Fargo code of ethics and business conduct which she refused to sign. (Tr. 187-89). Taylor advised Buffington that she had retained legal counsel and the matter was between her attorney and Wells Fargo. She began interviewing for positions with other banks in March of 2003 because her health was deteriorating due to anorexia. (Tr. 189-90).

On March 31, 2003, Taylor received her performance evaluation which she refused to sign and said she would take a copy home and respond point by point. (Tr. 197-98). Complainant, however, did not respond to the evaluation. She testified that she knew her review would be bad ahead of time because Homeyer was trying to terminate her employment. Homeyer stated in the review that Taylor was failing to meet her performance goals each month and that she needed to try to improve her relationship with other employees. (Tr. 199-202).

Taylor felt she worked well with everyone but Ortega and Patterson because they were retaliating against her. Ortega quit doing Taylor's work and Complainant was working late to get her paperwork through. (Tr. 203-05). Taylor began documenting when she felt Ortega was not doing her job although she was not Ortega's supervisor. She never had any complaints about Ortega's job performance until after the forgery incident. (Tr. 205-07). Taylor and Homeyer met with Ortega regarding Taylor's concerns about job performance. Complainant brought a copy of the notes she had made but refused to give a copy of her memo to Homeyer. (Tr. 208-09).

B. Testimony of Karen Patterson

Patterson has been an employee of Wells Fargo since July of 2000, and is currently a Loan Team Manager. (Tr. 310). In her position, Patterson recommends and approves credit requests and routine reviews for existing customers of Wells Fargo, or recommends credits to a loan supervisor that are beyond her authority. (Tr. 310). A Loan Team Manager interacts directly with the Relationship Manager (Complainant's position) when considering client requests. Specifically, the Relationship Manager provides a standard format underwriting memo that describes the client's request. (Tr. 311-12). Patterson described good communication between the Loan Team Manager and Relationship Manager to be "really important" because the Relationship Manager maintains the relationship with the client. (Tr. 312).

Patterson began working with Taylor in 2002. She described their relationship as changing over time with some arguments. (Tr. 313-14). Specifically, Patterson discussed Taylor's work regarding an account with Innova Electronics. The two disagreed about when Taylor should discuss the terms of a covenant with the client. Patterson found that Taylor had provided inadequate and inaccurate written support when she made a recommendation on loan supervision. (Tr. 315). She sent Taylor an email informing her of these problems, but Taylor refused to address these issues and instead responded the following Monday with a handwritten note accusing Patterson of working with Homeyer to hurt Taylor's reputation. (RX 49). Patterson contacted Human Resources, who informed her that they would be contacting Taylor. (Tr. 318). Due to this disagreement, Patterson decided she needed to formalize all contact with Taylor. (Tr. 319).

Patterson also discussed her interaction with Complainant in regards to an account Wells Fargo had with Jade Companies. According to Patterson, Taylor wanted to make a proposal on a line of credit with Jade. Taylor felt she had the authority to do this based on instructions from Wells Fargo's loan supervision. (Tr. 321-22). Patterson was skeptical, so she asked Taylor to conduct a "sniff test." This is a report that provides the loan supervision team with enough information to determine if there are obvious initial problems with a proposed deal. (Tr. 322). Taylor did conduct a "sniff test," but after conducting her own investigation and visitation with Jade, Patterson found the report inadequate and inaccurate. (Tr. 323-24).

On cross-examination, Patterson verified that Taylor had raised the issue of backdating letters of credit. Taylor specifically provided Patterson with a memorandum (CX L) raising the issue, as well as information concerning the provisions of the Sarbanes-Oxley Act. (Tr. 326).

C. Testimony of Deborah Metalbo

Metalbo has worked for Wells Fargo a little over a year and is currently an administrative assistant. (Tr. 338). She specifically works as Jonathan Homeyer's assistant and an administrative assistant to other staff members. On August 4, 2003 Metalbo witnessed a discussion between Taylor and Homeyer that she characterized as an argument. (Tr. 340). Metalbo testified that their voices were raised and Taylor's demeanor was unhappy. (Tr. 340).

On cross-examination, Metalbo affirmed that she was at work on August 8, 2003. She was at her desk when a Houston police officer arrived. (Tr. 344). However, she also affirmed that she was not in the office when the officer escorted Taylor from the building. (Tr. 344).

D. Testimony of Jonathan Homeyer

Homeyer has been employed at Wells Fargo for a little over eight years. (Tr. 346). He is the Regional Vice President, responsible for the North Houston Commercial Banking office. (Tr. 346). In this position he hired Taylor as the Senior Relationship Manager for the North Houston office, where he expected her to provide leadership and act as a rainmaker in terms of acquiring new business development. (Tr. 347).

Homeyer briefly explained the commercial lending process and the roles of the Relationship Manager, Loan Team Manager, Loan Supervision and Client Service Manager. (Tr. 348-50). He described his role as having ultimate responsibility over all areas and he stressed the importance of cooperation among all people in the office. (Tr. 350).

Homeyer testified as to his involvement in the forgery incident of February, 2003 between Taylor and her co-workers. The incident was brought to his attention the day after the event by Connie Ortega, the Client Service Manager. In response, Homeyer talked with Taylor and asked whether she had told Ortega to trace over a signature in order to forge a document. (Tr. 351-52). Taylor reacted by becoming very defensive and indicated she was only joking when she made that request to Ortega. (Tr. 352). Homeyer also spoke with Dorothy Buffington, who is with Wells Fargo's Human Resources department, and Bob Chereck, who is Homeyer's supervisor. (Tr. 352). Homeyer considered the forgery incident to be a material breach of ethics and placed Taylor on a final warning. (Tr. 353). A memorandum was written issuing this warning. (RX 18). Homeyer testified that Taylor became visibly distraught when she was issued the warning and she refused to sign it as he had requested. (Tr. 354).

On cross-examination, Homeyer affirmed that he wanted to terminate Taylor's employment after the forgery incident. (Tr. 365). He also affirmed that he spoke with Barron, Buffington, and McCaslin after he became aware of the incident. While McCaslin indicated that he thought Taylor may have been joking when she first asked for the document to be forged, Homeyer affirmed that after his conversation with McCaslin he believed Taylor was engaging in fraud. (Tr. 379-81).

Homeyer also testified that Taylor refused to discuss her performance evaluations of March, 2003 and July, 2003 despite Homeyer's attempts to engage her in a conversation to resolve certain matters. Specifically, in response to an email sent by Homeyer, Taylor refused to respond substantively and just stated she stood by her earlier comments. (Tr. 356). Homeyer considered this an inappropriate response that indicated an attitude of disinterest in work and a lack of effort in improvement. (Tr. 356).

On August 4, 2003 Homeyer met with Taylor to discuss both the HCC letter of credit and the Innova Electronics Loan. Specifically, he wished to discuss how the information is gathered

and communicated to the client, and how he had delegated certain authority to Patterson concerning the Innova loan. (Tr. 357-58). Taylor became defensive and very argumentative. After Taylor had raised her voice, Homeyer left her office. (Tr. 358). A couple minutes later, Taylor followed Homeyer to his office where she began to question his role in undermining her creditability. (Tr. 359, 413). He asserted this was not the case, but she ultimately began yelling and screaming. (Tr. 359). At this point, Homeyer told her that her behavior was unbecoming and unprofessional and asked her to leave his office. During the disagreement, Homeyer's office door was open. (Tr. 359).

After this argument, Homeyer contacted Buffington and Chereck. Later that day, Homeyer provided Buffington a document itemizing the events of that day. (RX 74). Based on the events of August 4, 2003, it was decided that Taylor must be terminated. (Tr. 360). The basis for the termination was Taylor's argumentative and combative behavior and insubordination on August 4, 2003. (Tr. 361). Homeyer considered this the top of a history of issues with Taylor concerning her combative demeanor in the office and performance issues. He felt there was no workable arrangement with Taylor to be productive in the office. (Tr. 435). On August 8, 2003, Homeyer and Chereck instructed Taylor that she had been terminated. Due to her previous behavior, they decided to have a plain clothes Houston police officer assist Taylor in gathering her belongings and exiting the building. (Tr. 362). After Taylor was terminated, her files on her computer in the office were secured. Homeyer affirmed that this was a common procedure. (Tr. 369). The computer contained numerous derogatory emails. Homeyer affirmed that had he known about these emails he would have recommended Taylor be terminated earlier. (Tr. 371).

A letter of credit is described as a financial instrument in which the bank's credit rating would be placed in lieu of the client's on the issue of the letter of credit. (Tr. 362). Homeyer affirmed that on occasion he has amended letters of credit for Wells Fargo's client, HCC, so the effective dates were different from the actual date of issuance. (Tr. 363). He also testified that this is not a fraudulent activity if the beneficiary and issuer of the letter of credit have accepted the amended date. (Tr. 363).

In 2001, Taylor raised a concern with Homeyer about backdating HCC's letter of credit. (Tr. 365). Homeyer contacted numerous individuals, including Wells Fargo's legal counsel and the head of compliance related to Trade Bank operational issues, to see if the practice was acceptable. They all approved the activity. From 2001 to July, 2003, Wells Fargo continued to amend HCC's letters of credit and Taylor, as Relationship Manager of the account, was aware of the activity. (Tr. 366-67).

In July, 2003, Taylor again raised concerns about backdating the letters of credit. Homeyer became aware of her concerns on July 30, 2003, when she sent him a memorandum (RX 68) stating that this practice violated bank policy. (Tr. 367). Homeyer also received a memorandum from Bemis (RX 66) giving criteria under which backdating could be maintained and that everyone needed to be careful in the current environment. (Tr. 368). Homeyer affirmed that before July, 2003, it was common practice to backdate letters of credit. However, the practice was stopped after Bemis issued this memorandum. Homeyer did not interpret the memorandum as finding the practice of backdating in violation of bank policy, instead Bemis

was asking the practice to stop for the some time to ensure compliance. (Tr. 408). Furthermore, Homeyer denies ever telling Taylor that she was to blame for the backdating. However, while Homeyer felt Taylor was doing her job when she raised the issue, he found the memorandum she left for him to be accusatory and unprofessional. (Tr. 405).

E. Testimony of Dorothea Buffington

Buffington has been employed at Wells Fargo for 18 years. She currently works as a Senior Human Resources Consultant. (Tr. 439). In this capacity, Buffington provides human resource consultations for approximately forty offices.

In February, 2003 Buffington was called by Chereck to investigate an incident involving Taylor and Homeyer. She was asked to investigate an allegation of forgery and a harassment charge. (Tr. 440). She spoke with Taylor who claimed the forgery incident was a joke and Homeyer was out to get her. (Tr. 441). However, Buffington interviewed two individuals who stated that Taylor had asked them to trace a copy of a signature intending to make it appear as the original. (Tr. 455). Buffington concluded this to be a breach of ethics. (Tr. 456). In regards to the assertions of harassment, Buffington found no substantiation of the claim. (Tr. 441-42). Based on this investigation, Buffington made a recommendation (RX 23) that Taylor be given a final warning for her involvement in the forgery incident, that she meet the performance expectations of a Senior Relationship Manager, or that she be provided a negotiated departure agreement since she did not want to be there and to terminate her. (Tr. 442-43).

Buffington was also present at the meeting where Taylor was issued her final warning. Taylor became very angry during this meeting and informed Buffington that she had retained counsel. (Tr. 444). Later in February, 2003 Buffington was contacted by Taylor's attorney. She informed him that in her capacity as a Human Resources Consultant she only had authority to speak to the employee, but Taylor's counsel stated his purpose was to advise her that if there was any adverse action taken against Taylor there would be severe ramifications. (Tr. 445-46).

In August, 2003, Buffington was contacted concerning the argument between Taylor and Homeyer. Buffington was involved in the decision to terminate Taylor due to her inappropriate behavior and lack of performance. (Tr. 446). She affirmed that the reasons behind the termination were Taylor's unwillingness to perform according to job expectations, as well as her unprofessional behavior. (Tr. 481). Buffington also affirmed that the final decision to terminate Taylor was made by Chereck.

LAW AND CONTENTIONS

Section 806 of the Act protects employees, who report a violation of certain federal laws, from retaliation by their employer. Specifically the Act protects against retaliation for employees who

> [P]rovide 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 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).

To receive protection under the Act, a complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity under the Act; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action; and (4) circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. §§ 1980.104(b), 1980.109(a); Macktal v. U.S. Dep't of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1101-02 (10th Cir. 1999); Dysert v. Sec'y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997). If the complainant proves all four elements by a preponderance of the evidence, then he 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 behavior. 29 C.F.R. § 1980.109. If the respondent is able to meet this burden, the inference of discrimination is rebutted. In order to prevail, the Complainant must show how that the rationale offered by the respondent was pretextual. See Overall v. Tennessee Valley Auth., 1997-ERA-53, (ARB April 30, 2001).

Protected Activity

The Act protects employees who provide information to authorities in the executive branch, to Congress, or to the employer, that the employee reasonably believes shows the employer violated federal laws against shareholder fraud. 29 C.F.R. § 1980.102(b)(1). The complainant is not required to show that the reported conduct actually constituted a violation of the law, but only that he reasonably believed that the respondent violated one of the enumerated statues or regulations. 18 U.S.C. § 1514A. The standard for determining whether the complainant's belief is reasonable involves an objective assessment.

This Court finds Complainant engaged in protected activity in July 2003 when she notified Respondent of her supervisor's practice of backdating letters of credit. Complainant reasonably believed that the practice of backdating letters of credit could have involved mail fraud, wire fraud, and bank fraud, in violation of Sections 1341, 1343, and 1344 of Title 18 of the United States Code.

Respondent asserts that Complainant did not have a reasonable belief that Respondent was committing fraud. Specifically, Respondent argues there is no specific evidence that it was defrauding or assisting a third party in committing fraud. However, Complainant does not need to show an actual violation of the law. See Halloum v. Intel Corp., 2003-SOX-7 (ALJ May 4, 2004) (stating "[a] belief that an activity was illegal may be reasonable even when subsequent investigation proves a complainant was entirely wrong. The accuracy or falsity of the allegations is immaterial; the plain language of the regulations only requires an objectively reasonable belief that shareholders were being defrauded to trigger the Act's protections"). Complainant does meet the threshold standard, demonstrating by a preponderance of the evidence that she reasonably believed that when backdating the letters of credit, Respondent was falsifying a bank document, which she believed would constitute an illegal and criminal act. (Tr. at 108, 110, 275). Furthermore, Complainant reasonably believed Respondent was assisting its client in committing fraudulent activities. In fact, when Complainant raised this concern, Respondent itself admitted it must be careful to not deceive any government regulators or creditors of the applicant when backdating letters of credit. (EX L).

Knowledge of Protected Activity

The regulations provide that "[t]he named person knew or suspected, actually or constructively, that the employee engaged in the protected activity." 29 C.F.R. § 1980.104(b)(1)(ii). There appears to be no issue, and the Court finds, that Respondent was aware of Complainant's protected activity. Complainant's supervisor, Mr. Homeyer, and Respondent's in-house counsels, Mr. Bemis and Ms. Sung, all knew Complainant was engaging in protected activity under the Act. Ms. Sung received a letter on July 30, 2003, specifically informing Respondent that Complainant was intending on invoking the protections under the Act. (EX M). Complainant also notified Ms. Patterson, Complainant's Loan Team Manager, of her protection under the Act.

Adverse Action Against Complainant

The regulations provide that an employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." 29 C.F.R. § 1980.102(a). It is undisputed in the present case that Complainant was terminated by her supervisors. Her discharge clearly constitutes an adverse employment action as defined by the Act.

Protected Activity as a Contributing Factor in Adverse Employment Action

The final element requires the Complainant to demonstrate by a preponderance of the evidence "that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint." 29 C.F.R. § 1980.109(a). I find that Complainant has failed to demonstrate circumstances sufficient to raise an inference that her protected activity was in any way a contributing factor in the decision to terminate her. That decision was made by Mr. Chereck after a consultation with Mr. Homeyer and Ms. Buffington. These individuals all agree that Complainant's grievance concerning the legality of backdating the letters of credit was not a factor in the decision to terminate her. (Tr. 361, 481). The record supports their

description of the events on August 4, 2003 and the months before, as well as the reasons given for Complainant's discharge.

On August 8, 2003, Homeyer and Chereck instructed Complainant that she had been terminated. I find that this decision was due to Complainant's argumentative and combative behavior during the prior eight months. I find that Complainant's unprofessional behavior during the argument between Homeyer and Complainant on August 4, 2003, was the last in a history of insubordinate acts. Homeyer testified that after his argument with Complainant, it was clear there was no workable arrangement with Complainant in the office. (Tr. 435). Buffington, the Human Resources Consultant who also participated in the decision to terminate Complainant, affirmed that Complainant's behavior was the reason to end her employment. (Tr. 481). I find the testimony of Homeyer and Buffington, when considered in light of the other evidence of record, credible.

Complainant denies acting inappropriately with Homeyer on August 4, 2003. She claims that Homeyer came into her office and demanded that she "take the rap" for backdating the letters of credit to HCC. (Tr. 130-31). She also denies raising her voice during the argument and testified that the conversation was not an argument, but merely a disagreement. (Tr. 163). I find that the record does not support Complainant's assertions. First, Complainant contradicts herself when describing the August 4, 2003 meeting. While she testified that the meeting was merely a disagreement, she admitted on cross-examination that in her calendar she had previously described August 4, 2003 as "hell." (Tr. 163-65). I also find that Metalbo's testimony affirms Homeyer's assertion that Complainant's voice was raised. Specifically, Metalbo classified the discussion as an argument and described Complainant's demeanor as unhappy. (Tr. 340). There is also no evidence that any of Complainant's superiors wished to use Complainant as a scapegoat for any penalty that may arise from backdating documents. In fact, Homeyer and Respondent's attorneys were never sure if their activity was illegal. (Tr. 408).

In denying Complainant's claim, I recognize that a close proximity between an employee's alleged protected activity and her termination may, in certain circumstances be sufficient to establish retaliatory intent. See, e.g., Cones v. Shalala, 199 F.3d 512, 521 (D.C. Cir. 2000); County v. Dole, 886 F.2d 147, 148 (8th Cir. 1989); Mitchel v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985). This close temporal proximity, however, does not require such a finding. While Complainant was terminated from her employment just nine days after contacting Homeyer and Bemis about the backdated letters of credit, her discharge was also after a series of confrontations in the office and poor performance. The timing of the termination is not suspicious when that timing is credibly explained by a non-retaliatory motive.

I find that Complainant's working relationship deteriorated after the forgery incident in February, 2003. Homeyer testified that there were continuous problems with Complainant's behavior in the office from February, 2003 until August, 2003. Specifically, Homeyer found that Complainant remained defensive and argumentative. (Tr. 352). This attitude continued when she refused to sign the warning she was issued (Tr. 354), as well as during Buffington's investigation concerning possible forgery. (Tr. 441). I find the testimony of other employees as creditable support that Complainant's working relationship with the office had deteriorated over the months prior to her termination. Patterson testified that she had a series of arguments with

Complainant. (Tr. 313-14). Specifically, when Patterson spoke with Complainant about problems with her work product, Complainant became defensive and responded with a threatening letter. Patterson felt so uncomfortable with Complainant that she felt she needed to inform Human Resources and formalize all contact. (Tr. 319). I also find Buffington's testimony demonstrates a deteriorating work environment. Buffington described Complainant as angry during their conversations. (Tr. 444). Furthermore, in February, 2003 Complainant hired an attorney who contacted Buffington, threatening that if adverse action was taken against Complainant there would be severe ramifications. (Tr. 445-46).

I also find Complainant's diminishing work product was a factor in the decision to terminate her employment. Both Homeyer and Patterson testified that Complainant's work became incomplete and inaccurate at times. Her performance evaluations of March, 2003 and July 3, 2003 demonstrate a decline in productivity. Most notably, Complainant was warned in the July performance evaluation that she "must demonstrate progress toward these development points and clearly demonstrate a willingness to meet performance expectations as a Senior Relationship Manager." (RX 55). During this time period, Complainant began to ignore many of her responsibilities as a Relationship Manager and she refused to discuss ways to improve her performance. (Tr. 356). Homeyer testified that Complainant had demonstrated an attitude of disinterest and lack of effort in improvement. (Tr. 356). Buffington also found some of Complainant's loan recommendations to be inaccurate or incomplete. (Tr. 315). Buffington specifically mentioned conducting a follow up investigation on Complainant's work only to find Complainant had not completed basic responsibilities that come with her position. (Tr. 322). All this occurred after Complainant was given a final warning and prior to her protected activity. Therefore, the performance evaluations, coupled with creditable testimony at the hearing, all support the conclusion that Complainant was fired because of a history of unprofessional conduct and poor work performance. The timing of Complainant's discharge, given the facts of this case, does not give rise to an inference of retaliation.

Complainant argues that the reasons proffered by Respondent are pretextual. However, the record adequately supports the reasoning behind Homeyer, Chereck and Buffington's decision that a termination was the appropriate course of action. The evidence and testimony demonstrate that the decision-makers considered the argument on August 4, 2003 to represent the culmination in a series of unprofessional actions. There is no evidence to suggest that Homeyer or any other of Complainant's supervisors conspired to create the argument to establish a pretext for firing her. I find the weight of the evidence shows Complainant was terminated because of her insubordinate actions on August 4, 2003, her unprofessional and combative behavior in the prior months, and her poor work performance. Therefore, Complainant has not met her burden of proving by a preponderance of the evidence that her termination was due, at least in part, to her protected activity.

Legitimate Nondiscriminatory Rationale for Adverse Action

Even if Complainant could demonstrate that her protected activity contributed to Respondent's adverse employment action, Respondent may still prevail so long as it can prove the adverse action was motivated by legitimate, nondiscriminatory reasons. The Complainant cannot prevail if Respondent shows "by clear and convincing evidence that it would have taken

the same unfavorable personnel action in the absence of any protected behavior." 29 C.F.R. § 1980.109. I find that Respondent has put forth a nondiscriminatory rationale to justify terminating Complainant.

The evidence shows that Complainant's working relationship with the office had deteriorated severely over the months prior to her termination. Homeyer testified that Complainant had remained defensive and argumentative since February, 2003. She also continuously refused to perform certain tasks that were part of her responsibility as a Relationship Manager. For instance, Homeyer testified Complainant refused to perform a credit investigation as he had requested. (Tr. 192-93). Making the situation worse was Complainant's refusal to talk to Homeyer, consequently she informed him of her refusal through his secretary. (Tr. 192-93). Complainant's relationship with team members also worsened. After receiving numerous accusatory emails in March, 2003, Ortega needed to contact Human Resources for advice on how to work with Complainant. (RX 29). Patterson also testified that she had a strained relationship because of Complainant's combative attitude and refusal to provide accurate information. (Tr. 313). In response to routine requests for information, Patterson would receive accusatory emails from Complainant, which made her uncomfortable to the point that she too needed to contact Human Resources for advice.

Complainant's testimony affirms the poor relations she had in the office, specifically with Homeyer. According to Complainant, she considered herself "at war" with Homeyer, as of March, 2003. (Tr. 196). In the months prior to her complaint concerning the letters of credit, she felt isolated in the office. (Tr. 211). In fact, Complainant conceded in her testimony that she feared termination before she even raised the issue of backdating the letters of credit. (Tr. 274).

I find the record also shows Complainant's work performance was a legitimate reason to terminate her employment. In the months prior to her release, Complainant had received a final written warning for a breach of ethics (Tr. 353), as well as negative performance evaluations. In July, 2003 Complainant was warned that she "must demonstrate progress toward these development points and clearly demonstrate a willingness to meet performance expectations as Senior Relationship Manager." (RX 55). Complainant refused to discuss her performance with Homeyer or acknowledge a performance counseling memo, which she dismissed as retaliatory and lacking merit. Homeyer interpreted this behavior as a disinterest in work and a lack of effort in improvement. (Tr. 356). Chereck also found Complainant had demonstrated that she did want to work for Respondent and had not put forth particularly good performance. (CX AA).

The evidence shows that the August 4, 2003 argument between Complainant and Homeyer was the last in a series of unprofessional and contentious actions between the office and Complainant. Based on Complainant's behavior in the preceding months, I find that Homeyer and Chereck were justified in finding there was nothing they could do to salvage the relationship and termination was the only option.

RECOMMENDED DECISION AND ORDER

It is the recommendation of the Court to the Secretary of Labor:

That the compliant of Patricia F. Taylor be DENIED. [1]

A

LARRY W. PRICE
Administrative Law Judge

LWP/TEH
Newport News, Virginia

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"), U.S. 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 will 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).

[1] Contrary to Respondent's assertion, there is not sufficient evidence to show Complainant filed this action in bad faith. Respondent's request for attorneys fees is denied.