U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 February 2005

CASE NO.: 2003-SOX-00032

In the Matter of

SHEILA JAYARAJ
Complainant

v.

PRO-PHARMACEUTICALS, INC.
Respondent

Appearances:

Jody L. Newman, Dwyer & Collora, LLP, for the Complainant

Lawrence J. Casey, Perkins Smith & Cohen, for the Respondent

Before: Colleen A. Geraghty
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding, which arises from a complaint filed by Sheila Jayaraj (the "Complainant" or "Mrs. Jayaraj") against Pro-Pharmaceuticals, Inc. (the "Respondent," "Pro-Pharmaceuticals," or the "Company"), alleges violations of the employee protection provisions in Section 806 of the Sarbanes-Oxley Act of 2002, as codified in 18 U.S.C. § 1514A (the "Act"). Enacted on July 30, 2002, the Act provides protection from employment discrimination to employees of companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (the "SEA") and companies required to file reports under Section 15(d) of the SEA.[1] Specifically, the Act protects "whistleblower" employees from retaliatory or discriminatory actions made by the employer because the employee provided information to the employer, a federal agency or Congress relating to alleged violations of 18 U.S.C. §§ 1341, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders.

[1] 15 U.S.C. § 781 (2004).

On May 14, 2003, the Complainant filed a Sarbanes-Oxley whistleblower complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA"). After conducting an investigation, OSHA issued a letter on August 26, 2003 advising the parties that the Complainant's complaint lacked merit. Subsequently, the Complainant filed her objections with the Office of Administrative Law Judges, U.S. Department of Labor. A formal hearing was held on April 5-6 and 15-16, 2004, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral arguments.[2] At hearing, the following exhibits were admitted into evidence: Complainant's Exhibits ("CX") 1-3, 5-14, and 18-21; Respondent's Exhibits ("RX") 1-21; and Joint Exhibits ("JX") 1-37. TR 8-10, 306, 348, 516, 604. The parties submitted post-hearing briefs on July 6, 2004. On July 29, 2004, the Respondent filed a Motion to Strike the Complainant's Post-Hearing Request for Value of Stock Options. On August 18, 2004, the Complainant filed an opposition to the Respondent's Motion to Strike. The record is now closed.

I. STATEMENT OF THE CASE

A. Background

The Respondent, Pro-Pharmaceuticals, Inc., is a Nevada corporation with its principal place of business in Newton, Massachusetts. The Respondent is a small start-up biotechnology company developing a method for reducing the toxicity and improving the effectiveness of chemotherapy drugs by combining those drugs with specific carbohydrate compounds. RX 16 at 203; RX 5; TR 460. It is a publicly traded company whose stock began trading on the over-the-counter ("OTC") market in September 2002 following a reverse merger with another Nevada corporation. TR 17, 20, 35, 461-463; RX 16 at 292; CX 18 at 82; RX 16 at 289.[3]

Pro-Pharmaceuticals was founded by Dr. David Platt, the Chief Executive Officer (CEO). TR 459-461.[4] Dr. Platt has a degree in biology and engineering and a Ph.D. in chemistry. TR 456; RX 16 at 306-307. James Czirr, Dr. Platt's partner in the Company, serves as Vice President of Business Development and also as a director. Ms. Maureen Foley serves as the Company's Chief Operating Officer. Dr. Platt, Mr. Czirr, Ms. Foley and a clerical assistant were the only officers or employees of the Company in September 2002. RX 16 at 306; TR 78, 471-472, 586. The Form 10-QSB filed with the United States Securities and Exchange Commission in September 2002 reports the nature of the operations as follows: "[t]he Company is devoting substantially all of its efforts toward product research and development and raising capital." RX 16 at 224. As a biotechnology start-up company lacking products or services to sell, the Company was required to raise funds and outside capital in order to fund the ongoing research and development business. TR 461, 519, 574; CX 18 at 83. The Company was attempting to raise capital through the sale of Company common stock in private placements and was also

[2] The hearing transcript is referred to herein as "TR".

[3] The parties stipulated that Pro-Pharmaceuticals is covered by the Sarbanes-Oxley statute as a publicly traded company. TR 17.

[4] Dr. Platt and Anatole Klyosov, Ph.D. the former Senior Vice President and now Chief Scientist for the Company jointly authored the first patents awarded to Pro-Pharmaceuticals. TR 460.

working to increase the volume and price of the publicly traded stock. TR 570; RX 16 at 224; CX 18 at 83.

B. Testimony of Sheila Jayaraj

Mrs. Jayaraj began work as Vice President of Investor Relations at Pro-Pharmaceuticals on or about October 14, 2002. TR 66. The Complainant was hired by Dr. Platt. TR 66, 470, 547; JX 5; RX 16 at 344. At that time, Pro-Pharmaceuticals had a total of five employees including the Complainant, with four employees working in the Boston office and Jim Czirr working from Idaho. TR 78, 464, 497.

Mrs. Jayaraj possesses an MBA in finance and business administration as well as a master's degree in biology. TR 59. She has over twenty years of professional experience in the areas of auditing, business development and investor relations and she has worked for several well-known companies. JX 3. Immediately prior to joining Pro-Pharmaceuticals, she was employed as an investment consultant at Morgan Stanley, structuring and managing portfolios for high net-worth individuals and small businesses. TR 61; JX 3. After a training course at Morgan Stanley, she obtained a Series 7 license, which allowed her to act as a registered representative in buying and selling securities and other investment products for Morgan Stanley. TR 62. In previous positions with other employers she was involved in ensuring that the financial information submitted as part of an annual report or a required filing was accurate. TR 63. The Complainant stated that in prior positions she referred legal issues that arose to the legal or compliance departments. *Id.*

At Pro-Pharmaceuticals, Mrs. Jayaraj was primarily responsible for directing and managing the Company's fund raising efforts and for maintaining contact with shareholders and the investment community. TR 68, 72; CX 6. She testified that when she began working in mid-October 2002, Pro-Pharmaceuticals was conducting a private placement to raise funds and operating capital for the Company. TR 68. The private placement had begun approximately one month prior to her arrival at the Company. *Id.* In a private placement, a company offers new stock at a price below the price for which the stock is trading on the public market, but the stock is restricted. TR 68-69. Pro-Pharmaceuticals' private placement was offered mainly to accredited investors, high net worth individuals or institutional investors. TR 69; RX 16 at 180, 182. During a private placement, a company can offer the stock only to individuals with which its principals have a pre-existing relationship. TR 227-228; JX 8. In the private placement that began in September 2002, Pro-Pharmaceuticals was attempting to raise 10 million dollars by offering 10 million shares at $1.00 per share. TR 68-69; RX 16 at 180. The Complainant stated that the private placement was to run until mid-January 2003. TR 69.

The Complainant also worked to promote the Company's effort to increase the volume of its publicly traded stock in order to generate interest in and increase the price of the stock, with an ultimate goal of qualifying for listing on the NASDAQ Exchange. TR 73-75. In order to qualify for listing on NASDAQ, the stock price must meet a minimum price per share. When the Complainant began working at Pro-Pharmaceuticals, the public stock price was trading near $3.25 per share, a figure below the threshold price required for NASDAQ. TR 74.

Within a week of starting at Pro-Pharmaceuticals, the Complainant and other principals in the Company received an e-mail from Jonathan Guest, corporate counsel. JX 8. Mr. Guest

cautioned them about appropriate and inappropriate activities during the private placement period, including the disclosure of material nonpublic information. *Id.*. The Complainant stated that she had a general understanding of the nondisclosure requirements, testifying that from her understanding the Company could not disclose nonpublic information to a selective group of individuals that was not available to the general public. TR 220-221. Mrs. Jayaraj also understood that the Company could not solicit investors generally for a private placement. TR 208. In addition, she stated that the message she took from Mr. Guest's October 19, 2002 e-mail was to be cautious during a private placement. She indicated that she did not understand the e-mail's reference to specific regulations. TR 226-227. The Complainant testified that she understood that she could talk with individuals about the Company as long as she did not mention or solicit for the private placement. TR 226. The Complainant also stated that based upon her conversations with Mr. Guest and with David Platt she understood that a private placement could be completed outside of the parameters and time-frame of the formal private placement, which was ongoing between September 2002 and January 2003. TR 69-72. She stated that she understood that private placement could be done with either individuals or institutions at any time, even after the close of the formal private placement on January 14, 2003. TR 72.

In her testimony, Mrs. Jayaraj outlined the actions and activities she engaged in to assist the Company to raise funds both through the sale of the publicly traded stock and in the private placement. TR 73-76. She attended numerous investor meetings, set up meetings with her contacts at various corporations in order to market the Company, targeted and communicated with high net worth individuals and institutional investors, and attempted to convince research companies to do research on Pro-Pharmaceuticals. She explained that without research coverage or analyst coverage rating the Company and its stock, few individuals would buy and sell the Company's public stock, thus making it difficult to generate interest in and to market the Company stock. TR 73-76. In addition, she prepared an informational package to send to individuals who may be interested in investing in the Company as well as a confidential business plan and a general business plan. TR 77; JX 27; JX 28. The Complainant stated that when she first started at Pro-Pharmaceuticals in October 2002, she prepared a Fact Sheet for the Company. In preparing this document she reviewed the Company's financial information and learned that the Company had approximately $800,000 in cash and was using cash at a rate of $200,000 per month. TR 66-67; JX 7. The Complainant stated that the Company was in a "pretty precarious position as far as cash was concerned" at that time. TR 67.

Three days after the Complainant began work at Pro-Pharmaceuticals, Dr. Platt directed her to hire an individual named George Mottel, who resided in California. TR 83-84. The Complainant testified that she did not know Mr. Mottel. *Id.* She reported that Dr. Platt told her that he knew Mr. Mottel from attending investor conferences on the West Coast and that Mr. Mottel was a broker who had contacts with smaller investor firms and that he could help market the Company's publicly traded stock. *Id.* The Complainant understood that Mr. Mottel was being asked to market the publicly traded stock to investment brokers, investment bankers and stock brokers in an attempt to increase the trading volume of the public stock. TR 230. The Complainant testified that she immediately looked Mr. Mottel up on the National Association of Securities Dealers (NASD) website. TR 84. The Complainant explained that one can usually check the NASD website to learn whether an individual is a registered broker and the broker's firm affiliation. Mrs. Jayaraj stated that she did not find Mr. Mottel listed and that this concerned her. *Id.* The Complainant informed Dr. Platt that Mr. Mottel was not a registered broker and

that she was concerned that he was going to be dealing in securities. *Id.* At the time he ordered the Complainant to hire Mr. Mottel, Dr. Platt was aware that Mr. Mottel was not a licensed broker. TR 560-561. The Complainant stated that she asked Dr. Platt if he had a resume for Mr. Mottel. TR 85. When he responded that he did not, she suggested they run a background check before hiring him.[5] Mrs. Jayaraj reported that Dr. Platt refused and told her to call corporate counsel and hire Mr. Mottel. *Id.* Following Dr. Platt's direction, the Complainant called Mr. Guest and they worked out a consulting agreement for Mr. Mottel.

On October 30, 2002, Pro-Pharmaceuticals entered into a Financial Services Consulting Agreement with Mr. Mottel. JX 14. The agreement was for $10,000 and had a term of 90 days. *Id.* The Complainant discussed Mr. Mottel and his activities with Mr. Guest in the course of discussing and drafting the consulting agreement. The Complainant testified that Mr. Guest described how easy it is for one to slip over into improper securities dealing. TR 228-229. The agreement with Mr. Mottel was not specific as to his responsibilities beyond providing "services" in "certain financial and investor matters." However, the agreement specifically prohibited Mr. Mottel from engaging in activity that "could be construed as 'effecting transactions in securities' within the meaning of the term 'broker' as defined in Section 3(4) of the Securities Exchange Act of 1934, or would cause the Consultant to be deemed an 'investment advisor' as defined in the Investment Advisers Act of 1940." JX 14; *see also*, TR 277, 948-949. The Complainant stated that based upon her conversations with corporate counsel in completing Mr. Mottel's contract she was aware of Mr. Guest's concerns that the Company comply with private placement rules with regard to Mr. Mottel's activities. TR 85-86, 228-29. Mrs. Jayaraj said that she supervised Mr. Mottel and in an effort to monitor his activities she instructed him to send her weekly reports detailing the entities he contacted and the result of the contact. TR 87-88. The Complainant stated that her concern regarding Mr. Mottel's activities increased when he called her to request that private placement packages be sent to individuals she believed he did not know well, based on his responses to her questions. TR 90-91, 250. She reported that she told Dr. Platt of her concern that Mr. Mottel was getting involved in the private placement and she stated that Dr. Platt responded, "If we don't get money now, in six months there will be no Pro-Pharmaceuticals." TR 91-92.

By mid-November, the Complainant had not received any of the requested weekly reports from Mr. Mottel, and she reported this as well as her concern regarding his activities to Dr. Platt. TR 93. She stated that Dr. Platt responded that Mr. Mottel had not brought the Company any private placement investors nor had he increased the public stock price and he told the Complainant to fire Mr. Mottel. TR 93-94, 494-496. At the Complainant's request, Mr. Guest prepared and forwarded a termination letter to Mr. Mottel on November 22, 2002, noting his failure to perform and requesting return of the $5000 paid him under the agreement. TR 94; JX 22. At the same time, the Complainant received a fax from Mr. Mottel, which was a list of individual names and phone numbers without firm affiliation under the heading "Broker/Investor Contact Program." JX 23. Mrs. Jayaraj stated that she called a few of the numbers and learned that they were non-working or the individual did not know Mr. Mottel. The Complainant stated that this confirmed her suspicion that he was contacting individuals about the private placement and that he did not have the contacts he was hired to pursue. TR 95-96. The Complainant was relieved when Mr. Mottel was no longer working with the Company. TR 97.

[5] The Complainant testified that she has hired many individuals in large organizations over the course of her career and never hired anyone without a background check or checking a reference. TR 85.

On November 25, 2002, the Complainant received a $25,000 performance bonus for her work, which involved marketing the Company to the local and national investment community, including the major pharmaceutical corporation Pfizer, and to contacts she had with high net worth individuals. The bonus was also given in part because the Complainant did not receive a sign-on bonus when she was hired. TR 99, 475-476; JX 24.

On November 26, an investor meeting was held at the Pro-Pharmaceuticals office with potential private placement investors whom Mrs. Jayaraj knew, including her husband, her son, Ameesh Bhandari, Pankaj Tandan and Richard Fino. TR 100-101. In addition to these potential investors, the Complainant, Dr. Platt and the Company's chief scientist, Dr. Klyosov, were also in attendance. *Id*. Dr. Klyosov explained the science supporting the process for enhancing the effectiveness of cancer treatment under development by the Company.

Early the following morning, the Complainant sent an e-mail to Dr. Platt telling him that she had done "damage control" with one of the potential investors after the meeting regarding the nature of Anatole Klyosov's position with the Company.[6] The Complainant testified that she explained what she meant by "damage control" in a face-to-face discussion she had with Dr. Platt when he arrived at the office that morning and before he read her first e-mail message. The Complainant told Dr. Platt that she believed he misrepresented Dr. Klyosov's relationship with the Company in responding to an investor's question the previous evening. She also told him of her concern, based upon cautions the Company had received from corporate counsel, that non-public information regarding the Company's potential deal with Sicor Pharmaceuticals may have been disclosed to the potential investors. TR 101-102, 104-105. The Complainant testified that Dr. Platt became angry and accused her of calling him a liar. TR 103-104. She replied that she was not calling him a liar but reiterated her concern that the Company needed to be cautious when speaking with potential investors. TR 104. The Complainant testified that she suggested that they check with Mr. Guest regarding the disclosure of information to potential investors. The Complainant reported that Dr. Platt responded that he did not want to talk with corporate counsel and told her that if she had concerns she was to take them up with him. TR. 105.[7] Dr. Platt then left her office. TR 106. The two exchanged additional e-mail communications that morning. TR 106-108; JX 25; JX 26. After the e-mail exchanges, the Complainant stated that Dr. Platt then entered her office telling her he did not want her to work there anymore and that she was creating document trails on him. The Complainant reports that she was very upset and she began packing her things. According to Mrs. Jayaraj, Dr. Platt returned 10 minutes later telling her she could stay as long as she did not talk to corporate counsel about him and she did not create further paper trails on him. TR 108-111.

In addition to supervising the activities of Mr. Mottel, the Complainant was also responsible for supervising the activities of James Braver. TR 115. The Complainant stated that Mr. Braver was a friend of Dr. Platt and that Dr. Platt asked her to hire Mr. Braver. TR 113-115. The Company entered a consulting agreement with Mr. Braver, wherein he would attend meetings in and around the Boston area, handing out the Complainant's business cards and

[6] Both the Complainant and the potential investor believed Dr. Platt had stated, or at a minimum, left a strong impression that Anatole Klyosov was a full time employee at Pro-Pharmaceuticals when he was not. TR. 101-103.

[7] The Complainant stated that Dr. Platt seemed concerned about the cost of Mr. Guest's services. TR 110-111.

collecting cards from meeting attendees. TR 113-114; *see also* JX 15. The Complainant reported that she supervised Mr. Braver by directing him as to what meetings he would attend, what he could and could not properly say about the Company at those meetings, and by exchanging e-mails regarding his ongoing activities. TR 115, 118-120, 121; CX 7 at 19. The consulting agreement provided that Mr. Braver would receive $500 monthly with the expectation that he would spend 5 hours each week or 5-6 meetings per month on company marketing. TR 115-117; CX 7 at 18. The Complainant testified that between November 2002 and February 2003 Mr. Braver's attendance at meetings and incurred expenses remained consistent, and his responsibilities remained the same. TR 121-123. Mrs. Jayaraj testified that soon after the private placement closed on January 14, 2003, Maureen Foley told her to tear up Mr. Braver's consulting agreement at $500 per month. TR 123-124. According to the Complainant, Ms. Foley stated that Dr. Platt wanted to pay Mr. Braver a $7,500 commission for the investors he brought for the private placement by passing it through a consulting agreement. TR 113, 123-124. The Complainant testified that she told Ms. Foley it was improper to pay Mr. Braver a commission for bringing in investors because he was not a licensed broker. TR 124-125. The Complainant testified that Ms. Foley responded, "he's the CEO, Sheila: We've got to do what he tells us to do." TR 125.

The Complainant reported that she did not tear up Mr. Braver's initial consulting agreement and that during the time she worked at Pro-Pharmaceuticals, she never saw the addendum to his consulting agreement, which increased his compensation to $2500 per month for three months in addition to the $500 he was receiving under the initial agreement. TR 128; JX 32. She testified that she saw the addendum to Mr. Braver's agreement for the first time during the discovery phase of this case. TR 127-128. The Complainant also stated that Mr. Braver's activities in January 2003 were the same activities he had been performing when she supervised him in November and December 2002. TR 115-117, 129.

The private placement did not bring in the $10 million in funds the Company had hoped. At the January 20, 2003 board meeting, the Company's cash picture, stock price and need to find institutional investors were discussed. TR 136, 577; CX 11. At some point after Mr. Mottel's termination and in particular after the close of the private placement on January 14, 2003, the Complainant became aware that Mr. Mottel was calling the office frequently. TR 137-138. Shortly before the January board meeting, the Complainant testified that Dr. Platt asked her to participate in a conference call with Jim Czirr and an investor who was interested in a private deal with the Company. TR 138-139. Once the call began, the Complainant realized that Mr. Mottel was also on the line. *Id.* When the investor hung up, Dr. Platt, Mr. Czirr, Mr. Mottel and the Complainant remained on the line. According to the Complainant, at this point Mr. Mottel asked for something in writing indicating that he would receive an 8-10% commission if the investor decided to invest in the Company. The Complainant reported that Dr. Platt replied affirmatively. TR 139-141. The Complainant also stated that as soon as the call ended she voiced her concern to Dr. Platt and told him that Mr. Mottel was seeking a commission, was getting involved in the private placement and that the Company had no contract with him. Mrs. Jayaraj testified that Dr. Platt essentially brushed her off. *Id.*

On January 31, 2003, the Complainant spoke with Jim Czirr on the telephone. TR 141-142; 260-262; 346. In the course of that conversation, he told her that he wanted to pay Mr. Mottel the balance of his terminated consulting agreement because Mr. Mottel was helpful in bringing in private placement investors. TR 141-142, 346.

In mid-February, Mrs. Jayaraj, Dr. Platt and Mr. Czirr attended the National Investor Bankers Association ("NIBA") conference in Las Vegas, Nevada. Mr. Mottel was also at the conference. The Complainant testified that she declined an invitation from Mr. Czirr to join him and Dr. Platt for dinner with Mr. Mottel. TR 145-146. The next morning she was present when Mr. Czirr and Dr. Platt discussed paying Mr. Mottel a commission for an investment that appeared to have been discussed at dinner the previous evening. TR 146-147. As a result of these events, the Complainant stated that she believed that Pro-Pharmaceuticals was using Mr. Mottel as an unregistered broker to get investors to buy private shares and to do private deals and that he was seeking a commission that she believed was unlawful. TR 252-253.

When she returned to the office on Monday, February 24, after the NIBA conference, the Complainant stated that Maureen Foley showed her an invoice submitted by Mr. Mottel seeking reimbursement for his hotel room at the conference with a notation "MDB Capital – Intro Pro $5 to $10 M Funding." TR 148; CX 14. Mrs. Jayaraj reported that she was very upset and that she told Ms. Foley that Dr. Platt was not going to listen to her or to Ms. Foley regarding Mr. Mottel and his activities. TR 150. The Complainant stated that she asked Ms. Foley to give Mr. Mottel's file to the auditors. *Id*. The Complainant testified that she believed that if the auditors became aware that Dr. Platt was dealing with Mr. Mottel without a contract and paying a commission or invoices to Mr. Mottel, the auditors would attempt to stop payment. TR 151. The Complainant stated she believed that if the auditors wrote up an audit comment on Mr. Mottel, the board and corporate counsel would become aware of the situation and stop payment of commission or expenses to Mr. Mottel. TR 149-151, 204, 813.

Mrs. Jayaraj and Dr. Platt were both scheduled to travel to New York City on the next day, February 25, to attend a conference. Both the Complainant and Dr. Platt had also scheduled additional New York meetings. TR 152-153. On the afternoon of February 24, 2003 Dr. Platt asked the Complainant to attend a meeting at Penn Station the following day with Mr. Mottel and individuals Mr. Mottel referred to the Company. TR 153. The Complainant stated that Dr. Platt did not tell her whom the meeting was with, and that she thought this New York meeting would be another instance of Mr. Mottel trying to refer investors for a commission, given her belief that Mr. Mottel had introduced a potential institutional investor to the Company in Las Vegas. TR 153-154. The Complainant told Dr. Platt that she did not want to attend the meeting because continuing to deal with Mr. Mottel, with whom the Company did not have a contractual relationship, in a situation in which Mr. Mottel is bringing in investors on a transaction basis was a violation of securities law. TR 154. The Complainant reported that Dr. Platt agreed that she did not have to attend the meeting. TR 154, 158, 597. The Complainant stated she did not know the identity of the individual Dr. Platt was meeting on Mr. Mottel's referral. The Complainant also stated that she did not recall seeing the following e-mail message Dr. Platt sent her the afternoon before the New York trip: "we have a meeting with MS at the restaurant at 12:00…" TR 155; RX 18 at 362. The Complainant further testified that having worked at Morgan Stanley, she and other Morgan Stanley employees always referred to the company by the abbreviation MWD. TR 156.

On February 25, Mrs. Jayaraj and Dr. Platt traveled separately to New York. TR 158. After arriving at the conference, the Complainant called Dr. Platt just before noon to tell him that she had arrived. She also indicated that she would see him at 4:00 p.m. at the meeting she had arranged with Broadmark Capital, an institutional investor. TR 158-159; 657; CX 1. Dr. Platt

again asked her to come to Penn Station for the meeting with Mr. Mottel's referrals. TR 160. The Complainant testified that she restated her concern that the Company's dealings with Mr. Mottel under circumstances in which "he introduces investors for private placement, whether it be brokers or any investor, and asks for a commission is in violation of the securities laws." TR 161. The Complainant testified that Dr. Platt did not identify the referrals or their firm affiliation. *Id.* Dr. Platt eventually agreed she did not have to attend the meeting. At approximately 12:40 p.m., the Complainant called Ms. Foley, who was at the Company office. When she confirmed that Ms. Foley had given Mr. Mottel's file to the auditors, she relayed that Dr. Platt had again asked her to attend the meeting with Mr. Mottel's contacts. TR 162. The Complainant spoke with Ms. Foley again later that afternoon to ask whether she had received any response from the auditors. TR 163-164. The Complainant testified that during this conversation, Ms. Foley's voice sounded different and Ms. Foley told the Complainant that Dr. Platt knew about Mr. Mottel's file being given to the auditors. TR 164.

When Dr. Platt did not show up for the 4:00 p.m. meeting with Broadmark Capital, the Complainant called him. TR 165. The Complainant stated that Dr. Platt was angry and told her to cancel her reservation in New York for that evening, to go home and to wait for his call on Friday. TR 165-166. The Complainant did as Dr. Platt directed and waited for his call on Friday. Dr. Platt did not call her. TR 168. After following Dr. Platt's direction, the Complainant unsuccessfully attempted to reach him at the Pro-Pharmaceuticals office several times.

On March 6, 2003 the Complainant received a termination letter signed by Ms. Foley, the Chief Operating Officer, who also had responsibility for the human resources function. TR 524, 821-822; JX 37. Dr. Platt had approved the letter. The letter stated, "you have repeatedly expressed your disagreement with [Platt's] business strategy, your resistance to implementing it, your unwillingness to work with people with whom he has requested you work, and your personal difficulty working with him." JX 37. The letter went on to provide examples, specifically noting the Complainant's refusal to attend the meeting Dr. Platt wanted her to attend in New York because of her "disagreement with the strategy and your unwillingness to work with the people involved." *Id.*

The Complainant has not worked since her termination. She injured her back on the trip to New York and has not been released to work by her physicians. TR 167.

C. Testimony of David Platt

Dr. Platt founded Pro-Pharmaceuticals with Jim Czirr, Vice President of Business Development, and Anatole Klyosov, the chief scientist. TR 459-461, 544. He testified that he hired the Complainant and that she was the most qualified person from among the applicants. TR 470, 547. Dr. Platt further testified that the Complainant reported to him. He stated that Maureen Foley, the Chief Operating Officer, did not have authority over the Complainant. He also testified that Ms. Foley was second in command and that because of the small size of the Company she would do whatever he could not do in terms of the operational aspects of the Company and that she "fills me in when I am out." TR 471-472. Dr. Platt stated that Ms. Foley was not in favor of his decision to hire Ms. Jayaraj. TR 473. Dr. Platt explained that it was a personality issue and Ms. Foley didn't think that the Complainant's former employment with a large corporation would make her a good fit at the small start-up company. TR 473-474.

Dr. Platt acknowledged that shortly after the Complainant began working at Pro-Pharmaceuticals he directed her to hire George Mottel. TR 493. He admitted that he knew that Mr. Mottel was not a licensed broker when he ordered the Complainant to hire him. TR 560-561. Dr. Platt denied that the Complainant wanted to do a background check before hiring Mr. Mottel. TR. 632. Dr. Platt agreed that he met Mr. Mottel approximately six months earlier at an investor conference and that he thought Mr. Mottel could help the Company raise capital by talking to brokers about the Company. TR 493, 495-496. Dr. Platt stated that he wanted Mr. Mottel to promote the Company to brokers in order to help the stock trade on the public market. TR 569. The sale of the Company's publicly traded stock would not bring any direct financial benefit, whereas the sale of stock through a private placement or private deal brought the Company cash. TR 569-570.

Dr. Platt testified that soon after signing the consulting agreement with Mr. Mottel, the Complainant wanted to terminate the agreement as Mr. Mottel was not sending her the reports she had requested. TR 494. Dr. Platt stated that the Complainant had a good reason to terminate Mr. Mottel's contract, as he did not provide the list of his marketing efforts. TR 624. Dr. Platt agreed to terminate the consulting agreement with Mr. Mottel. TR 495-496. Dr. Platt claims the Complainant never told him of her concern that Mr. Mottel was getting involved in the private placement. TR 496.

Shortly after the termination of Mr. Mottel's first contract, Dr. Platt stated that he had a conversation with his partner, Mr. Czirr, in which Mr. Czirr expressed his desire to continue working with Mr. Mottel, as he believed he could use Mr. Mottel to the Company's advantage and that Mr. Mottel could assist the Company to raise money. TR 497.[8] Dr. Platt and Mr. Czirr agreed to enter a second consulting agreement with Mr. Mottel. Under the second agreement, Mr. Mottel was to report to Mr. Czirr rather than to the Complainant. TR 497. Dr. Platt testified that the Complainant never told him that she was concerned Mr. Mottel was involved in the private placement. He also stated that the Complainant never told him she had a problem with Mr. Mottel from the time she terminated his first consulting agreement until January 31, 2003 when Dr. Platt signed the second agreement with Mr. Mottel. TR 498. Dr. Platt acknowledged that he did not tell the Complainant that the Company had entered a second contract with Mr. Mottel. He stated that he did not feel good about that but he believed the Complainant would not have further interaction or contact with Mr. Mottel. TR 622.

Dr. Platt acknowledged that he attended a meeting in late November at the Company offices with potential investors for the private placement that the Complainant knew and referred to the Company. TR 482-483. He stated that Anatole Klyosov was also present and discussed the science behind the process the Company was developing to increase the efficacy of current cancer drugs. TR 483. Dr. Platt acknowledged that the following day he and the Complainant exchanged a series of e-mail messages. He stated he was surprised an issue arose regarding Dr. Klyosov's status with the Company and he stated that his e-mail telling the Complainant not to talk with corporate counsel was intended to save money. TR 487-488. Dr. Platt conceded that in reading the e-mails it appears there was a meeting or conversation between him and the Complainant in addition to their e-mail communications, but he stated that he did not remember

[8] Dr. Platt testified that he did not know how Mr. Czirr could use Mr. Mottel for the Company's advantage. TR 497. Nevertheless, Dr. Platt acquiesced to Mr. Czirr's desire to continue working with Mr. Mottel.

any conversations. TR 486-487, 489. Dr. Platt also denied that he was upset with the Complainant for raising the concerns she had and he denied threatening to fire her or asking her to leave the Company. TR 491.

Dr. Platt disagreed with the Complainant's testimony that the Company's second quarter 2002 financial statements, which reflected approximately $800,000 in cash, indicated that the Company was in a difficult financial position. TR 572-573. He testified that the Company was always in need of money but that it was always raising money. TR 574, 586. He admitted that Pro-Pharmaceuticals intended to fund the 2003 budget through the private placement that began in September 2002 and ended on January 14, 2003. TR 576-577. Dr. Platt conceded that the Company fell short of its goals in the formal private placement. TR 577.[9] Dr. Platt denied that the Company was ever in danger of losing the business, because it could always cut back on contracts for manufacturing and clinical trial preparation. TR 634-635.

Dr. Platt agreed that Jim Braver was a friend of his and that he asked the Complainant to enter into a consulting agreement with him to assist the Company in promotional activities. Pro-Pharmaceuticals entered into a consulting agreement with Mr. Braver on November 11, 2002. TR 500-502; JX 15. Mr. Braver reported to the Complainant. TR 501. Dr. Platt stated that the Company made an addendum to Mr. Braver's initial consulting contract in early February 2003 and that the addendum was effective on January 1, 2003. TR 502; JX 32. The second agreement provided Mr. Braver $7,500 in compensation, in monthly installments of $2,500 for a period of three months, in addition to the $500 per month he received under the first consulting agreement. JX 32. Dr. Platt denied that the second contract was to hide a 10% commission to Mr. Braver. TR 504-505, 509.[10] At his deposition, Dr. Platt stated that the second agreement was initiated at the Complainant's request, but then he stated he didn't remember and did not know whether he himself initiated the second agreement. TR 610-611. At the hearing, he testified that the second agreement was initiated at Jim Braver's request and that the Complainant was aware of the increase to Mr. Braver. TR 501, 503, 610, 612. Dr. Platt also stated that Mr. Braver's compensation increased because his workload increased. TR 503.

Dr. Platt stated that he attend the NIBA conference in Las Vegas with the Complainant and Mr. Czirr. TR 509-510. Mr. Mottel was also at the conference. TR 510. The evening of the conference he and Mr. Czirr had dinner with Mr. Mottel. TR 511.

Dr. Platt denied that he ever participated in a conference call with Mr. Czirr, Mr. Mottel, a potential private investor and the Complainant during which Mr. Mottel asked for a commission if the potential investor were to invest in the Company. TR 529.

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[9] Dr. Platt stated that the Company could enter a private deal with individuals or with institutional investors wherein the Company stock is offered at a discount in exchange for cash. TR 580-585. Dr. Platt stated that when the private agreements are concluded with individuals it is referred to as a Private Placement Memorandum (PPM) and when the agreement is completed with an institutional investor it is referred to as Private Investment Public Equities (PIPE). Id.

[10] A spreadsheet that the Company prepared to track private placement investors shows that three investors referred by Mr. Braver invested a total of $75,000 on January 6, 2003. JX 31.

Dr. Platt recalls his conversations with the Complainant regarding the New York meeting differently than the Complainant. He testified that on the evening prior to the meeting, he told the Complainant that the meeting was with Ron Vincent, who Dr. Platt described at the hearing as a broker from Morgan Stanley who holds micro cap stocks. TR 478. Dr. Platt stated that the Complainant responded that she did not want to attend the meeting because she did not like Mr. Mottel and Mr. Mottel had referred the broker. TR 478-479. Dr. Platt admitted that at that time he agreed the Complainant did not have to attend the meeting in New York with Mr. Mottel's referral the following day. TR 479, 513. Dr. Platt said he was surprised that the Complainant put herself before the Company. TR 478-479. When Dr. Platt arrived for the noon meeting with Mr. Vincent on February 25, he learned that a broker from Wachovia and a fund manager would join them. TR 479. Dr. Platt recalls that the Complainant called him just prior to the lunch meeting and he told her that he learned that other individuals from Wachovia and a fund manager were joining the meeting and again asked her to attend. Dr. Platt stated that the Complainant again declined, saying the referrals had come from Mr. Mottel. TR 479, 514. At the hearing, Dr. Platt explained that he considered this meeting very important, as it was the first time that Pro-Pharmaceuticals had gotten in front of brokers who could buy the stock, which increases its volume and in turn generates additional interest for the Company from investment banker and others who will purchase the public stock. TR 479, 517-519. This added trading volume also helps increase the price of the stock. Dr. Platt testified that he was angry with the Complainant for not attending the meeting. He and the Complainant spoke by phone later that afternoon and he expressed his displeasure. He stated they had a long conversation in which he reports that the Complainant stated that she believed the Company was too small to be talking with brokers from a large company such as Mr. Vincent's and they needed to focus on broker dealers in smaller firms which invest in small companies. TR 525-526.

Dr. Platt testified that from the date she was hired until the day of the New York meeting, he was happy with the business plan the Complainant put together and that he did not have any problems with her performance. TR 475. He stated that Mrs. Jayaraj was in charge of the significant project attempting to get the Company registered on NASDAQ. He further stated that she did very well on that project in spite of the fact that the efforts were unsuccessful because the stock price was trading below the NASDAQ threshold. TR 475-476.

Dr. Platt testified that he decided to fire Mrs. Jayaraj after she did not attend the meeting in New York. He said this was the only reason he terminated her. TR 531.[11]

D. Testimony of Maureen Foley

Maureen Foley, the Chief Operating Officer of Pro-Pharmaceuticals, was responsible for the human resources function at the Company. Ms. Foley has an associate's degree. TR 751. She has also taken several courses in budget and planning, human resources, and facilities management. TR 750-751. When she began working at the Company she was also responsible for implementation of the infrastructure, including administration, accounting, facilities, payroll, purchasing, project management, information technology, legal coordination and investor relations. TR 753, 757. Prior to working at Pro-Pharmaceuticals, Ms. Foley held administrative

[11] Dr. Platt denied that Ms. Foley had informed him that she had given Mr. Mottel's file to the auditors at the Complainant's direction at the time he decided to fire the Complainant. TR 520-521.

positions at other small start-up companies. TR 749-50.[12] Ms. Foley testified that the Complainant did not report to her and that she did not have supervisory responsibility over the Complainant. TR 757. At Pro-Pharmaceuticals, Ms. Foley directly supervised only one clerical position. TR 758. Ms. Foley stated that prior to working at Pro-Pharmaceuticals she had no experience with the sale of securities by a publicly traded company or with private placements. TR 756-757. Ms. Foley testified that she interviewed the Complainant and she disagreed with Dr. Platt's decision to hire her because she believed the Complainant's experience was on a more executive level with companies such as Morgan Stanley, whereas Pro-Pharmaceuticals was a start-up company with a different environment. TR 770. Ms. Foley said that she developed the spreadsheet the Company used to track the private placement activities. TR 784-785. Ms. Foley stated that the Complainant did not like Mr. Mottel because he would not respond to her and did not send her reports. TR 788-789. Ms. Foley acknowledged, however, that the Complainant showed her the list of contacts Mr. Mottel sent to the Complainant after she terminated the first consulting agreement and the Complainant expressed her belief that Mr. Mottel had opened a phone book and put the names and numbers on the list he submitted. TR 789, 842.

Ms. Foley stated that she was aware that the Company entered a second contract with Mr. Mottel. On cross-examination, she said that near the time of the discussion to terminate Mr. Mottel's first contract, Jim Czirr, the Vice President, told her that Mr. Mottel was helpful to the Company and that she then suggested that the Company have him report to Mr. Czirr rather than to the Complainant. TR 842-843. Ms. Foley stated that she prepared Mr. Mottel's second contract simply by making a couple of changes to the original contract that the Complainant and the Company's corporate counsel had developed. TR 790, 850. Ms. Foley said that she did not tell the Complainant about the existence of the second contract with Mr. Mottel. TR 844. She said she thought it was Dr. Platt's place to tell the Complainant as the Complainant reported to him. TR 843-844.

Ms. Foley testified that on the day before the New York meeting, the Complainant was very upset about Mr. Mottel and the fact that the Company was still dealing with him. TR 810. At the time, the Company was in the middle of an audit and the Complainant asked her to give Mr. Mottel's file to the auditors. Ms. Foley claimed that she was totally confused and had no idea why the Complainant was so upset about Mr. Mottel because the private placement had ended in January. TR 810, 813. Ms. Foley conceded that at her deposition she testified that the Complainant had told her that she thought Mr. Mottel was doing work on the private placement. At the hearing, Ms. Foley disavowed this testimony and claimed that the Complainant did not tell her she was concerned about Mr. Mottel's activities. TR 810-811. Ms. Foley explained that the change in her testimony on this point occurred because she had confused February 24th with sometime after that date. She stated that in the week prior to the hearing she had discovered a notebook she kept at the office and that it refreshed her memory. TR 810-811. Ms. Foley did acknowledge that later in the afternoon of February 24 the Complainant told her that she was not attending the noon meeting in New York because it was with Mr. Mottel's people. TR 818. Ms. Foley reported that she then told the Complainant that Dr. Platt was the CEO, and therefore, the

[12] Shortly before the Complainant was hired, Ms. Foley's salary was increased in September 2002 from $75,000 to $110,000. TR 834. Her salary increased again in October 2003 to $150,000. TR 755, 833. She acknowledged that her salary at Pro-Pharmaceuticals was higher than any salary she had received in similar positions she had held at other start-up companies. TR 834. In addition, Ms. Foley acknowledged that she was not pleased that the Complainant would be making a higher salary than she made when the Complainant was first brought onboard. TR 831-833.

Complainant needed to do what he was requesting. TR 786, 817. On cross-examination, Ms. Foley could not clearly recall whether she told Dr. Platt about the Complainant's request that Mr. Mottel's file be turned over to the auditor. TR 864-865, 867.

E. Testimony of Jonathan Guest

Jonathan Guest, Pro-Pharmaceutical's corporate counsel and a partner in the same firm that is defending the Respondent in this action, testified on behalf of the Company. Mr. Guest testified that he worked closely with the Complainant in developing an agreement with Mr. Mottel and also in formulating the Company's response to the NASDAQ questions following its application to be listed on NASDAQ. Mr. Guest stated that in working with the Complainant on Mr. Mottel's contract and also on the termination of his contract she did not express concern with securities law violations. TR 905-906. He stated that the Complainant struck him as more knowledgeable than business professionals usually are because she understood the requirements for complying with the Exchange Act, the difference between a private placement and public offering, the need to qualify investors in a private placement, the distinction between accredited and non-accredited investors, and because she showed familiarity with the documents that NASDAQ required. TR 906-07.

Mr. Guest stated that the Company contracted with Mr. Mottel to help it become better known and that Mr. Mottel was more of a public relations person. TR 907, 912, 951. Because there was a private placement ongoing, Mr. Guest was concerned that the Company comply with the rules and regulations. Mr. Guest testified that he wanted to be sure Mr. Mottel understood what he could and could not do, as Mr. Guest was aware that Mr. Mottel was not a registered broker. Mr. Guest stated that he included the provision specifying prohibited activities to ensure that the Company complied with all requirements during the course of the private placement. TR 907, 911, 918, 949. In order to assist the Company with compliance, Mr. Guest stated that he had a conversation with Mr. Mottel in which he told Mr. Mottel that he could talk with people about becoming aware of the Company, explaining that individuals might buy stock from their brokers on the open market, but that Mr. Mottel could not talk to people about the private placement. Mr. Guest stated that Mr. Mottel was not being engaged for the private placement. TR 911-912. Mr. Guest further stated that he made clear to Mr. Mottel that Mr. Mottel could not engage in activity headed toward effecting transactions and securities akin to what a broker does, nor could he act as an investment advisor to persons who might buy securities from the Company. TR 918-919. Mr. Guest stated that he did not speak with the Complainant about whether Mr. Mottel could talk with people who might be interested in investing in the Company outside the purchase of public shares. TR 912.

On cross-examination, Mr. Guest acknowledged that he sent an e-mail message to the Complainant, Dr. Platt and other Company officials on October 19, 2002, warning them of the need to be cautious about press releases and attending investor conferences during an ongoing private placement to ensure that the Company complied with all securities laws. TR 941-942. Mr. Guest stated that the Complainant required Mr. Mottel to submit weekly reports so that she could see that he was providing the services she had requested and that the Company was paying for. Although he declined to state that the Complainant required the reports as a way of monitoring Mr. Mottel's activities, he stated that he did not have concerns about the Company's ability to monitor Mr. Mottel's activities because the Complainant was doing that and the two of them had talked about the need to do so. TR 946-947, 951-952. Mr. Guest also admitted that he

included the provision in Mr. Mottel's first contract, which specifically identified prohibited activities, because he knew that Mr. Mottel was not a licensed broker, that there was a private placement ongoing and that the Company needed to be cautious regarding its own activities and those of Mr. Mottel to ensure compliance with securities rules. TR. 948-950. Mr. Guest conceded that if Mr. Mottel violated the prohibition that he placed in the consulting agreement and did engage in activities that could be construed as effecting transactions in securities within the definition of the term "broker" the Company may have been at risk for criminal or civil penalties. TR 950-951.[13]

II. ISSUES

The issues to be adjudicated are as follows:

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

2. Whether the Respondent knew of the Complainant's protected activity;

3. Whether the Complainant suffered an adverse personnel action;

4. Whether the Complainant's protected activity was a factor contributing to the adverse action; and, if so,

5. Whether the Employer demonstrated that it would have taken the same adverse personnel action against the Complainant in the absence of the protected activity.

III. CONCLUSIONS OF LAW

The Sarbanes-Oxley Act states in relevant part:

> No Company with a class of securities registered under section 12 of the Securities and 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. 78o(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 sections 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 –

[13] At the hearing, four additional witnesses testified on one or more specific and limited issues. To the extent that their testimony is relied upon, it is noted explicitly herein.

(A) a Federal regulatory or law enforcement agency;
(B) any Member of Congress or any committee of Congress; or
(C) any 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). The Secretary of Labor's final regulations implementing the Act are patterned after regulations that implement the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 Act), codified at 29 C.F.R. Part 1978. The Sarbanes-Oxley statute is new and therefore lacks an established body of case law. Because the whistleblower provisions of Sarbanes-Oxley are similar to whistleblower provisions found in several federal statues, it is appropriate to consider case authority interpreting these whistleblower statutes.

In a Sarbanes-Oxley whistleblower case, the Complainant must establish by a preponderance of the evidence that: (1) she engaged in protected activity under the Act; (2) her employer was aware of the protected activity; (3) she suffered an adverse action; and (4) the protected activity was a contributing factor in the adverse personnel action. *Macktail v. U.S. Dep't of Labor*, 171 F.3d 323, 327 (5th Cir. 1999); *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Dysert v. Sec'y of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997). Once the Complainant satisfies this requirement, she is entitled to relief unless the employer proves by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. 29 C.F.R. § 1980.109(a). "Clear and convincing" evidence has been recognized by the Secretary and the Courts as being more than a preponderance of the evidence but less than beyond a reasonable doubt.

If the Employer is successful in meeting this burden, the inference of discrimination is rebutted. In order to prevail, then, the Complainant must establish that the rationale offered by the employer was pretextual, i.e., not the actual motive or real reason for the adverse action. *Overall v. Tennessee Valley Auth.*, Case No. 1997-ERA-53, ARB Nos. 98-111, and 128 (ARB April 30, 2001). As the Supreme Court noted in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), a rejection of the employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination.

A. Protected Activity

The Act protects employees who provide information to authorities in the executive branch, to Congress, or to an employer, that the employee reasonably believes show the employer violated various provisions of Title 18 of the United States Code (18 U.S.C. §§ 1341, 1343, 1344, or 1348), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. The statute is clear that the Complainant is not required to show that the reported conduct actually constituted a violation of the law, but only that she reasonably believed that the employer violated one of the enumerated statutes or regulations. The standard for assessing whether the Complainant's belief is reasonable is an objective one determined on the basis of a reasonable person in the circumstances with the Complainant's experience and training. *Minard v. Nerco Delamar Co*., 92-SWD-1, Sec'y (Jan. 25, 1994); *Svendsen v. Air Methods, Inc*, ARB No. 03-074, 2002-AIR-16 (ARB Aug. 26, 2004). In addition, a belief that an

activity was illegal may be reasonable even when subsequent investigation reveals a complainant was wrong.[14]

Under the Securities and Exchange Act of 1934, it is unlawful for any "broker or dealer" to use interstate commerce to "effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" unless the individual is registered as a broker/dealer. *See* 15 U.S.C. § 78o(a)(1). A broker is defined as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(4)(A). The registration requirement is intended to protect investors by providing a degree of control and supervision over the activities of brokers. Misstatements or incorrect information relative to a company or its stock that is given to potential investors could result in fraud in connection with the purchase or sale of securities.

In the instant case, the Complainant argues that she engaged in two instances of protected activity: (1) On February 24 when she asked Ms. Foley to give Mr. Mottel's file to the auditors based upon her belief that the Company's dealings with him were improper and with the hope that the auditors would identify the Company's interactions with him as a concern and bring the issue to the attention of the Board and (2) on February 24 and 25 when she refused to participate in a meeting in New York with Mr. Mottel's referrals because she reasonably believed that the Company was using him as an unregistered broker to bring in investors for a commission. Cl. Br. at 20-25. The Respondent argues that the Complainant's belief that the Respondent's actions violated securities law was not reasonable. Resp. Br. at 23-32. The Respondent further contends that some of the acts or events the Complainant alleges were violations of securities law did not occur or were not reported to a supervisor. Resp. Br. at 22.

1. Reasonableness of the Complainant's Belief

The Complainant cites several events to support the reasonableness of her belief that the Company was utilizing Mr. Mottel as an unregistered broker to bring investors to the Company for private deals in exchange for a commission. All of these events occurred after the close of the formal private placement on January 14, 2003.

First, shortly after the close of the private placement on January 14, 2003, the Complainant had a phone conversation with Jim Czirr, the Vice President of Business Relations, in which Mr. Czirr told the Complainant that he wanted to pay Mr. Mottel the remaining funds due under his contract because Mr. Mottel had been helpful in bringing investors to the private placement. TR 261. .[15] The Complainant's testimony in this regard was not contradicted. Therefore, I find that this telephone conversation occurred as reported by the Complainant.[16]

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[14] Cases arising under the Surface Transportation Assistance Act and other whistleblower statutes hold that a complainant's opposition to an employer's acts that he reasonably believes violate the law is protected, even if investigation reveals the employer did not violate the law. This is so whether the employer never did what the employee complained about, or because the employer's actions were legal. *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, (1st Cir. 1998); *Minard v. Nerco Delama Co*., 92-SWD-1 (Sec'y Jan. 25, 1994); *Clement v. Milwaukee Transport Services, Inc.*, 2001-STA-6 (ALJ).

[15] The parties disagree as to whether Pro-Pharmceuticals followed through on Mr. Czirr's intention and paid Mr. Mottel the balance remaining under the first contract. The Complainant asserts that in January 2003, the Company received an invoice from Mr. Mottel for $5,000 which Ms. Foley marked as "final payment" under the original October 30, 2002 contract. TR 847-848; CX 12 at 38. The Complainant argues that Pro-Pharmaceuticals paid the

The second event occurred right before the January 20, 2003 Board meeting. The Complainant testified that Dr. Platt asked her to participate in a conference call with a potential investor who was interested in a private deal or private transaction with the Company. TR 138, 140, 266-267. When she joined the call in Dr. Platt's office, Mr. Czirr, Mr. Mottel, and the potential investor were already on the line. Near the conclusion of the call and after the investor had hung up, Mr. Mottel sought assurance in writing that he would receive a commission of 8-10% if the investor invested in the Company and Dr. Platt agreed. As soon as the call ended, the Complainant immediately turned to Dr. Platt and stated, "did you hear that: George Mottel wants a commission to be paid him and we don't have a contract with this guy…and he is getting involved in private placement, in the sale of securities…because private placement is the sale of securities." TR 139-140. According to Mrs. Jayaraj, Dr. Platt responded that there was no problem and did not address her specific concerns. TR 139.

Dr. Platt has denied that this conference call ever occurred. However, in general I do not find Dr. Platt to be a credible witness. I had the opportunity to observe his presence and demeanor at the hearing, and, as discussed below, I find his testimony on several issues inconsistent, equivocal, suspect or contradicted by other documentary evidence. With regard to the conference call on or about January 20, I note that the Respondent offered no evidence from the individuals the Complainant identified as participants to the call, other than Dr. Platt, to support its assertion that this conference call did not occur as the Complainant alleged. At the time of the hearing, Mr. Czirr was still the Vice President. If the Complainant simply made up this event to support her claim, as the Respondent contends, she could have helped herself more by concocting an event or conversation involving fewer individuals. Instead, she reported that the call involved several other persons one might expect may be adverse to her. Therefore, I credit the Complainant's testimony that she did participate in a conference call with Dr. Platt, Mr. Czirr, Mr. Mottel and a potential investor, in which Mr. Mottel asked for confirmation in writing that he would receive an 8-10% commission if the investor went ahead and completed a private deal to invest in the Company. I also credit her testimony that immediately after this call, she expressed her alarm to Dr. Platt that Mr. Mottel was seeking a commission, was getting involved in private placements and that the Company did not have a contract with him.

Dr. Platt's credibility as a witness is also undermined by his testimony on the important question of the financial wellbeing of the Company. On several occasions he denied that the Company was in poor financial shape and could run out of money during the period the Complainant was employed. He stated that if the Company ran short of funds it was "no problem" because the business model was designed so that the Company would slow down on the research and clinical trials. However, the materials prepared for the private placement in the fall of 2002, which include Forms 10-QSB filed with the Securities and Exchange Commission, indicate that one of the risks the Company faced is competition from a competitor that may get a competing product to market faster than Pro-Pharmaceuticals. Slowing the pace of research

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invoice in two installments of $3000 and $2000. CX 12 at 39, 43-44. Cl. Br at 11. The Respondent offered evidence suggesting that the payments of $3000 and $2000 made to Mr. Mottel in 2003 were actually payments made for services Mr. Mottel would perform in the future under the second consulting agreement. TR 803, 795-806. It is not necessary for me to reach this question in resolving the issues before me as it is undisputed that the Complainant did not know of the Company's second consulting agreement with Mr. Mottel.

[16] However, there is no evidence that Dr. Platt was aware of this conversation between Mr. Czirr and the Complainant at the time he fired the Complainant.

because of a lack of funds was a serious matter, and one would expect the Company would make every effort to avoid doing so, as delaying research and clinical trials placed the Company at a competitive disadvantage. Thus, I find that Dr. Platt's testimony on the Company's financial condition in the period shortly before and during the Complainant's tenure was less than forthright.

In addition, the testimony of corporate counsel Jonathan Guest further undermines the credibility of Dr. Platt's testimony on the subject of the Company's financial wellbeing. Mr. Guest acknowledged that the Company's annual report and audited financial statement for 2002 stated, "[t]he company's financial statements have been presented on an ongoing concern basis." TR 929-930. Mr. Guest explained that in situations where the auditor is concerned that a company may not have sufficient cash to make it through the year under its plan of action, the auditor would require the company to indicate that the financial statements are on an "ongoing concern" basis. Accordingly, I find that the Company was struggling financially in the months coinciding with the Complainant's employment. During this period, obtaining capital to fund the ongoing research and development was a primary focus of Dr. Platt and others at the Company.

Dr. Platt's testimony regarding the events surrounding the November 26, 2002 investor meeting, during which Dr. Anatole Klyosov's relationship to the Company allegedly became an issue for one potential investor is contradicted by documentary evidence, and further undermines Dr. Platt's credibility as a witness. Dr. Platt initially denied and then did not recall having any conversation with the Complainant on the day after the November 26 investor meeting, other than what was exchanged in e-mail messages with the Complainant. Specifically, Dr. Platt denied in his testimony at hearing that he was upset with the Complainant for raising her concerns regarding potential securities issues associated with the investor meeting. However, the e-mail exchange from the Complainant to Dr. Platt, in which she states that the two of them need to be able to discuss matters calmly, is clear evidence that the two had oral communications in which Dr. Platt expressed displeasure or anger. JX 25. Thus, I credit the Complainant's testimony on this matter and find that Dr. Platt warned the Complainant and threatened to fire her if she created document trails on him or spoke with corporate counsel about him.[17]

In yet another instance, Dr. Platt testified that it was the Complainant who wanted to revise Jim Braver's consulting agreement and to increase his compensation substantially. The Complainant's testimony that she did not know of Mr. Braver's increase when she was working at Pro-Pharmaceuticals is supported by the fact that she prepared a budget memo on February 9, 2003, which she e-mailed to Dr. Platt. The memo budgeted Mr. Braver $6000 for 2003, which is equivalent to $500 per month. CX 20. This is the same amount the Company was paying him under his initial agreement. The budget projection document the Complainant prepared corroborates her testimony that she did not initiate any increase in Mr. Braver's compensation. Indeed, although the Complainant was responsible for supervising Mr. Braver's activities, and the addendum to his contract was signed by Dr. Platt in February with an effective date of January 1, 2003, Dr. Platt never informed the Complainant of the addendum to Mr. Braver's

[17] A few weeks later, Dr. Platt asked the Complainant to head up the Company's efforts to get listed on NASDAQ. This project required coordination with Mr. Guest. In order to ensure Dr. Platt did not question her regarding her communications with Mr. Guest, she sent him an e-mail requesting his permission to meet with Mr. Guest. TR 110-111. This provides further support for the Complainant's testimony that Dr. Platt warned her not to speak with Mr. Guest about his actions.

contract during the time she worked at the Company. Moreover, the Complainant's statements that Mr. Braver's work remained the same from November 2002 through February 2003 is supported by the invoices Jim Braver submitted, which show that he attended approximately the same number of events and worked close to the four to five hours a week during that period. TR 115-117, 123; CX 7 at 18; CX 8; CX 9; CX 10. I thus conclude that Dr. Platt's testimony on this issue is not credible.

The third event the Complainant relies upon to support the reasonableness of her belief that the Company was improperly using Mr. Mottel as a broker to obtain investors in exchange for a commission occurred at the NIBA Conference in Las Vegas, which the Complainant attended with Dr. Platt and Mr. Czirr. The conference was held the week before the New York trip. At the conference Mrs. Jayaraj declined Mr. Czirr's dinner invitation to join him, Dr. Platt and Mr. Mottel. The following morning, the Complainant was present when Dr. Platt and Mr. Czirr discussed paying Mr. Mottel a commission after the previous evening's dinner meeting with Mr. Mottel and a potential investor. In addition, after returning to the office from the Las Vegas conference, Ms. Foley showed the Complainant an invoice from Mr. Mottel seeking reimbursement for his hotel room. CX 14. The invoice appeared to the Complainant to reference a potential institutional investor having a $5-10 million investment interest who had been introduced by Mr. Mottel. The Complainant was aware that during this period of time that the Company was seeking to raise capital through institutional investors.

Finally, unbeknownst to Mrs. Jayaraj, Pro-Pharmaceuticals entered a second consulting agreement with Mr. Mottel, which was formally signed on January 31, 2003. JX 33. Neither Dr. Platt nor Mr. Czirr nor Ms. Foley ever disclosed the existence of Mr. Mottel's second consulting agreement to the Complainant. TR 141-143, 153, 595-596, 622, 645, 815, 843-844. Company officials acknowledge that they actively withheld this information from Mrs. Jayaraj even though she questioned Platt, Czirr and Foley as to why the Company was continuing to do business with Mr. Mottel after his contract had been terminated. As a result, the existence of such an agreement could not have affected the Complainant's concern that Mr. Mottel was working in exchange for a commission based on the investors he brought to the Company.[18]

The events described above lead the Complainant to believe that the Company and its principal officers, Dr. Platt and Mr. Czirr, were using Mr. Mottel as an unlicensed broker to bring investors to the Company in exchange for a commission, in violation of the securities law.

The Respondent raises several challenges to the reasonableness of the Complainant's belief that the Company's continued relationship with Mr. Mottel after the Company had terminated his first consulting agreement was improper. First, the Respondent argues that after the private placement closed on January 14, 2002, the laws and regulations relating to private

[18] In addition to these events, which all occurred soon after the private placement ended on January 14, the Complainant continued to harbor misgivings about Mr. Mottel based on her initial experience under his first consulting agreement. These experiences included Dr. Platt's order that she hire Mr. Mottel even though Dr. Platt knew he was not a licensed broker; Dr. Platt's willingness to allow Mr. Mottel to get involved in the private placement in spite of specific provision inserted into his contract by Corporate Counsel Guest prohibiting him from acting as a broker; and the Broker/Investor Contact List that Mr. Mottel faxed her, which included a list of individual's names and incorrect or inaccurate phone numbers that contributed to her suspicion that Mr. Mottel was contacting individuals about the private placement rather than promoting the Company's publicly traded stock, the activity he was hired to perform.

placements were no longer applicable. Thus, the Respondent contends that the Complainant could not reasonably be concerned about Mr. Mottel referring investors to the Company after the private placement had closed and the regulations requiring a pre-existing relationship for establishing accredited investor status were no longer applicable. Resp. Br. at 29. Although the Complainant's brief does not specifically address this contention, the Complainant's concern was that the Company improperly used Mr. Mottel, who is not a registered broker, to bring investors to complete private deals with the Company in exchange for a commission. Thus, the Complainant's concern was broader than simply whether Mr. Mottel was complying with the private placement regulations during the course of the formal private placement. Therefore, the fact that the formal private placement had ended does not make the Complainant's concern about Mr. Mottel's ongoing "broker" activities with the Company unreasonable.

In addition, the Complainant testified that she understood a private placement deal could be arranged with individuals or institutions outside the confines of a formal private placement. This testimony was not contradicted. In fact, after the close of the formal private placement, the Complainant participated in a conference call, described above, that included an individual who wanted to enter a private deal and invest in the Company. Her participation in the conference call with the potential private investor and her reaction to Mr. Mottel's request for a commission demonstrates that her concern regarding his activities was broader than that of his compliance during the timeline of the formal private placement. Therefore, her continued concern that Mr. Mottel was getting involved in private placement deals as an unlicensed broker after the close of the formal private placement was not unreasonable.

Second, the Respondent asserts that a reasonable person with the Complainant's experience and background would be aware of situations in which parties may receive payment for services without the requirement of a written contract. Therefore, the Respondent argues, the Complainant could not have had a reasonable belief that a written contract was required in order to pay a finder's fee. Resp. Br. at 29. The Complainant stated that she has a Series 7 license, which permits her to sell securities if she registers her license with a broker-dealer. She also has experience in preparing corporate financial statements. TR 245-246. The Complainant testified that she was not familiar with the concept of a finder's fee and that she had never heard of a finder's fee before she went to work for Pro-Pharmaceuticals. TR 246-247. She stated that when she was at Pro-Pharmaceuticals there was some talk and Dr. Platt "was using the terminology, finder." TR 247. She also stated that she understood the concept to mean "someone introducing somebody." *Id*. The Complainant testified that it was her understanding at the time and remained her understanding that in order to pay a finder's fee there needed to be a contract or written agreement and that it was improper for someone to simply introduce someone to a company and seek payment. It is noteworthy that when Pro-Pharmaceuticals entered a Non-Exclusive Best Efforts Finder's Agreement with Tomlinson Programs, Inc., in which Tomlinson would act as finder to locate, introduce and refer potential investors in exchange for a finder's fee, the agreement was reduced to writing. RX 3.[19] This further supports the Complainant's understanding that such agreements be written.

Finally, the Respondent contends that if the Complainant reasonably believed the Company's actions violated securities rules, she would have taken her concerns to the outside auditors or to Mr. Guest. With regard to the auditors, I have credited the Complainant's

[19] The Respondent has not alleged that it was using Mr. Mottel as a finder to bring investors to the Company.

statements that she told Ms. Foley that she was concerned that Mr. Mottel was involved in private placements. The evidence is undisputed that Ms. Foley was responsible for interacting and coordinating with the auditors on the Company's behalf. The Complainant's reliance on Ms. Foley to turn over Mr. Mottel's file rather than talking with the auditors directly does not undermine the reasonableness of her belief regarding the Company's dealings with Mr. Mottel. Ms. Foley did indeed turn the file over. With regard to sharing her concerns with Mr. Guest, the Complainant's testimony that Dr. Platt warned her not to talk with Mr. Guest about him and to bring her concerns to him was sincere and credible. I have found that Dr. Platt threatened to dismiss the Complainant in November 2002, after she put her concerns regarding the investor meeting in an e-mail. The Complainant attempted to follow Dr. Platt's directive by raising her fears regarding the Company's interactions with Mr. Mottel with him. Under the circumstances, the fact that she did not take her concerns to Mr. Guest does not establish that her belief that the Company was using Mr. Mottel as an unlicensed broker was unreasonable.

In sum, the Complainant was aware that Mr. Mottel was not a licensed broker, she knew that one could not sell securities unless one were registered as a broker or broker dealer, she knew Mr. Mottel was trying to bring private investors to the Company, she knew he would not assist the Company without payment for his efforts, she overheard Dr. Platt and Mr. Czirr discuss paying him a commission, she participated in a call in which Mr. Mottel asked for a commission and Dr. Platt did not refuse, and she did not have knowledge of the Company's second consulting agreement with Mr. Mottel. Accordingly, after reviewing all of the evidence offered, I find that the Complainant's belief that the Company was using Mr. Mottel as an unregistered broker to solicit investors in exchange for a commission was reasonable.

2. Specific Instances of Protected Activity

a. Referral of File

The Complainant asserts that she engaged in protected activity in directing Ms. Foley, the Chief Operating Officer, to turn Mr. Mottel's file over to the auditors. The Complainant testified without equivocation that she considered Ms. Foley her peer and not her supervisor. Therefore, I conclude that Ms. Foley did not occupy a supervisory position vis-à-vis the Complainant**.** However, although she acknowledges that Ms. Foley was not her supervisor, the Complainant contends that as the COO, Ms. Foley had the authority to investigate misconduct. The Complainant argues that Ms. Foley fits within the class of persons identified in the statute as "other person working for the employer who has the authority to investigate, discover, or terminate misconduct." 18 U.S.C. § 1514A(a)(1). Therefore, the Complainant asserts that Ms. Foley was a person to whom disclosures are protected under the Act.

At her deposition, Ms. Foley testified that on the day before the New York meeting the Complainant was very upset and had told her that she was concerned that Mr. Mottel was doing work on private placements. At the hearing, Ms. Foley disavowed her deposition testimony, and she stated that the Complainant did not say that she was concerned with Mr. Mottel's activity related to private placements. Ms. Foley attempted to explain this discrepancy in her testimony by saying that she had been confused about the period before February 24th and the period after that date. Ms. Foley claimed that a recently discovered notebook refreshed her memory. In further support of her hearing statement that she did not understand the reason the Complainant was so upset and had asked her to give Mr. Mottel's file to the auditor's she stated, "I know full

well that if I had – if there was any discrepancy, or if there was a problem with what George [Mottel] was doing, and I had an issue, I would have talked to the auditors." TR 810. I find this statement curious. If Ms. Foley had little knowledge of securities laws or lacked authority to investigate securities law violations, then she would not have had the knowledge necessary to evaluate whether there was a "problem" with Mr. Mottel's activities. This statement suggests one of two things: either Ms. Foley has more knowledge and responsibility for securities law violations than she or the Respondent acknowledged, or she lacks knowledge of and authority for investigating securities law issues and is simply conforming her hearing testimony to support the Respondent's position. In either case, Ms. Foley's credibility has been tarnished. Her testimony that the Complainant did not tell her that she was concerned about Mr. Mottel's activities regarding private placements before she asked Ms. Foley to turn the file over to the auditors and before the New York meeting is contradicted by her deposition testimony, and her attempt to "correct" her deposition testimony on this point is not credible.

The issue as to whether Ms. Foley is an individual with "authority to investigate, discover and terminate misconduct related to securities law" is a close one. Ms. Foley was the Chief Operating Officer of the Company. She testified that her duties included initiation and implementation of all of the infrastructure for the Company, including administration, accounting, facilities management, investor relations, payroll, purchasing, project management, legal coordination, information technology and human resources. TR 753. Ms. Foley testified that prior to coming to work at Pro-Pharmaceuticals she had no experience with the sale of securities or private placements. TR 757. At the Company, she reported that she worked with and relied upon Mr. Guest on those issues. *Id.* According to Ms. Foley, her duties at Pro-Pharmaceuticals included working with Russ Trading Company and with Tomlinson Programs on the private placement. Ms. Foley was involved in rewriting the second contract with Russ Trading. TR 763; RX 2. Ms. Foley testified that she understood the services Russ Trading and Tomlinson were to provide the Company and she interacted with individuals at Russ Trading and Tomlinson regarding those services in connection with the private placement. TR 773-766; TR 784-788.

Pro-Pharmaceuticals is a small company. There was no direct evidence that Ms. Foley was responsible for securities law violations, although she testified to direct involvement in the formal private placement that was more extensive than simply tracking the billing and investments that came in. Dr. Platt testified that he was the person with authority for securities law matters. Ms. Foley testified that she did not have authority to terminate the Company's relationship with Mr. Mottel. TR 758. However, Ms. Foley was the second in command and held the title of COO, which gave her broad authority at the Company, including the authority to monitor the activities of and interface with the auditors. Ms. Foley was in possession of Mr. Mottel's file, had some responsibility and involvement with the private placement, and was responsible for the auditors. All of this suggests that she had some authority to investigate Mr. Mottel's activities. She reported direct involvement in securities issues and the private placement. Moreover, her testimony that she would have talked to the auditors if there were a problem with Mr. Mottel's activities is powerful evidence that she had authority to address securities law issues.[20]

[20] In addition, her substantial salary further supports a finding that she had broad and significant responsibility and authority, beyond simply the Company's administrative matters.

On balance, I find that Ms. Foley had sufficient authority and involvement in investor relations, auditing and the private placement to conclude that she is a person with authority to investigate, discover and terminate misconduct related to securities law under 18 U.S.C. § 1514A(a)(1)(C) and as such is a person to whom disclosures of potential securities law violations are protected. I have found that the Complainant told Ms. Foley of her concern that Mr. Mottel was involving himself in private placements before she asked Ms. Foley to give his file to the auditors. Accordingly, I find that the Complainant's direction to Ms. Foley to turn Mr. Mottel's file over to the auditors was protected activity under the Act, as Ms. Foley was a person with authority to investigate, discover, or terminate misconduct related to securities laws. 18 U.S.C. § 1514A(a)(1).

b. Refusal to Attend New York Meeting

A refusal to participate in unlawful activity or conduct is protected under the Act. *Getman v. Southwest Securities* 2003-SOX-8 (ALJ Feb. 2, 2004) at 19-20. The Complainant asserts that she engaged in protected activity when she refused to attend the meeting on February 25, 2003 at Penn Station in New York City with Mr. Mottel and individuals he referred to the Company. The Complainant refused to attend the New York meeting because it was with Mr. Mottel and individuals he referred and she believed the Company was using Mr. Mottel as an unlicensed broker to bring investors to the Company in exchange for a commission in violation of securities law. I have found that the Complainant told Dr. Platt of her concern regarding Mr. Mottel's activities and that she told Dr. Platt that she did not want to attend the New York meeting because it was with Mr. Mottel's referrals. These actions were protected under the Act. Accordingly, the Complainant's refusal to attend the New York meeting was protected activity.

B. Respondent's Knowledge of Complainant's Protected Activity

I have found that the Complainant told Ms. Foley of her concern that Mr. Mottel was involving himself in private placement activities when she asked Ms. Foley to give his file to the auditors. However, Dr. Platt stated that he did not know the Complainant had asked Ms. Foley to turn over the file to the auditors. At the hearing, Ms. Foley denied that she told Dr. Platt about the Complainant's direction regarding Mr. Mottel's file. However, at her deposition she stated that she did not remember if she told Dr. Platt about the file. TR 864-866. She also acknowledged at her deposition that she had no reason to believe that she did not tell him. TR 867. In light of Dr. Platt's testimony that Ms. Foley was in charge of the office when he was out and that she informed him of events that occurred in his absence, I do not credit his denial.[21] Ms. Foley's denial is undercut by her deposition testimony. Dr. Platt and Ms. Foley have worked closely since the beginning of the Company, they discussed the Complainant's refusal to attend the New York meeting by phone on the morning of the meeting, they had several phone conversations later that afternoon, and Ms. Foley stated that in the afternoon calls Dr. Platt was getting angry at the Complainant. Under these circumstances I find it implausible that Ms. Foley did not tell Dr. Platt that she had given Mr. Mottel's file to the auditors at the Complainant's request. On the weight of the evidence of record, I conclude that Ms. Foley did tell Dr. Platt

[21] In another example of Dr. Platt's equivocation, he testified on direct examination that Ms. Foley was second in command and "fills me in when I am out." TR 471-472. In response to a question on cross-examination as to whether she informed him of what was going on when he was out, he answered "not always." TR 545.

about the Complainant's direction regarding Mr. Mottel's file. Accordingly, Dr. Platt had knowledge of this protected activity.

I have also found that the Complainant expressed concern that Mr. Mottel was seeking a commission in exchange for bringing investors to the Company, and that she did so to Dr. Platt in January 2003, after the conference call involving a potential investor, Mr. Czirr, Mr. Mottel and Dr. Platt. I have also found that the Complainant earlier expressed concern to Dr. Platt that Mr. Mottel was not a registered securities broker. These statements were sufficient to inform Dr. Platt of her concern with the Company's interactions and relationship with Mr. Mottel. More importantly, I have found that Mrs. Jayaraj told both Dr. Platt and Ms. Foley that she would not attend the meeting at Penn Station with Mr. Mottel and his referrals because he was bringing in investors and seeking a commission in violation of the law. Dr. Platt does not dispute his knowledge of the Complainant's refusal to attend the New York meeting because it was with Mr. Mottel and his referrals.[22] Therefore, I find that Dr. Platt was aware of the Complainant's concern that the Company was using Mr. Mottel as a broker on a transaction basis when she told him that she did not want to attend the meeting in Penn Station. Accordingly, I find that Dr. Platt, the Complainant's direct supervisor, was aware of the Complainant's protected activity.[23]

C. Adverse Action

There is no dispute that the Complainant suffered adverse action – she was fired. Therefore, I find that the Complainant was subject to an adverse employment action by the Respondent.

D. Was the Complainant's Protected Activity A Contributing Factor In The Termination?

The Complainant has the burden of establishing that her protected activity was a "contributing factor" in her termination. In cases brought under other similar whistleblower statutes, a contributing factor includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano v. Dep't of Justice,* 2 F.3d 1137, 1140 (Fed. Cir. 1993) (citations omitted) (defining "contributing factor" in the Whistleblower Protection Act for federal employees).

Here, as in most cases of discrimination or retaliation, there is no direct evidence of intent. However, a complainant is not required to demonstrate specific knowledge that the respondent had the intent to discriminate against her. Instead, a complainant may demonstrate the respondent's motivation through circumstantial evidence of discriminatory intent. *See Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34 (Mar. 26, 1996); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

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[22] I have not determined that the Company was actually utilizing Mr. Mottel as a broker to bring investors to the Company in exchange for commissions. The Complainant is not required to prove that the Company was actually doing so in violation of securities laws. The Complainant need only show that she held a reasonable belief that the Company was engaging in such activity.

[23] I previously found that Mr. Czirr told the Complainant during a phone conversation in January 2003 that he wanted to pay Mr. Mottel the remainder of his first consulting agreement because he had been helpful in raising capital for the Company. However, there was no evidence that Dr. Platt knew of this telephone conversation between Mr. Czirr and the Complainant when he terminated the Complainant. Therefore, as a matter of law, this phone conversation was not a factor contributing to the Complainant's dismissal.

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

The Secretary has noted that, when addressing a complainant's proof of a prima facie case, one factor to consider is the temporal proximity of the subsequent adverse action to the time the respondent learned of the protected activity. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Instant Oil Change, Inc.* 91-SWD-4 (Sec'y Jan. 5, 1993). Findings of causation based upon closeness in time have ranged from two days (*Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd*., 91-ERA-13 (Sec'y Oct. 26, 1996) to about one year (*Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993). On the other hand, just as temporal proximity may be a factor in showing an inference of causation, the lack of it is also a consideration, especially if a legitimate intervening basis for the adverse action exists. *Evans v. Washington Public Power Supply Systems*, 95-ERA-52 (ARB Jul. 30 1996).

In addition, the complainant need not proffer direct evidence that unlawful discrimination was the real motivation. Instead, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147 (2000).

The Complainant, Dr. Platt and Ms. Foley all agree that the Complainant told Dr. Platt that she did not want to attend the New York meeting because it involved Mr. Mottel's referrals. I have found that the Complainant twice told Dr. Platt that she did not want to attend the New York meeting because it was with Mr. Mottel and his contacts and that she believed that the Company was using Mr. Mottel to bring investors in exchange for a commission. The Complainant was sent home on the same day she engaged in protected activity by asking Ms. Foley to give Mr. Mottel's file to the auditors and by declining to participate in the New York meeting with Mr. Mottel's referrals. She was officially terminated on March 6, 2003, ten days from the date of her protected activity. The proximity in time between the exercise of protected activity and the Complainant's termination suggest that her protected activity contributed to her termination. The termination letter the Complainant received from Pro-Pharmaceuticals provides further support for this inference. The termination letter expressly identifies her failure to attend the New York meeting as a basis for the Complainant's termination: "you would not attend a meeting…. in New York…because of your disagreement with the strategy and your unwillingness to work with the people involved." JX 37.

On February 24, 2003, the day prior to the New York meeting at Penn Station, the Complainant stated that she did not want to attend the meeting with Mr. Mottel's referrals. The Respondent contends that this statement did not contribute to her dismissal. Rather, the Respondent asserts that the Complainant was terminated only after she refused to attend the lunch meeting a second time, after she spoke with Dr. Platt just minutes before the meeting,

when he told her of the additional attendees and reiterated the meeting's significance. Resp. Br. at 36. The Respondent contends that Dr. Platt did not understand the rationale behind the Complainant's objection to attending the meeting with Mr. Mottel's people. *Id.* The Respondent further submits that Dr. Platt understood the Complainant's refusal to attend the meeting to be based upon her personal dislike of Mr. Mottel. *Id.* at 36-37. I find Respondent's contentions unpersuasive.

First, I do not find persuasive or credible Dr. Platt's statements that he did not understand the Complainant's stated refusal to attend the meeting simply because the other attendees would be Mr. Mottel referrals. I have credited the Complainant's testimony that she had expressed her concern regarding Mr. Mottel's activities to Dr. Platt in January, immediately following the January 2003 telephone conference. I also credited her testimony that she explained to Dr. Platt why she did not want to attend the meeting with Mr. Mottel's referrals. The Complainant told Dr. Platt that she believed continuing to deal with Mr. Mottel, with whom the Company did not have a contractual relationship, in a situation where Mr. Mottel was bringing in investors and asking for a commission was a violation of securities laws and regulation. TR 154.[24] In addition, the fact that Dr. Platt told the Complainant of the additional participants and reiterated the importance of the meeting just minutes before it began does not negate the Complainant's concern that the meeting involved individuals referred to the Company by Mr. Mottel.

Second, it is undisputed that Dr. Platt, Mr. Czirr and Ms. Foley were all aware of Mr. Mottel's second consulting contract with the Company and that they kept the existence of that contract from the Complainant. Dr. Platt testified that he did not feel good about keeping the second contract from the Complainant. TR 622. Had Dr. Platt informed the Complainant that the Company had entered into a second agreement with Mr. Mottel, she would have understood why the Company was engaged in ongoing interactions with Mr. Mottel, she would have known that Mr. Mottel would be compensated for his work under a second consulting agreement and her concerns that the Company intended to pay him a commission for his efforts on its behalf may have been addressed. Moreover, if Dr. Platt, Mr. Czirr, or Ms. Foley believed that the Complainant's reluctance to participate in Company dealings with Mr. Mottel after she had terminated his contract was based upon her personal dislike of Mr. Mottel, the reasonable professional response would have been to explain to the Complainant that while the Company understood that she may not get along with Mr. Mottel, the Company believed he could assist it in raising capital, and therefore the Company had entered into a second agreement, would continue to work with Mr. Mottel and would have him report to Mr. Czirr. Instead, Dr. Platt, Mr. Czirr and Ms. Foley all kept quiet about the Company's second contract with Mr. Mottel even when the Complainant asked them why the Company was continuing to deal with Mr. Mottel when, as she believed, it had no contract with him. The fact that the principals in the Company hid the existence of the second contract from the Vice President of Investor Relations strongly suggests that the Company was aware that the Complainant's concerns with Mr. Mottel involved more than a simple personality conflict. Therefore, the Respondent's contention that it understood that the Complainant's refusal to meet with Mr. Mottel's contacts was based upon her personal dislike of him is unconvincing.

[24] In addition, Dr. Platt was aware that the Complainant had been concerned that Mr. Mottel was not a licensed broker right from the time he directed her to hire Mr. Mottel. TR 84.

The Respondent has also stated that the Complainant was terminated because she was opposed to dealing with large brokerage firms. Resp. Br. at 37. However, this proffered reason for her termination is undermined by the fact that the Complainant had consistently attempted to use her contacts at Morgan Stanley to obtain entry into the firm to promote Pro-Pharmaceuticals. Additionally, her draft budgetary and strategic plan, developed on February 9, 2003, recommends continuing contacts with Morgan Stanley. RX 17; CX 20. Even assuming, arguendo, that the Complainant was not fully supportive of Dr. Platt's strategy to raise capital through large brokerage firms, she had never refused to attend meetings or to carry out instructions or directives that he had given her prior to her refusal to attend the meeting with Mr. Mottel's contacts. Therefore, the evidence does not support a finding that she refused to attend the meeting because she disagreed with the business strategy of pursuing large brokerage companies.

The Respondent's contention that the Complainant was terminated for her unwillingness to work with individuals as directed by Dr. Platt is equally unpersuasive. JX 37; Resp. Br. at 19. Dr. Platt admitted that the only meeting in which the Complainant ever declined to participate was the New York meeting with Mr. Mottel and his referrals. Accordingly, the evidence is undisputed that the Complainant never refused to work with any one Dr. Platt asked her to work with other than Mr. Mottel, and that she declined to attend the meeting with Mr. Mottel's referrals because she believed he was acting in violation of securities law.

The Respondent's proffered explanation for its decision to dismiss the Complainant is not supported by the evidence. The Complainant has demonstrated that she engaged in protected activity when she directed Ms. Foley to give the file to the auditors and when she declined to attend the New York meeting arranged by Mr. Mottel with his referrals because of her concern that the Company was using him as a broker. The Complainant has also established that the Respondent was aware of her protected activity and that the Respondent took adverse action causally related to such activity: Dr. Platt sent the Complainant home on the same day that she refused to attend the New York meeting, and then formally terminated her ten days later, specifically citing her failure to attend the New York meeting. *See Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Instant Oil Change, Inc.* 91-SWD-4 (Sec'y Jan. 5, 1993). Furthermore, the Complainant has demonstrated that the Respondent's stated reasons for terminating her are not supported by the evidence. Therefore, the Complainant has established that her refusal to attend the New York meeting, which was protected activity, was a contributing factor in Dr. Platt's decision to terminate her.

E. Legitimate Nondiscriminatory Rationale For Adverse Action

I find that the Complainant has demonstrated that her protected activity contributed to the Respondent's adverse action. The Respondent now has the burden of proving that the adverse action was motivated by legitimate, non discriminatory reasons. The Complainant cannot prevail if the Respondent shows by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. The Administrative Review Board has held that "clear and convincing" evidence is more than a preponderance of the evidence but less than proof "beyond a reasonable doubt." *Yule v. Burns Int'l Sec. Serv.,* 1993-ERA-12 (Sec'y May 24, 1995). In this case, Pro-Pharmaceuticals contends that the Complainant was fired for insubordination. The charge of insubordination is premised upon the Complainant's refusal to attend the New York lunch meeting set up by Mr. Mottel with

individuals he referred to the Company. I have found that the Complainant's refusal to attend the New York meeting was protected under the Act. I have also found, as discussed above, that the Respondent's proffered insubordination defense is not supported by the evidence and is a pretext or not the true reason for terminating the Complainant.

The business of Pro-Pharmaceuticals was ongoing research and clinical trials of its process for decreasing the toxicity and improving the effectiveness of chemotherapy drugs by combining the drugs with carbohydrate compounds. As with any start-up company in the biotechnology field, it is important to be the first company to successfully complete research and clinical trials and to have the process approved by the United States Food and Drug Administration. In its Form 10-QBS filing of September 30, 2002, Pro-Pharmaceuticals specifically acknowledged the risk of competition from larger, better capitalized companies. RX 16 at 203. In order to ensure its ability to continue research and clinical trials without interruption or a slow down, it was necessary for the Company to raise capital to support the ongoing research and development. In September 30, 2002, the Company had $1,275,477 in cash and working capital of $895,468. *Id*. Dr. Platt, Mr. Czirr and the Complainant were engaged in significant efforts to increase the capital available to the Company. Dr. Platt and Mr. Czirr clearly believed that Mr. Mottel could assist the Company to raise the capital necessary to continue funding the ongoing research and development. Dr. Platt did not respond to the concerns the Complainant reported to him after the telephone conference in January 2003 regarding Mr. Mottel's involvement in a private placement and his asking for a commission. Nor did Dr. Platt address her concerns on February 24, 2003 when she told him she would not attend the meeting the following day in New York with Mr. Mottel's referrals. He simply excused her from attending the meeting. On February 25, when he again asked the Complainant to attend the meeting with Mr. Mottel's referrals and she once again voiced her concern with Mr. Mottel's activities, Dr. Platt did not explain to her why Mr. Mottel's activities were appropriate or make any effort to allay her reasonable concerns. On the evidence before me, I conclude that Dr. Platt's concern for and interest in obtaining needed capital for the Company lead him to ignore or discount the Complainant's concerns regarding the Company's dealings with Mr. Mottel. I infer that Dr. Platt terminated the Complainant because he grew tired of her continued objections regarding the Company's interactions with Mr. Mottel. Accordingly, I conclude that the Respondent's proffered reason for dismissing the Complainant, insubordination, is pretextual. Therefore, the Respondent has failed to show by clear and convincing evidence that it would have terminated the Complainant absent her protected activity.

IV. RELIEF

A. Statutory Provision

The Sarbanes-Oxley Act provides that an employee who prevails in an action under the whistleblower provisions of the Act is entitled to relief in the form of reinstatement, back pay with interest, and/or compensation for any damages sustained, including litigation costs, expert witness fees and reasonable attorney fees. 18 U.S.C. § 1514(A)(c)(2)(A)-(C); 29 C.F.R. § 1980.109(b).

B. Duty to Mitigate Damages

Victims of employment discrimination have a duty to mitigate damages by seeking suitable employment. Reasonable efforts to find employment include checking want ads, registering with the state employment agency, and using personal contacts. *Jones v. EG & G Defense Materials, Inc.*, 1995-CAA-3 (ARB Sept. 29, 1998)(arising under the Clean Air Act and the Resource Conservation and Recovery Act (RCRA)). A complainant in a federal whistleblower action has a duty to mitigate damages. *Wilkins v. St. Louis Housing Authority*, 198 F. Supp. 1080 (2001) (employee terminated in violation of the False Claims Act, 31 U.S.C. § 3730(h), has a continuing duty to mitigate his lost wages); *see also Timmons v. Franklin Electric Coop.*, 1997-SWD-2 (ARB Dec. 1, 1998) (arising under the Solid Waste Disposal Act and the Resource Conservation and Recovery Act).

The Complainant testified that she has been unable to work since her termination because of a medical condition unrelated to her employment. In her closing brief, the Complainant does not seek reinstatement to her position or back pay. The Complainant seeks compensation for the value of 50,000 in stock options that she alleges she lost as a result of her termination, attorney fees and costs in prosecuting her claim, and "any other special damages, including the humiliation and career impact resulting from her termination as the court may deem reasonable and just." Cl. Br. at 31.

In its brief, the Respondent argues that the Complainant has failed to mitigate her damages because she has not sought employment since her termination and thus is not entitled to back pay. Resp. Br. at 38. The Respondent notes that the Complainant herself testified that a medical condition has rendered her unable to work since her termination. Therefore, the Respondent argues, the Complainant's medical condition would also have precluded her from working at Pro-Pharmaceuticals, thereby extinguishing any claim for back pay. Resp. Br. at 39. As noted, the Complainant is not seeking reinstatement to her position or back pay. Accordingly, the issue of whether the Complainant mitigated her damages with regard to seeking employment following her termination is moot.

C. Compensation for Value of Stock Options

In response to the Complainant's brief requesting compensation for the value of stock options, the Respondent filed a Motion to Strike Complainant's Post-Hearing Request For Value of Stock Options. The Respondent objects to the request for stock options, contending that the Complainant did not raise the issue or request stock options at any point in the proceedings, including in the complaint, the pre-hearing submission, or at any time during the hearing. Resp. Mot. at 1. In essence, the Respondent contends that the Complainant waived any entitlement to compensation based upon stock options. Specifically, the Respondent argues that the Complainant offered no evidence regarding her alleged loss of stock options as a result of her termination and that therefore, any claim for the unvested stock options is waived. The Respondent contends that it will suffer prejudice should the court consider the post-hearing request and grant compensation based on an allegation, which was not presented before or during the hearing, is not supported by any evidence submitted to the court, and which it had no opportunity to rebut. Resp. Mot. at 3. The Respondent also asserts that the court should reject the Complainant's request for the value of the stock option because the Complainant had an

opportunity to present evidence regarding the stock options and the appropriate value of the options at the hearing and chose not to provide such evidence. Respondent states that the Complainant is not entitled to re-open her case to submit additional evidence after she rested and the hearing was concluded. Resp. Mot. 3-4. Finally, the Respondent argues that it would be improper to grant the Complainant a monetary award based upon some valuation of the Company stock because the Complainant was not granted shares of stock, but rather was granted an option to purchase shares at a price set forth in the Stock Option Agreement. The Complainant could exercise the option only by providing the notice and paying the Company the purchase price for the shares. Resp. Mot. at 4.

In her Opposition to the Respondent's Motion to Strike the Request for Stock Options, the Complainant states that the request for stock options is based upon the Incentive Stock Option Agreement between the Complainant and the Company, which is in evidence. Cl. Opposition at 1; JX 6. Under the agreement, the Complainant was granted an option to purchase 50,000 shares of stock on November 14, 2002, 25,000 shares on May 14, 2003 and 25,000 shares on November 13, 2003.[25] The Complainant asserts that the value of lost stock options is an element of economic damages in wrongful termination cases. Cl. Opposition at 2-3. In addition, the Complainant states that calculating the value of the 50,000 unvested stock options is a complex process properly reserved for post-hearing proceedings for the sake of judicial efficiency and consistency. Finally, the Complainant disagrees with the Respondent's contention that she is not entitled to compensation for the value of the lost stock options because she failed to present evidence that she would have exercised the options. Cl. Opposition at 3-4.

The Complainant's Opposition to the Motion to Strike cites several cases in which courts have awarded the value of stock options as economic damages in wrongful termination cases. Cl. Opposition at 1-3. However, the issue here is not whether the value of stock options may be properly awarded as "front pay" in whistleblower cases; rather, the issue is whether the Complainant presented any evidence in support of her claim for compensation for the value of the unvested stock options. The Complainant's request for compensation for the value of 50,000 stock options she lost as a result of her termination was raised for the first time in one sentence at the end of the brief under the heading "requested relief." Cl. Br. at 31. The brief also requests the Court to appoint a Special Master to value the shares under the Black Scholes Method. *Id*. The Complainant did not request compensation for the value of the stock options at the hearing even when the Court asked her to identify the specific relief she was seeking. TR 35. The Complainant failed to offer any evidence at the hearing as to the value of the stock options. Nor did she offer a suggestion or provide evidence as to the method by which the stock option shares were to be valued. Instead, it was not until she filed her Opposition to the Motion to Strike that the Complainant explicitly asserted that stock options can be an element of economic loss in wrongful termination cases. Cl. Opposition at 1-2. The Complainant is correct that economic loss in a whistleblower case may include the value of lost stock options. However, that does not excuse the Complainant's failure to allege loss of the stock options or to offer any evidence in support of her claim for the stock options. While the Complainant argues that valuing the

[25] It is undisputed that the Complainant never exercised her option to purchase the 50,000 shares that were vested on November 14, 2002. The Complainant is not seeking to recover the 50,000 shares of vested stock options that she could have, but did not, exercise. Cl. Opposition at 1. Instead, she is seeking compensation for the option for 50,000 shares of stock that had not vested as of the date of her termination (the unvested stock option).

options ought to be done using the Black-Scholes method, she neglects to explain or present evidence regarding this method of valuing stock option shares.

The Complainant's assertion that because the valuing of stock options is a complex process it is properly reserved for a post-hearing proceeding is without merit. The hearing in this matter was held over four days. All the parties were present and afforded an opportunity to present evidence on all issues, including issues of relief. There was no discussion or agreement to delay evidence on the issue of appropriate relief to a post-trial hearing should the Complainant prevail on her underlying claim. The Court could certainly have addressed the claim for stock options, including determining a value for the options, had any evidence, including testimony from an expert, been presented at the hearing. On the record before me, there is no basis for assessing the value of the stock options.[26] I recognize that my decision in this regard may result in the Complainant's loss of some relief to which she may have been entitled. However, the Complainant placed herself in this position by failing to pursue the issue of compensation for stock options by offering evidence at the hearing.

D. Special Damages

The Complainant seeks recovery of her litigation costs and reasonable attorney fees. As the prevailing party, the Complainant is entitled to recover her litigation costs and reasonable attorney fees. *Wells v. Kansas Gas & Elec. Co.,* 85-ERA-72 (Sec'y Mar. 21, 1991), slip op. at 17; *DeFord v. Sec'y of Labor,* 700 F.2d 281, 288-289, 191 (6th Cir. 1983). The Complainant is directed to submit an itemized list of costs and attorney fees, including supporting documentation, within thirty days of this order. The petition for attorney fees and costs must clearly provide counsel's hourly rate and supporting argument or documentation therefore and a clear itemization of the complexity and type of service rendered. The Respondent shall have fifteen days thereafter within which to file any objection to the costs and attorney fees requested by the Complainant.

Finally, the Complainant requests that she be "compensated for any other special damages, including humiliation and career impact resulting from her termination…" Cl. Br. at 31. In whistleblower cases under other statutes, including the Energy Reorganization Act, the Secretary and the Administrative Review Board have recognized that compensatory damages for such harms as impairment of reputation, humiliation and mental anguish may be appropriate. *Smith v. Esicorp*, ARB Case No. 97-065, ALJ Case No. 93-ERA-16 ARB Dec. (August 27, 1998). The Complainant must prove the existence of such subjective injuries with competent evidence. *Lederhaus v. Paschen,* Case No. 91-ERA-13, Sec'y Dec., Oct. 26, 1992, slip op. at 10. In this matter, the Complainant did not allege any specific career impact as she acknowledged that she has been medically unable to work or to look for work since her termination.[27] The Complainant has not offered any evidence regarding harm to her career as a result of her

[26] The Complainant's request that the Court appoint a Special Master to determine the value of stock options is without merit. Unlike the United States District Court, the Department of Labor's Office of Administrative Law Judges lacks authority to appoint Special Masters. Moreover, an administrative law judges is capable of considering and assessing methods of evaluating the value of stock options and assigning a value to stock options when presented with evidence upon which to make such a determination.

[27] The Claimant testified that she put out a few feelers for other positions after her dismissal but she admitted that she was not medically cleared to work. TR 173-175.

termination. Nor has the Complainant suggested any method for assessing monetary compensation damages for humiliation or career impact. Therefore, I have no basis on which to compensate the Complainant for these alleged special damages. Nevertheless, as a general matter, the Court recognizes that a termination may have a negative impact on an individual's career or future job prospects. At some point it is expected that the Complainant will be medically cleared to return to employment. Accordingly, the Respondent is directed to remove any reference to the Complainant's termination from its records. In addition, the Respondent is to report that the Complainant's performance was satisfactory should it receive inquiries regarding the Complainant's employment at the Company.

ORDER

IT IS HEREBY ORDERED that the Respondent, Pro-Pharmaceuticals, Inc.:

1. Pay to the Complainant, Sheila Jayaraj, all costs and expenses, including attorney fees, reasonably incurred in connection with this proceeding in an amount to be determined by supplemental decision and order based upon the parties' written submissions as described above;

2. The Respondent shall remove any and all reference to the Complainant's termination from its records;

3. The Respondent shall report that the Complainant's performance was satisfactory in response to inquiries regarding the Complainant's employment with Pro-Pharmaceuticals.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily 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 the be 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. §§ 1980.110(a) and (b), as found in "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).