U.S. Department of Labor

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Issue Date: 30 March 2006

CASE NO.: 2005-SOX-59

IN THE MATTER OF

DAVID WENGENDER,
COMPLAINANT

v.

ROBERT HALF INTERNATIONAL INC.,
RESPONDENT

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

A. Background

This case arises under the Sarbanes-Oxley Act of 2002 (herein "SOX" or "the Act"), technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 *U.S.C.* §1514A *et seq.*, and the employee protective provisions promulgated hereunder at 29 *C.F.R.* Part 1980. Under SOX, the Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of publicly traded companies who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for providing information about fraud against company shareholders to supervisors, federal agencies or members of Congress.

On September 27, 2004, Complainant filed a complaint with the Department of Labor Occupational Safety and Health Administration (herein "OSHA") under the employee protective provisions of SOX contending that he was constructively discharged after he expressed concerns about individuals receiving commissions when they actually did nothing to earn them. The Secretary of Labor through her agent, OSHA investigated the September 27, 2004 complaint and on April 11, 2005 issued a report dismissing the complaint, finding no evidence of a SOX

violation or any evidence to support Complainant's contention that he was constructively discharged. Complainant timely filed objections and request for hearing regarding the OSHA determination. The matter was referred to the undersigned for hearing.

On November 16 2005, Respondent filed a Motion for Summary Decision and Brief in Support contending that Complainant could not establish a *prima facie* case of discrimination under SOX. Respondent contends that Complainant suffered no unfavorable personnel action and did not engage in protected activity. Further there is no evidence that Complainant's complaint was a contributing factor to any unfavorable personnel action.

On November 23, 2005, Complainant filed Complainant's Response To Respondent's Motion for Summary Decision and Brief in Support contending he does not have to prove a SOX violation or to prove he suffered an adverse personnel action only that he reported what he reasonably believed to be a SOX violation or a fraud upon shareholders and that his complaint was a contributing factor in harassment or discrimination with respect to compensation, terms, conditions, or privileges of employment. 29 *C.F.R.* §1980.102.

For the reasons set forth *infra* the undersigned finds in the present case that Complainant failed to establish the essential elements of a retaliation case against Respondent under SOX and accordingly recommends dismissal of the instant complaint

B. Uncontested Facts:

1. Respondent is a specialized provider of temporary and permanent professionals in the fields of finance, accounting, technology systems, marketing, desktop publishing, legal support services, and office administration. Respondent is staffed, in part, by salespersons. Salespersons are paid a base salary and a commission based upon placements.
2. Respondent is a company within the meaning of 18 *U.S.C.* §1514A.
3. Complainant was employed as a salesman by Respondent from late October of 1998 to early December of 2004. Complainant received various awards from Respondent for his work and was generally considered to be a top producer.
4. At no time during Complainant's employment with Respondent was Complainant subject to a demotion.

5. Initially, Complainant received an annual base salary of $60,000. However, Complainant experienced a $2,000 reduction in his annual base salary as a result of some structural changes to Respondent's employee pay plans in late 1999. His annual base salary was thereby reduced to $58,000. Otherwise, Complainant's annual base salary remained unchanged throughout the remainder of his employment with Respondent.

6. Complainant's annual income, annual base salary plus commissions, in 2002 was $533,792.62. Complainant's annual income in 2003 was $319,406.00 and $211,650.70 in 2004.

7. Respondent has several personnel policies in effect in each branch office. These policies include salespersons' attendance at weekly 8:00 a.m. board meetings unless a salesperson is at a client meeting or interviewing a candidate for placement; salespersons document their sales activities by entering the activities as they happen into a computer program known as Micro J; and periodic performance evaluations referred to as sales activity reviews (herein "SAR").

8. In cases of staff turnover, according to Respondent's Sales Tracking procedures in effect in 2001, permanent place division receivables, open orders, were to be assigned to the House Account, not to another Recruiting Manager. Any open and active permanent division job orders were permitted to be reassigned to another Recruiting Manager at the discretion of the Division Director overseeing that particular division. And, a Recruiting Manager would not receive any sales credit subsequent to their termination of employment with Respondent.

9. Under Respondent's Sales Tracking procedures that were in effect in 2001, in order to reassign credit from the House Account, one must have proper authority to do so[1] and a valid business reason that supports the goals of the company.[2]

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[1] Individuals with the property authority to reassign credit from the House Account are limited to branch mangers and above.

[2] An example of a valid business reason is when a consultant is on billing at a particular client and continues to work at that client although the consultant is moved to a completely new project. The recruiter that was working with the consultant while he was on the original project could then earn the recruiter credit on the new project. The new project is considered a new engagement even though it is for the same client so the recruiter could earn the recruiter credit. Another example is when a new salesperson is assigned to the client account from which the credit was earned.

10. Respondent had in place a financial controls complaint hotline through which any employee could report questionable activity, and could do so anonymously if the employee so chose.

11. During the time Complainant was employed by Respondent, Complainant worked mainly from Respondent's Dallas Downtown office with the exception of a brief move to Respondent's Fort Worth office and a brief transfer to Respondent's Dallas Galleria office.

12. Complainant worked at Respondent's following branches for the specified durations under the supervision of the identified individuals:

Office Branch	Dates of Employment	Supervisor(s)
Dallas Downtown	10/98 – late 2002	Deborah Bennet, Peggy Page Tracy Turner, Curtis Ludwig
Team Solutions Dallas Downtown	mid 2001 – late 2002	Joe Taylor, Curtis Ludwig
Fort Worth	late 2002 – early 2003	Ray Sheppard
Dallas Downtown	early 2003 – late 2003	Curtis Ludwig
Dallas Galleria	late 2003 – early 2004	Scott Patenaude, John Reed
Dallas Downtown	early 2004 – 9/04	Kay Steelman, John Reed
Dallas Downtown	11/04 - 12/04	Steve Clary, Stephanie Wessling, Bob Clark

13. In 2000 while at Respondent's Dallas Downtown office, Complainant developed an account with a company known as TXU. This account developed into substantial book of business in 2002. The billable hours attributable to the TXU account decreased in each subsequent year.

14. Complainant was counseled about his job performance on the following occasions by the specified individuals:

    (a) In at least February of 2003, Ray Sheppard requested that Complainant attend 8:00 a.m. board meetings every day. Complainant did not make the 8:00 a.m. meetings every day as preferred by Ray Sheppard.

    (b) In at least July and September of 2003, Curtis Ludwig requested that Complainant attend 8:00 a.m. sales meetings. Complainant understood that Curtis Ludwig expected him in the office at 8:00 a.m. for the Monday and Wednesday branch and division meetings. Complainant attended these meetings whenever his client considerations did not interfere.

(c) In discussing Complainant's move to the Dallas Galleria office in late 2003, John Reed advised Complainant to diversify his client account base. Around the same time, Cecil Gregg, John Reed's supervisor, advised Complainant to diversify his client base in case anything ever happened to the TXU accounts.

(d) In November of 2003 Scott Patenaude requested that Complainant enter his sales activities in Micro J. Following this request, Scott Patenaude continued to counsel Complainant about not documenting his activities in Micro J.

(e) In November of 2003 Scott Patenaude requested that Complainant come into the office 8:00 a.m. every day. Complainant informed Scott Patenaude that the employee handbook stated that work began at 8:30 a.m. and that if that was going to be changed, he and Scott Patenaude would need to discuss it as Complainant had personal considerations that prevented him from being in at 8:00 a.m. every morning. Scott Patenaude then asked that Complainant at least make the 8:00 a.m. meetings on Monday mornings. Complainant agreed to be at the Monday morning meetings where possible. Following this exchange, Scott Patenaude continued to counsel Complainant about his non-attendance at the Monday morning meetings.

(f) In January of 2004, Complainant was instructed by both Scott Patenaude and John Reed to develop a target list. Phil Willingham, regional manager over professional staffing services, also spoke with Complainant regarding a target list.

(g) On January 30, 2004, Phil Willingham sent Complainant an e-mail, stating, "It's equally saddening to now hear people saying Dave W. brings 0 value to the MR team and we are through trying to work with it." In this same e-mail, Phil Willingham advised Complainant to diversify his client base.

(h) In February 2004, Cecil Gregg again advised Complainant to diversify his client account base during a meeting between him, Complainant, Scott Patenaude and John Reed.

(i) While at Respondent's Dallas Downtown office in early 2004 to September 2004, Kay Steelman requested that Complainant attend 8:00 a.m. board meetings.

(j) In June 2004, John Reed requested that Complainant document his sales activities in Micro J.

(k) On approximately September 2, 2004, Complainant received a draft performance expectations memorandum in which he was warned by John

Reed that his arrival to the office beyond 8:00 a.m. would not be tolerated. Upon receiving this memorandum, Complainant sent an e-mail to John Reed advising him that personal issues prevented him from being at work at 8:00 a.m. every day and that if that was going to be a requirement, they would need to discuss accommodations. Complainant did not pursue a discussion regarding any type of accommodations beyond this e-mail message to John Reed.

(l) Complainant was advised in a revised performance expectations memorandum from John Reed received by Complainant on September 7, 2004 to not only improve his attendance, but to also document his activities in Micro J and to improve his target list.[3]

(m) Complainant documented some of his sales activities in Micro J as requested by John Reed in the revised performance expectations memorandum after Complainant returned from leave.

15. Complainant engaged in periodic performance evaluations[4] on the following occasions with the following individuals:

(a) While working under the supervision of Ray Sheppard in late 2002 to early 2003, Complainant participated in performance expectation discussions.

(b) While working under the supervision of Curtis Ludwig in mid 2001 to late 2002 and early 2003 to late 2003, Complainant regularly engaged in business discussions.

(c) On or about December 4, 2003, Scott Patenaude met with Complainant for the purposes of conducting an initial SAR.

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[3] Complainant contends that this written warning was the first warning he had ever received regarding his job performance and that he received the warning only after he had complained of the improper reassignment of credits. While this memorandum may have been the first written warning Complainant received, the record plainly shows that Complainant was counseled about his job performance on numerous occasions both prior to and following his complaint to his supervisors regarding the reassigned credits.

[4] Complainant testified in his deposition that none of the performance expectations meetings in which he participated were a SAR as defined by Respondent's operating procedure even though some of the meetings were referred to as a SAR by his supervisors. For the purposes of summary decision, the non-movant must show a genuine issue of material fact. If a purpose of a SAR, as Complainant testified, is to discuss performance expectations, a meeting which addresses that issue satisfies that purpose whether or not the meeting is identified as a SAR, a performance expectations meeting, or a business discussion. Disagreeing as to the particular title assigned to these meetings simply does not establish a genuine issue of material fact.

(d) On June 29, 2004, John Reed and Cecil Gregg met with Complainant in order to discuss performance goals for Complainant.

(e) On or about August 30, 2004, Complainant met with John Reed for purposes of conducting a SAR. At this meeting, John Reed and Complainant revisited the issues discussed between them in their meeting of June 29, 2004 regarding Complainant's performance goals. John Reed informed Complainant that he would follow up the meeting with a performance expectations memorandum.

16. In an e-mail dated June 15, 2004, Complainant informed Kay Steelman, that he had heard a rumor that she was going to give credit from Respondent's House Account to new salespersons who had not earned the credit. Complainant further informed Kay Steelman that he was not against her giving credit to others, but he didn't want his contribution to the credits to go unrewarded. The credits rumored to be subject to reassignment by Kay Steelman were TXU related.

17. Kay Steelman reassigned credit for five orders to five new salespersons and credit for two orders to herself. Complainant scheduled a meeting with Kay Steelman following her reassignment of these credits from the House Account.[5]

18. On June 16, 2004, Complainant met with Kay Steelman regarding her reassignment of credits from the House Account. According to Complainant, Kay Steelman, in response to his inquires regarding the reassignments to the new salespersons, said "we want these people to stay," and when questioned about the reassignment to herself stated that "John Reed is on board with this."

19. After June 16, 2004, Complainant periodically checked to see if the credits had been returned to the House Account.

20. On June 29, 2004, Complainant informed John Reed and Cecil Gregg of the reassignment of credits from the House Account.[6] Cecil Gregg informed Complainant that he would look into the matter.

21. From mid-June to mid-August, John Reed, while in Respondent's Dallas Downtown office would sit in the general working area of the office referred to as the bullpen. Complainant's desk was located in the bullpen. Complainant perceived that John Reed was periodically staring at him.

[5] The total dollar amount of reassigned credits at issue was estimated at $12,500.

[6] The essence of Complainant's complaint was that it was inappropriate to pay out commissions to individuals who had not earned them.

22. On August 30, 2004 Kay Steelman reassigned credit on the same orders in the same manner except that she did not again assign two credit orders to herself. Instead, Kay Steelman assigned one order to another salesperson and the other order to Complainant. Complainant subsequently informed Kay Steelman that the assignment was a mistake and should be changed.

23. Complainant took an approved leave from work in early September 2004 to November 2004.

24. Around mid-August to early September 2004 prior to Complainant's leave, Complainant had setup his company e-mail account to carbon copy messages to his personal Yahoo e-mail account.

25. Complainant periodically reviewed his company e-mail through his personal Yahoo account while he was out on leave.

26. From mid-August to late September 2004, Complainant's company e-mail account had e-mails deleted or purged.[7]

27. From mid-August to early September, John Reed, while in Respondent's Dallas Downtown office would sit in the bullpen and Complainant perceived that John Reed constantly stared at him.

28. While out of the office on choice time off ("CTO") in September of 2004, Complainant informed Respondent's chief operating officer, Paul Gentzkow of the reassigned credits and of Complainant's perception of retaliation against him by his supervisors whom he originally notified of the reassignment of credits.[8]

29. Respondent investigated Complainant's allegations and determined that some credits from the House Account had been reassigned against company policy. Respondent was unable to substantiate the retaliation allegations, but offered Complainant a new chain of command upon his return from leave.

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[7] The record does not contain any facts to illustrate how these e-mails were deleted or purged, deliberately or accidentally. The record, however, shows that a new computer system was installed sometime during Complainant's leave. A reasonable inference, based on this record, is that the e-mails were lost due to some sort technical difficulty with the new computer program.

[8] Complainant discussed the reassignment of credits with his direct supervisor, Kay Steelman, on June 16, 2004. On June 29, 2004, Complainant informed John Reed and Cecil Gregg of his belief that the credits were improperly reassigned. Complainant then notified Paul Gentzkow of this belief in September of 2004 and also filed a complaint with OSHA, alleging a SOX violation.

30. Kay Steelman was demoted and transferred out of the Dallas Downtown office as a result of the reassignment of credits. John Reed was disciplined for his handling of the matter.

31. Following his return from leave, Complainant was instructed to report to Steve Clary as his direct supervisor and Stephanie Wessling, Steve Clary's direct supervisor, regarding his daily activities and to report to Bob Clark, zone director, regarding compensation and performance issues.

32. Upon his return from leave, Complainant was unable to view all his previously read e-mail due to the deletions or purging of e-mails from his company e-mail account. Complainant was instructed to contact tech support for assistance regarding the matter. Complainant was informed that e-mails deleted for a period of seven days or longer could not be retrieved.

33. Complainant does not know of any business opportunity that he missed as a result of the deletions or purging of his company e-mail account.

34. While on leave, Complainant contributed to the maintenance of a few TXU related accounts. Following his return from leave, Complainant contacted Phil Willingham as well as Steve Clary and Stephanie Wessling regarding sales credits relevant to his contribution. Complainant was told that the matter would have to be resolved by John Reed. Complainant contacted John Reed regarding these sales credits. A meeting between Complainant, John Reed and Stephanie Wessling was scheduled for the purposes of resolving this matter. Following this meeting, John Reed gave Complainant the sales credits for his contribution to the accounts. Complainant did not bring the matter to the attention of Bob Clark.

35. As of November 1, 2004, the reassigned credits had not been returned to the House.

36. Complainant resigned from his employment with Respondent in December 2004.

37. Respondent's form 10-k shows Respondent's total revenue for fiscal year ended December 31, 2004 as $2,675,696,000, net revenue as $140,604,000, total assets as $1,198,657,000 and stockholder equity as $911,870,000.

38. Financial statements included in Respondent's form 10-k are rounded to the nearest thousand dollars. Management discussions and other disclosures included in Respondent's financial statements are rounded to the nearest million dollars. A $12,500 reassignment of House Account credits would not have been reflected in earnings or expense trends in Respondent's management discussions in its form 10-k.

C. Parties' Positions

Complainant asserts that Respondent retaliated against him in violation of SOX for his reporting what he believed to be an accounting violation. Complainant contends that he was subjected to a written reprimand, several oral reprimands, and a change in both procedure (required to attend meetings outside of business hours) and substance (required to attend SARs) immediately after (June 29, 2004) he brought to the attention of his supervisors what he believed to be an inappropriate assignment of unearned commissions. Complainant contends that after he raised what he believed to be an inappropriate assignment of commissions, his work environment became so hostile that he felt he no longer had any choice but to end his employment with Respondent.

Respondent moves for summary decision and asserts that Complainant did not establish a *prima facie* case of retaliation under SOX. Respondent contends that Complainant suffered no unfavorable personnel action and did not engage in protected activity. Further there is no evidence that Complainant's complaint was a contributing factor to any unfavorable personnel action or any evidence that Respondent would not have taken the same action anyway. Respondent, therefore, argues that it is entitled to summary decision.

Complainant opposes summary decision, insisting that he has raised an issue of fact with respect to whether he engaged in protected activity, and whether he was subject to actions violative of 29 *C.F.R.* §1980.102(a). Respondent submitted objections to Complainant's evidence used in opposition to summary decision, contending that: (1) portions of Complainant's evidence is hearsay; (2) portions of Complainant's evidence is conclusory and not based on personal knowledge; and (3) portions of Complainant's evidence contradicts Complainant's previous sworn testimony.

D. Substantive Law and Procedure

The standard for granting summary judgment or decision is set forth at 20 *C.F.R.* §18.40(d) which is derived from Federal Rules of Civil Procedure (FRCP) 56. Section 18.40(d) permits an Administrative Law Judge to enter summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision." 20 *C.F.R.* §18.40(d) (1994). A "material fact" is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And, a "genuine issue" exists

when the non-movant produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. *Id.* at 249.

In deciding a motion for summary decision, the Court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). In other words, the Court must look at the record as a whole and determine whether a fact-finder could rule in non-movant's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587. The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp., v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. If the non-movant fails to sufficiently show an essential element of his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Id.* at 322-323.

The purpose of the employee protection provisions of SOX is to protect employees of publicly traded companies who provide information or assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of various federal fraud provisions, including Sections 1341 (fraud and swindles), 1342 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders. 18 *U.S.C.* §1514A; 29 *C.F.R.* §1980.102(a); *Hendrix v. American Airlines, Inc.*, 2004-AIR-00010 and 2004-SOX-00023 (ALJ Dec. 9, 2004).

The information or assistance must be provided to or the investigation must be conducted by a federal regulatory or law enforcement agency, any member of Congress, or any committee of Congress, or 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)(1). Any employer may not 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 under the Act's protection. *Id.*

The evidentiary framework to be applied in SOX is an analysis different from that of the general body of employment discrimination law. *Stone & Webster*

Engineering Corp., v. Herman, 115 F. 3d 1568, 1572 (11th Cir. 1997). The applicable evidentiary framework requires that a complainant, in order to secure an investigation, "pass a gatekeeper test" by establishing a *prima facie* showing that retaliation for protected activity was a contributing factor in the alleged unfavorable personnel action. ***Id.*** After which, respondent may avoid liability by showing by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. ***Id.*** If respondent is unable to make such a showing, complainant must then show by a preponderance of the evidence that the protected activity was a contributing factor in the alleged unfavorable personnel action. ***Id.*** After such showing by complainant, Respondent has a final opportunity to avoid liability by showing by clear and convincing evidence that it would have taken the same unfavorable personnel action regardless of the activity. ***Id.***

In *Brune v. Horizon Air Industries, Inc.*, the Administrative Review Board re-clarified the procedures and burdens of proof in whistleblower complaints. *Brune v. Horizon Air Industries, Inc.*, ARB Case No. 04-037 (Jan. 31, 2006); See also, *Bechtel v. Competitive Industries, Inc.*, 2005-SOX-00033 (ALJ Oct. 5, 2005) (stating, claims under SOX follow same procedures governing AIR 21.). The Board distinguished between a complainant's burden to secure the investigation of a complaint, which merely requires the complainant establish a *prima facie* case that raises an inference of discrimination, and complainant's burden to secure adjudication in his favor after he has raised an inference of discrimination by a preponderance of the evidence. *Brune v. Horizon Air Industries, Inc.***,** at 14.

Accordingly, to establish a case of whistleblower retaliation under SOX, Complainant must establish that: (1) he engaged in protected activity; (2) Respondent knew or could be presumed to know of Complainant's protected activities; (3) Complainant suffered unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable personnel action. *Carroll v. Bechtel Power Corp.,* Case No. 91-ERA-46 (Sec.'y Final Decision and Order, February 15, 1995) *aff'd sub nom.* 78 F.3d 352 (8th Cir. 1996); *Mackowiak v. University Nuclear Systems, Inc.,* 735 F.2d 1159, 1162 (6th Cir. 1983). A contributing factor need not be significant, motivating, substantial, or predominant and can be any factor which alone or in connection with other factors, tends to affect in any way the outcome of the decision. *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004), quoting *Marano v. Dept. of Justice*, 2 F 3d 1137, 1140 (Fed. Cir. 1993); See also, *Collins v. Beazer Homes U.S.A., Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004). Ordinarily, temporal proximity between the protected activity and unfavorable personnel

action will satisfy the burden of making a *prima facie* showing of employer knowledge and that the protected activity was a contributing factor. *Id.*

If the Complainant proves discrimination by a preponderance of the evidence, and not merely an established *prima facie* case, the complainant prevails unless the Respondent meets its burden of proving, by clear and convincing evidence, that it would have taken the same adverse action in any event. *Brune v. Horizon Air Industries, Inc.*, at 14. If the Respondent meets this burden, it may avoid any liability for retaliation. *Id.*, citing, 49 *U.S.C.* §42121(b)(2)(B)(i) and 29 *C.F.R.* §1979.109(a). If the Respondent does not meet this burden, summary decision for Respondent is inappropriate.

Objections to Complainant's Evidence

Respondent objects to a portion of Complainant's evidence advanced to oppose summary decision as inadmissible hearsay. The standards governing the admissibility of evidence in administrative proceedings, such as the instant proceeding, are less stringent than those which govern under the Federal Rules of Civil Procedure. An administrative law judge ("ALJ") is not bound by common law or statutory rules of evidence or technical or formal rules of procedure. *Brown v. Washington Metropolitan Area Transit Authority*, 764 F.2d 926 (D.C. Cir. 1985).

Hearsay evidence is generally admissible if considered reliable. *Richardson v. Perales*, 402 U.S. 389 (1971). An ALJ's findings simply cannot be based *solely* on hearsay. *Colliton v. Defoe Shipbuilding Co.*, 3 BRBS 331, 335 (1976) (emphasis added). Therefore, the admissibility of this evidence depends on whether a reasonable mind might accept it as probative. See e.g., *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969). I have reviewed the evidence in question. I found the information helpful, but in no way dispositive. Accordingly, Respondent's objection to Complainant's evidence as inadmissible hearsay is **OVERRULED**.

Respondent objects to a portion of Complainant's evidence advanced to oppose summary decision as conclusory and not based on personal knowledge. In opposing summary decision, a non-movant cannot rest on ignorance of facts, on speculation, or on suspicion, (*Conaway v. Smith*, 853 F. 2d 789, 793 (10th Cir. 1988)), and mere conclusory statements in affidavits are inadmissible. *Topalian v. Ehrman*, 954 F. 2d 1125, 1131 (5th Cir. 1992). I have reviewed the evidence in question. The evidence consists of statements in an affidavit submitted by Complainant. The evidence shows that Complainant's statements were made on

the basis of belief. To the extent that Complainant's statements were made on the basis of belief, the statements amount to nothing more than mere speculation. Therefore, Respondent's objection to Complainant's evidence as conclusory and not based on personal knowledge is **SUSTAINED**.

Respondent objects to a portion of Complainant's evidence advanced to oppose summary decision as contradictory of previous sworn testimony. In opposing summary decision, a non-movant may not rest upon "[m]ere conclusory or self-contradictory allegations" as such allegations "will not protect an otherwise unsupportable claim from summary disposition." *Webster v. Bass Enterprises Production Co.*, 192 F. Supp. 2d 684, 690 (N.D. Tex. 2002). More importantly, "mere conclusory allegations, without support, or where contradicted by former deposition testimony, will not create a genuine fact issue." *Albertson v. T.J. Stevenson & Co.*, 749 F. 2d 223, 228 (5th Cir. 1984); See also, *Doe v. Dallas Independent School District*, 220 F. 3d 380, 386 (5th Cir. 2000) (stating, "If a party who has been examined at length in deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.").

I have reviewed the evidence in question. The evidence consists of statements in an affidavit submitted by Complainant. The statements contradict Complainant's previous sworn unchallenged deposition testimony. Accordingly, the evidence will not be considered in the disposition of this case and Respondent's objection to Complainant's evidence as contradictory of previous sworn testimony is **SUSTAINED**.

Protected Activity

Protected activity under SOX is defined as reporting an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. *Marshall v. Northrop Grumman Synoptics*, 2005-SOX-00008 (ALJ June 22, 2005). The employee's belief must be scrutinized under both subjective and objective standards. *Id.*, citing, *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051 (July 14, 2000). The employee does not need to show that the employer's conduct actually caused a violation of the law, but must show that he reasonably believed the employer violated one of the laws or regulations enumerated under SOX or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders. *Id.*; See also, 18 *U.S.C.* §1514A; 29 *C.F.R.* §1980.102(a); *Hendrix v. American Airlines, Inc.,* at 9.

Protected activity under SOX is thus essentially comprised of three elements: (1) report or action that involves a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders; (2) complainant's belief concerning the activity must be subjectively and objectively reasonable; and (3) complainant must communicate his concern to either his employer, the federal government or a member of Congress. See, *Harvey v. Safeway, Inc.*, 2004-SOX-21 at 29 (ALJ Feb. 11, 2005).

Fraud is an integral element of a SOX claim, which necessarily includes an implicit element of deceit that would impact shareholders or investors. *Marshall v. Northrop Grumman Synoptics* at 4. Materiality is likewise an integral element of a SOX claim. Section 302 of SOX specifically "establishes a requirement for the accuracy of material facts relating to finances." *Harvey v. Safeway, Inc.*, at 31. (emphasis in original). This provision particularly "demonstrates Congress' intention to protect shareholders by requiring accurate reporting of significant information concerning a corporation's financial condition." *Id.* (emphasis in original). Stated differently, the Act "was not intended to capture every complaint an employee might have as a potential violation of the Act." *Id.* at 4. Instead, the "goal of the legislation was to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." *Id.* In order to successfully maintain an allegation of a violation of SOX, a complainant's belief as to a violation of SOX must be reasonable from the outset, (*Bechtel v. Competitive Industries, Inc.* at 31), or complainant may show that he actually believed the activity to be violative of SOX at the time of his complaint. *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-8 (ALJ June 15, 2004).

In the instant case, Complainant's report of reassigned credits from Respondent's House Account does not constitute protected activity under SOX. Firstly, Complainant did not allege the reassignment of credits as a violation of securities or federal regulations or laws until he submitted his objections and request for hearing to this office. Prior to the filing of these documents, Complainant referred to the reassignment of credits as an accounting violation, against generally accepted accounting principles ("GAAP"), and in terms of general allegations of fraud. SOX does not apply to generic allegations of accounting violations, violations of GAAP, or general allegations of fraud. See, *Marshall v. Northrop Grumman Synoptics* at 5, stating that, "The fact that the concerns involved accounting and finances in some way does not automatically mean or imply that fraud or any other illegal conduct took place." Rather, applicability of SOX is limited to specifically enumerated laws or regulations related to fraud against shareholders. *Id.* at 3. Therefore although Kay Steelman's

reassignment of credits from Respondent's House Account violated Respondent's internal accounting policy and perhaps also GAAP, the reassignment did not violate SOX.

Moreover, while Complainant made general allegations of fraud regarding the reassignment of credits, Complainant presented no evidence as to intent to deceive shareholders. Instead, Complainant offered evidence showing that Kay Steelman wanted to encourage new salespersons to continue their employment with Respondent. This evidence tends to show that Kay Steelman wanted to provide an incentive to new employees, not that she intended to deceive shareholders.

Secondly, the record plainly shows that Complainant's belief as to a violation of SOX was not a reasonable belief from the outset. Complainant did not allege the reassignment of credits as a violation of securities laws or regulations related to fraud against shareholders until he submitted his objections and request for hearing to this office. Initially, Complainant informed his direct supervisor, Kay Steelman, that he was not against her reassigning credits he just didn't want his contribution to the credits to go unrewarded. Complainant next brought the issue to the attention of two more supervisory employees, John Reed and Cecil Gregg, on June 29, 2004, informing them that he believed, based on company policy, the reassignment of credits was improper. On September 9, 2004, Complainant informed Respondent's chief operating officer, Paul Gentzkow, that he believed Kay Steelman had wrongfully reassigned credits from the House Account.

After notifying Paul Gentzkow, Complainant filed a complaint with OSHA, alleging a violation of SOX. Prior to and during OSHA's investigation of the complaint, Complainant never referred to a securities or federal regulation or law which he believed the reassignment of credits violated. Instead, Complainant consistently referred to the reassignment as an accounting violation, a violation GAAP, and made general allegations of fraud. It was not until Complainant filed his objections to OSHA's findings and a request for hearing with this office that Complainant alleged a violation of 18 U.S.C. §1348 (securities fraud).

While it is true that in order to successfully allege a violation under SOX a complainant need not show an actual violation of a securities or federal regulation or law, complainant must nevertheless show that he reasonably or actually believed the reported activity violated such law or regulation. Based on the record, it is clear that Complainant did not reasonably believe from the outset nor actually believe at the time of filing his complaint with OSHA that SOX had been violated.

Thirdly, the financial implications of the reassigned credits in this matter do not rise to the level of materiality required under SOX. The gravamen of Complainant's complaint at this stage in the proceedings is that the reassignment of credits devalued Respondent's stock. Complainant contends that the reassignment took away earnings from the company, thereby reducing the value of Respondent's stock. The estimated total dollar amount of reassigned credits is $12,500. According to Respondent's financial disclosures, financial statements included in Respondent's form 10-k are rounded to the nearest thousand dollars. Management discussions and other disclosures included in Respondent's financial statements are rounded to the nearest million dollars. A $12,500 reassignment of House Account credits would not be reflected in earnings or expense trends in Respondent's management discussions in its form 10-k. In other words, the significance of the reassignment of credits is so limited that it would not be included in any disclosures to Respondent's shareholders.

Unfavorable Personnel Action

Under SOX, an employee of a publicly traded company may not be discharged or otherwise discriminated against with regard to his terms and conditions of employment for providing information about fraud against company shareholders. See, 29 *C.F.R.* §1980.102. In the instant case, Complainant contends that he suffered unfavorable personnel action, including a written reprimand, several oral reprimands, and a change in both procedure (required to attend meetings outside of business hours as stated in employee handbook) and substance (required to attend SARs), only after he reported what he believed to be an improper reassignment of House Account credits to his supervisors on June 29, 2004. The record in this matter simply does not support Complainant's contention.

The evidence presented by Complainant and Respondent shows that Complainant was repeatedly counseled regarding his job performance, including his attendance at 8:00 a.m. meetings, his use of Micro J computer software, diversifying his client base, and developing target lists from as early as February 2003 to as late as September 2004. The evidence also shows that Complainant participated in SARs, or a functional equivalent, throughout his employment with Respondent.

Contributing Factor to Unfavorable Personnel Action

A "contributing factor" has been defined as anything that tends to affect in any way the outcome of the decision. *Marano v. Department of Justice*, 2 F. 3d at 1140. Normally the burden of establishing a *prima facie* showing of a contributing factor "is satisfied…if the complainant shows that the adverse personnel action took place shortly after the [reported] activity, giving rise to an inference that it was a factor in the adverse action." 29 *C.F.R.* §1980.104(b)(2); See also, *Kendrick v. Penske Transportation Services, Inc.*, 220 F. 3d 1220, 1234 (10th Cir. 2000). Here, the evidence presented by Complainant and Respondent does not establish existence of a contributing factor. Instead, the record clearly shows that Complainant was consistently counseled about his job performance both prior to and following his report of the reassignment of House Account credits.

Same Adverse Action

Ordinarily where a complainant alleges a SOX violation, if complainant proves discrimination by a preponderance of the evidence, and not merely an established *prima facie* case, the complainant prevails unless the respondent proves by clear and convincing evidence that it would have taken the same adverse action in any event. *Brune v. Horizon Air Industries, Inc.* at 14. Complainant has not sustained his burden of proof under SOX. Therefore, it is unnecessary to discuss whether or not Respondent would have taken the same adverse action under the circumstances.

Constructive Discharge

In order to establish constructive discharge, a complainant must demonstrate "an even more offensive and severe work environment than is needed to prove a hostile work environment." *Harvey v. Safeway, Inc.* at 35; See also, *Brown v. Kinney Shoe Corp.*, 237 F. 3d 556, 566 (5th Cir. 2001). Complainant contends that he was constructively discharged because his company account e-mails were deleted or purged and because he perceived that his supervisor, John Reed, was periodically then constantly staring at him. No evidence was presented by either party which would tend to show that Complainant's company account e-mails were deliberately deleted or purged. Even if one were to assume that the e-mails were deliberately deleted or purged, that alone is not enough to establish constructive discharge. Coupling such an act of deliberately deleting or purging Complainant's company account e-mails with Complainant's perception of John Reed staring at him is still insufficient proof to demonstrate constructive discharge. A few deleted or purged e-mails and one's perception of another staring at him is surely not proof

of a "more offensive and severe work environment" than that required to establish a hostile work environment. *Id.*

Based on the foregoing discussion, construing all facts in the light most favorable to Complainant, the Court finds that Complainant failed to establish the necessary elements of a case of retaliation under SOX or facts sufficient to sustain a finding of constructive discharge, requiring dismissal of the instant complaint.

E. Recommended Order

For the reasons set forth above, Respondent's motion for summary decision is hereby **GRANTED**. Accordingly, the undersigned recommends dismissal of Complainant's complaint.

A

CLEMENT J. KENNINGTON

ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary,

Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).