U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 June 2007

CASE NO. 2006-SOX-2

IN THE MATTER OF:

ROBERT J. DEREMER, JR.

Complainant

v.

GULFMARK OFFSHORE, INC.

Respondent

APPEARANCES:

STEPHEN R. WALKER, ESQ.
GREGORY J. FINNEY, ESQ.

For Complainant

GARY J. SILLER, ESQ.

For Respondent

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Sarbanes-Oxley Act enacted on July 30, 2002, technically known as the Corporate and Criminal Fraud Accountability Act, Public Law 107-204, 18 U.S.C. § 1514A, et seq., (herein SOX or the Act), and the regulations promulgated thereunder at 29 C.F.R. Part 1980, which are employee protective provisions. This statutory provision prohibits any company with a class of securities registered under § 12 of the Security Exchange Act of 1934, or required to file reports under § 15(d) of the same Act, or any officer, employee or agent of such company, from discharging, harassing,

or in any other manner discriminating against an employee in the terms and conditions of employment because the employee provided to the employer or Federal Government information relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission (herein SEC), or any provision of Federal law relating to fraud against shareholders.

I. PROCEDURAL BACKGROUND

Robert J. Deremer, Complainant, filed a request for hearing with the Office of Administrative Law Judges on October 7, 2005, as a result of a September 8, 2005 dismissal of his complaint by the Occupational Safety and Health Administration, U. S. Department of Labor.

Pursuant to the Notice of Hearing, a formal hearing was held in Houston, Texas on October 26, 2006. All parties were afforded a full opportunity to adduce testimony, offer documentary exhibits, submit oral argument and file post-hearing briefs. The following exhibits were received into evidence: Administrative Law Judge Exhibits 1-7; Joint Exhibits 1-25; Complainants' Exhibit 1; and Respondent's Exhibits 1-2. A brief due date was January 22, 2007. (Tr. 592-593). Post-hearing briefs were received timely from Complainant and Respondent. The following post-hearing responses to inquiries by the Administrative Law Judge were received from Complainant and Respondent: Complainant's Post hearing correspondence filed 11/13/2006 and 11/27/2006; Respondent's post-hearing correspondence filed 11/2/2006 and 11/9/2006.

II. STIPULATIONS

1. Respondent is a publicly traded company with a class of securities registered under Section 12 of the Security Exchange Act of 1934. (Tr. 7).

III. ISSUES

1. Whether Complainant engaged in protected activity within the meaning of the SOX Act?

2. Whether Complainant suffered an adverse action(s)?

3. Assuming Complainant engaged in protected activity, was Respondent aware of the protected activity?

4. Assuming Complainant engaged in protected activity and suffered an adverse job action, whether his activity was a contributing factor in Respondent's alleged discrimination against Complainant?

5. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action irrespective of Complainant having engaged in protected activity?

IV. SUMMARY OF THE EVIDENCE

TESTIMONIAL EVIDENCE

ROBERT J. DEREMER, JR.

Mr. Deremer is the Complainant in this matter. He testified at formal hearing, was deposed by the parties on November 15, 2005, and made a formal statement to OSHA. (Tr. 22; Motion for Summary Judgment EX-7, p. 1; JX-4).

Complainant testified he formerly held registrations to sell insurance and as a stockbroker. (Tr. 22). Complainant has worked in public accounting, as an internal auditor in various capacities, as an accounting manager, and has about thirty years of accounting and auditing experience. (Tr. 23-26, 34). Prior to his work for Respondent, Complainant had not worked in auditing since 1998. (Tr. 233). He started his own company in 1999 after being laid off. (Tr. 27). In the course of his business, he sold insurance, did financial planning, and was a stockbroker. (Tr. 27). His work for Respondent ended in April 2005. In June 2005, he became a contractor for Sirius Solutions focusing on Sarbanes-Oxley documentation, and is still employed in that capacity. (Tr. 28).

Complainant stated he was informed by an acquaintance that Respondent was looking for help on Sarbanes-Oxley issues in September 2004. He contacted Respondent's controller and e-mailed his resume. He did not fill out a job application or employment documents. (Tr. 31-32, 39). He and Ms. Carla Mashinski, Respondent's controller, discussed his role as project manager, coordinating SOX compliance. (Tr. 33). Complainant acknowledged he was hired specifically to work on Sarbanes-Oxley compliance. (Tr. 145). He originally anticipated that his engagement would end in January 2005. (Tr. 270).

Complainant testified he began work for Respondent in September 2004, after agreeing to an hourly rate of $45.00. (Tr. 35). In initial discussions, it was agreed that he would be re-evaluated at a later time. In January or February 2005, Complainant was given a $5.00 per hour increase in rate. (Tr. 146). Complainant further stated that although the raise was discussed in the beginning of his association with Respondent, he believed the increase in rate was merit-based. (Tr. 249).

Complainant testified he was hired as an independent contractor. He received no overtime, health or pension benefits, paid his own employment taxes, and received a Form 1099 at the end of the year. (Tr. 140-141). He did not sign a contract with Respondent, but billed his services and was paid as a sole proprietor. (Tr. 39, 141). He acknowledged that he exercised independent judgment while working for Respondent. (Tr. 141-142). Respondent provided Complainant with a workspace at Respondent's location, and some resources including office supplies, a company e-mail address, and internet access. He used his own laptop computer. (Tr. 37-38).

Complainant stated he reported to the controller, who directed all of his activity. (Tr. 35-36) He had very little interaction with Ed Gutherie, Respondent's chief financial officer. (Tr. 36). He interacted with outside auditors on matters involving SOX compliance and completion of Respondent's 10-K SEC filing. (Tr. 43). Particularly, Respondent testified he interacted with auditors Ramy Wahba and Barry Goss, and Raj Muchimilli, IT manager, all of whom are with Ernst & Young. (Tr. 44).

On January 10, 2005, Complainant stated he and the controller had lunch to discuss possible future employment of Complainant in an audit manager capacity. (Tr. 147, 150). The position did not yet exist, but was being formulated. (Tr. 148). At lunch he also broached the subject of a raise in pay rate, which had been discussed during initial negotiations. (Tr. 46). Complainant testified that he told the CFO that he intended to discuss a possible future position with the controller, although he knew that she was not in a position to hire, because he thought it was appropriate. (Tr. 47).

The controller sent a follow-up e-mail concerning the lunch discussion to Complainant on February 6, 2005. (Tr. 47, 150; EX-10). It outlined steps Complainant should take and stated "This will demonstrate your initiative, and if Ed (CFO) feels

appropriate, he can share it with the audit committee." (Tr. 48). The e-mail listed three tasks. The first task was completed as a group effort. Complainant testified that he completed the second and third tasks and left them in his work area. (Tr. 152-154). Complainant acknowledged that he was never promised a position by either the controller or CFO. (Tr. 148).

Complainant testified that toward the end of the calendar year, as the outside auditors were on-site more often, the controller created an atmosphere of secrecy. Conversations were held behind closed doors and care was taken to watch what was stated in front of the auditors. (Tr. 49-50).

Complainant stated he encountered four instances of impropriety concerning Respondent's accounting practices: (1) untimely updating of the "Controller's checklist" indicating certain tasks were timely completed when such may not have been the case; (2) indication by the controller of her intent to avoid recognition of additional insurance expense by reframing a portion of the balance in Respondent's prepaid insurance account; (3) representation to external auditors by the controller that an internal control document, the "non-functional currency accounts" listing, existed and functioned as an "internal control" in December 2004 when it did not; and (4) instructions to Complainant by the controller to conceal from external auditors the existence of a software feature that allowed manual override of currency exchange rates. (Tr. 50, 66, 81, 100).

Complainant stated he reasonably believed that improper handling of the insurance expense would result in a mis-statement of Respondent's income. The other three items affecting internal control could result in a flawed audit opinion included in the SEC 10-K filing, and thus deceive stockholders. If these items came to light, it may result in issuance of a negative audit opinion by the external auditors. As he believed a negative audit opinion and the impact on Respondent's net income would affect the value of Respondent's stock, Complainant stated he reasonably believed these items constituted fraud against the shareholders. (Tr. 275-276; JX-4, pp. 16-17, 21).

Complainant testified that Joint Exhibits 11 and 12 are the "Controller's Checklist" for the months of September, November and December 2004. These lists track monthly, quarterly, and annual control processes which are part of the financial

statement closing process. (Tr. 50; JX-11, 12). The "checklists" list each process and have a space for insertion of a date when the process was completed and a space for initials of the person who completed the process. (JX-11, 12). Complainant stated they are controls necessary to be compliant with SOX requirements. (Tr. 55).

Complainant testified that the checklist was a "representation that there's management's control over the fact that these processes were completed . . . on a timely basis." (Tr. 52). He became concerned that processes were added to checklists for prior months and documented as if the process had taken place. If the process was not actually performed at the time it was represented to have taken place, it would constitute a misrepresentation. (Tr. 54). Complainant stated he became aware that prior checklists were being changed in late September or early October 2004, but did not document the changes he observed. (Tr. 54, 58-59). In February or March 2005, he informed Mr. Wahba of Ernst & Young that retrospective changes to the checklists had taken place. (Tr. 59). Complainant agreed that he considered this a minor issue and brought it to the auditor's attention only after he noticed other irregularities. (Tr. 206-207).

Complainant testified the controller assigned him the task of analyzing the prepaid insurance account. (Tr. 62). Prepaid insurance is a balance sheet asset account which represents the excess of payments to the insurance company, for insurance on vessels owned by Respondent, over the amount of the policy that has been used up. (Tr. 60, 62). This account affects the company's financial information which is reported to the SEC on form 10-K. (Tr. 63). Complainant interacted with the controller for clarification during his examination of the account. (Tr. 65-66, 163). He stated the controller told him during preliminary discussions concerning the prepaid insurance account, that she would not recognize additional expense. He believed this to be because the controller was unwilling to show a decrease of the company's income. (Tr. 66).

Complainant testified that Ernst & Young had also examined the prepaid insurance account, and proposed an adjustment to increase income (increase the asset) by $248,539. (Tr. 69-70; JX-9, p. 11). Another version found a difference of only $2,602.50. (Tr. 170; EX-15). After several iterations by Complainant, he determined the account was under-amortized by $199,674.38, which would have resulted in an additional expense and thus a decrease in income. (Tr. 63, 65-66; JX-9, p. 14).

In late January or early February 2005, he was told by the controller that she wanted to show the excess in the asset account as an extra payment so the auditors would not request an adjustment. Complainant told her that he would not participate. (Tr. 67, 79). Complainant stated Sal Nicotra was present at that meeting. (Tr. 164-165). Complainant believed such a deception would constitute fraud on the shareholders because it would overstate income by an amount that may be material. (Tr. 67).

Complainant believed Ernst & Young ultimately recommended an adjustment which would have decreased income by $60,000. However, they "passed" on the adjustment based on materiality. (Tr. 76).

Complainant testified that the day after his disagreement with the controller over the prepaid insurance account, he had a discussion with Mr. Wahba of Ernst & Young. (Tr. 78-79). He related the issues of backdating the checklists, and the controller's suggestion of reframing the apparent excess in the prepaid insurance account to reflect an excess payment instead of an expense that may need to be written off. (Tr. 78-79, 172). Complainant told Mr. Whaba that he was relating this because he did not intend to participate in this deception which he believed may be illegal. (Tr. 78). Complainant further stated the auditor agreed that such conduct was a misrepresentation and was illegal. (Tr. 80).

Complainant testified that in January 2005, he was assigned to compile a list of non-functional currency accounts that were to be revalued at the end of the quarter. (Tr. 80-81). When he presented the document dated January 2005 to the controller, she asked him to change the date to December 2004. Complainant stated it indicated that an accounting control was in place in December 2004, when it was not. (Tr. 81). As it relates to SOX compliance, Complainant testified this is significant in that the external auditors assess controls which were in place as of year end. (Tr. 81).

Complainant testified that he presented a copy of the non-functional currency accounts listing to Mr. Wahba at the same time he gave it to the controller in late January or early February 2005. He told the auditor that it was newly prepared. (Tr. 82-83, 86). Complainant explained that while the process [of revaluation of the accounts] may have been operating in December 2004, the control provided by the listing was not created until January 2005. (Tr. 85-86).

Complainant testified that Mr. Wahba met with the controller and himself the following day. (Tr. 86). During the meeting, the auditor asked the controller if he could get a signed version of the form. (Tr. 86). Complainant testified that the controller took the auditor's form, to which the auditor had added an inconspicuous "1" in the upper left corner. (Tr. 87). The meeting then ended. (Tr. 88). The following day, Complainant again spoke to the auditor who showed Complainant the document he received from the controller with her signature. The auditor pointed out that the "1" which he had placed on the document was on this signed version. (Tr. 89). Complainant testified Mr. Wahba expressed to him that this was proof "she is actually trying to deceive us." (Tr. 90). This testimony was admitted as an excited utterance exception to the hearsay rule. (Tr. 89).

Complainant stated he told Mr. Wahba "if that [the signature] was supposed to indicate that the control was functioning in December, that it was absolutely a form of fraud, that that wasn't when it occurred." (Tr. 91). Complainant further testified that the accounts were in fact revalued, however, prior to January, no report existed listing all of the accounts which had been revalued. (Tr. 96). Complainant testified the controller's signature on the December report indicated that the control was in place during December 2004, which it was not. (Tr. 96-97).

Complainant testified that another issue arose regarding a feature in Respondent's computer system to manually override currency exchange rates. (Tr. 98-99). In February 2005, after the events regarding the non-functional currency accounts document, Complainant found that a manual override existed whereby the user could input a currency exchange rate for a specific transaction, bypassing the default exchange rate. (Tr. 99). Complainant explained the import of the feature is that the value of a transaction could be inadvertently or purposely misstated. He stated that the outside auditors should include additional testing to insure transaction value integrity, as a result of the existence of the feature. (Tr. 99-100). He discussed the override feature with the controller who told Complainant that she was not aware of the feature but instructed him to make sure the auditors did not find out about it. (Tr. 100).

Complainant testified that he informed Mr. Wahba and Mr. Muchimilli of Ernst & Young, about the manual override of currency exchange rates feature in the software. (Tr. 102). The auditors stated they were not aware of the feature. (Tr. 180). Complainant asked Sylvia Lamedola, an employee of Respondent, to demonstrate the manual override feature to Mr. Muchimilli, which she did. (Tr. 102). On cross-examination, Complainant acknowledged he was not aware of IT control documentation which indicated that Respondent did not rely on the currency conversion feature for payments to vendors, until the formal hearing. (Tr. 181-182).

Complainant testified he was originally hired to "coordinate and perform the testing and review in regards to Sarbanes-Oxley, and identify areas that need to be in place." (Tr. 269). He considers his identification of the manual override of currency exchange rates feature in the software to be within the scope of his duties, while the prepaid insurance account would be outside the original scope of his duties. (Tr. 269-270).

Complainant testified that when he presented his concerns to Mr. Wahba, he asked him to keep the matter between the two of them. (Tr. 157-158). However, Mr. Wahba conveyed Complainant's concerns to his superior, Mr. Barry Goss, a senior auditor with Ernst & Young. (Tr. 103, 158). Complainant testified he later spoke to Mr. Goss, who informed Complainant that the (Ernst & Young) audit partners intended to contact the audit committee of Respondent's board of directors about the concerns raised by Complainant as well as their own concerns. (Tr. 103-105). Complainant stated Mr. Goss informed him that the auditors had their own concerns about the controller and the financial records, but that he was limited in what he could tell Complainant. (Tr. 104). Thereafter, Complainant was contacted by a lawyer from the firm of Lidell and Sapp, who stated he was conducting an investigation on behalf of the audit committee. (Tr. 105).

Complainant met with the attorney for about five hours on March 4-5, 2005, and went through details of the concerns he had shared with the auditors. (Tr. 105-107). Complainant further testified that because the law firm was engaged by the company, he believed they had authority over him. (Tr. 106). He believed that he had no option other than "to testify" when requested to do. (Tr. 106). The attorney conducting the interview took notes but did not ask Complainant to sign a written statement. (Tr. 108-109).

Complainant testified that immediately after his "testimony" to the investigating lawyer, the atmosphere in Respondent's office changed toward him. The controller would not talk to him and would smirk or look away if they passed in the hallway. (Tr. 110). He received similar treatment from Mr. Guthrie, Respondent's Chief Financial Officer and Mr. Streeter, Respondent's President. (Tr. 36, 110, 518). This was a marked change from the situation prior to his "testimony" as he regularly exchanged pleasantries with Mr. Guthrie and Mr. Streeter, and spoke to the controller regularly regarding work issues. (Tr. 110-111). Complainant testified that the way he was treated caused him to be in shock, caused stress, and hurt his feelings. (Tr. 111-112).

Within a few days, Complainant's work area was moved into the file room. (Tr. 112). Complainant had formerly been working in a conference room divided by a curtain. (Tr. 223). The only telephone in the file room was on the wall by the copy machine. (Tr. 114). He was given no technical support, but he connected his computer to a network hub himself. (Tr. 113). Complainant testified that contrary to Mr. Guthrie's statement, Mr. Guthrie had not helped him put a wire together to connect to the network server hub. (Tr. 114). To his knowledge, the file room had not been previously used as an office. (Tr. 113). Thereafter, Mr. Guthrie told him that anything related to SOX had to go through him. (Tr. 113). Other employees had to pass Complainant's chair to get to the coffee room, which caused constant interruptions and was demeaning. (Tr. 115-116). After two weeks, Complainant's prior office space was occupied by two additional consultants brought in to work on Respondent's SEC 10-K filing. (Tr. 118-119). Complainant stated he did not recall anyone else's office space being moved. (Tr. 118).

Complainant testified he was given no further SOX related projects to work on after his "testimony" to the investigating law firm. (Tr. 111). Prior to testifying, he worked about 54 hours per week. After his "testimony," he averaged 40 hours per week. (Tr. 125, 214; JX-19). He stated that he performed work for Respondent for approximately six weeks after his "testimony." (Tr. 126). He therefore lost approximately $3,000.00 of revenue (10 hours x $50.00 per hour x 6 weeks). He agreed that by the end of March 2005 through April 2005, Sarbanes-Oxley compliance activity for 2004 was winding down. (Tr. 214).

Complainant's last day of work for Respondent was April 22, 2005, after Respondent's 10-K for 2004 was filed with the SEC. (Tr. 120, 145). Complainant stated that Mr. Guthrie called him into his office and requested his last invoice. Complainant complied by bringing the invoice to Mr. Guthrie. (Tr. 120-121).

Complainant opined that the way he was treated would discourage others from coming forward. (Tr. 257-258). He speculated that a staff member, observing what happened to him, could only imagine what would happen to them. He stated that staff members whispered when talking to him, which he believed was because they did not want management to find out they were talking to him. (Tr. 258).

Thereafter, Complainant stated he spoke with Ernie Delachica, a manager with UHY, Mann, Frankfort, an accounting firm, about possibly applying for a job with UHY. (Tr. 122). Complainant worked with Mr. Delachica when Respondent contracted UHY personnel to assist with SOX testing. (Tr. 122). Complainant testified it became apparent during his conversation with Mr. Delachica, that he should not apply for work at UHY because of the relationship Respondent's controller had with a UHY partner. (Tr. 123). Complainant further testified that when the UHY personnel were working at Respondent's office, the controller had constant interaction with a certain UHY partner. (Tr. 122).

Complainant acknowledged he was aware of Respondent's code of business conduct which Respondent contends calls for the reporting of irregularities through a chain of command. However, Complainant contends, the protocol was not applicable to a person in positions such as he held, who were working directly with management. (Tr. 220). Complainant testified that he reported what he observed to the controller, to the auditors from Ernst & Young, and Mr. Hill, the attorney from the law firm hired to investigate the matter. (Tr. 220-221). He believed that the law firm was hired by the board of directors to investigate the allegations, and as such the law firm had authority over him to compel his "testimony." (Tr. 277). Complainant did not know of any formal proceeding that had been filed or was likely to be filed. (Tr. 280).

Claimant never complained to anyone specifically that any of the conduct he observed violated any SEC rule or regulation, or a provision of SOX. (Tr. 273-275). However, he discussed with the auditor that deception, such as he observed, violated the spirit of Sarbanes-Oxley which strives to ensure accurate

reporting. (Tr. 274-275). Complainant stated that an inference of fraud against the shareholders was created because the external auditors did not see a clear picture of activity. (Tr. 274-275). Complainant believed deception such as framing a prepaid insurance adjustment so that it does not hit the bottom line, or an attempt to not let the auditors find out about something, could result in a flawed opinion rendered by the auditors which would affect the SEC 10-K filing, and thus deceive stockholders in that regard. (Tr. 275-276).

Complainant stated he holds an undergraduate degree in accounting and is certified as a CPA (Certified Public Accountant) and CIA (Certified Internal Auditor) in Oklahoma. (Tr. 22). Complainant explained the CPA designation indicates only having passed the CPA examination. A license is required in addition to the CPA designation to perform certain engagements. (Tr. 134). Complainant stated he was certified but unlicensed in Oklahoma. (Tr. 138). Complainant stated he put his CPA designation on the resume he submitted to Respondent, a Texas company, although he was not a licensed CPA in Texas. (Tr. 135).

Counsel for Respondent pointed out that the Texas Occupational Code does not allow persons not certified under the Texas code to use the designation of "CPA." (Tr. 136-137). Complainant testified he was not aware of that law, but does not hold himself out as a "Texas CPA." (Tr. 137). When informed by Counsel that the Oklahoma Board showed his license as revoked, not inactive, Complainant stated he did not know why the Board showed a revoked license, but he would find out. (Tr. 138-139). He further stated he never received notice from the Oklahoma Accountancy Board that his certification was revoked. (Tr. 236). Complainant stated he believed the address communicated to Respondent's Counsel by the Oklahoma Accountancy Board was one used by his ex-wife. (Tr. 247). He had assumed that he had not been contacted by the Board in some time because his license was inactive. (Tr. 248).

Complainant testified he was out of work for approximately eight weeks before securing another job. (Tr. 127). He thus alleges he sustained an economic loss of about $20,000.00 (50 hours per week x $50.00 per hour x 8 weeks). (Tr. 128). Complainant additionally stated he filed this action in good faith. (Tr. 128).

Salvatore Nicotra

Mr. Nicotra testified at formal hearing. (Tr. 281). He is a certified public accountant and holds a Bachelors degree in accounting. (Tr. 282). He has experience in public accounting and private industry, and is in good standing with the Texas Board. (Tr. 283-284). He worked for Respondent from November 2004 through March 2005, as the assistant controller. (Tr. 283-284). He also worked with Respondent's controller, Ms. Mashinski at a former employer, Duke Energy, for about a year. (Tr. 288-289). He stated he was hired by Ms. Mashinski, Respondent's controller, for both jobs. (Tr. 307).

He testified that during the time he worked for Respondent, the accounting department was busy and he worked long hours including weekends. (Tr. 284-285). The office space was inadequate and crowded. On an occasion, some accountants had to share a desk. (Tr. 285). He stated he was aware Complainant was moved into the file room, but did not believe it was because Complainant was being discriminated against. He thought it was a result of the crowded conditions. (Tr. 287). He did not observe any mistreatment or discrimination against Complainant by Mr. Streeter, Mr. Guthrie, or Ms. Mashinski during the time he worked for Respondent. (Tr. 295). He was not aware that Ms. Mashinski or Mr. Guthrie had stopped talking to Complainant. Mr. Nicotra stated that he spoke with Complainant while he was stationed in the file room. (Tr. 297-298).

Mr. Nicotra was interviewed by Mr. Hill with the Locke, Lidell, and Sapp law firm, as part of the investigation. (Tr. 288, 296, 387). Mr. Hill asked him not to discuss the investigation as it was ongoing. (Tr. 296).

Concerning Ms. Mashinski, Mr. Nicotra testified he had not "observed anything about her to be dishonest, or showing any kind of lack of integrity." (Tr. 288). He never had any question about her integrity or character, and any debate with auditors over grey areas in accounting was honest. (Tr. 289). Additionally, he did not observe the environment to be secretive or observe anything that would cause him to be suspicious of the way the controller discharged her duties. (Tr. 293). He did not observe any conscious attempt to hide things from the auditors, nor was he instructed by the controller or anyone else to be less than open and honest with the auditors. (Tr. 294).

Mr. Nicotra testified he was aware that Complainant had many discussions with the controller concerning the prepaid insurance account because his office was next door to the controller. (Tr. 289-290). He was informally asked to join a discussion between Complainant and Ms. Mashinski concerning the account. (Tr. 289). He opined that Complainant did not exhibit expertise of what he was doing. (Tr. 290-291). Mr. Nicotra also explained to Complainant how to reconcile the account, and stated that Complainant seemed to understand after his conversation. (Tr. 291-292).

Mr. Nicotra stated he did not witness any suggestion by the controller that insurance expense be moved into an inappropriate category, or any other inappropriate recommendation. (Tr. 291). Mr. Nicotra also stated that he had no knowledge of what the controller may have said outside of his presence. (Tr. 299).

Carla Mashinski

Ms. Mashinski testified at formal hearing. (Tr. 309). She has held the position of controller with Respondent from April 5, 2005 through the present day. (Tr. 315-316). She holds a Bachelor's degree in accounting and an MBA, graduating with honors, and has over twenty years of experience. (Tr. 415-416). She is not an internal or external auditor, but has been involved in several audits as the representative of companies being audited. (Tr. 313). She further testified that her integrity had never been questioned prior to the allegations by Complainant. (Tr. 419).

Ms. Mashinski testified that Respondent is in the oil service industry. They own supply vessels that take supplies and people to and from drilling rigs. (Tr. 337). The majority of Respondent's assets are vessels at sea. (Tr. 338). Respondent's corporate office is in Houston, and has field offices in Scotland, Norway, Singapore, Brazil and Mexico. (Tr. 337). Respondent's board of directors is compiled of six or seven members who are located in different cities. (Tr. 337-338).

Ms. Mashinski testified that when she began working for Respondent, the accounting department was shorthanded and the company lacked accounting capabilities, which she attributed to a lack of leadership from the former controller. (Tr. 420-421). The first year Respondent was required to comply with the Sarbanes-Oxley Act was 2004, which was a significant undertaking. (Tr. 421). Sarbanes-Oxley dictates that internal

controls are to be in place, but does not outline details concerning such controls. Therefore, the standards for other companies, accounting firms, the PCAOB (Public Companies Accounting Oversight Board), as well as Respondent were evolving. (Tr. 421-422).

As she was in need of assistance with Sarbanes-Oxley related work, Ms. Mashinski sought referrals from business associates to someone who may be interested in performing such work. (Tr. 423). She met and interviewed Complainant via telephone and he faxed his resume. (Tr. 340-341, 425). Ms. Mashinski testified that she was impressed with Complainant's designations of CPA and CIA, but was concerned about his lack of experience with Sarbanes-Oxley and that he had not worked in a corporate environment since 1998. (Tr. 424). She assumed from the CPA designation on the resume that Complainant was a licensed certified public accountant in good standing in Texas. (Tr. 426).

Ms. Mashinski testified that Complainant was engaged as a contractor at a set rate for a time period to coordinate SOX activities. (Tr. 341). She further stated that if she had known Complainant was not a CPA, she still may have hired him but would have had a more formal interview process, and may have looked at more candidates. (Tr. 427). Complainant was paid by a wholly owned subsidiary who paid all of Respondent's employees. (Tr. 348). He owned his own computer, but was given access to other supplies needed to perform his duties. (Tr. 349). He originally had a company phone at his desk, was given access to the company [network] server, and was assigned an e-mail address on Respondent's system. (Tr. 349).

Ms. Mashinski testified that within the first month of his engagement, Complainant inquired as to why an internal audit director position did not exist within the company. (Tr. 342). She informed him that historically the company could not justify the expense of such a position, but that could change in the future. (Tr. 343).

She testified that she and Complainant had lunch on January 10, 2005, at Complainant's request. (Tr. 347, 428). They spoke about a potential position in an internal control and audit capacity. (Tr. 343-344). No position of that nature existed at the time she and Complainant had lunch. (Tr. 429). She further informed Complainant that she was not the decision maker for this position, but Mr. Guthrie and the audit committee would make such a decision. She stated Complainant was

concerned that his contract role did not provide sufficient exposure to the decision makers, and asked what he could do to obtain more exposure. (Tr. 344-345). She followed up their conversation with an e-mail in response to Complainant's inquiry. (Tr. 344-345). The e-mail listed three tasks. She has no knowledge if Complainant completed the second and third items. (Tr. 431-432).

The topic of Complainant's hourly wage was also discussed during their lunch. (Tr. 345). Ms. Mashinski testified that when Complainant was engaged, he wanted $60.00 per hour, but they had agreed to a rate of $45.00 per hour to start, and agreed to reassess the rate after Complainant had "gotten over the learning curve." (Tr. 345). Complainant reminded her of the original conversation at lunch, and she agreed to discuss the matter with Mr. Guthrie. (Tr. 345-346). She discussed the matter with Mr. Guthrie, and Complainant was given a $5.00 per hour increase in his hourly rate within a few days after January 10, 2005. (Tr. 346-347, 430). However, Ms. Mashinski testified she did not agree that Complainant "got up over the learning curve and deserved that raise." (Tr. 347). She stated "in my mind, Sarbanes-Oxley people were in high demand, and I thought at least $5.00 was at least a cost of living [raise]." (Tr. 346). She additionally stated she thought Complainant had some "short fallings in his performance." (Tr. 347).

Ms. Mashinski testified during the period of time the auditors were in the office, she did ask that her door be closed during private conversations. However, she disputes that there was a "hush-hush tone" around the external auditors. (Tr. 352). She explained that her office was directly across the hall from the auditors and they were constantly asking questions and interrupting, even when she was having a conversation with someone else. (Tr. 352-353). Therefore, she felt it necessary to close the door to proceed uninterrupted. (Tr. 353).

Ms. Mashinski explained that external auditors do not examine 100% of a company's financial transactions during an audit. In reaching an opinion, they do testing on a sampling of information. If something in the sampling indicates more testing or investigation is needed, the item is further pursued. (Tr. 324). The auditors must rely upon the honesty of the company to some extent, but they do independent verification as well. (Tr. 325). She agreed if a knowledgeable person within an organization represents to an external auditor that a control was in place when it in fact was not, it could be considered dishonest. (Tr. 311). She further stated that such a

misrepresentation may or may not affect the attestation of the auditor concerning SOX compliance, depending upon whether there were compensating controls in place, and whether the amount at issue was material. (Tr. 311).

Ms. Mashinski described the "controller checklist" as a list of tasks that accountants were required to complete during the [period end] accounting close process. (Tr. 353; EX-11; EX-12). She instituted the checklists as part of an effort to introduce more structure to the period end closing process. (Tr. 473). As additional items which needed to be accomplished were identified, the checklist was updated to include those items. (Tr. 473-474). To her knowledge, there is no impropriety in signing the checklist some time after the task was completed, as long as the task was in fact completed. (Tr. 474-475). She agreed that, ideally, the checklist would be signed-off at the same time the process was performed, but such was not required by Sarbanes-Oxley, which requires only that internal control over financial reporting be in place. (Tr. 354-355). She agreed that some items on the checklist are related to "audit control," which was an insignificant step in the overall picture. (Tr. 356-357). Ms. Mashinski did not recall a time when external auditors indicated that although the process was done, the list was not signed-off. (Tr. 355-356).

Ms. Mashinski testified that when the SOX work "started on the wind down," she inquired if Complainant was interested in other projects, and he indicated he was. (Tr. 350). She then assigned Complainant the task of preparing [reconciling] the prepaid insurance account. (Tr. 358). She stated Complainant analyzed the account over approximately two weeks, and approached her daily with a different number. She would give additional guidance and he would do more work on the account. (Tr. 358). She stated that both Complainant and Mr. Wahba, an external auditor, came up with multiple versions of the analysis. (Tr. 358-359). At one point, Mr. Wahba's reconciliation suggested a reduction to expense of $248,539.00. (Tr. 454-455; JX-14). Ms. Mashinski testified that Mr. Wahba brought the matter to his manager, who ultimately came up with the final number, which was the same as she had calculated. (Tr. 359-360).

There was no proposed audit adjustment by Ernst & Young after their final analysis of the account. (Tr. 458). At some point, Mr. Wahba proposed an adjustment of about $60,000.00 because the policy period ends on February 20th, but Respondent amortized the premiums over the twelve months of March through

February. However, the adjustment was not made at the suggestion of Mr. Guthrie, and the auditors passed on the entry as immaterial. (Tr. 459-460).

Ms. Mashinski recalled the meeting between herself, Sal Nicotra and Complainant. She stated it was a theoretical discussion for the purpose of guiding Complainant on analysis of the prepaid insurance account. It was held toward the end of the two-week period during which Complainant analyzed the account, and it was obvious to her that Complainant had not understood her input. (Tr. 360).

She testified that at some point, Complainant approached her with an adjustment number of roughly $200,000.00. (Tr. 361). She stated she is aware of Complainant's allegation, but made no suggestion of what to do with the $200,000.00 adjustment. (Tr. 361). She testified that she never told Complainant not to give information to the auditors concerning the prepaid insurance account, and has no knowledge of the conversation about which Complainant is making the allegation concerning the prepaid insurance account. (Tr. 362-363). Ms. Mashinski stated that she did not tell anyone at any time not to give information to the auditors. (Tr. 503).

Concerning the non-functional account listing, Ms. Mashinski explained that, in this context, the term "non-functional currency" is any currency other than the primary currency of the entity. (Tr. 363). One hundred percent of Respondent's revenue is currently derived from foreign sources. (Tr. 364). Complainant created the non-functional currency accounts list at her direction, she believed in January 2005. (Tr. 364-365; JX-13). The purpose of the list is to ensure that all non-functional currency accounts have been addressed and revalued. Therefore, the list cannot be addressed prior to the end of the accounting period being closed. (Tr. 372).

She testified that the designation on the document of "December" indicated that the document related to December 2004 activity, not that the review of the document or accounts occurred in the month of December. (Tr. 373). To be accurate, the account list could not be prepared until after the end of the period. (Tr. 374). She further testified that when Complainant originally presented the non-functional accounts

list to her, supporting detail was attached which showed the accounts had been re-measured. (Tr. 471). The original report was dated January, and she asked Complainant to change the date to December because it related to December activity. (Tr. 471-472).

Ms. Mashinski testified that she met with Complainant and Ramy Wahba. At the meeting, Mr. Wahba indicated he needed the non-functional currency account listing along with other items. (Tr. 368). Ms. Mashinski did not recall representing to Mr. Wahba that there was a signed copy of the document on file. (Tr. 368). She also did not recall if Complainant or Mr. Wahba gave her the document, but acknowledged signing the document marked as Joint Exhibit 13 or a replica of it. (Tr. 369). She stated she now knows that the document bore a "1" from Mr. Wahba, which she may have signed "when I got the original back." Ms. Mashinski further expounded "that doesn't mean that I didn't review it." (Tr. 370). She gave the document to Mr. Wahba within a day or two after his request. (Tr. 370-371).

Ms. Mashinski testified that she was now aware of the software feature allowing manual override of currency exchange rates, but was not when Complainant raised the issue. (Tr. 376). She believes it is a standard optional feature of the Great Plains software utilized by Respondent. (Tr. 465). The feature was brought to her attention by Complainant in January 2005, after their lunch meeting. (Tr. 383-384). Ms. Mashinski testified she did not tell Complainant that she did not want the external auditors to know about the manual override feature. (Tr. 380, 470).

She agreed that the foreign currency override feature had the potential to affect the integrity of currency valuation if compensating controls were not in place, but stated that Respondent did have compensating controls in place. (Tr. 378). Respondent's internal review and evaluation of internal processes which was prepared in January 2005, documented that foreign currency transactions were adjusted in the bank reconciliation process. (Tr. 467-468). Complainant had access to this report. (Tr. 468). Ms. Mashinski further testified she believed that Ernst & Young would have known about the feature of the software based on their five-year audit history with Respondent. (Tr. 469).

Ms. Mashinski learned about Complainant's allegation concerning the manual override feature when she was interviewed during the investigation. (Tr. 382). She heard Complainant had communicated with Ernst & Young concerning the four issues raised, and that Ernst & Young approached Respondent's audit committee. (Tr. 384-385). The audit committee, a subset of the board of directors, then engaged the law firm of Locke, Lidell and Sapp, to do a full investigation. (Tr. 385-387).

Ms. Mashinski testified that she was interviewed on Saturday, March 5, 2005, by Greg Hill, a forensic accountant with the Locke, Lidell and Sapp law firm. (Tr. 387). The day before the interview she was told by Mr. Guthrie that allegations had been made, but he stated he could not elaborate on the allegations. (Tr. 389). At the interview, she went through each of the allegations, and was told the source of the allegations. She stated she did not know Complainant had made allegations against her until the interview. (Tr. 389). Ms. Mashinski testified she was later told by Mr. Guthrie that she was cleared of all allegations, which she confirmed with Mr. Hill and the audit committee. (Tr. 392). She requested a copy of the report but it was not provided to her because of the attorney-client privilege. (Tr. 394).

Ms. Mashinski testified that she completely stopped speaking to Complainant after his testimony in the investigation. (Tr. 397). She stated she believed he made false allegations against her and she was afraid that anything she may say would be misconstrued. (Tr. 315). She further stated that she considered the allegations to be defamatory of her character and integrity, and it was an extremely stressful time for her. (Tr. 435-436). However, she was not trying to discriminate against Complainant when she stopped talking to him. (Tr. 444).

The Monday after she was interviewed, she was told by Mr. Guthrie that Complainant would be reporting to him. (Tr. 397, 437). At the time, the Sarbanes-Oxley process was winding down, but there was still Sarbanes-Oxley related work being done. (Tr. 438).

Ms. Mashinski verified that Complainant was moved into the file room within a week after his testimony. (Tr. 398). She testified office space was extremely limited at that time. (Tr. 441). After Complainant was moved, two consultants who worked

on the 10-K filing were moved into his prior work area. (Tr. 442). She worked closely with the consultants, so it made sense to have them in that work area which was across the hall from her office. (Tr. 443).

It was Mr. Gutherie's decision to move Complainant's work location. (Tr. 398). No one had previously used the file room as an office. (Tr. 398). She stated that after Complainant left, a contractor named Steve Lawrence occupied the file room as an office for two to three months, and was content to do so. (Tr. 402-403, 443). Mr. Lawrence, a CPA, was hired as an employee and now has an office. (Tr. 403).

Ms. Mashinski testified that Complainant's association with Respondent ended on April 22, 2005. (Tr. 403). She stated it was Mr. Guthrie's decision to discontinue his services as Complainant's contract was at an end. (Tr. 403-404). However, she was not present during any conversation between Complainant and Mr. Guthrie. (Tr. 404).

Included in Respondent's SEC 10-K filing is management's assessment of internal controls upon which the independent auditors render an opinion. (Tr. 406). Ms. Mashinski testified that Ernst & Young issued a clean (audit) opinion on April 26, 2005, regarding Respondent's financial statements included in its amended SEC 10-K filing. (Tr. 405). After issuance of the 10-K report, the audit committee chose to replace Ernst & Young as the company's auditors. (Tr. 413).

Included in Respondent's 10-K filing in notes to consolidated financial statements, under item 9 entitled "changes in and disagreements with accountants on accounting and financial disclosure," is item 9A which states:

> "As a result of these material weaknesses, the Company's Chief Executive Officer and Chief Financial Officer have concluded that . . . the Company's disclosure controls and procedures were not effective." (Tr. 406; CX-1, pp. 48, 62).

Ms. Mashinski testified that she was intimately involved in the preparation of the 10-K and 10-KA reports. (Tr. 484). The report identified three material weaknesses in internal control. (Tr. 485). She agreed that Respondent's management "stated that their disclosures, controls and procedures were not effective." (Tr. 406). Management's report identifies weaknesses related to

the "financial statement close process," and "insufficient controls over . . . amounts owed to third parties denominated in non-functional currencies." (Tr. 407-408; CX-1, pp. 63). The report defines material weakness as "a control deficiency, or combination of control deficiencies, that result in more than a remote likelihood that a material misstatement of the annual or interim financial statements will not be prevented or detected." (Tr. 409-410; CX-1, p. 63). However, she testified that the weaknesses identified in the 10-K report are not related to allegations by Complainant. (Tr. 491-492).

Ms. Mashinski testified that the first material weakness identified, the financial statement close process, was related to audit adjustments proposed by Ernst & Young after the books were closed. The adjustments were ultimately included in the published financial statements. (Tr. 485-486). Those entries were unrelated to any of the four allegations raised by Complainant. (Tr. 486).

The second material weakness identified had to do with the re-measure of foreign currency accounts. Ms. Mashinski testified that this issue was in relation to Financial Standards Accounting Board pronouncement number 52 (FASB-52). She explained that whether a re-valuation difference due to fluctuations in currency exchange rates is capitalized as a balance sheet item is determined by whether the item is expected to be realized as a cash transaction in the immediate future. If the item will be "cash-settled," the exchange rate difference must be recognized on the profit and loss statement as income or expense. (Tr. 489). However, if it is "permanently invested," meaning the transaction is not expected to result in a cash transaction, it is capitalized as a balance sheet item. (Tr. 489-490). She stated that this issue is unrelated to any of the four allegations raised by Complainant. (Tr. 490).

Ms. Mashinski further explained the third material weakness concerned only classification of tax in Brazil as either an operational expense as opposed to an income tax. (Tr. 490-491). Therefore, none of the internal control weaknesses identified in the report are related to the four areas of concern raised by Complainant. (Tr. 491-492). She testified she does not believe she has committed any illegal act with regard to any of the issues identified by Complainant. (Tr. 494).

The 10-K report also identified the cause of the weaknesses as a lack of "accounting and tax resources in terms of size, technical experience and institutional knowledge due to unusually high levels of personnel turnover." (Tr. 410; CX-1, p. 63).

Ms. Mashinski stated Complainant was "good at taking a task and completing it" but fell short of the leadership role she had envisioned. (Tr. 445). She testified Complainant was "very hard headed about his conclusion," and had a tendency to create problems. (Tr. 445). From her observations, she thought he lacked management skills and jumped to conclusions. (Tr. 446). At a meeting of the audit committee, an Ernst & Young auditor expressed concern that Sarbanes-Oxley work would not be timely completed. (Tr. 449). In response, Mr. Pierce, Respondent's former CFO, was brought in to do work on Sarbanes-Oxley. Ms. Mashinski testified that she had envisioned Complainant as filling that role. (Tr. 449-450). Complainant was resistant to suggestions made by Mr. Pierce, and she felt she had to mediate between the two. (Tr. 450). Mr. Pierce left after two or three weeks. (Tr. 451).

Mr. Mashinski testified that she is acquainted with Vicky Gregorcky at UHY Mann Frankfort. (Tr. 404).

Ms. Mashinski testified that Anthony White was hired by Respondent as internal audit director in July 2005. (Tr. 477, 479). The board of directors authorized the position in May 2005. (Tr. 478-479). Ms. Mashinski stated Mr. White is the type of person that she had hoped to bring on to do the Sarbanes-Oxley work. He brought in a consultant for about two weeks during internal testing, but does most of the internal audit work himself. (Tr. 479). She interviewed Mr. White prior to his hire, and works with him on a regular basis. (Tr. 481). Placement agencies were utilized to find candidates. Advertising for the position began in late May or June 2005. (Tr. 482).

Ed Guthrie

Mr. Guthrie testified at formal hearing. (Tr. 505). He holds a Bachelor of Arts degree in economics and political science, and an MBA in finance. (Tr. 506). Mr. Guthrie has an extensive work history dating from the late 1960's, including

positions as chief financial officer. (Tr. 506-507). He began working for Respondent as CFO in July 1999, and has held the position of Secretary-Treasurer. (Tr. 507).

Mr. Guthrie stated he has observed Ms. Mashinski and her work and has found her to possess an "extremely high quality" work ethic, and a high level of integrity and honesty. (Tr. 508). At no time did Mr. Guthrie observe an atmosphere of secrecy in Ms. Mashinski's department. (Tr. 534). He stated he raised the issues of information flow and cooperation with the audit partner of Ernst & Young because Respondent had a "whole new staff of people" and he was concerned that they may not know or understand questions posed to them. (Tr. 534-535). However, no problems were ever brought to his attention. (Tr. 534).

Mr. Guthrie stated SOX compliance is the ultimate responsibility of the board of directors and himself as CFO. Because he had other responsibilities, Ms. Mashinski was charged with compliance with Sarbanes-Oxley Section 404. (Tr. 509). The Section 404 compliance process began in mid-2004, Sirius Solutions was brought in to document internal control processes. (Tr. 509). Complainant was retained to assist with the process. (Tr. 509). Mr. Guthrie stated the term of Complainant's contract was through completion of the Section 404 compliance process. (Tr. 541).

After the documentation stage was complete, UHY was brought in to perform testing of the internal processes because SOX prohibited the same firm who documented the processes from performing the testing. (Tr. 509). Completion of those steps was necessary to complete management's representation of Respondent's compliance with Sarbanes-Oxley Section 404. (Tr. 509). After those steps were completed, Ernst & Young as the independent external auditors, assess management's representations. Ernst & Young then issued an opinion on the financial statements, including an assessment of internal control, which was eventually filed as part of the 10-K filing, to comply with Sarbanes-Oxley. (Tr. 509-510).

Mr. Guthrie recalled that Ms. Mashinski had lunch with Complainant around January 10, 2005. (Tr. 511). He was told by Ms. Mashinski that she and Complainant discussed a number of remaining items to be completed, and Complainant had inquired with regard to future opportunities with Respondent and how he

should demonstrate his abilities. She indicated that she would respond. (Tr. 511-512). Complainant's rate of pay was also discussed, and was subsequently increased by $5.00 per hour. (Tr. 512).

Mr. Guthrie testified that he and Complainant met on February 16 or 17, 2005. (Tr. 512, 513). Complainant inquired about future opportunities with Respondent. Mr. Guthrie told Complainant that there were no opportunities with respect to an audit position. Respondent was in the process of defining a position, and the position had to be approved by the board of directors, which was scheduled to meet in May 2005. (Tr. 512). Mr. Guthrie further testified he made it clear to Complainant that no position would be available at the end of his contract period. (Tr. 513). Mr. Guthrie also reminded Complainant of his commitment to remain through the end of the Section 404 compliance process as Complainant indicated that he needed to seek future employment if there was nothing available with Respondent. (Tr. 513-514).

Mr. Guthrie testified that prior to his knowledge of the allegations, the Ernst & Young audit partner reported to the audit committee and himself that Complainant was not "getting the job done." The auditor recommended that further resources should be brought in to complete the work timely. Respondent then brought in Mr. Pierce. (Tr. 567).

Mr. Guthrie testified that he learned of the law firm investigation on Saturday, February 26, 2005. He received a call from the president of the company who indicated he had been informed by the chairman of the audit committee and chairman of the board that allegations had been made against Ms. Mashinski. (Tr. 517). When asked if the audit committee considered only Complainant's allegations, Mr. Guthrie testified that he was not privy to the conversation between the audit partner (of Ernst & Young), and the audit committee. (Tr. 558-559).

Mr. Guthrie stated it was his understanding that Complainant made the allegations to Ernst & Young, who then brought them to the board. (Tr. 521-522). Ernst & Young did not have supervisory authority over Complainant. (Tr. 522). Ernst & Young currently provides tax advice to Respondent. (Tr. 540).

The following week a board of directors meeting was held in New York at which the matter was discussed with the audit committee and they were advised that an investigation would take place. (Tr. 518). Mr. Guthrie stated he and Mr. Streeter, the president, met with the investigating law firm. (Tr. 518). They were not advised of the allegations, but were advised they needed to provide information and access to company personnel for the investigation. (Tr. 519). He did not tell Ms. Mashinski what the allegations were prior to her meeting with the investigating law firm. (Tr. 519).

Mr. Guthrie stated he then coordinated interviews of company personnel with the law firm. He was advised of the specific allegations when he was interviewed, which was the day before Ms. Mashinski was interviewed. (Tr. 520). When he received details of the allegations, Mr. Guthrie stated he realized the allegations had been made about a week after his meeting with Complainant. (Tr. 521). He reported this observation to the president and the audit committee. (Tr. 521).

He was told by Locke Lidell, the investigating law firm, that they were going to tell persons interviewed that the investigation was confidential, and they should not talk to anyone about it. (Tr. 532).

Mr. Guthrie testified that Ernst & Young intensified its scrutiny because of the allegations. (Tr. 524). Because of the allegations, Ernst & Young informed Mr. Guthrie that he was then the responsible party to supply information and coordinate the work. (Tr. 523). Formerly, the controller was the responsible party for this function. (Tr. 523). Respondent's 10-K could not be filed until the investigation was completed. (Tr. 523-524).

After he learned of the allegations, Mr. Guthrie asked his outside counsel and the law firm hired to investigate, if he should remove Ms. Mashinski's supervisory authority over Complainant. (Tr. 525-526). He received permission from counsel, and within a day or two, Mr. Guthrie informed Complainant that he would be reporting to him. (Tr. 526-527). Prior to the allegations, Complainant and Ms. Mashinski appeared to have a close working relationship. (Tr. 528).

Mr. Guthrie testified that there was still Sarbanes-Oxley related work to be done at the time he assumed supervision of Complainant. (Tr. 428). He also felt that Respondent had made a verbal commitment to Complainant to keep him through the Section 404 compliance process. (Tr. 530). He assigned Complainant to complete the three items listed in the February 6, 2005 e-mail to Complainant from Ms. Mashinski. The first item listed, "current assessment of meeting SOX requirements 2004," was to be Complainant's first area of concentration. (Tr. 529; JX-10). Mr. Guthrie surmised that the items listed in Ms. Mashinski's e-mail were sufficient to keep Complainant fully occupied through the end of the process. (Tr. 529-530).

He stated Sarbanes-Oxley work was winding down at that point, although Complainant still remained busy and billed forty hours a week. (Tr. 531). Company staff, Mr. Guthrie, and the external auditors were all working on financial and 10-K aspects of the year end closing cycle. (Tr. 532). Mr. Guthrie and Complainant had several meetings during this period, and had more contact concerning work than they had prior to Mr. Guthrie assuming supervision of Complainant. (Tr. 530, 533). Mr. Guthrie further testified that he told Complainant 'good morning' every morning as he passed Complainant on his way to get coffee. (Tr. 531).

Mr. Guthrie testified that he observed Ms. Mashinski to be under tremendous stress after the allegations were revealed. (Tr. 527). He knew that Ms. Mashinski ceased talking to Complainant, and he "didn't have an issue with that." (Tr. 533). He also stated that he did not notice any difference in the way Mr. Deremer was treated by others. (Tr. 534).

Mr. Guthrie stated he made the decision to relocate Complainant's work area to the supply room. (Tr. 535). There were two contract people coming in to assist in completion of the 10-K filing, who needed to be located contiguous to Ms. Mashinski's office. They were moved into the space previously occupied by Complainant the day following his move. (Tr. 535-536). Mr. Guthrie testified that he told Complainant his reason for the move was the other consultants being brought in. (Tr. 546).

Mr. Guthrie further stated that the office was very crowded at that time and there was no other place other than the supply room to put Complainant. (Tr. 535-536). After Complainant's departure, a contract accountant occupied the supply room space for about three months until the office expansion was complete. (Tr. 537).

Mr. Guthrie testified that the investigation by the law firm lasted approximately three weeks, and Complainant was moved in the middle of the investigation period. (Tr. 554). After Complainant's move, Mr. Guthrie stated he assisted Complainant in running a wire for internet access over a wall. (Tr. 538, 566-567).

Mr. Guthrie stated that April 22, 2005, was Complainant's last day with Respondent. He told Complainant that "the 404 process . . . had been completed, and . . . that should be his last day." (Tr. 541). Mr. Guthrie further stated he does not remember being on the phone, as Complainant had testified, during their last encounter. (Tr. 541). Mr. Guthrie asked Complainant if the other items listed in Ms. Mashinski's e-mail had been completed. (Tr. 541-542). He stated Complainant told him they were on his desk. (Tr. 542). However, Mr. Guthrie testified, to his knowledge, those items were never found in the items on Complainant's desk. (Tr. 542).

Mr. Guthrie testified that on May 18, 2005, he submitted an organizational plan at a meeting of the board of directors which addressed several issues, including an internal audit position. (Tr. 514-515; JX-20). When asked by Respondent's counsel: "did the interview process for that job start before or after May 18th?" Mr. Guthrie responded: "it started after May 18th." (Tr. 515).

Respondent ultimately hired Anthony White for the internal audit position, through a third party placement agency. (Tr. 516). Mr. Guthrie stated Mr. White is extremely well-qualified in his opinion. (Tr. 543). He further stated, because Respondent had just come through a stressful period, it was important that a highly qualified person be hired in order to lend credence to the position. (Tr. 543). He did not believe Complainant was qualified for the position, nor did Complainant make application for it. (Tr. 544). Complainant's status as a CPA and prior representation of himself as a CPA would have been a consideration in the hiring decision. (Tr. 545).

Mr. Guthrie testified Respondent has a mechanism for reporting of improprieties which is outlined on the company website. (Tr. 538-539). However, the first time he learned that allegations existed was subsequent to the start of the investigation by law firm. (Tr. 539-540). Anyone can make a report via the website, not only employees of Respondent. (Tr. 566).

Sylvia Lamendola

Ms. Lamendola testified at formal hearing. (Tr. 568). She holds a Bachelors degree in accounting and is a certified public accountant. (Tr. 569). Her work experience is mainly in the oil and gas industry. (Tr. 569). She has worked for Respondent for six and a half years. (Tr. 569). She worked as assistant controller until 2004 when she began working part-time on special projects. (Tr. 570).

Ms. Lamendola considers herself a friend of Complainant and had lunch with him occasionally during his stint with Respondent. (Tr. 570). She further testified that he tended to "blow things out of proportion." (Tr. 576). She believed he was an emotional person and viewed things negatively in the sense that he was not being treated "right." (Tr. 577). She further opined Complainant had unrealistic expectations concerning his position and compensation. (Tr. 577). She did not observe anyone "shunning" Complainant after the investigation, and she continued to talk to him after the investigation. (Tr. 580).

She stated she was on the conversion team when Respondent converted to Great Plains software in 2001, and she feels she is "fairly familiar" with the package. (Tr. 570). She was aware of the manual override feature for currency conversion rates, which was used by the company mainly in two instances. (Tr. 570-571). Exchange rates are typically input daily by Respondent using information from The Wall Street Journal. The first instance in which the manual override feature may be needed is when there is a holiday in the United States, and thus no rate input for that day, but a system user in another country needs to enter a transaction. The second instance is to input an actual exchange rate for a particular transaction. (Tr. 571-572). The feature is rarely used, and she believes it is a standard feature of Great Plains software. (Tr. 572). The feature has been in place since Respondent installed the software. (Tr. 573).

Ms. Lamendola testified Respondent does not rely on the manual override feature for internal control in that all bank account activity is reconciled to actual activity in the bank account for a given month. (Tr. 572). Any discrepancies between the actual exchange rate for a bank transaction and the system assigned rate would be caught by the bank reconciliation process. (Tr. 572).

Ms. Lamendola opined that the feature would not be a method by which one could commit fraud. (Tr. 573). She stated Respondent has never hidden the feature from the auditors, and she finds it hard to believe that Ernst & Young did not know about the feature. (Tr. 573-574). She did not recall Complainant specifically asking her to demonstrate the feature for the Ernst & Young auditor, but stated she would not have had any concern about doing so. (Tr. 574). She testified she did show Raj Muchimilli the manual override feature along with many other features of the software. (Tr. 582, 588).

Ms. Lamendola stated Complainant told her that he disagreed with the way the company amortized the prepaid insurance. (Tr. 585). She acknowledged he told her that he was not comfortable with the method Ms. Mashinski endorsed which he believed would result in the account being under amortized. (Tr. 585-586).

Ms. Lamendola testified that she and the other members of the department, including Ms. Mashinski, were extremely busy and worked long hours during the period of January through April 2005. (Tr. 574). She did not recall an atmosphere of secrecy during this time or any attempt by Ms. Mashinski to hide anything from the auditors. She further testified that she has found Ms. Mashinski to possess a high degree of integrity. (Tr. 575).

During this period the office was “unbelievably crowded,” Ms. Lamendola testified. (Tr. 578). She recalled that Complainant was moved to the supply room. She opined that this move made sense because the contractors who later occupied Complainant’s former space needed to work closely with the controller and herself. (Tr. 579-580). She did not view the move as degrading, and stated that Mr. Lawrence used the supply room office space after Complainant’s departure. (Tr. 580).

Ms. Lamendola stated she participated in the investigation performed by Locke Lidell law firm. (Tr. 576). She knew there were allegations but were not told specifically what the allegations were. (Tr. 576). She stated she was shocked to learn that allegations were made against Ms. Mashinski. (Tr. 577).

OTHER EVIDENCE

Complainant's resume reads "R. J. Deremer, Jr. CPA, CIA." The document does not state the licensing state(s) or status of his licenses. (JX-1).

Complainant asserts "I was the project manager to ensure GulfMark's compliance with the Sarbanes-Oxley Act." (JX-3, p. 4).

Complainant's statement to OSHA includes the following: (1) "The company had weekly steering committee meetings . . . Mashinski never told me the meeting had been cancelled. Thereafter, the steering committee never met for the duration of my tenure with the company . . . After testifying, I was no longer the POC (point of contact) for the foreign locations" (JX-4, p. 7); (2) "While I was working on the [prepaid insurance] account I thought the [under] amortization amount totaled about $175,000.00 (at the time). I talked to Mashinski and her new assistant controller, Sal Nicotra (now a former employee) about the $175,000.00, and how we could explain it to E&Y . . . Mashinski said to tell E&Y it (the $175,000.00) amortization amount was one of the payments and not relative to under reporting. I refused because it was a lie." (JX-4, p. 11); (3) Complainant contends Respondent was motivated to retaliate against him because his reporting activity threatened the issuance of a "clean opinion" by the outside auditors, which in turn would reflect on the company's 10-K filing with the SEC. (JX-4, p. 15); (4) Complainant contends he had a reasonable belief that the controller tried to deceive external auditors with regard to internal controls in order to secure a positive audit opinion, and deceived external auditors to avoid additional [insurance] expense. He contends this activity constituted fraud against the shareholders in that the value of their stock would be affected both by the amount of Respondent's loss for 2004 and a negative audit opinion issued by the external auditors. Complainant contends that the four issues he encountered would be factors toward issuance of a negative audit opinion. (JX-4, pp. 16-17, 21); and (5) Complainant stated he

learned Respondent had began the interview process to hire his replacement from deLachia (UHY employee) when he inquired about employment with UHY. (JX-4, p. 25).

An e-mail from Ms. Mashinski to Complainant and copied to the CFO, dated Sunday, February 06, 2005, stated: "As a follow-up to our lunch conversation a couple of weeks ago, it may be worthwhile for you to compile a document for the Company that provides:

1. Current assessment of meeting the SOX requirements for 2004,
2. Proposal for ongoing SOX maintenance, and
3. A risk assessment of the company.

"I think this would demonstrate your initiative, project management skills and decision making skills. If Ed feels it is appropriate, he can share with the Audit Committee." (JX-10).

The "Non-Functional Currency Accounts" listing dated "December 2004" contains a signature reading "Carla S. Mashinski" and a circled "1" in the upper left corner. (JX-13).

Joint Exhibit 18 is Respondent's "statement of position," which contains the following statements/assertions by Respondent: (1) Respondent lists its reporting responsibilities under Sarbanes-Oxley Act Section 404 as including (a) a report of management on the company's internal controls over financial reporting, which must include . . . management's assessment of the effectiveness of internal controls and (b) the attestation report of the public accounting firm who audited the financials. (JX-18, p. 5); (2) Complainant's time sheet documents that he had lunch with controller on January 10, 2005. (JX-18, p. 6); (3) Respondent contends Complainant was not qualified to fill the role of Compliance Officer, for which it hired after Complainant's departure. (JX-18, p. 12); (4) Respondent stated: "Complainant also alleges that he was discharged after 'it became apparent that senior management at GulfMark was actively seeking and interviewing candidates for the position previously and mutually discussed as appropriate for my rehire.' Complainant is mistaken in his belief. GulfMark had begun interviewing for tax accountants, but had not sought or interviewed candidates for a Compliance Officer position . . . The interview process for that position did not commence until after the approval was obtained from the Board of Directors." (JX- 18, p. 13).

Also included in Joint Exhibit 18 is the "Affidavit of Edward A. Guthrie" signed July 27, 2005, and "Finance Department – Organization Plan" dated May 18, 2005. (JX-18, pp. 17-23, 24-27). Mr. Guthrie's affidavit at paragraph 10 states:

> "As concerns the position of Compliance Officer, Complainant was never qualified to hold that position. Further, a plan to hire someone in the Compliance Officer position was not even submitted to the Board of Directors Audit Committee for approval until May 18, 2005. See, GulfMark's Proposal to its Board of Directors on May 18, 2005 where the hiring of a Compliance Officer was first approved (Exhibit II [sic] to the affidavit of Edward A. Guthrie). As of April 22, 2005, the date that Complainant's services were terminated, GulfMark was still in the early stages of formulating a job description for the Compliance Officer position . . . did not begin interviewing for a Compliance Officer position until it received Board approval to so do, which approval occurred on or about May 18, 2005."

(JX-18, pp. 19-20).

Mr. Guthrie further states in paragraph 22 "attached hereto as Exhibit 1 is a true and correct copy of the proposal to GulfMark's Board of Directors meeting on May 18, 2005 establishing that the Board first approved the retention by senior management of a Compliance Officer." (JX-18, p. 23).

Respondent's "Finance Department – Organizational Plan" dated May 18, 2005, states: "We have been interviewing for the tax and internal control positions since we completed the first quarter 10-Q." (JX-18, p. 18).

Joint Exhibit 19 consists of 19 invoices submitted by Complainant to Respondent for worked performed during weeks ending December 17, 2004 through April 22, 2005. Therefore, the invoices cover the 12 weeks immediately preceding the law firm's interview of Complainant regarding his allegations, and 7 weeks after the interview. For week ending December 31, 2005, only 18.5 hours were billed. This week encompassed the Christmas holiday and seems to be an anomaly. Excluding week ending December 31, 2005, the average of hours billed by Complainant

prior his interview by the law firm, was 53.82 hours per week. The average for the 7 weeks subsequent to his interview was 43.25 hours per week, a difference of 10.57 hours per week. (JX-19, pp. 1-19).

A printout of internet inquiry to the Oklahoma Accountancy Board reports Complainant's CPA Certificate/License as "Revoked-Failure to Register" as of August 20, 1999. (EX-1).

Title 5 Section 901.451 of the Texas Occupational Code states a person may not use the designation of "CPA" unless the person "holds a certificate under this chapter." (EX-2).

Complainant's Exhibit 1 is Respondent's Form 10-K/A filing with the SEC. This amended form was filed April 26, 2005, and consists of a myriad of information about the company and its operations, including the following:

The 10-K report notes "Item 9A is amended to update Management's Annual Report on Internal Controls Over Financial Reporting." (CX-1, p. 6). It also states that internal control weaknesses associated with foreign tax provisions, allowance for bad debt, and indirect labor costs, were identified by Respondent's external auditors in the third quarter (of 2005). (CX-1, p. 21).

Respondent's revenue for 2004 was $139 million, and it incurred a loss for the year of $4.631 million. (CX-1, p. 25). Respondent's assets total $632.7 million which includes $520.5 million in vessels. (CX-1, p. 44).

Concerning currency fluctuations and inflation, Respondent noted that it was exposed to exchange rate risk because "substantially all" of its operations are international. Respondent's North Sea fleet generated 74% of its total revenue, primarily denominated in British pounds. (CX-1, pp. 40, 42). Respondent also stated that of its $277.5 million of outstanding debt, $168.0 million was denominated in U.S. dollars and the remainder of $109.5 million was in British pounds. (CX-1, p. 40).

The "Report of Independent Registered Public Accounting Firm," issued by Ernst & Young, concludes that Respondent's financial statements fairly reflect its financial position and results of operations for 2004 (a "clean" accounting opinion on the financial statements). (CX-1, p. 43). However, both management's representation and Ernst & Young identified

material weaknesses in internal control, related to: the financial statement close process, effects of foreign currencies, and accounting for income tax associated with new international operations. (CX-1, pp. 63, 67). Both parties identified the cause of the weaknesses as a lack of "accounting and tax resources in terms of size, technical experience and institutional knowledge due to unusually high levels of personnel turnover." (Tr. 410; CX-1, pp. 63, 67).

Post-Hearing, Complainant submitted a letter from the Oklahoma Accountancy Board dated November 17, 2006, stating in pertinent part, that Complainant's CPA Certificate No. 8837 was revoked on August 20, 1999, for failure to renew the certification. It further states: "Mr. DeRemer must make application to reinstate, pay all applicable fees and submit letters of reference as well as a recent photograph."[1]

The Contentions of the Parties

Complainant contends that he is a covered employee for purposes of the Act; he engaged in protected activity; Respondent knew of his protected activity; he suffered an unfavorable personnel action; his protected activity was a contributing factor in the adverse job action; and the same unfavorable job action would not have resulted absent the protected activity.

Specifically, Complainant contends he engaged in protected activity in that he had a reasonable belief of fraudulent activity and that he reported such activity to the corporate controller, external auditors, constructively via the external auditors to the audit committee of the board of directors, and to a law firm hired by the audit committee to investigate Complainant's allegations.

Complainant contends his reasonable belief of fraudulent activity is based on four alleged circumstances: (1) untimely "signing-off" of tasks as completed, and the addition of items to the "controller's checklist," an internal control document; (2) Controller's intention to conceal from auditors a $200,000 under-amortization of prepaid insurance by reframing the additional balance as a payment; (3) misrepresentation by the Controller to an external auditor concerning the time frame of existence and functioning of an internal control document, the

[1] Complainant submitted supplemental documentation dated April 2, 2007, from the Oklahoma Accountancy Board stating his CPA Certificate had been reinstated.

"non-functional currency accounts" listing; and (4) Controller's instructions to Complainant to conceal the feature of Respondent's software that allowed manual override of foreign currency transaction exchange rates.

Complainant further contends that he has suffered an adverse job action in that: (1) his assigned work area was moved to the supply room; (2) he was removed from work related to SOX and Respondent's 10-K SEC filing thus reducing his billable hours; (3) certain company personnel ceased communication with him; (4) inconveniences regarding office supplies and equipment necessary to his job were created; (5) he was not considered for a permanent position nor was his contract renewed; and (6) he was "blacklisted" with Respondent and UHY Mann Frankfort accounting firm.

Respondent contends that the bases stated by Complainant are untrue, and even if assumed to be true, were insufficient to support a reasonable belief of impropriety. Additionally, Respondent offers the nine defenses listed below, each of which Respondent contends, defeats one or more necessary elements of Complainant's claim.

(1) Respondent contends that Complainant may not assert a cause of action under the Sarbanes-Oxley because he is not a covered employee of Respondent.

(2) Conduct reported by Complainant does not constitute the conduct covered under SOX of violation of an enumerated statute, violation of a SEC rule or regulation, nor does it constitute fraud against shareholders.

(3) Respondent contends that Complainant did not specify as required by SOX, that the reported conduct violated an enumerated statute, a SEC rule or regulation, or constitutes fraud against shareholders, or was illegal.

(4) Respondent contends that Complainant has not established that he formed a reasonable belief that Respondent engaged in the conduct which Complainant enumerated.

(5) Respondent contends that Complainant's allegations cannot constitute protected activity because they fell within his job responsibilities.

(6) Respondent contends Complainant failed to report his allegations to a person with supervisory authority as required by SOX.

(7) Respondent contends Complainant is not entitled to recover under SOX as he has not suffered an adverse job action.

(8) Respondent contends Complainant would have experienced the same employment action regardless of his alleged protected activity.

(9) Respondent contends Complainant is not entitled to recover under SOX as he has not suffered any damages.

V. ANALYSIS AND DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations

must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

B. The Statutory Provisions

The whistleblower provision of Sarbanes-Oxley, set forth at 18 U.S.C. §1514A, states, in pertinent part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--
>
> > (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
> >
> > > (A) a Federal regulatory or law enforcement agency;
> > >
> > > (B) any Member of Congress or any committee of Congress; or
> > >
> > > (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) . . . .

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

Title 18 U.S.C. § 1514A(b)(2) provides that an action under Section 806 of the Act will be governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell Ford Aviation Investment and Reform Act for the 21st Century (the AIR 21 Act). See, Platone v. FLYi, Inc., ARB No. 04-154, Case No. 2003-SOX-27 (ARB Sept. 29, 2006). 49 U.S.C. § 42121(b) reads in pertinent part:

> (i) Required showing by complainant. The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (ii) Showing by employer. Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

Title 29 C.F.R. § 1980.101 of the implementing regulations of Sarbanes-Oxley defines the term "employee," stating in pertinent part:

> Employee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.

29 C.F.R. § 1980.101.

The whistleblower provision of Sarbanes-Oxley is similar to whistleblower provisions found in many other federal statutes. Since the Sarbanes-Oxley Act is relatively new, reference to

case authority interpreting other whistleblower statutes is appropriate. See Welch v. Cardinal Bankshares Corporation, Case No. 2003-SOX-15 (ALJ Jan. 28, 2004), *rev'd on other grounds*, ARB 05-064 (ARB May 31, 2007).

C. Is Complainant a covered "employee" within the purview of SOX?

Complainant bears the burden of proof of any cause of action asserted under the Act. Respondent contends that Complainant may not assert a cause of action under Sarbanes-Oxley because he is not a covered employee. Specifically, Respondent cites the plain language of SOX Section 806, codified as 18 U.S.C. § 1514A, which prohibits discrimination against "employees." Respondent further contends that Complainant, as an independent contractor, does not meet the definition of employee as listed in 29 C.F.R. § 1980.001. He was never employed by Respondent. Neither was he a person "applying for work" because he never submitted an application, was never interviewed, nor engaged in anything beyond casual conversation with the controller.

Complainant, in brief, asserts he is a covered employee for purposes of asserting a cause of action under SOX under four theories. First, he contends he was an employee under the common law principles of master-servant. He further contends that he was both an "individual applying to work for a company," and an "individual whose employment could be affected by a company or company representative," as defined in 29 C.F.R. § 1980.001. Finally, Complainant contends he should be afforded protection under the Act for policy reasons as failure to provide protection would lead to an impermissible loophole, thus subverting the intent of the legislation. Each of Complainant's contentions is addressed below.

Common Law Master-Servant principals

Complainant contends that he was an employee under the common law principals regarding the master-servant relationship, and therefore was "an individual presently working for a company," as defined in 29 C.F.R. § 1980.001. In support, Complainant states Ms. Mashinski dictated his assignments and directed his work. He testified that Respondent supplied his workspace, internet link, e-mail, and other necessities of his work. Therefore, he concludes, based on the degree of control by Respondent, he was an employee under the common law principals.

Complainant further cites Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992), for the proposition that where a statute uses the term "employee" but fails to provide further clarification, the court is to presume Congress intended to refer to the common law master-servant relationship.

I find this argument unpersuasive. Notwithstanding the proposition advanced under Nationwide, the facts of this case simply do not support a conclusion that Complainant was an employee under common law principles.

Complainant, Ms. Mashinski, and Mr. Guthrie all testified as to their understanding that Complainant was initially hired on a contract basis. He was hired for a specific task, with an estimated time of completion. The nature of his assignment was such that he needed access to Respondent's financial records for testing and analysis. Therefore, his physical presence at Respondent's location and the guidance provided by the controller in completion of his assignment are incidental to his assignment, not indicia of Complainant's status as an employee. Further, Complainant was at all times paid as a contractor as he submitted invoices, had no taxes withheld, and no formalities associated with employment as an employee.

Based on the foregoing, I find that Complainant failed to establish his status as an employee of Respondent under the common law principles of master-servant.

Individual applying to work for a company

Complainant also contends he was an "individual applying to work for a company," as evidenced by his conversations with his supervisor concerning future employment. Complainant points to his informal "hire" when he was originally engaged. He expressed his interest in an internal-audit position to Ms. Mashinski, which he contends was initially met with positive encouragement, and he followed-up with Mr. Guthrie. He further contends that he was discriminated against in that he was not afforded the opportunity to be considered for the position.

Complainant acknowledges he never made formal application for the position. He cites cases based on gender and race discrimination, Gentry v. Georgia-Pacific Corp., 250 F.3d 646 (8th Cir. 2001), and Chambers v. Wynne School District, 909 F.2d 1214 (8th Cir. 1990), for the proposition that formal application

for a job is unnecessary where the plaintiff had no knowledge of the job from other sources until it was filled, and employer was aware of plaintiff's interest in the job.

This argument is unavailing. As Complainant acknowledged in testimony, he was initially engaged as a contractor. The lack of formality of his initial engagement demonstrates the understanding of both parties of Complainant's status as a contractor. Further there is no evidence to indicate a change in his status from contractor to employee after he was initially engaged.

Complainant's conversations with the controller and CFO do not constitute application for a position. Complainant testified he was aware that the controller did not have authority to hire for the internal-audit position, and that the position did not exist at the time of his conversations with the controller and CFO.

Complainant correctly cites Chambers for the proposition stated. In that case alleging failure to promote due to gender and race discrimination, the U.S. Court of Appeals for the Eighth Circuit held that where a teacher became aware of a job opening from faculty members, "the information that she did know put her on reasonable notice to at least engage in further inquiry with administrators concerning the openings." Id. at 1217.

Without specifically addressing whether the factors listed in Chambers may be applied to an employee under the Act, I find that the proposition noted in Chambers is not applicable to contractors for purposes of coverage under the Act. While an employer may have a duty to inform interested employees of job openings to avoid discriminatory situations, I find no such duty exists with regard to contractors within the purview of SOX.

Assuming **arguendo**, that Complainant was found to be an employee of Respondent, Complainant had sufficient notice of the upcoming job opening to prompt further inquiry. Complainant testified as to his belief, that Respondent conducted interviews for the internal-audit position prior to Complainant's departure. Therefore, whether or not the interviews were actually underway, he had sufficient notice to inquire about the application process. Complainant's subjective belief that inquiry would be to no avail is insufficient to support his status as an "individual applying to work for a company."

Mr. Guthrie testified that the internal-audit position, which was officially created after his conversation with Complainant, was eventually filled by use of personnel placement agencies. There is no evidence to suggest that Complainant was in any way discouraged from seeking employment through any placement agency.

Considering the above, I find and conclude that Complainant is not a covered employee under the Act based on status as an "individual applying to work for a company." I further find that Complainant has failed to meet his burden of proof that Respondent's failure to hire him in any way constituted an adverse job action.

Individual whose employment could be affected by a company

Complainant contends that he was "an individual whose employment could be affected by a company or company representative," and therefore he was an "employee" as defined in 29 C.F.R. § 1980.001. In support, Complainant points to Respondent's degree of control over the length and content of his assignment, Respondent's ability to discontinue his engagement at any time, and Respondent's obvious control of its hiring decisions.

The instant inquiry as to whether this purposefully broad language encompasses contractors for purposes of protection under the Act, hinges on the word "employment." The corresponding language in 18 U.S.C. § 1514A prohibits discrimination "in the terms and conditions of employment." Therefore, if the term "employment" as used in the context of 29 C.F.R. § 1980.001 is construed to include contract engagements, then Complainant is an "employee" for purposes of the Act.

As with any interpretation of a statutory term, the intent of the legislation is paramount. Interpretation should strive to carry out the objectives of legislation with fidelity to its purpose, anticipated methods to achieve its purpose, and intended limitations.

The overriding objective of Congress in passing Sarbanes-Oxley was clearly to protect investors. To that end, Congress included the whistleblower provisions in Section 806 reasoning: "U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies," 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement by Senator Leahy).

Concerning interpretation of statutory terms, the U.S. Supreme Court opined:

> A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies . . . The point is the same even when the terms share a common statutory definition, if it is general enough. Environmental Defense v. Duke Energy Corp., 127 S.Ct. 1423, 1426, 1432-1433 (2007).

Prior cases have afforded coverage to employees of non-publicly traded subsidiaries of publicly traded companies based on various theories of legislative intent or the ability of the parent company to affect employment of individuals employed by the subsidiary. See Collins v. Beazer Homes USA, 334 F. Supp. 2d 1365 (N.D. Ga. 2004); Morefield v. Exelon Services, Inc., 2004-SOX-2 (ALJ Jan. 28, 2004). Complainant cites discussions in Morefield, supra, and Daniel v. Timco Aviation Services, Inc., 2002-AIR-00026 (ALJ June 11, 2003), both of which observe that whistleblower coverage should be broadly applied.

The goal of investor protection is best served by an expansive interpretation of persons eligible for protection as "employees," as the purview of the Act is sufficiently limited by the "reasonableness test" of the employee's belief. Only in this way can the legislation promote "whistleblowing" by as many persons as may have knowledge of fraud, while ensuring that only worthy activity is protected.

For this reason, I find that the term "employment" as used in 29 C.F.R. § 1980.001 includes any service or activity for which an individual was contracted to perform for compensation. Therefore, a contractor or sub-contractor may be "an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.001. Under this definition, the only "employment" which the employer is capable of affecting, in its terms and conditions, is the contracted for services or assignment. Here, Complainant testified he contracted to perform work related to Sarbanes-Oxley compliance.

Non-Coverage would result in an impermissible loophole

Complainant further contends that failure to extend coverage to him would lead to an impermissible loophole in coverage that would subvert the intent of Congress. Therefore,

for policy reasons, Complainant should be afforded coverage. In support of this contention, he notes that the statute specifically prohibits discrimination by a contractor or sub-contractor, concluding that inclusion of this class of persons under the statute is needed to complete the logical legislative scheme.

Having found that Complainant is covered as an "employee" under 29 C.F.R. § 1980.001, this argument with regard to Complainant is rendered moot. However, as stated above, "employment" is necessary for an employer to be capable of retaliatory conduct.

D. The Burden of Proof

In a Sarbanes-Oxley "whistleblower" case, a complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity as defined by the Act; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action, such as discharge; and (4) circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. See Macktal v. U. S. Dep't of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Welch v. Cardinal Bankshares Corporation, ARB No. 05-064, Case No. 2003-SOX-15, @ 8 (ARB May 31, 2007).

The foregoing creates an inference of unlawful discrimination. Id. With respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation. Id.

In Marano v. Dept. of Justice, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the Court observed:

> The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, 2 F.3d at 1140 (citations omitted); see also, Welch, supra.

If complainant fulfills this burden of proof, Respondent may avoid liability under Sarbanes-Oxley by producing sufficient evidence to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action. See 29 C.F.R. § 1980.101; Yule v. Burns Int'l Security Serv., Case No. 1993-ERA-12 (Sec'y May 24, 1995). Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than a preponderance of the evidence and less than beyond a reasonable doubt. See Id. @ 4.

The burden shifts to the complainant who must then provide some evidence, direct or circumstantial, to rebut the proffered reasons as a pretext for discrimination.[2] Ultimately, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown **both** that the reason was **false**, **and** that discrimination was the real reason" for Respondent's decision. Hicks, 509 U.S. at 515 (emphasis added).

Complainant's Prima Facie Case

(1) Did the Complainant engage in Protected Activity under the Sarbanes-Oxley Act?

Under SOX, protected activity must be based on Complainant's reasonable belief that the employer's conduct constituted a violation of 18 U.S.C., sections 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A (a)(1).

Reasonable Belief Standard

The legislative history of Sarbanes-Oxley states that the reasonableness test "is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts." Legislative History of Title VIII of HR 2673: The

[2] Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a **prima facie** case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-511, 113 S.Ct. 2742 (1993). See Carroll v. United States Dep't of Labor, 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a **prima facie** case becomes irrelevant once the respondent has produced evidence of a legitimate non-discriminatory reason for the adverse action.)

Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002), 2002 WL 32054527 (citing Passaic Valley, 992 F.2d 474 (3rd Cir. 1993). "The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." Id.; see Collins v. Beazer Homes USA, Inc., supra.

Thus, complainant's belief "must be scrutinized under both subjective and objective standards, i.e., [he] must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable." Melendez v. Exxon Chemicals Americas, Case No. 1993-ERA-6 (ARB July 14, 2000). The reasonableness of a complainant's belief regarding illegality of a respondent's conduct is to be determined on the basis of "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." Melendez, supra, (quoting Minard v. Nerco Delamar Co., Case No. 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. @ 7, n.5); see Lerbs v. Buca Di Beppo, Case No. 2004-SOX-8 (ALJ June 15, 2004).

Additional guidance is contained in the legislative history, noting "certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief." Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002).

Essential Elements of Fraud actionable under SOX: Intent, Materiality/Significant Deficiency, Impact on Shareholders

The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision. See e.g., S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (explaining that the pertinent section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company"). The provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent." Id.

In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." Ames Department Stores Inc., Stock Litigation, 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations). While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit. See Hopkins v. ATK Tactical Systems, Case No. 2004-SOX-19 (ALJ May 27, 2004); Tuttle v. Johnson Controls, Battery Division, Case No. 2004-SOX-0076 (ALJ Jan. 3, 2005).

The elements of fraud include: (1) a misstatement or omission; (2) of a material fact; (3) made with the intent to defraud; (4) on which the [complainant] relied; and (5) which proximately caused the [complainant's] injury.[3] Williams v. WMX Technologies, Inc., 112 F.3d 175, 177 (5th Cir. 1997). Hence, a fraudulent activity cannot occur without the presence of intent.

Courts are split on the question of whether or not whistleblower protection is limited to fraud "against shareholders." The Court in Reyna v. Conagra Foods, Inc., 2007 WL 1704577 (M.D.Ga. June 11, 2007), relying solely upon its analysis of the plain language of the statute, held: "alleged violations of mail fraud or wire fraud do (sic) not have to relate to shareholder fraud in order to be protected activity." Id. at 16.

The Reyna holding conflicts with the position of the Administrative Review Board (ARB) that: "an employee's protected communications must relate 'definitively and specifically' to the subject matter of the particular statute under which protection is afforded." Platone v. FLYi, Inc., supra, at 17 (ARB Sept. 29, 2006). The ARB reiterated this position in Welch, supra, in which the ARB held that recording of accounting

[3] In the context of securities fraud claims under section 10(b) of the Securities Exchange Act and Rule 10-b5, the "intent to defraud" element is replaced with "scienter." Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud, or at minimum, highly unreasonable (conduct), involving not merely simple, or even excusable negligence, but an extreme departure from the standards of ordinary care . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." In re: Alpharma Inc. Securities Litigation, 372 F.3d 137, 148 (3d Cir. 2004); see also Tuchman v. DSC Communications Corportation, 14 F.3d 1061, 1067 (5th Cir. 1994).

information in violation of generally accepted accounting principles (GAAP), or other industry specific standards, was not ipso facto violation of federal securities laws. Welch, supra, @ 11-12.

The Reyna Court correctly observed "it is unnecessary (and inappropriate) to rely upon the legislative history of a statute to derive Congress' intent when that intent is readily revealed by a plain reading of the statute." Reyna, supra, citing Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1167 (2003) (citing Fed. Reserve Bank of Atlanta v. Thomas, 220 F.3d 1235, 1239 (11th Cir. 2000)). However, as with any statutory provision, whistleblower provisions should not be viewed in isolation, but must be viewed in the context of the act in which it exists.

Sarbanes-Oxley was enacted for the purpose of eliminating perpetration of fraud against shareholders as evidenced by the plain language of the Act as a whole. SOX goes to great lengths to assure that information assimilated to the investing public is not fraudulent by, among other measures, establishing the Public Company Accounting Oversight Board to ensure auditors' independence, assessing responsibility to the Audit Committee of the Board of Directors of a company, requiring management to attest to the accuracy of internal controls and financial reports, and installing criminal penalties for intentional misrepresentations to the investing public. 15 U.S.C. § 7211; 15 U.S.C. § 7241; 15 U.S.C. § 78j-1; 18 U.S.C. § 1350.

I find that, consistent with the position expressed by the ARB, allegations of "shareholder fraud" is an essential element of a cause of action under SOX. Therefore, where the conduct complained of involves potential dissemination of false information to the investing public, not all intentionally fraudulent activity may support a cause of action under SOX. Rather, the alleged conduct must be sufficiently material to rise to the level of shareholder fraud. See also, Harvey v. Safeway, Inc., Case No. 2004-SOX-21 (ALJ February 11, 2005).

The Supreme Court, in addressing other types of shareholder fraud, held that to "fulfill the materiality requirement there must be a substantial likelihood that the disclosure of the omitted (or misstated) fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976)).

Similarly, the Securities and Exchange Commission, in providing guidance concerning materiality of financial statement items stated: "the omission or misstatement of an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item." The SEC further provides that magnitude (amount) alone does not determine materiality. All factors must be considered, as "misstatements of relatively small amounts . . . could have a material effect on the financial statements." (U.S. Securities and Exchange Commission, Staff Accounting Bulletin No. 99, Release No. SAB 99, August 12, 1999).

Therefore, under subjective and objective standards, Complainant must actually and reasonably believe, based on the knowledge available to a reasonable person, that Respondent intentionally acted fraudulently, and that such conduct was sufficiently material so as to constitute fraud against the shareholders. In cases where allegations of shareholder fraud are based on potential or actual dissemination of fraudulent information, there must exist a "substantial likelihood" that the disclosure of the omitted or misstated information would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.

Moreover, SOX specifically assesses responsibility for a company's internal controls to management, and requires disclosure of significant deficiencies, requiring in pertinent part:

> The principal executive officer or officers and the principal financial officer or officers . . . certify in each annual or quarterly report filed or submitted under either such section of such Act that . . .
>
> (4) the signing officers . . .
> (A) are responsible for establishing and maintaining internal controls . . .
> (5) the signing officers have disclosed to the issuer's auditors and the audit committee . . .
> (A) all significant deficiencies in the design or operation of internal controls . . .

15 U.S.C. §7241 (a).

Internal controls are essentially the system of checks and balances upon which a company relies to ensure the accuracy, completeness, and timeliness of recordation, compilation, and publication of financial information. Respondent's 10-K report defines a material weakness in internal control as "a control deficiency, or combination of control deficiencies, that results in more than a remote likelihood that a material misstatement of the annual or interim financial statements will not be prevented or detected." I adopt this definition for purposes of this opinion.

In securities fraud cases, it has been observed that inadequacy of internal accounting controls "are probative of scienter [defendant's intent to deceive, manipulate, or defraud] . . . and can add to the strength of a case based on other allegations." Crowell v. Ionics, Inc., 343 F.Supp.2d 1, 12, 20 (D. Mass. 2004). Therefore, a significant deficiency in internal controls, at least when combined with other significant issues, would constitute a circumstance likely to be "viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." As a company's management is under a statutory duty to disclose significant deficiencies in internal control, a willful attempt to conceal such deficiencies or subvert the published attestation of auditors concerning internal controls, would constitute "shareholder fraud" for purposes of protected activity under the Act.

Protected Activity Alleged

Complainant alleges that he engaged in protected activity by reporting his concerns regarding the following four practices: (1) untimely "signing-off" of tasks as completed, and the addition of items to the "controller's checklist," an internal control document; (2) the Controller's willful attempted concealment of a $200,000 under-amortization of prepaid insurance; (3) willful misrepresentation by the Controller to an external auditor concerning the time-frame of the existence and signing of an internal control document, the "non-functional currency accounts" listing; and (4) the Controller's instructions to Complainant to conceal from auditors a feature of Respondent's software that allowed manual override of foreign currency transaction exchange rates.

Complainant contends that these four circumstances, when combined, constituted material weaknesses in internal control so as to prompt a negative audit opinion from Ernst & Young, the public audit firm, concerning internal control. He further contends that Respondent's controller purposefully committed the above practices in an attempt to fraudulently secure a clean audit opinion as to Respondent's financial statements and internal controls. Such audit opinions become part of Respondent's SEC filings and are disseminated to the public.

Respondent contends that the activity reported by Complainant does not constitute conduct covered under SOX because he did not specify, nor did the conduct constitute a violation of an enumerated statute, SEC rule or regulation, nor does it constitute fraud against shareholders. Respondent further contends that Complainant failed to establish his reasonable belief of the conduct he enumerated.

Complainant testified he brought all such concerns to Ernst & Young, the external auditors, and to the law firm engaged by Respondent's Audit Committee to investigate the matter. Complainant also contends his allegations were brought to Respondent's Audit Committee via the external auditors. Whether a complaint to such persons is covered under the Act is addressed later in this section.

Complainant also testified that he expressed his concerns about the "controller's checklist," foreign currency exchange rate override, and prepaid insurance to the controller. It is noted he discussed the deficiency of the "checklist" signoff procedure and currency override feature, only in his conversation concerning the prepaid insurance did Complainant testify he expressed that showing the discrepancy as an extra payment was improper. I conclude simply revealing internal control deficiencies is not sufficient to constitute protected activity, however revealing an official's attempt to conceal such deficiencies may be protected if material. In this case, all disclosures that may constitute protected activity, except concerning prepaid insurance, were made to the outside auditors, law firm, and constructively to the audit committee.

Three of the four items which Complainant contends is protected activity concern only internal controls, and have no direct impact on Respondent's financial statements. Only the alleged attempt to misstate the prepaid insurance asset would

have an affect on the financial statements. The items affecting only internal controls were the untimely "signing off" of the Controller's checklist, misrepresentation concerning the "non-functional currency accounts" listing, and the alleged attempt to conceal the manual exchange rate override feature in Respondent's Great Plains accounting software.

Respondent does not deny that certain items on the Controller's checklist were signed off at a time later than immediately after the item was completed. Ms. Mashinski testified that the document is a "to do" list. As an accountant completed each task, ideally they would initial and date the item, however, in reality some documentation was done well after-the-fact. Complainant contends that this item was purposefully misrepresented as a functioning internal control when this practice of late "signing off" left open the possibility of inadvertent or intentional error. Complainant also testified that he considered this a minor internal control breach and brought it to the attention of the external auditor only after noticing other issues.

The "non-functional currency accounts" listing is a compilation of the accounts to be addressed. While Ms. Mashinski did not deny that she signed a copy of this document and gave it to an auditor, she testified that her signature confirmed that the accounts listed had been revalued, not that the listing existed during the month of December 2004. She further testified that Complainant had previously presented the document to her with copies of the account revaluations. Therefore, when she signed the document, she had personal knowledge that the revaluation had been performed. Complainant contends that she represented to the external auditor that a signed document existed prior to the time she actually signed it, and the control process was in effect prior to its actual institution. Complainant does not allege that the underlying revaluation of the accounts was not in fact performed.

Complainant contends that the controller willfully attempted to conceal the existence of a manual exchange rate override feature in the computer software. He states that this is of particular significance because all of Respondent's revenue is received from foreign sources. Ms. Lamendola, Respondent's employee who routinely dealt with the feature, testified that the feature was used infrequently. Ms. Mashinski testified that she was unaware of the feature when Complainant brought it to her attention. She further testified that the feature had the potential to have a material impact on the

financial statements but for compensating controls which Respondent had in place. She denied an intention to conceal the feature from the external auditors.

Complainant's final item of alleged protected activity concerned the prepaid insurance account, which if true and correct, would have affected Respondent's income. Complainant testified that after his analysis, he held a reasonable belief that an adjustment increasing Respondent's net loss by $200,000.00 should have been made.

Complainant additionally asserts that an atmosphere of secrecy and "closed door" meetings existed during the time auditors were present in Respondent's offices. He contends that such was an indicia of impropriety, and contributed to his reasonable belief of fraudulent activity.

I find as credible Complainant's testimony regarding his conversations with Ms. Mashinski concerning the four above stated items.

While I find none of these items, individually, would constitute a significant deficiency in internal control, or a material misstatement of financial information, they must be considered collectively to determine whether they can support an objective and subjective belief of fraudulent activity of a material nature. I find that they do not.

Complainant's reasonable belief of willful and material misstatement of financial information or willful failure to disclose significant deficiencies in internal control must be supported by the facts available to him at the time he formed the belief. Such reasonable belief cannot be based on inferences of additional impropriety, of which Complainant had no first hand knowledge. As stated earlier, not all fraud is actionable under SOX. Fraud that is not significant to the "total mix" of information, i.e., not material to the company, does not impact the shareholders. Therefore, even fraudulent activity is not actionable under SOX, if it is not material or significant enough to constitute fraud against shareholders.

In the instant case, the only potential financial impact of alleged fraudulent activity was an additional expense of $200,000.00. The record also reveals varying computations of the amount that are less than $200,000.00. This amount arguably is not material when compared to Respondent's 2004 revenue of $139 million, or its loss of $4.631 million. The only evidence

introduced to suggest that this item would be considered material by shareholders was Complainant's subjective opinion. The external auditors chose not to adjust the expense by the finally determined amount of $60,000.00 because they considered it immaterial.

Of the items affecting internal controls, the only item with the potential to constitute a significant deficiency was the manual override of currency exchange rates. Both Complainant and Ms. Mashinski testified that she was not aware of the software feature when Complainant presented the issue to her. Therefore, no conversation between Complainant and Ms. Mashinski could support a reasonable belief that the feature was significant to internal control.

Complainant did not offer testimony he investigated further to conclude that compensating controls were not in place to support a conclusion the software feature constituted a significant breach of internal control. As a person experienced in internal control procedures, Complainant would surely have been aware that compensating controls may have existed which could have negated the effect of the software feature. Therefore, Complainant could not have held a subjective belief that this software feature, even when coupled with the other internal control deficiencies, constituted a significant deficiency in Respondent's internal controls. I find that reasonable belief of a "potential" significant deficiency is not sufficient to constitute protected activity.

Complainant testified that Mr. Goss, of Ernst & Young, informed him that the audit firm intended to speak with the company's audit committee concerning their own concerns as well as those raised by Complainant. The audit committee thereafter engaged a law firm to investigate allegations raised by the audit firm. Mr. Guthrie testified that the audit firm increased its scrutiny as a result of the allegations.

While the actions of the auditors and audit committee lead logically to a conclusion that they considered the issues raised to be significant, their actions do not support the conclusion that the concerns upon which they acted were primarily the allegations asserted by Complainant. Certainly, Complainant's allegations may have been a factor considered, however there is no evidence that they considered Complainant's concerns significant in isolation. Similarly, Management's assessment of internal controls in Respondent's 10-K report identified weaknesses, which were confirmed in the external auditors'

attestation. However, the source of some weakness is identified as a lack of resources and technical experience, and personnel turnover. Therefore, the evidence does not support a conclusion that these weaknesses were based primarily upon fraudulent activity as raised in Complainant's allegations.

Complainant also points to Respondent's failure to provide the investigating law firm's report as evidence that Respondent's investigators confirmed his allegations. I find no merit in this contention. It is Complainant's burden to offer evidence sufficient to support his reasonable beliefs.

Based on the foregoing, I find and conclude that Complainant has failed to establish his reasonable belief of fraudulent activity actionable under SOX. He failed to establish, either objectively or subjectively, that Respondent's conduct of which he complained constituted a significant deficiency in Respondent's internal controls or had a material impact upon Respondent's financial information assimilated to the public.

Assuming, **arguendo**, that evidence supports Complainant's reasonable belief of conduct sufficient to constitute protected activity, I will proceed to analyze the remaining factors.

Did Complainant complain to an appropriate person?

The Act requires disclosure to a person with supervisory authority over Complainant or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct. 18 U.S.C. § 1514(A)(1)(c).

Complainant contends this definition includes external auditors, and alternatively argues that failure to provide protection for disclosures to auditors would leave an impermissible gap in protection of whistleblowers under the Act.

Respondent contends that Complainant failed to disclose information to a person enumerated under the statute, and therefore his action must fail.

Complainant testified he informed Ms. Mashinski, the external auditors, and the investigating law firm of his concerns. The external auditors communicated his concerns to the audit committee. He informed the external auditors and

investigating law firm of deceptive practices followed by Ms. Mashinski. While disclosure to Ms. Mashinski is clearly covered under the Act, it is the disclosures to the auditors and law firm that are pivotal in this case.

The law firm hired by the audit committee to investigate the allegations was acting as an agent of the audit committee. The testimony reveals that the law firm had both express and apparent authority to investigate. Therefore, I find and conclude that disclosures to the investigating law firm constitute communications to 'such other person working for the employer who has the authority to investigate, discover, or terminate misconduct,' and is covered under the Act.

The external audit firm is in a unique position under SOX. They are obligated to render an objective opinion on the financial statements and assertions of the company. Arguably, they are in a position to "terminate misconduct," at least constructively, by refusal to render a positive opinion. As stated earlier, SOX goes to great lengths to insure auditors' independence with the goal of full and accurate financial disclosure. Indeed, in order to render a fully informed opinion, disclosure of deceptive practices or other questionable conduct to auditors is necessary.

Examining once again the intent of the legislation, I find that limitation of whistleblower protection based upon disclosure to an external auditor would produce a result inconsistent with the purpose of the Act. The purposefully broad statutory language quoted above indicates statutory intent to broadly define to whom the whistle may be blown. I find that the plain language of the statute encompasses disclosure to external auditors. Accordingly, I find that disclosures to external auditors may constitute protected activity within the purview of the Act. Constructive disclosure to the audit committee need not be addressed in this case.

Is Complainant's action barred because: (1) his allegations fell within his job responsibilities; or (2) he failed to communicate to Respondent that he believed its conduct to be illegal?

Respondent contends that Complainant's allegations cannot constitute protected activity because they fell within his job responsibilities. Pointing to Complainant's testimony that he was surprised by the investigation, Respondent contends that it was within the scope of Complainant's job responsibilities to report internal control deficiencies and misconduct. As

Complainant did not specifically state that he was reporting for the purpose of revealing an illegality, Respondent contends that his activity is not protected.

Respondent is initially mistaken in this assertion, as Complainant's reports to external auditors of internal control problems and improper conduct by the controller was outside of the duties of his original engagement. Assuming, **arguendo**, that all reporting fell within Complainant's job responsibilities, I will proceed to address the issue.

Respondent cites several cases for the propositions that finding irregularities as part of one's job duties cannot constitute protected activity, and that an employee, in reporting improprieties, must put the employer on notice that he is reporting the information for the purpose of exposing an illegal act rather than "merely warning the defendants of the consequences of their conduct." The cases cited are Hitchcock v. FedEx Ground Pkg. Sys., 442 F.3d 1104 (8th Cir. 2006), Skare v. Extendicare Health Serv., 431 F. Supp.2d 969 (D. Minn. 2006), U.S. v. Metropolitan Health Corp., 375 F.Supp.2d 626 (W.D. Mich. 2005), and Grant B. Dominion Ohio Gas, Case No. 2004-SOX-00063 (ALJ March 10, 2005). Hitchcock, supra, and Skare, supra, are based on a Minnesota statute.

It is important to note at this juncture that the existence of internal control deficiencies, expenses, or mismanagement cannot, in itself, support a finding of protected activity. It is the purposeful non-disclosure of such information that may form the basis of protected activity under SOX. Additionally, while it is appropriate, to a certain extent, to refer to case law interpreting other whistleblower statutes, interpretations of SOX provisions must still be made in light of its purpose and goals.

The holdings in Hitchcock and Skare are based largely on statutory provisions of a Minnesota whistleblower statute which I find inapplicable to SOX. In Grant, the Judge concluded that the activity of which the complainant complained could not support a reasonable subjective belief of fraud. It does not support the proposition cited.

In Metropolitan, supra, the Court interpreting the whistleblower provision of the False Claims Act, 31 U.S.C. § 3730, stated "Furthermore, where the whistleblower is . . . a corporate officer with assigned legal compliance responsibilities, the corporation must receive heightened notice

that the employee intended to further a qui tam/FCA action rather than merely warning the defendant of the consequences of its conduct." Id. at 644. Metropolitan, supra, is a case based upon the whistleblower provisions of the Fraud Claims Act and concerns medicare fraud.

The Fraud Claims Act also provides standing for action by a private person and a monetary incentive for a whistleblower to come forward, stating in pertinent part:

> (b)(1) Actions by private persons. A person may bring a civil action for a violation of section 3729 for the person and for the United States Government . . .
>
> (d)(1). . . such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim . . .

37 U.S.C. 3730.

The underlying reasoning for the rule stated in Metropolitan, supra, is to assure the employer has knowledge that it is subject to a private qui tam action or government action that may be initiated by the whistleblower. Unlike the FCA, SOX does not provide the possibility for monetary recovery by the whistleblower based on fraud against the government. Therefore, the motivation of a whistleblower under the FCA would be different from that of a whistleblower under SOX. It is the added incentive afforded to the whistleblower under the FCA that necessitates the heightened notice requirement.

Respondent's knowledge of protected activity is indeed a necessary element of an action under SOX. However, I find no reason to support a heightened notice under SOX of an employee's intention to pursue further action, such as is required under a FCA claim according to Metropolitan, supra.

The Act contains no language excluding one's job duties from protected activity. As stated above, to constitute protected activity, conduct must give rise to a reasonable belief of illegal conduct, i.e., violation of an enumerated statute or provision related to shareholder fraud. It is quite conceivable, as in the case of Sherron Watkins of Enron, that

one's job duties may broadly encompass reporting of illegal conduct, for which retaliation results. Therefore, restricting protected activity to place one's job duties beyond the reach of the Act would be contrary to Congressional intent.

In the case of accounting fraud that would impact shareholders, it is difficult to imagine how one would glean such sensitive information if one was not exposed to such as part of his job. The Senate Report on SOX specifically cited the case of Sherron Watkins, Enron's vice-president for corporate development. The report states "Enron employee, Sherron Watkins, tried to report accounting irregularities at the highest levels of the company in late August 2001," and goes on to chronicle Enron's pursuit of legal advise on the repercussions of firing her. Senate Comm. on the Judiciary, The Corporate and Criminal Fraud Accountability Act of 2002 (The Sarbanes-Oxley Act of 2002), S. Rep. No. 146, 107th Cong., 2nd Sess., 2002 WL 863249 (May 6, 2002). At least broadly, Ms. Watkins' report fell within her job responsibilities and is activity of the type that SOX was intended to protect and promote.

An employer is not deprived of notice or knowledge by holding it liable for retaliatory acts against whistleblowers who blow-the-whistle as part of their job duties because of the other necessary elements of a claim under SOX. Knowledge of protected activity, and an adverse job action to which protected activity is a contributing factor is also required. The employer, as the actor, is necessarily aware of an adverse job action and its motivation for such action.

I find and conclude that Respondent's argument fails. I further find that activities that fall within one's job duties may constitute protected activity if other requisite factors are met.

Further, since a necessary element of protected activity by Complainant is both a subjective and objective reasonable belief that Respondent's conduct was illegal, it is necessarily implied that if Respondent has knowledge of Complainant's protected activity, it is aware that such activity supports a subjective reasonable belief of illegality.

In Platone, the ARB noted that an employee's protected communications must relate "definitely and specifically" to the subject matter of the particular statute under which protection is afforded. The ARB goes on to say "for example, an employee's

disclosure that the company is materially misstating its financial condition to investors is entitled to protection under the Act." Platone, supra, @ 17.

As stated above, a willful attempt to conceal internal control deficiencies or subvert the published attestation of auditors concerning internal controls, could constitute "shareholder fraud" for purposes of protected activity under the Act. Similarly a willful attempt to materially misstate a company's financial statements would also be protected.

In addressing the question of whether Complainant was required to state in his communications that he believed Respondent's conduct to be illegal, an examination of the context in which and to whom the statements were made must be conducted. In this case, Complainant, who was versed in internal audit, communicated with the controller, auditors, and investigating law firm. All of these parties would have had knowledge of the Act and requirements for disclosure. Therefore, in disclosing activity that would constitute protected activity as concerning internal control deficiencies or financial statements as outlined above, all parties should logically recognized fraudulent activity if Complainant described it to them. Additionally, since all parties had knowledge of SEC requirements and SOX, they should have known that fraudulent activity with regard to internal controls or financial statements to be published with the SEC was illegal.

Therefore, I find that Complainant was not required to specifically state to Respondent that the activity of which he complain was illegal.

Accordingly, I find and conclude Complainant shall not be denied protection simply because he reported alleged conduct as part of his assigned job duties or because he specifically failed to articulate that he believed the conduct to constitute an illegality.

(2) Was Respondent aware Complainant engaged in protected activity?

A complainant is not required to prove "direct personal knowledge" on the part of the employer's final decision-maker that he engaged in protected activity. The law will not permit an employer to insulate itself from liability by creating "layers of bureaucratic ignorance" between a whistleblower's direct line of management and the final decision-maker. Frazier

v. Merit Systems Protection Board, 672 F.2d 150, 166 (D.C. Cir. 1982). Therefore, constructive knowledge of the protected activity can be attributed to the final decision-maker. Id.; see also Larry v. Detroit Edison Co., Case No. 1986-ERA-32 @ 6 (ALJ October 17, 1986); Platone, supra.

Ms. Mashinski testified that she learned of Complainant's allegations when she was interviewed by the law firm, and ceased speaking to Complainant immediately thereafter. Mr. Guthrie testified that he was informed of the allegations and enlisted to set up interviews of company personnel by the law firm. He understood that Complainant had brought concerns to the attention of the external auditors, who in turn brought the allegations to the audit committee. This activity took place prior to the interview of Complainant by the law firm.

Assuming **arguendo** that Complainant's activities were protected under the Sarbanes-Oxley Act, which I have previously concluded were not, I would find and conclude that Respondent had knowledge of Complainant's activities.

(3) Did Complainant experience an adverse employment action, and if so, did Respondent demonstrate a legitimate non-discriminatory business reason for its action?

An employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures. A complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities. Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000). See also Halloum v. Intel Corp., Case No. 2003-SOX-7 (ARB Jan. 31, 2006); Daniel v. TIMCO Aviation Servs., Inc., supra. Such adverse actions are not limited to "those that are related to employment or occur at the workplace." Burlington Northern and Santa Fe Railway Co. v. White, 126 S.Ct. 2405, 2409 (2006).

Respondent contends that an adverse employment action must have a "tangible job consequence" which "constitute(s) a significant change in employment status, such as hiring, firing . . ." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998); Dolan v. EMC Corp., Case No. 2004-SOX-1 (ALJ March 24, 2004). However, in cases of retaliation, the Supreme Court's holding in Burlington Northern v. White, supra, has relaxed this standard.

Citing the Supreme Court's holding in Burlington Northern v. White, supra, the U.S. Court of Appeals for the Fifth Circuit recently observed:

> In Burlington Northern, the Supreme Court rejected the approach taken by several circuits, including this one, that required plaintiffs to demonstrate an "ultimate employment decision" to satisfy the "adverse employment action" element of a retaliation claim. Instead, the Court clarified that the plaintiff must demonstrate that the actions were the sort that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." These actions may include those that take place outside of the workplace. Thus, the district court's reliance on caselaw requiring an "ultimate employment decision" became inconsistent with Burlington Northern when it was rendered.

McCullough v. Kirkum, 212 Fed.Appx. 281, 284-285 (5th Cir. 2006).

Respondent contends that Complainant is not entitled to recover under SOX as he has not suffered any damages. Respondent additionally contends Complainant would have experienced the same employment action(s) regardless of his alleged protected activity.

Complainant contends that he experienced adverse employment action in that: (1) during the approximately six weeks following his interview by the investigating law firm, his hours were reduced by approximately ten hours per week; (2) he was not assigned further work concerning Respondent's SOX compliance or 10-K report; (3) his workspace was relocated into a supply room which also created inconveniences with regard to office equipment, supplies, and network access; (4) the CEO, CFO, and controller ceased communicating with him; (5) he was not retained for a long-term position nor was his contract renewed; and (6) he was blacklisted and not hired at Respondent and the UHY Mann Frankfort accounting firm.

In support of his contentions, Complainant advances the following propositions: the temporal proximity between his protected activity and unfavorable job actions are such that a causal relationship is implied; Respondent's "attempts to besmirch the character, attitude and professional ability" of

Complainant were inconsistent with the simple expiration of a contract; and the hiring of a person to perform functions previously performed by Complainant indicates "his position had not truly and completely ended in terms of [Respondent's] need."

As discussed above, in determining whether the Act protects disclosures by contractors such as Complainant, I have held the term "employment" to include the work for which Complainant was contracted. Therefore, any economic impact of adverse employment action must be limited to that related to the contracted for work.

Reduced hours / non-assignment of further work

The parties agree that Complainant was engaged to work on SOX compliance matters. Complainant testified he originally expected his engagement to end in January 2005. Both Complainant and the controller testified that she assigned the prepaid insurance account analysis/reconciliation to him which was outside of the original scope of his duties. The controller testified that this was done because the SOX work was "winding down" and Complainant indicated that he was interested in additional work. It is also agreed by the parties that Complainant billed at least 40 hours per week until the time his engagement was discontinued on April 22, 2005. It is undisputed that the 2004 SOX work had ended by that time. Respondent's 10-K report was filed on April 26, 2005. Therefore, the "employment" for which Complainant was originally engaged was not diminished in that, if additional work was being assigned to Complainant, then SOX-related work had apparently dwindled down to less that 40 hours per week, and all SOX work would have been completed by Complainant's termination date of April 22, 2005.

The temporal proximity of the reduction in Complainant's hours was immediately after Complainant's interview with the law firm. However, the action, absent damage of some type, is irrelevant. Such damage is not shown in this case. Notwithstanding, if Complainant had continued to report directly to the controller, he may have been assigned additional work for which he may have billed Respondent, there was no diminution of his original contracted-for services.

Based on the foregoing, I find that Complainant has failed to establish an adverse job action in that his hours were not reduced or that he was not assigned additional SOX or 10-K related work after his interview with the law firm.

Workspace relocation / non-communication

All parties agree that Complainant's workspace was relocated to an area in the supply room immediately after he was interviewed by the law firm, and that equipment such as a telephone and network connection was much less accessible than in his prior workspace. Complainant testified that the workspace was in a path leading to the coffee pot and he was frequently interrupted to move and let people pass, and no other personnel were moved at the time.

He contends that this was a discriminatory action on the part of Respondent and caused him emotional harm. Respondent contends that the move was driven by the need for his prior workspace and lack of sufficient space in the office. The workspace was later occupied temporarily by a later employee of Respondent.

As noted earlier, during this period of time SOX work was "winding down." While it does appear that Complainant was singled out to be moved to a much less convenient work area, Respondent has demonstrated good reason for doing so. Complainant was not prevented from doing his work, rather it was made more cumbersome by the change in work area. However, it is within the business judgment of Respondent to make the best use of limited space as long as such is not done for an improper purpose. The need for space is demonstrated in Respondent's actions of locating an employee in the same space after Complainant's departure. Some inconvenience would be reasonably expected under such circumstances, and I find such does not rise to the level of conduct likely to deter other employees from making protected disclosures.

Consequently, I find and conclude that the workspace relocation was not an adverse employment action in that it did not rise to the level of activity that is reasonably likely to deter employees from making protected disclosures.

Ms. Mashinski testified that she ceased speaking to Complainant after she learned of the allegations against her. Mr. Guthrie testified that he was aware of this behavior and did not "have a problem" with it. Complainant contends that Mr. Streeter and Mr. Guthrie also ceased to speak with him, although Mr. Guthrie testified that he interacted with Complainant concerning his assignment. This conduct must be examined to determine whether, in the context of these circumstances, it constitutes a hostile work environment.

In a whistleblower case, the ALJ must weigh the following five factors to evaluate whether a hostile work environment claim has been established: (1) the [complainant] suffered intentional discrimination because of his or her membership in the protected class; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the [complainant]; (4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and (5) the existence of **respondeat superior** liability. Varnadore v. Oak Ridge National Laboratory, Case Nos. 1992-CAA-2 and 5, 1993-CAA-2 and 3, 1995-ERA-1 (ARB June 14, 1996). The Supreme Court's holding in Burlington Northern v. White, supra, did not relax this standard, but rather lowered the overall standard for conduct that constitutes retaliation.

While in an ideal world, allegations of wrong-doing would have no effect on personal relationships within an office, such is simply not reality. Complainant chose to communicate directly with the external auditors about his concerns, although he could have reported them anonymously via Respondent's website. He was informed that his comments would be communicated to company personnel. Therefore, some type of change in personal relationships/attitudes was to be expected.

Therefore, I find that the conduct complained of does not rise to the level of discrimination that would detrimentally affect a reasonable person. Thus, I find that Complainant has not presented sufficient evidence to establish that he experienced a hostile work environment as a result of his protected activities.

Blacklisted / non-hire and non-renewal of contract

Complainant contends that he experienced discrimination in that he was not hired nor was his contract renewed, but rather another person was hired for the internal control position, and he was blacklisted with Respondent and the UHY Mann accounting firm. Complainant contends this resulted in his being unemployed for approximately eight weeks at a loss of approximately $20,000.00.

Mr. Guthrie testified that the internal control position was filled through a placement agency. He also testified that the hiring process for the internal control position did not begin until after Complainant's departure, although his testimony conflicts with other evidence of Respondent concerning the exact date it began interviewing. Complainant testified

that he did not apply for work with UHY because he was told by an UHY employee that he would not be considered for employment because of the relationship between other UHY personnel and Respondent's controller. Complainant also testified he did not apply for the internal control position with Respondent, outside of his conversations with the controller and Mr. Guthrie, but he believed Respondent began interviewing for the position prior to his departure on April 22, 2005.

Citing gender and race discrimination cases, Complainant advances the proposition that formal application is not necessary where: (1) Plaintiff had no knowledge of the job from other sources until it was filled, and (2) the Employer was aware of his interest in the job notwithstanding failure to make formal application. See, Gentry v. Georgia Pacific Corp., supra, at 652; Chambers v. Wynne School Dist., supra, at 1217.

As the 2004 SOX compliance work had come to an end, I find that Complainant had no reasonable basis to expect extension or renewal of his original contract. Therefore, I find that Respondent's failure to renew or extend Complainant's contract does not constitute an adverse employment action.

Notwithstanding the proposition supported by the employment discrimination cases, some acts of discouragement do not relieve a Complainant from making a good faith effort to secure the job for which he complains. In the case of the UHY Mann accounting firm, Complainant presented no evidence that there was a job available, nor that the UHY employee who advised him not to "bother to apply" was a person responsible for hiring. Rather, discrimination on the part of UHY is assumed without affording them the opportunity to respond to a good faith application for work.

I find that Complainant has failed to meet his burden of proving adverse employment action based on "blacklisting" with the UHY Mann accounting firm.

Finally, Complainant contends he was "blacklisted" with Respondent, and thereby denied the opportunity to apply and be considered for the position of internal auditor. Respondent counters that the position was not available during Complainant's tenure with Respondent, and Complainant was not qualified for the position which eventually became available.

As noted above, Complainant is under an obligation to pursue employment for which he contends he was precluded due to discrimination. Complainant was apparently not precluded from contact with any employment agency, nor did he testify that he inquired of other company personnel concerning hiring procedures. Respondent was under no duty to offer the position to Complainant prior to pursuing applicants from a placement agency.

For reasons discussed above, I find and conclude that Complainant has not suffered an adverse job action by being "blacklisted" with Respondent. As discussed above, Complainant has not met his burden of proof that he made a reasonable effort to apply for a job with Respondent. Therefore, failure of Respondent to hire Complainant for the internal audit position cannot constitute retaliatory action that would dissuade employees from making protected disclosures.

Based on the foregoing, I find and conclude Complainant has failed to carry his burden of production and persuasion by a preponderance of the evidence that he suffered an adverse employment action.

VI. CONCLUSION

For the reasons discussed above, I find and conclude Complainant failed to establish that he engaged in protected activity within the meaning of the SOX Act or that he was subjected to any adverse employment action by Respondent because of his alleged protected activity.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, Respondent did not unlawfully discriminate against Complainant because of his alleged protected activity and, accordingly, his Complaint is hereby **DISMISSED.**

ORDERED this 29th day of June, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

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