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Issue Date: 11 February 2005

Case No.: 2004 SOX 21

In the Matter of

COLIN M. HARVEY
Complainant

v.

SAFEWAY, INC.
Respondent

Appearances: Mr. Colin M. Harvey,
Pro Se

Mr. Joseph Harkins, Attorney
Ms. Maria Perugini Baechli, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

INITIAL DECISION AND ORDER – GRANT OF MOTION TO DISMISS & DISMISSAL OF COMPLAINT

This matter arises under the employee protection provision of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C. § 1514A ("Act" or "SOX") as implemented by 29 C.F.R. Part 1980 (Final Rule 69 Fed. Reg. 163, August 24, 2004)[1]. This statutory provision, in part, prohibits an employer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 from discharging, or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to alleged

[1]The interim final rule under 29 C.F.R. Part 1980 (Interim Final Rule, 68 Fed. Reg. 31860, May 28, 2003) was in effect at the time Mr. Harvey's employment relationship with Safeway ended and at the time of the hearing. Since the hearing, the final rule has been promulgated. Because the final rule does not conflict with the interim final rule in any matter pertinent to the issues for determination before me, I will reference the final rule without addressing the retroactive nature of the rule, since such a determination is moot. *See Thorson v. Gemini, Inc*., 205 F.3d 370, 376 (8th Cir. 2000) (citing *Bowen v. Georgetown University Hospital et al*., 488 U.S. 204, 208 (1988)).

violations of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of federal law relating to fraud against shareholders.

Procedural History

In his October 23, 2003 SOX complaint, Mr. Harvey alleged Safeway, Inc. ("Safeway" or "Respondent") constructively terminated his employment on or about July 27, 2003. On December 17, 2003, the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor ("DOL"), who investigated Mr. Harvey's complaint, notified the parties that the complaint did not allege facts and evidence to meet all the required elements of a *prima facie* case of discrimination under SOX. Mr. Harvey objected to the stated findings and requested an administrative hearing in a letter dated January 6, 2004, received on January 21, 2004.

Pursuant to a Notice of Hearing, dated January 21, 2004, I set a hearing date of February 24, 2004 (ALJ 1).[2] However, on February 19, 2004, with a supplemental filing on February 20, 2004, Respondent requested additional time to prepare the case because of a delay in Respondent's receipt of the original Notice of Hearing. I approved the request. Subsequently, pursuant to a Notice of Hearing, dated February 24, 2004, I conducted a hearing on March 23, 2004 in Washington, D.C. (ALJ 2). Mr. Harvey, Mr. Harkins and Ms. Baechli were present.

Parties' Positions

Complainant[3]

Mr. Harvey asserts he engaged in protected activity because the Sarbanes-Oxley Act requires only that an employee provide information he reasonably believes constitutes a violation of section 1341 or any provision of federal law relating to fraud against shareholders. The Act contains no requirement that a complainant actually state the reported action is a violation of SOX. Additionally, the Act imposes no amount-in-controversy threshold in order to present a SOX complaint.

Mr. Harvey reasonably believed that the SOX employee protection provisions were invoked when he filed his complaints with the store management staff as well as the senior executives that the Respondent violated the Fair Labor Standards Act. Mr. Harvey "had the trigger for protection and notification under the Act in [his] July 29, 2003 letter." The letter provided Respondent with knowledge of Mr. Harvey's SOX complaint. Under SOX, there are a number of federal laws, which when violated constitute a violation under SOX because "violations of such laws and regulations end up being a cost, a charge and a lost to the

[2]The following notations appear in this decision to identify exhibits: CX – Claimant's exhibit; RX – Respondent's exhibit (these exhibits had been previously labeled "EX"); ALJ – Administrative Law Judge exhibit; and TR – Transcript

[3]TR, pages 15 to 20, 111 to 113; and, Complainant's written argument submitted April 20, 2004.

shareholders' investments as well as the improper accounting of the company funds budgeted to prevent these violations." In Mr. Harvey's case, the violations of Fair Labor Standards Act ("FLSA") involved an accounting issue because unpaid wages would be incorrectly reported as part of Safeway's revenue and profit. Therefore, Mr. Harvey engaged in protected activity when he complained to Respondent's management about not being paid for all of the hours he worked.

Respondent knew that Mr. Harvey engaged in protected activity because he directly sent his complaints to both the store's management staff and senior executives of Respondent. Additionally, in Mr. Robert Gordon's July 17, 2003 letter responding to Mr. Harvey's concern, he stated that Respondent "will not terminate or otherwise discipline an employee for acting in good faith to report concerns he or she may have about compliance with applicable laws and policies." This letter shows that Respondent was aware of Mr. Harvey's protected activity.

Mr. Harvey suffered adverse employment action when he received a message from Ms. Barnes, stating "she was left a note by [assistant store manager] Amy [K]nolls asking her to call [him] telling [him] not to return to work because [he is] not on the schedule." Earlier, Ms. Knolls had told Mr. Harvey he was hired to work six days a week, eight hours per day. She did not indicate that he was hired part-time as Mr. Wescott stated at the hearing. Attached to the closing statement is a description of the 401K plan offered to Mr. Harvey by Safeway, which is a plan in which only full-time employees may participate.[4] Ms. Knolls also did not tell Mr. Harvey his correct rate of pay, which was $6.60 per hour with a $1.00 premium when he worked the night shift, which was not paid on Sundays or holidays.

Subsequently, once Mr. Harvey was reassigned to another store, that store's assistant manager told him, "[he] better come to work or else," which Mr. Harvey interpreted as a threat to his job. All of these actions by Respondent constitute constructive discharge of his employment.

Mr. Harvey's protected activity contributed to the unfavorable personnel action as evidenced by his being singled out by a grocery manager who told him that the store would not continue to employ seven night stockers. In addition, Mr. Harvey was not being appropriately paid for his responsibilities as the Person-in-Charge. To date, he has not been paid the proper amount and Mr. Wescott refused Hr. Harvey's request for an audit of his hours worked and compensation received.

The veracity of Mr. Harvey's excuse for not being able to report to work at his new store assignment has been questioned. In response, as another attachment to his closing argument, Mr. Harvey submitted weather reports from that time period, which indicate the presence of severe weather. The storms caused a power outage and precluded Mr. Harvey from taking care of his personal hygiene, so he did not feel comfortable going to work.

Mr. Harvey requests that the Motion to Dismiss made by Respondent's attorney be denied and that he prevail under SOX. He seeks back pay in the amount of $1,500 per month

[4]I informed the parties at the hearing that I would only consider evidence offered and admitted into evidence during the course of the March 2004 hearing (TR, pages 12 to 14). Since neither attachment to Mr. Harvey's April 2004 closing argument was presented at the hearing for my consideration and admission into evidence, I have not considered the information on the attached 401 K program or the weather summary.

from August 2003 to the present and "my own attorney fees for the 250 hours it [took Mr. Harvey] to prepare and present [his] case," at a rate to be decided at the court's discretion. Additionally, he requests compensatory damages in the amount of $25,000 plus "an amount equal to the sum total of all compensatory damages and costs."

Respondent[5]

For several reasons, Mr. Harvey is not entitled to the requested relief under the employee protection provisions of SOX. In particular, his complainant has no merit and should be dismissed.

First, Mr. Harvey's SOX complaint should be dismissed because the subject of his alleged protected activity simply involved issues involving the correct pay for his hours worked. According to Mr. Harvey, he engaged in a SOX protected activity by complaining (via letter and oral communication to store management and executives of Safeway) about wage and hours that were not calculated and paid accurately under the Fair Labor Standards Act. However, the protected activity under the Act relates to an employee's communication of concerns about violations of Federal law involving fraud against the shareholders. The Act "was not intended to capture every complaint an employee might have as a potential violation of the Act." Rather, the "goal of the legislation was to 'protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws.'" Though Mr. Harvey asserted that the FLSA is a law relating to fraud against shareholders, his complaint did not contain violations of securities laws.

Although Mr. Harvey may have subjectively believed his wage complaint was a protected activity under SOX, the standard for determining whether a complainant's belief is reasonable involves an objective assessment. Under an objective standard, Mr. Harvey's belief that he engaged in protected activity by complaining about wage underpayment, where the amount in controversy is less than $300, is insufficient to satisfy the reasonableness requirement for a finding of protected activity. His wage and hour complaints did not involve auditors, accountants, financial officers or securities counsel. Moreover, no employee dealing with Mr. Harvey's pay was involved in fraud, defined as an act done intentionally to mislead or harm investors. At most, there were a few "glitches" in the weekly pay of a new employee that were corrected well before the pay shortages or corrections could work their way into the company's financial disclosure to investors. Mr. Harvey's complaint did not affect "the 'true financial condition of the company,' the core purpose of the Act."

Second, in regards to notice of a SOX protected activity, Mr. Harvey's mere reference to SOX in his July 29, 2003 correspondence to the company executives did not place the Respondent on notice that he had a securities law concern under the provisions of the Act. The specifics of his letter to senior management involved nothing beyond wage payment issues. In response to the letter, senior management attempted to address his specific concerns about his pay. In particular, Safeway's actions were taken to help Mr. Harvey understand that he had not been terminated, regardless of his mention of the Act.

[5]TR, pages 21 to 28, 109 and 110; and, Respondent's closing argument submitted April 30, 2004.

Third, the Respondent did not engage in any adverse personnel action against Mr. Harvey. Any loss of employment Mr. Harvey suffered was effectively self-imposed. He misunderstood a telephone message he received indicating he was not on the store's schedule for a particular night. Mr. Harvey mistakenly interpreted his absence from that night's schedule as a termination action and did nothing to assure the accuracy of his interpretation. In reality, Mr. Harvey remained on the work schedule for another two weeks beyond the incident night. In a subsequent meeting, Mr. Wescott, a human resources advisor, assured Mr. Harvey that he was not terminated and offered him a transfer to another store, which Mr. Harvey accepted. Yet, Mr. Harvey never reported to his new work location and was therefore considered to have resigned because of job abandonment.

Fourth, Mr. Harvey did not carry his burden of proving by a preponderance of the evidence that his wage and hour complaints contributed to the eventual loss of his employment at Safeway. Following his complaints, Safeway paid Mr. Harvey for alleged deficiencies in his pay and arranged a transfer as he requested in order to keep Mr. Harvey employed by Safeway. If Mr. Harvey had reported to work at the new store, he would still be employed. Indeed, "Mr. Harvey admitted that he did not return to work because he was 'angry.'" Safeway had a legitimate reason, Mr. Harvey's failure to show up for work, for the eventual termination of his employment.

Finally, although Mr. Harvey has not established a *prima facie* case of impermissible discrimination under the Act, Safeway has nevertheless demonstrated by clear and convincing evidence that it would have taken the same separation action regardless of Mr. Harvey's protected activity. Safeway treated Mr. Harvey as they would any other employee. The company has clearly demonstrated legitimate reasons for its actions concerning Mr. Harvey; from the initial change in his work schedule to his separation for job abandonment due to his failure to report to work after being transferred. The purpose of the Act is to protect employees from retaliation who make disclosures of corporate wrongdoing in regards to securities law. That purpose will not be furthered by protecting Mr. Harvey from the termination action caused by his failure to responsibly communicate with his employer and to report for work.

In summary, Mr. Harvey's complaint does not relate to federal securities laws and is therefore not a protected activity under SOX. Safeway responded to Mr. Harvey's concerns arising under the FLSA, maintained Mr. Harvey's employment and would have continued to do so had he reported for work. Mr. Harvey has not met his burden to establish any of the elements of his SOX claim except that he "subjectively feels Sarbanes-Oxley is a vehicle for every workplace wrong."

Issues

1. Motion to Dismiss (whether Mr. Harvey engaged in a protected activity under the Act).

2. Whether Safeway took an adverse personnel action against Mr. Harvey

3. If Mr. Harvey engaged in a protected activity and Safeway took an adverse personnel action, whether his protected activity contributed to the adverse personnel action.

4. If Mr. Harvey's protected activity was a contributing factor in the adverse personnel action taken against him, whether Safeway has demonstrated by clear and convincing evidence that it would have taken the adverse personnel action against Mr. Harvey in the absence of the protected activity.

SUMMARY OF DOCUMENTARY EVIDENCE AND TESTIMONY

My decision in this case is based on the sworn testimony presented at the hearing and following documents admitted into evidence: CX 1 to CX 9, RX 1 to RX 15 and RX 17 to RX 20.

Complainant's Case

Documentary Exhibits

CX 1 – Seven of Mr. Harvey's earning statements from Safeway dated June 19, June 26, July 3, July 10, July 17, July 24, and July 31, 2003. His weekly hours of work ranged from 40 to 28.49.

CX 2 – Mr. Harvey received a cash pay out on July 21, 2003 in the amount of $121.31. The payment was made for a Sunday adjustment and Sunday premium for weeks ending June 14, 2003 and July 12, 2003.

CX 3 (and RX 7) – Ms. Amy Knolls wrote a letter to Mr. Harvey indicating that she figured out some of the problems regarding his pay and had received approval to issue a check for that amount. Ms. Knolls said she would "make sure" to avoid the problem in the future when she is processing payroll.

CX 4 (a) (and RX 1) – Mr. Robert Gordon, Senior Vice President and General Counsel, wrote to Mr. Harvey on July 17, 2003 in response to his letter of July 7, 2003. Mr. Gordon stated, "Safeway encourages employees to speak up about issues of this nature. The Company will not terminate or otherwise discipline an employee for acting in good faith to report concerns he or she may have about compliance with any applicable laws or policies." He forwarded the letter to Donna Gwinn to address the payroll and personnel issues Mr. Harvey had raised.

CX 4 (b) (and RX 2) – Ms. Lucy Madert wrote to Mr. Harvey on July 23, 2003 "to clarify the issue regarding [Mr. Harvey's] job responsibilities as a night stocker" stemming from her conversation with Mr. Harvey on July 21, 2003. She explained to Mr. Harvey:

> Under the collective bargaining agreement between Safeway and the United Food and Commercial Workers Union, Local 400, employees who stock the stores overnight are classified as Food Clerks. Food clerks are permitted to perform duties such as teller, cashier, stocker, working in perishable departments and inventory control.

The Collective Bargaining Agreement also outlines wage rates for the different job classifications and designates the starting rate of pay for night stockers at $6.60 per hour plus a $1.00 premium. Stockers do not receive the $1.00 premium for hours worked on Sunday because those hours are compensated at time and a half.

Ms. Madert also informed Mr. Harvey that she will look into his union membership and ask the union business agent to get Mr. Harvey a copy of the collective bargaining agreement. Finally, Ms. Madert expressed her appreciation for Mr. Harvey's feedback at the meeting.

CX 4 (c) (and RX 5) – On August 5, 2003, Ms. Lori Raya wrote to Mr. Harvey in response to his letter directed to Ms. Larree Renda. She explained that local management may be having problems interpreting or applying the provisions of the collective bargaining agreement with Local 400 in that area. Ms. Raya commented that appropriate action was being taken on the security matter that concerned Mr. Harvey but she could not discuss the situation in detail in deference to the privacy of the individuals involved.

Regarding Mr. Harvey's concerns about operational practices he believes are inefficient, Ms. Raya suggested he talk to the store manager about his observations. With respect to price tags, Ms. Raya explained Safeway's reasons for accomplishing price tag changes in the way that they do.

CX 4 (d) (and RX 8) – On August 11, 2003, Mr. William Wescott wrote to Mr. Harvey for two purposes. First, he acknowledged receipt of Mr. Harvey's letter to the Eastern Division President describing his concerns and indicated that the Director of Human Resources, Ms. Donna Gwinn, had asked him to look into the situation. Second, Mr. Wescott requested a meeting with Mr. Harvey.

CX 4 (e) and (RX 13) – On December 22, 2003, Ms. Lucy Madert wrote to Mr. Harvey enclosing a check dated August 29, 2003, in the amount of $57.95. The check represented payment for relief work performed by Mr. Harvey while employed at the Safeway, Bauer Drive store.

CX 5 (and RX 13) – Mr. Harvey received a check, dated August 29, 2003, for $57.95, based on earnings of $62.75.

CX 6 – Mr. Harvey wrote to Mr. Robert Gordon, Senior Vice President and General Counsel for Safeway, on July 7, 2003 to inform him of some problems he had encountered during his four-week tenure with the company. First, every paycheck Mr. Harvey received was short several hours. As indicated in the enclosed letter, the assistant store manager said one computer had not "talked" to another and that they were working on the problem. If the computers were the problem, Mr. Harvey asked Mr. Gordon to consider how many other employees "could be similarly affected and even more if they don't understand or comprehend their paychecks fully and just rely on the company to make sure it is accurate." During one pay period, when Mr. Harvey worked more than 70 hours in preparation for a store visit, he was only paid for about 40 hours. When he complained to an assistant store manager, he was told to go home, figure out his hours; then, he would be paid the next week. Mr. Harvey went home but became very upset about the shortage. Consequently, he returned to the store and talked to the store manager who said he would get him another check.

Next, Mr. Harvey indicated that he was taking on more duties than those typical for a night stocker. He had started unloading pallets. And, on at least one occasion, when he arrived at 11:00 p.m. for his night shift, he was placed in charge of the store and a new cashier. In that situation, he was concerned about who to contact during an emergency. He also complained that store management did not respond to his request for a pay adjustment because he was doing more than just stocking shelves at night. The managers reacted as if he were bothering them. The additional work and supervisory responsibilities went beyond the job description and he was not being adequately compensated for those tasks. His night premium pay was also short.

Further, one night after Mr. Harvey had difficulty opening a door for a delivery, the warehouse truck driver used obscene language towards him. When Mr. Harvey reported the incident to store management, they did not take any action.

Additionally, Mr. Harvey discussed a situation involving the sale of outdated meat to store employees that had been under investigation and resulted in the termination and suspension of two employees. He sought involvement from the senior executive in the matter that he believed was not being fairly remedied. He was concerned that the two employees were being punished for doing what they were told to do and trying to take actions in the best interests of the store.

Lastly, Mr. Harvey brought up operational inefficiencies that he had observed. One problem related to the stocking of the same items nightly. He suggested the use of extenders and extra shelves. Mr. Harvey was also concerned with having to put out "hundred or thousands of price tags."

In the final paragraph, Mr. Harvey emphasized his belief that Safeway encouraged its employees to bring problems to management's attention. He stated:

> One of two things are going to happen once this letter is received, all the issues I raised are going to be dealt with or the company might just decide to terminate especially since I am still in my 90 day probation period. If I am terminated I can walk out the door with my chest out and my chin high because I gave Safeway a

> [sic] 150% of my effort at the caliber of an [sic] $25 an hour employee and never complained about the work, I complained about not being fairly compensated.

CX 7 – Mr. Harvey wrote to Mr. Steven Burd, Chairman, President and CEO of Safeway, on July 29, 2003. Attaching Mr. Gordon's July 17, 2003 letter, Mr. Harvey presented the president with his experience that was contrary to Mr. Gordon's statement that Safeway does not terminate or otherwise discipline an employee for acting in good faith to report concerns about compliance with applicable laws and regulations. Specifically, three days after receiving Mr. Gordon's letter responding to his initial concerns, Mr. Harvey became sick and missed two days of work. On the third day, when he planned to return to work, he received a phone message from a person in charge informing him that she saw a note at the store asking her to call Mr. Harvey and tell him not to return to work because he was not on the schedule. Mr. Harvey remarked, "So much for your Corporate Governance and Code of Ethics policies." According to Mr. Harvey, "Sarbanes-Oxley states that it is unlawful to suspend, harass, terminate or coerce an employee because the employee has filed a report to persons of a supervisory nature in the company of possible fraud against shareholders under several federal laws."

Mr. Harvey also summarized the events that followed the submission of his July 7, 2003 complaint. On July 21, 2003, he met with Ms. Madert and Ms. Knolls. At that time, Mr. Harvey indicated that he had been paid for all of the discrepancies he had found. Ms. Madert explained Safeway's payroll policies to him, but Mr. Harvey had not been instructed on the procedures and did not believe they were in place in his store. She suggested that Mr. Harvey keep track of all his hours. While he initially thought the idea was ridiculous, he realized it was a good suggestion since he "and other employees are not being paid for hours worked." In response to Mr. Harvey's concern about the grocery manager's callous attitude regarding the underpayment of his wages, Ms. Madert replied, "he is just a Grocery Manager." In regards to his hourly rate, Ms. Madert told him that if he didn't like the $6.60 an hour, he should consider leaving Safeway. Concerning his lack of training as a person in charge, Ms. Knolls handed him a copy of the contact phone book. However, Mr. Harvey pointed out that he had other problems being in charge. As an example, he described a situation were he wrote a note about the attendance of an employee who had forgotten his time card. Ms. Knolls indicated that his note was legally insufficient to enable the employee to be paid for the work.

Mr. Harvey next complained about the treatment he received from the new grocery manager. Early one morning, she criticized Mr. Harvey's decision to work extensively on one side of an aisle. After criticizing his performance, she queried whether he thought the store would keep five night stockers. The new grocery manager had a reputation for being "super" and taking no prisoners. Mr. Harvey considered her actions "abusive" and "disrespectful," especially since he was a new employee.

Finally, Mr. Harvey repeated his concern raised in the July 7th letter about two employees who were terminated and suspended for selling meats that were going to be thrown away. Since he later discovered that one of the employees may have been acting with the permission of his supervisor, Mr. Harvey requested the sympathy and personal involvement of,

"you, Mr. Gordon, as the most senior legal employee"[6] in the situation concerning two employees of Safeway. Mr. Harvey is certain George, the fired employee, had done no wrong and acted with his supervisor's permission. No one spoke out about the situation because the termination appeared to be part of a process where Safeway was terminating long-term employees and replacing them with lower paid employees.

CX 8 – On December 17, 2003, Regional Administrator for OSHA, DOL, wrote to Mr. Harvey dismissing his complaint filed under SOX because it did not meet all of the required elements of a *prima facie* case.

CX 9 – The District Director of the Employment Standards Administration, Wage and Hour Division, DOL, wrote to Mr. Harvey on January 21, 2004 to acknowledge receipt of information Mr. Harvey sent to initiate an investigation under the Fair Labor Standards Act regarding Safeway, store #1668.

Sworn Testimony of Mr. Colin Harvey
(TR, page 38 to 108)

[Direct examination[7]] Mr. Harvey began working at Safeway in the Rockville, Maryland store on Norbeck Road, Store #1668 on June 2, 2003. He was a night stocker, primarily responsible for unloading merchandise from trucks. Mr. Harvey's direct supervisor was Tim and the store manager was Mr. Mark Mercer. The assistant manager Ms. Amy Knolls, offered the job to Mr. Harvey and told him he would be receiving $7.60 per hour. He didn't discover until two weeks later that his base wage was $6.60 an hour with a $1 premium for working the night shift, which he started around 10:00 pm. Mr. Harvey worked every day his first three weeks as an employee before having a scheduled day off.

Mr. Harvey was paid every week, typically receiving a check on Thursdays. In the paycheck for June 19, 2003 (CX 1), Mr. Harvey noticed that he did not receive pay for all of the hours he had worked. Having worked seven days in a row, he determined that the check was eight hours short. The employees clocked in with a swipe card and the summarized time sheet was posted in the break room. After reviewing the break room time sheet, Mr. Harvey approached the grocery manager, who was also one of the two assistant store managers in the store, about the issue. The assistant store manager encouraged Mr. Harvey to go home and review the hours carefully. If a shortage had occurred, the grocery manager said he would pay Mr. Harvey in the next paycheck since there was nothing he could do at the present time. Mr. Harvey went home but became upset because he believed someone at the store should take care of the problem. So, he returned to the store and spoke with Mr. Mercer, the store manager. Mr. Mercer made a copy of the pay stub and told Mr. Harvey that another assistant manager, Ms. Amy Knolls, would look into the situation and take care of it. The following Monday, Mr. Harvey again spoke with Mr. Mercer, informing him how many hours he believed were missing.

[6]Mr. Harvey addressed the letter to Mr. Burd but this portion of the letter directed his concerns to Mr. Gordon. At the hearing, Mr. Harvey testified that he did not copy and paste the content of the various letters he sent to Safeway executives. (TR, pages 81 and 82).

[7]Since Mr. Harvey was proceeding *pro se,* I conducted the direct examination.

Mr. Mercer indicated that Mr. Harvey's pay would be corrected in the upcoming paycheck. Mr. Mercer seemed genuinely concerned.

On June 26, 2003, Mr. Harvey received another paycheck, which included an adjustment for the prior week, plus a Sunday premium adjustment of eight hours for the current week. The first adjustment accounted for the hours that Mr. Harvey had been missing from the prior week for his work on a Sunday. Ms. Knoll explained that the shortage may have been caused by "one computer not speaking to the other computer." The paycheck adjustment corrected the mistake from the earlier check.

The June 26, 2003 check also included an amount listed as a payroll adjustment offset but Mr. Harvey is not sure what that amount represented and why it was taken out after tax deductions. He never asked anybody about it because he felt as though he was being a bother.

Around July 7, 2003, after two incidents of missed hours in his paycheck, Mr. Harvey wrote a letter of complaint to the executives of Safeway in California and the President of the Maryland division to notify them of his missed hours of pay problem. He attached Ms. Knoll's response about the computer problem. At that time, he felt no one was really concerned about the company's failure to pay him for the hours he had actually worked. Because he was only making $6.60 an hour, he believed management did not think it was a big deal. His letters were also prompted by two other incidents. One day, after he experienced some difficulty getting the store's delivery door open, a delivery truck driver used obscene language towards him. On another occasion, Mr. Harvey was left in charge of the store and one inexperienced cashier. Mr. Harvey was bothered by the incident because he had not been properly trained in Safeway operating procedures (for example, he didn't know where the telephone contact numbers were located) and was not hired for that kind of responsibility. When these events accumulated, Mr. Harvey wrote the letter to the company executives to tell them about his situation. Later, Mr. Harvey heard that Ms. Knolls felt his letters were personal attacks.

On the July 17, 2003 pay stub (CX 1), there are 1.57 hours for prior week adjustment and 7.43 hours for Sunday prior week adjustment, meaning more Sunday hours were missed. Mr. Harvey believes that hours are missed when he should be receiving time and a half pay, which occurs on Sundays. When Mr. Harvey found the second incident of missed hours, he talked to Ms. Knolls and Mr. Mercer about it. Ms. Knolls explained that the process of putting hours worked by employees into the computer was not working properly. Mr. Harvey believes there was another incident of missing hours from his paycheck in one of his last two paychecks but he is not certain of the details.

On July 21, 2003, Mr. Harvey met with Ms. Knolls and Ms. Madert, a human resources advisor. Both Ms. Madert and Ms. Knolls made a special effort to meet with Mr. Harvey during his shift at 11:30 that evening. At that meeting, he received a cash pay-out (CX 2), which Mr. Harvey believes reflects payment for missed hours on June 14, 2003 and July 12, 2003. Ms. Madert indicated that his letters had come back through the system and she had been asked to talk to him about his situation. She stated that it was the employee's responsibility to accomplish the time procedures to ensure he received the correct pay for the amount of hours worked. After this meeting, Mr. Harvey attended work on July 22, 23 and 24.

Mr. Harvey's last day of work at the Norbeck store was on July 24, 2003. He was sick with the flu and did not attend his scheduled shifts on July 25 and July 26. On July 25, Mr. Harvey called the store to let the manager know he was too sick to come to work. The woman who answered the phone did not know where the manager was so Mr. Harvey left a message that he would not be in that day. The following day, Mr. Harvey called in and spoke to his immediate supervisor, Tim, to be sure that he got the message about his illness. Tim indicated that he had not received Mr. Harvey's earlier message about being sick but said he now understood his absence.

The next day, July 27, 2003, before Mr. Harvey left for work that evening, he received a phone message from Ms. Tamara Barnes, the designated person in charge for the evening shift. At about 5:30 p.m., she left a message stating that she saw a note from Ms. Knolls asking him not to come to work because he was not on the schedule. At that point, Mr. Harvey believed he had been terminated by Ms. Knolls in retaliation for writing the July 7th letter and complaining about his pay being short

On July 29, 2003, after receiving the call terminating his employment, Mr. Harvey wrote another letter to the senior executives at Safeway. Mr. Harvey noted that in the company's response to his first letter, he was informed that Safeway did not terminate its employees for speaking out. Yet, after raising his concerns and writing the July 7, 2003 letter, he had been informed that he was no longer on the schedule. In the first paragraph of his letter, Mr. Harvey referenced SOX.

In response to his second letter, Mr. Wescott, another human resources advisor for Safeway, called Mr. Harvey to set up a meeting regarding Mr. Harvey's concerns. They met on August 14, 2003. Mr. Harvey told Mr. Wescott about the 10 to 12 times he had been left alone, in charge of the store. Mr. Wescott believed Mr. Harvey might be entitled to a higher rate of pay for those occasions. Concerning Mr. Harvey's absence on the schedule, Mr. Wescott informed Mr. Harvey that "as far as he's concerned, and as far as Safeway is concerned, [Mr. Harvey] is not terminated." He explained that the person from the store who had left Mr. Harvey a message called on her own initiative. Mr. Harvey accepted Mr. Wescott's offer to return to work at that Safeway or another store; he preferred a return to work at a different store closer to his home. Towards the end of August, Mr. Wescott called Mr. Harvey and informed him that he found a store in Chevy Chase in the District of Columbia where Mr. Harvey could work.

Mr. Harvey was due to begin work at the new store on a Monday at the beginning of September. However, due to a severe storm, his apartment had lost power. As a result, the night before he was scheduled to start at the new store, he called the new assistant manager and asked if his start date could be delayed by one day so he could make sure he had a shower and was able to brush his teeth. The assistant store manager indicated that he didn't see how Mr. Harvey's problem would preclude his coming into work. He informed Mr. Harvey that "[he] better come to work that particular night or else." Mr. Harvey did not go to work that day or any subsequent day because he believed he had been constructively discharged in light of the new assistant manager's threat; the company had been making things difficult for him. Mr. Harvey did not call the store again to tell the company he was not coming to work. He was "just angry" and "fed up." Mr. Harvey summarized:

> They make $20 billion a year and they could only pay me $6.60 an hour, and the assistant store manager told me to come to work, and, you know, I'm trying to explain to him about my personal hygiene and he has a responsibility if a person has personal issues, and if an employee calls him with a personal problem, personal issues, and that's the kind of response he's going to give me, I'm just through. . . I was just fed up, and again I just left it at that point. (TR, page 68)

After his conversation with the new assistant store manager, Mr. Harvey did not have any communication with Safeway. He did not receive a termination notice. On December 22, 2003, Mr. Harvey received a letter from Ms. Madert, which included a check for $57.95 for relief work. Mr. Harvey believes the relief work pay accounted for underpayment during the hours he worked alone with only another cashier, thus entitling him to a higher pay rate. The check was dated August 28, 2003 though Mr. Harvey did not receive it until late December.

Between July 27, 2003 and the beginning of September when Mr. Harvey planned to return to a different Safeway to work, he looked for employment unsuccessfully. He relied on his parents for support.

The protected activity in which Mr. Harvey engaged was "not being paid under the Fair Labor Standards Act," which violates a federal law. The underpayment constitutes fraud against the shareholders.

Mr. Harvey believes that an unfavorable personnel action was taken by Safeway when he was told not to return to work on July 27, 2003. His belief stems from conversations he had with Mr. Kesler, a loss prevention investigator, who indicated that Ms. Knolls felt personally attacked by the letters that Mr. Harvey wrote to the executives, which included a copy of the letter she had written acknowledging the problems with pay.

[Cross-examination] Mr. Harvey possesses some college education; he was enrolled in additional college business courses when he started working at Safeway. Mr. Harvey worked for a local retailer in the home improvement business for 13 years; then he worked for Trak Auto, also a retail establishment for one year; followed by nine years working for Home Depot. He resigned from all of his previous jobs. Mr. Harvey has several claims pending against Home Depot, some of which are Sarbanes-Oxley employment discrimination complaints.

He has worked as an hourly employee in the past, including seven years during his employment at Home Depot and so he is aware of various systems for recording time and being paid.

Mr. Harvey filed a complaint with the U.S. Department of Labor, Wage and Hour Division, under the FLSA about his pay problems with Safeway on October 11, 2003 (RX 18). Mr. Harvey wrote a letter containing references to the same things in his FLSA complaint as when he filed his complaint with DOL, OSHA under SOX (RX 19). In fact, the bodies of the two complaints are "similar." Mr. Harvey did some research on Sarbanes-Oxley to determine that his complaint was also relevant under that law as well. He only mentioned violations of

SOX in the second complaint that he filed. He typed the two complaints separately and "from memory." After referencing a website on whistle blowing, Mr. Harvey concluded that wage and hour violations under FLSA "are possible violations under Sarbanes-Oxley."

In Mr. Harvey's July 29, 2003 letter to the executives of Safeway, he refers to internal policies of Safeway (CX 7). He only mentioned SOX in the last sentence when he explained that a Sarbanes-Oxley complaint involves an employee's reasonable belief that a violation of federal law has occurred that causes fraud upon the shareholders. He never spoke with any of the Safeway employees about securities law, SEC rules or a fraud statute.

When Mr. Harvey met with Ms. Madert and Ms. Knolls at 11:30 p.m. on July 21, 2003, he knew they had made a special effort to meet with him. The meeting arose in response to Mr. Harvey's letter to Mr. Gordon, Safeway's general counsel, which prompted him to ask Ms. Donna Gwinn, the eastern division director of human resources, to get involved with the situation. Ms. Gwinn then designated Ms. Madert to handle the situation by making contact with Mr. Harvey. Mr. Harvey's main concern going into the meeting was the issue of not getting paid for hours he worked and the issue did not seem resolved afterwards. During the meeting, Ms. Madert explained that accurate accounting of hours was his responsibility and that he should be reviewing the "exceptions list," which was a list of hours logged by employees and posted in the break room.

(At the hearing), Mr. Harvey acknowledged that both the employer and employee have a shared responsibility to ensure accurate recording of hours.

Ms. Lori Raya also responded to Mr. Harvey's July 7th concerns in a two page letter, indicating that Mr. Harvey should talk to the store manager about some of his operational suggestions. However, because Mr. Harvey and Mr. Mercer worked different schedules, the occasion for Mr. Harvey to speak with Mr. Mercer never arose.

On Sunday, July 27, 2003, Mr. Harvey received the phone call that "informed me not to return to work because I'm not on the schedule. Those were the exact words." Mr. Harvey understood that message to mean that he was not on the schedule anymore because he was being retaliated against for "personally attacking [Ms. Knolls]." He never called to verify that he was not scheduled to work later in the week even though Sunday was only the first day of the week-long schedule. He assumed the message was referencing the whole week. Mr. Harvey did not discuss the schedule with his supervisor or anyone else at Safeway. At that point, he wrote to Mr. Gordon again to inform him of the personnel action taken by Safeway because Mr. Gordon had specifically said in his response to Mr. Harvey's first letter that he would not be retaliated against for raising personnel concerns.

In response to Mr. Harvey's second letter, an executive from Safeway, the president of the northeast division contacted Mr. Harvey to investigate the letter he had sent about being terminated and not being paid properly. After playing phone tag for a few days, Mr. Harvey finally spoke with Mr. Wescott and the two set a meeting for mid-August. Mr. Wescott told Mr. Harvey that he was not terminated from the company. The two disagreed about whether the message given to Mr. Harvey about not being on the schedule indicated that he had been

terminated, but nonetheless Mr. Harvey understood at this point that he was not terminated. It was Mr. Harvey's intention, upon conclusion of the meeting, to go back to work for Safeway.

Given the option by Mr. Wescott, Mr. Harvey chose to return to work at a different store. Mr. Harvey preferred working at a store closer to home and so Mr. Wescott arranged for a position at the Connecticut Avenue (Chevy Chase) store the first week of September. Mr. Harvey intended to start work there as scheduled but suffered from a power and water outage after a storm which disabled him from going to work his first scheduled day. He called the store around 6:00 or 7:00 in the evening to let management know that he was having problems and would be unable to attend work later that evening. He waited to call until then because he had hoped that he would have electricity and water back in enough time to go to work. When Mr. Harvey explained the situation to Mr. Marlow, the assistant manager with whom Mr. Harvey spoke, his exact words according to Mr. Harvey were, "what does [your personal hygiene] have to do with you coming to work?" The conversation ended with Mr. Marlow saying, "[Mr. Harvey] better come to work or else." After his conversation with Mr. Marlow, Mr. Harvey knew that he was still expected to report to work but Mr. Harvey did not choose to find alternative means to take care of his personal hygiene; he preferred to delay his start date by one day.

After not attending his first day of work, Mr. Harvey did not call Mr. Marlow that week to find out the rest of his schedule, though he assumed the schedule started on Sunday and ran through the rest of the week. Mr. Harvey believed that Safeway was going to terminate him based on "everything that had happened to [him]," and it "just got to the point where [he] felt like he couldn't work for Safeway anymore." However, by not reporting for work that week, Mr. Harvey understood that he was in effect terminating himself.

Mr. Harvey signed a document acknowledging receipt of Safeway policies (RX 17). One of the policies was an absenteeism policy (RX 15), which Mr. Harvey claims to have no knowledge of because he signed the papers without reading them. He remembers receiving the document but did not read it upon receipt or later when problems arose concerning his employment.

Since the first week in September, Mr. Harvey has been sending out resumes to apply for jobs. He has not collected unemployment compensation and is being financially supported by his parents. He has not worked for any other employer since then because he has not found a job. He has earned about $2000 doing handyman jobs. He never went to the Safeway in Chevy Chase on Connecticut Avenue.

Respondent's Case

Documentary Exhibits

RX 1 – *See* CX 4 (a).

RX 2 – See CX 4 (b).

RX 3 – Mr. Craig Kesler, an investigator, prepared a memo based on his interview with Mr. Harvey that took place on July 22, 2003, in response to Mr. Harvey's letter dated July 7, 2003. He noted that Mr. Harvey believed store management had knowledge that a frozen food employee was buying outdated meat at a reduced priced. Mr. Harvey did not have first hand knowledge. He did state that one employee in particular had authorized the purchase of dated meat at a discounted price. All of the information he provided came from other employees. Mr. Harvey believed the employee was honest and dedicated to the company.

Mr. Harvey indicated the investigation was not the focus of his letter. He also clarified that when he wrote "…I was the only night stocker in the store that night," he did not mean that he was alone because a cashier was still on duty. He has never been in the store alone.

RX 4 – The weekly work schedule for grocery/night stockers for the week ending August 2, 2003 demonstrates that Mr. Harvey was scheduled to work from 11:00 p.m. until 7:30 a.m. on Sunday, July 27, 2004, Wednesday, July 30, 2003, and Saturday, August 2, 2003.

RX 5 – *See* CX 4 (c).

RX 6 – The weekly work schedule for grocery/night stockers for the week ending August 9, 2003 demonstrates that Mr. Harvey was scheduled to work from 11:00 p.m. until 7:30 a.m. on Sunday, August 3, 2003, Wednesday, August 6, 2003, and Saturday, August 9, 2003.

RX 7 – *See* CX 3.

RX 8 – *See* CX 4 (d).

RX 9 – Effective August 30, 2003, Mr. Harvey, a food clerk, was transferred from store 1668-81 to 4832-85 by Mr. William Wescott. Mr. Wescott signed the form on September 4, 2003.

RX 10 – The weekly work schedule for grocery/night stockers for the week ending September 6, 2003 demonstrates that Mr. Harvey was scheduled to work from 11:00 p.m. until 7:30 a.m. on Sunday, August 31, 2003, Monday, September 1, 2003, Tuesday, September 2, 2003, Wednesday, September 3, 2003, Friday, September 5, 2003 and Saturday, September 6, 2003.

RX 11 – Mr. Clifton Marlow, Assistant Manager for Store #4832 (the Connecticut Avenue store), wrote an e-mail on September 12, 2003 to Mr. Wescott describing the phone call

he received from Mr. Harvey on September 2, 2003 at about 10 p.m. Mr. Harvey told Mr. Marlow that he would be unable to work that night due to loss of electricity in his apartment complex caused by a thunderstorm. Since he had no power, he would not be able to shower before coming into work. Mr. Marlow asked how that would affect Mr. Harvey's ability to work and he responded "that he would smell." Mr. Marlow told Mr. Harvey that he was expected at work and suggested that he be at work because his excuse was unacceptable. Mr. Harvey agreed and stated that he would be in that night.

RX 12 – An e-mail confirmation, dated December 15, 2003, shows that Mr. Harvey was terminated on September 20, 2003 by reason of job abandonment. Mr. Wescott prepared the separation papers. Mr. Harvey's last day worked was listed as July 31, 2003.

RX 13 – *See* CX 4 (e) and CX 5.

RX 14 – Applicable provisions of the Collective Bargaining Agreement between Local 400, chartered by the United Food and Commercial Workers International Union, AFL-CIO-CLC, and Safeway, Inc, effective March 26, 2000 through March 27, 2004. Article 9 describes Night Crew Employees. Section 9.4 provides that "each employee working on the night shift will receive an additional one dollar ($1.00) per hour, which shall be over and above the regular rate of pay for the same or similar day job." Schedule "C" is a wage rate table for full and part time food clerks. The chart indicates that any food clerk with 0 to 3 months of experience is paid at the rate of $6.60 per hour. Schedule "F" provides for variations in the agreement such as "Food Clerks who work a portion of the week as Relief Manager shall receive the rate of Assistant Store Manager for the hours of actual relief."

RX 15 – Safeway's program for Absenteeism from Scheduled Work states that job abandonment occurs when an employee is absent without notice for three consecutive shifts and results in termination.

RX 17 – On May 31, 2003, Mr. Harvey signed an acknowledgement indicating that he received, reviewed, will study and abide by selective provisions and manuals, including Safeway's Program for Absenteeism from Scheduled Work.

RX 18 – On October 11, 2003, Mr. Harvey wrote to the Wage and Hour Division, Employment Standards Administration, DOL, to file a complaint under the FLSA against Safeway. Mr. Harvey complained that from June 3, 2003 until the termination of his employment on July 27, 2003, his paychecks were consistently short six to ten hours every week. He discussed his failed attempts at getting the situation remedied by management who were uncooperative. Mr. Harvey believes Safeway has a practice of paying employees less than the amount employees actually work, which represents a "windfall in money saved because of unaccounted payroll dollars not paid to employees hence more profits for the company."

Mr. Harvey addressed his "termination ordeal," which he believed resulted from his letter of July 7, 2003 to company executives in which he complained about not being paid for the hours worked. On July 21, 2003, he participated in a meeting requested by Safeway's management, where a human resources advisor and his store's assistant manager explained to

him payroll policies and his rate of pay. Mr. Harvey likewise discussed his attempt to document the work of another employee who had forgotten his time card. Mr. Harvey further noted an incident where a new grocery store manager told him that he was doing unacceptable work.

Mr. Harvey described his termination, which he received through a phone message indicating that he was not on the schedule. He responded by again writing to the executives and letting them know he had been terminated. This prompted another meeting with a different human resources advisor, Mr. Wescott, who contacted Mr. Harvey and requested a meeting to address his underpayment issues, perceived termination and potential transfer to a new store. At that time, Mr. Wescott indicated Mr. Harvey had not been terminated; and, he arranged for Mr. Harvey's employment at a different Safeway store.

Mr. Harvey then described how he was unable to report to work on his first scheduled day at the new store because he had no electricity in his apartment and couldn't bathe. When he informed the store manager and asked if he could report the next day, the supervisor responded, "what does that have to do with you coming to work?" The conversation ended with the manager telling Mr. Harvey he "better come to work or else." In Mr. Harvey's opinion, "It became more than obvious to me that Safeway persons surely do not want me in their employment."

RX 19 – On October 20, 2003, Mr. Harvey wrote to the Regional Administrator, OSHA, DOL, to file a complaint under SOX against Safeway. Mr. Harvey described how he was not paid for all of the hours he worked during the two-month period he worked for Safeway. He then set out in detail his circumstances regarding his July 7, 2003 letter, Mr. Gordon's reply letter, his meeting with Ms. Madert and Ms. Knoll, his termination by telephone, his meeting with Mr. Westcott, his reassignment and inability to start his new assignment.[8]

Concerning the underpayment of his hours, Mr. Harvey believed "Safeway is increasing its profits on unaccounted wages from the salaries of employees which are not paid to these employees." Mr. Harvey knew of at least 10 employees that were not paid their weekly wages and had to wait two weeks to get paid hours shorted from their salaries. Other mentally challenged and non-English speaking employees may not be able to even comprehend the discrepancies in their paychecks. Mr. Harvey had heard that Safeway managers received big bonuses for low payroll figures that increased store profits. Mr. Harvey asserted that the Safeway managers and representatives did not appear to be aware of the several federal and state laws they were violating such as the FLSA.

RX 20 – A 2003 calendar.

[8]Mr. Harvey's SOX complaint to OSHA is almost verbatim with his complaint to the Wage and Hour Division. *See* RX 18

Sworn Testimony of Ms. Lucy Madert
(TR, pages 114 to 145)

Ms. Madert is a human resources advisor at Safeway. She has worked for Safeway for seven years and been in the human resources field for thirty years. Ms. Madert oversees human resources issues for approximately 18 stores, which includes answering questions from store managers and employees and investigating other personnel issues.

Mr. Harvey wrote to the corporate offices, specifically to Mr. Robert Gordon, senior vice president and general counsel, in July 2003 about not being paid properly. Mr. Gordon passed the letter (RX1) to Ms. Donna Gwinn who then asked Ms. Madert to handle the situation because the Norbeck Road store was one of the stores for which Ms. Madert had responsibility.

Mr. Harvey's usual shift as a night stocker began at 11 p.m. and ended at 6 or 7 a.m. Ms. Madert met with Mr. Harvey and first assistant manager, Ms. Amy Knolls, on July 21, 2003 at 11 in the evening. During the meeting, Mr. Harvey addressed a) his paychecks in which he had not received pay for all the hours he worked; b) the amount of compensation he was receiving at $6.60 per hour versus the tasks he was doing and the appropriate pay for those particular duties; c) an investigation about loss prevention occurring at the store; and, d) how the Union worked and who his business agent was under the collective bargaining agreement.

First, Ms. Madert explained to Mr. Harvey time and attendance procedures to make sure he knew how his time was accounted for and calculated. She gave Mr. Harvey a check for $121 and asked him whether that amount covered what was owed to him. He stated that the amount was satisfactory. Regarding his rate of pay, Mr. Harvey believed he should be making more than $6.60 per hour plus a $1 premium for working during the night because of his work taking merchandise off of the trucks and stocking shelves. However, Ms. Madert explained that the collective bargaining agreement specified certain job classifications and the corresponding rates of pay. Since Mr. Harvey was hired as a food clerk, he was being paid the rate mandated for a new employee in that position. His duties were within the realm of a food clerk's duties, which included stocking shelves.

Mr. Harvey was also concerned that he should receive relief pay when he was filling in for the Person-in-Charge at the store and holding the keys to the store. Ms. Madert brought that concern to Mr. Wescott's attention who looked into it.

When Ms. Knolls and Ms. Madert were explaining payroll and attendance procedures to Mr. Harvey, he indicated that he did not want to hear about that and that he already understood them. Ms. Madert explained the card swiping system, in which employees swiped their scan cards through the reader at the beginning and end of their shifts, as well as before and after any breaks they may take during the course of their shifts. The next day a computer print out of the employees' time called the exception report is hung in the break room. This gives employees the opportunity to make sure their times are logged in correctly. If an employee finds a problem, he/she would talk with a manager and fill in the correct hours on an exception card, which the manager would then authorize and use to edit the schedule.

Ms. Madert asked Mr. Harvey again if he was satisfied with the voucher he received that evening or whether there were other pay shortages that needed to be addressed. Mr. Harvey told Ms. Madert there were no other issues. Ms. Madert said she would get back to Mr. Harvey on the issue of relief pay. Mr. Harvey also expressed concern over a loss prevention investigation that was ongoing. Because Ms. Madert knew from Mr. Harvey's employment application that he had worked in loss prevention, she assured Mr. Harvey she would set up a meeting between him and the investigator because she thought he may have good information to provide. Finally, though it was not her responsibility, Ms. Madert told Mr. Harvey she would contact the business agent for Local 400 and let him know Mr. Harvey was interested in talking to him. Ms. Madert called the Union business agent after the meeting. On July 23, 2003, Ms. Madert wrote a memorandum commemorating the meeting (RX 2).

A head night stocker supervises the night stockers until about 4 a.m. when a grocery manager arrives. The head night stocker gets an additional $25 per week; however, if someone fills in for the head night stocker, there is no additional pay. Should an employee fill in for the night stocker for an entire week, he would then be eligible for the additional pay. The collective bargaining agreement (RX 14) under Article 9 (on page 14) explains the pay schedule for night crew employees as stated by Ms. Madert. Schedule C is a chart with the classifications of employees and mandates pay for each food category. It indicates that a food clerk with 0 to 3 months of grocery experience would start at $6.60 per hour. Schedule F of the Agreement (on page 45) describes Variations in the Agreement. The section addressing food clerks accurately states Ms. Madert's understanding of relief pay.

Ms. Madert received a memo from Mr. Craig Kesler, the loss prevention security investigator, informing her that he had met with Mr. Harvey as she requested (RX 3). Mr. Harvey did not have any personal knowledge of the situation under investigation.

Ms. Madert sent a letter to Mr. Harvey along with a check for his relief pay on December 22, 2003 (RX 13). There was a delay in mailing the check because after Mr. Harvey filed his Sarbanes-Oxley complaint, Ms. Madert requested Mr. Harvey's personnel file from Mr. Wescott. When she reviewed the file, she found the check sitting in Mr. Harvey's file that had been cut to compensate him for relief pay due. This was the last correspondence Ms. Madert had with Mr. Harvey.

Ms. Madert was not aware that Mr. Harvey's complaints had something to do with securities laws and fraud against the shareholders until after Mr. Harvey wrote to corporate executives the second time. She did not know at the time of her meeting with him. Based on Mr. Harvey's letters to the corporate executives, Ms. Madert believed that he was displeased with her resolution of the issues; however, she treated him as she would any other employee.

[Cross-examination] Ms. Madert was operating under the premise that Mr. Harvey swiped his card every time he came and left the store. She believed the mistake in payroll arose from his night hours that started during one pay period and ended during the subsequent pay period. The assistant manager would be responsible for manually inputting those hours correctly.

Ms. Madert did not think that Mr. Harvey had witnessed the issue under investigation by loss prevention because the memo did not indicate so to her recollection.

Ms. Madert agreed with Mr. Harvey that he should have been given relief pay when he was handed the keys to the store and was responsible for closing the store and that is why she asked Mr. Wescott to look into the situation. The collective bargaining agreement specifically states that a food clerk who is given those added responsibilities is entitled to relief pay. A non-designated non-trained food clerk should not be handed relief work but in Mr. Harvey's case he was. Ms. Madert does not know how the prior week adjustment for past due relief pay in the amount of $62.75 was calculated.

[ALJ examination] New Safeway employees should be: a) trained on the procedure for verifying hours worked the previous day, which includes reviewing the exceptions report; and, b) given an orientation where employees are taught how to properly clock in and out. When Ms. Madert tried to explain the exceptions procedure to Mr. Harvey during their July 21 meeting, he told her she did not need to pursue the discussion. Mr. Harvey told Ms. Madert about another night stocker who was experiencing the same problems of being improperly compensated.

[Redirect examination] Safeway provides an orientation or training session for its employees at the beginning of their employment. Mr. Harvey should have gone through a two to four hour computer based training program at the store level.

Sworn Testimony of Mr. William Wescott
(TR, pages 146 to 202)

Mr. Wescott is a human resources advisor for Safeway. He provides support to management and employees on human resources related issues, including work performance, assisting management on dealing with work performance issues, handling employee inquiries regarding pay and classification and dealing with the Union on issues they raise. Mr. Wescott's territory includes 17 stores in the Northern Virginia area. Mr. Wescott has worked for Safeway for 20 years, 16 years of which were in human resources with 7 of those years as a human resources advisor.

Mr. Wescott's supervisor, Ms. Donna Gwinn, Human Resources Director, asked him to contact Mr. Harvey regarding a letter he had sent to the division president on July 29, 2003, which addressed his concerns at the Rockville, Maryland store where he had worked. Mr. Wescott left Mr. Harvey a phone message and after a few return calls back and forth, they finally spoke on August 11 and planned to meet on August 14. Mr. Wescott also wrote a letter to Mr. Harvey indicating the company's interest in speaking with him regarding the issues he raised in his July 29 letter (RX 8).

Also in attendance at the meeting between Mr. Wescott and Mr. Harvey was Ms. Barbara Pemron, the human resources advisor for another district. Mr. Wescott asked her to sit in on the meeting so that a neutral person was present. They discussed the issues raised by Mr. Harvey in his letter. First, Mr. Wescott informed Mr. Harvey that he had not been terminated and explained the reason for the phone message from Ms. Tamara Barnes informing him not to come

to work. According to Mr. Wescott, the schedule was published on July 26, 2003 and Mr. Harvey called in sick that day. Since he typically worked the following evening, a Sunday, a note was left for Ms. Barnes indicating that if Mr. Harvey reported to work, he should be told that he is not scheduled. Mr. Mercer, the store manager, led Mr. Wescott to believe that Ms. Barnes took it upon herself to give Mr. Harvey a courtesy call so that he did not unnecessarily travel into work.

Mr. Harvey told Mr. Wescott that he did not seek clarification from Ms. Barnes after she left him the phone message because he was angry at the time and assumed he had been terminated. Mr. Harvey, however, was on the schedule for 24 hours later that week. Mr. Mercer relayed this sequence of events to Mr. Wescott and explained that Mr. Harvey was not scheduled to work that Sunday because due to a slowing of sales after the July 4th holiday, the workforce at Safeway and in particular, the night crew, was reduced. Prior to that time, for a number of weeks, Mr. Harvey had worked overtime to prepare the store for a business review. When Mr. Wescott reviewed the work schedule (RX 4), it did not seem "to be out of norm."

The work schedule beginning July 27, 2003 and ending August 2, 2003 for the store that Mr. Mercer manages on Norbeck Road in Rockville, Maryland showed that Mr. Harvey was on the schedule to work that week (RX 4). The night stockers are scheduled in such a way that if a night stocker is scheduled for Sunday, July 27, he is due to report on Saturday, July 26 at 11 p.m. and his shift would end Sunday morning at 7:30 a.m. So, in Mr. Harvey's case, the July 27th phone message meant that he was not on the work schedule for the Monday shift, which was to begin at 11 p.m. Sunday evening and carry over to Monday morning.[9]

Ms. Barnes did not tell Mr. Harvey when he was to report to work later in the week and he did not report to work or call to indicate his ability to work the remainder of the week. Safeway's policy is that the employee is responsible for checking the schedule to be certain when to report to work. The next shift Mr. Harvey was scheduled for was Wednesday, July 30, which required him to report Tuesday evening at 11 p.m. His only other scheduled day that week was Saturday, August 2, 2003, which required him to report to work at 11 p.m. on Friday evening. Mr. Harvey did not report for either of those shifts.

Mr. Mark Mercer, the store manager, never called to find out where Mr. Harvey was when he did not report into work. Mr. Wescott does not believe that is something managers typically do.

In preparation for his August 14 meeting with Mr. Harvey, Mr. Wescott contacted Mr. Mercer and asked him for information about Mr. Harvey, including whether he had been terminated. The manager's response was no, Mr. Harvey was not terminated. This conversation occurred on August 8 or 9, a few days after Mr. Wescott had been instructed to deal with this matter. After relaying this information to Mr. Harvey, Mr. Wescott asked him about his intentions with Safeway. Mr. Harvey indicated a willingness to continue to be employed by the company, preferring a reassignment.

[9]RX 4 shows that for Monday, July 28, 2003, Mr. Harvey was "off," which means he did not have to report to work at 11:00 p.m. on Sunday, July 27, 2003.

They also discussed the underpayment concerns Mr. Harvey had brought to Ms. Madert's attention. Mr. Harvey explained that he was familiar with the scan card and exceptions report from his orientation but that no one fully explained how it worked until Ms. Madert did. Mr. Harvey reiterated to Mr. Wescott that he believed he had been clocking in and out properly and that the company was still not paying him for all of the hours documented. Mr. Harvey noted that the only unresolved pay issue was whether he was entitled to relief pay. Mr. Wescott agreed that if Mr. Harvey was left in charge of the store during the hours between 6 a.m. and midnight, when the store was considered open, he was entitled to additional pay for that time, whether or not he was appropriately qualified for that responsibility. Mr. Wescott told Mr. Harvey he would look into the matter.

Mr. Harvey next brought up concerns he had regarding statements by the new grocery manager, Cathy. Prior to July 27, 2003, she had criticized some of this work and asked whether he thought the store could really continue to employ five night stockers. This conversation played a role in Mr. Harvey forming the belief that he was terminated when Ms. Barnes called him.

Mr. Harvey and Mr. Wescott briefly spoke about the loss prevention investigation. Mr. Harvey indicated that he had no direct knowledge but based upon his interactions with the employee under investigation, he did not believe the employee was at fault. From a secondary source, he had learned that the employee under investigation was acting under approval from management. Mr. Wescott explained to Mr. Harvey that a fact-finding investigation was taking place and all that management could do was try and gather the truth. He also told Mr. Harvey that the individual under investigation could file a grievance to contest it.

Concerning his observations about store efficiency, Mr. Harvey was no longer interested in discussing the issue. Ms. Lori Raya had responded via letter, dated August 5, 2003, to Mr. Harvey's satisfaction (RX 5).

Mr. Harvey was also scheduled to work three days on the schedule for the Norbeck store ending August 9 (RX 6). Mr. Mercer told Mr. Wescott that Mr. Harvey did not attend work that week either. Safeway policy deemed missing three scheduled shifts to be job abandonment, so on Sunday, August 3, Mr. Harvey had missed his third scheduled day. Nonetheless, Mr. Mercer did not remove Mr. Harvey from the schedule for his remaining shifts that week.

Mr. Wescott's advice to a manager in Mr. Mercer's position is when an employee does not report to work as scheduled for three shifts in a row and does not contact the company at all, that person is subject to termination. Typically, if a person misses three scheduled shifts, the following week they are removed from the schedule and within two weeks, Mr. Wescott instructs the manager to submit separation paper work for job abandonment. In the rare exceptional situation, Safeway will contact an employee who has not reported for work for a number of days when the employee has worked for the company a long time and has a very reliable attendance record. Usually, Mr. Wescott does not suggest the store manager call an employee who has abandoned the job because the policy is clear. Mr. Wescott's understanding of Safeway's policy regarding absenteeism and job abandonment is accurate.

Mr. Harvey was not terminated despite his repeated absences from work because on Sunday, July 26, Mr. Harvey called in sick. Then, through the August 6th correspondence, Mr. Wescott became aware of Mr. Harvey's belief that he had been terminated. Because Mr. Harvey provided Safeway with notification about his whereabouts and his understanding that he had been terminated, Safeway allowed him to return to work. Had Mr. Harvey called Mr. Mercer the Monday after he received the phone message about not being on the schedule, he would have learned that he was not terminated

Mr. Wescott spoke with Mr. Harvey about his desire to return to the store location where he had worked or opt for a position at an alternate location. Mr. Harvey told Mr. Wescott where he would prefer to work geographically, specifying his desire to work in a different district based on his perception that the new grocery manager had a friendship with the district manager. After that meeting, Mr. Wescott spoke with other human resource advisors outside of Ms. Madert's territory and learned through Ms. Mary Dockery that a store was opening on Connecticut Avenue in Washington, D.C. Mr. Wescott contacted that store manager, Mr. Bob Weschler, to find out if the store was in need of night stockers as he had learned. Mr. Weschler was in favor of bringing on another night stocker, and so Mr. Wescott promised to get back to him after he spoke with Mr. Harvey about the assignment.

Mr. Wescott again spoke with Mr. Harvey on August 28, providing him with the store location, manager and contact number and asked him to contact the store manager on Saturday, August 30 for the work schedule that would be posted the following week. Mr. Wescott also explained to Mr. Harvey that he would be sending him a relief pay check for $62.50, which represented five hours of pay at the assistant manager's pay rate of $19.15 an hour less the hourly pay he already received for that time. Mr. Harvey continued to question the amount of night stocker relief pay he believed was due to him, and Mr. Wescott indicated that he did not think Mr. Harvey was entitled to it but would look into it more.

Mr. Wescott submitted a transfer form for Mr. Harvey on August 30, 2003 (RX 9). He had signed it and faxed it to the employee service center on September 4, 2003. The schedule for the week ending September 6 at the Connecticut Avenue store showed that Mr. Harvey was to work 48 hours on the night shift with Thursday being his day off (RX 10). Mr. Wescott learned from Mr. Weschler when he called him September 4 or 5 that Mr. Harvey had not reported to work yet. Mr. Weschler told Mr. Wescott that Mr. Harvey had called an assistant manager and said that he could not report to work. Mr. Wescott requested details of that conversation from the assistant manager, Mr. Clifton Marlow. Mr. Marlow sent Mr. Wescott an e-mail explaining the conversation he had with Mr. Harvey, in which Mr. Harvey said he could not work because he was unable to bathe due to a power outage (RX 11). Mr. Marlow asked Mr. Harvey how that affected his ability to work and Mr. Harvey stated he was concerned about his hygiene. Mr. Marlow did not believe that was a valid reason to miss work and by the end of the conversation, Mr. Harvey agreed to report to work. Mr. Harvey did not report to work on September 2, 3, 5, or 6.

Mr. Wescott had no further correspondence with Mr. Harvey. The only other conversation he had regarding Mr. Harvey's employment was with the human resources advisor for the district responsible for the Connecticut Avenue store, who asked about Mr. Harvey's

work status based on an internal report she generated. Mr. Wescott told her since Mr. Harvey had missed three scheduled shifts, he would take care of the paperwork to terminate Mr. Harvey's employment. Mr. Wescott submitted an electronic form that separated Mr. Harvey from Safeway's payroll system. He then received a confirmation from the employee service center confirming Mr. Harvey's separation because of job abandonment on September 20, 2003 (RX 12).

Mr. Wescott followed up on Mr. Harvey's relief pay by speaking with Mr. Mercer. Although Mr. Harvey could not recollect the specific dates to which he was entitled to relief pay, because he estimated he was left in charge on four or five occasions, the company paid him for one hour of relief pay for five days. The check was dated August 29, 2003 and issued to Mr. Wescott at that time; however, he placed it in Mr. Harvey's case file and forgot about it until Ms. Madert requested the case file and he discovered he had not mailed it. Ms. Madert agreed to send Mr. Harvey the check at that time.

At no point during their conversation did Mr. Harvey raise concerns about violations of securities laws, violations of the SEC or any commission of fraud on Safeway shareholders. Mr. Wescott treated Mr. Harvey like any other employee and believed that Mr. Harvey was sincere when he stated his interest in continuing to be employed with Safeway at their August 14 meeting.

[Cross-examination] Ms. Barnes called Mr. Harvey to inform him not to come to work because Mr. Harvey was not scheduled on a day that he was usually scheduled to work and he had called in sick the prior few days so that he may not have had the opportunity to review the newly published schedule for the week. She called him on July 27 around 6 in the evening to tell him not to come into work that Sunday evening at 11 p.m. Based on Mr. Mercer's explanation of why Mr. Harvey's schedule was reduced to only 24 hours that week, Mr. Wescott believes that the Norbeck store had gone from a busy period with a business review to a dead period during the summer months, which was typical in the Washington, D.C. area. Mr. Harvey was a part-time employee and his weekly hours were subject to change. Safeway tries to provide at least 35 hours a week. Even if the individual's weekly total is 40 hours or more, he is still considered a part-time employee.

Ms. Knolls left a note on July 27th indicating that if Mr. Harvey reported for work, Ms. Barnes should let him know that he is not scheduled to work that shift. Mr. Wescott believes the note triggered Ms. Barnes to let Mr. Harvey know ahead of time because he had not been into work since the schedule had been posted. Mr. Harvey wanted Mr. Wescott to know that he believed someone asked Ms. Barnes to call him and he was concerned about her suffering ramifications if management believed otherwise.

Mr. Wescott actually requested the check for relief pay on August 27 or 28, 2003 and received it shortly thereafter, but he did not send it. As a result, the check sat in Mr. Harvey's file until Ms. Madert found it after she requested his file several months later.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Specific Findings

Based on the evidence in the record and the probative sworn testimony, I make the following findings of fact.

June 2, 2003 to June 18, 2003. Mr. Harvey begins working for Safeway as a night stocker, earning $6.60 per hour plus a $1 premium for working the night shift. Due to an upcoming store visit, Mr. Harvey agrees to work more than 40 hours a week. Shortly after his arrival, Mr. Harvey starts moving pallets of merchandise from trucks into the store. On a few occasions, Mr. Harvey is left in charge of the store during the last hour it is open (11:00 p.m. to 12:00 a.m.).

June 19, 2003 to June 26, 2003. Mr. Harvey receives a paycheck that he believes does not compensate him for all of the hours he worked the prior week. He speaks with an assistant manager and eventually the manager, Mr. Mercer, about the situation. The paycheck that Mr. Harvey receives on June 26, 2003 contains an adjustment of pay from the prior week.

June 26, 2003 to July 7, 2003. Mr. Harvey continues to experience problems receiving pay for all of the hours he worked. On one occasion, when Mr. Harvey is delayed in opening a delivery door while trying to find a key, a delivery truck driver uses obscene language towards him.

July 7, 2003, Mr. Harvey writes a letter to Safeway's corporate counsel, Mr. Gordon, explaining the various problems he has experienced. His weekly paychecks are consistently short. If computers are the problem, Mr. Harvey queries how many other employees could be similarly affected and not realize the problem. Mr. Harvey was dissatisfied with the assistant store manager's response to the paycheck issue. Mr. Harvey complained about the additional responsibilities he was being given, including moving pallets and being in charge of the store, without an adjustment in his paycheck. Mr. Harvey had been cursed by a truck driver. He was concerned about the unfair treatment two employees received concerning allegations that they sold outdated meat. Additionally, Mr. Harvey gave examples of operational inefficiencies. In response to his letter, Mr. Harvey anticipated either action by Safeway to deal with the noted problems or his termination.

July 17, 2003. Mr. Gordon replies to Mr. Harvey's correspondence. He confirms Safeway's policy of encouraging its employees to raise the type of issues presented by Mr. Harvey. Such good faith reports will not result in any adverse personnel action. Mr. Gordon indicates Mr. Harvey's concerns have been forwarded for resolution.

July 21, 2003. Mr. Harvey meets with the assistant manager of the store and a human resources advisor, Ms. Knolls and Ms. Madert, to discuss his payroll concerns. Ms. Madert explains some of the company's problems with its computer but advises Mr. Harvey that he is responsible for ensuring the accuracy of his weekly paycheck. She further indicates that the union contract sets his hourly wage.

July 23, 2003. Ms. Madert advises Mr. Harvey that the store's collective bargaining agreement sets the starting hourly rate of a night stocker at $6.60, with a one dollar premium for night work.

July 24, 2003 to July 27, 2003. Since the store visit has been completed, and due to the drop in business due to summer season, Mr. Harvey's weekly hours are reduced down to about 24 hours a week. Due to an illness on July 24 and July 25, Mr. Harvey does not work and is not aware of the next week's schedule. Based on his prior experience, Mr. Harvey plans to return to work around 11:00 p.m. on July 27, 2003.

July 27, 2003. In the evening of July 27, 2003, prior to his typical reporting time, Ms. Barnes, a person in charge, leaves Mr. Harvey a phone message advising him not to return to work because he is not on the schedule. Based on that message, Mr. Harvey believes that he has been terminated as a Safeway employee and does not report to work anymore.

July 28, 2003 through August 8, 2003. Mr. Harvey remains on the weekly schedule at Safeway, for 24 hours a week.

July 29, 2003. Believing that he has been terminated as an employee, Mr. Harvey writes a letter to inform the president of Safeway that despite Mr. Gordon's assurances to the contrary, he has been terminated. He describes the events and meetings that occurred since his July 7, 2003 letter to Mr. Gordon and expresses his belief that as a result of his activities he received a phone message on July 27, 2003 terminating his employment with Safeway. Mr. Harvey reminds the company president that under SOX termination of an employee who reports possible fraud against shareholders is illegal. Mr. Harvey also includes a complaint about the new grocery manager and requests senior executive intervention on behalf of two other employees who Mr. Harvey believes have suffered unfair adverse personnel actions.

Mid-August 2003. Due to Mr. Harvey's July 29, 2003 letter, Mr. Wescott is assigned to address Mr. Harvey's complaints. He sets up a meeting with Mr. Harvey to clarify that Safeway did not terminate him. Mr. Wescott offers Mr. Harvey the opportunity to transfer to another store, which Mr. Harvey accepts. After the meeting, Mr. Wescott finds Mr. Harvey a position at another store and gives the information about the new assignment to Mr. Harvey.

September 1, 2003 to September 8, 2003. Mr. Harvey is scheduled to work at the Connecticut Avenue store beginning at 11:00 p.m. on September 2, 2003. Sometime between 6:00 and 10:00 p.m., Mr. Harvey calls the store and speaks to the assistant manger, Mr. Marlow, to let him know that he will not be able to come to work that night because he has no electricity and cannot take care of his personal hygiene. He requests that he be permitted to wait a day before he reports to work. Mr. Marlow finds the excuse unacceptable and tells Mr. Harvey that he expects to see Mr. Harvey at work. Mr. Harvey does not go to work that night and makes no other contact with Mr. Marlow, Mr. Wescott, or Safeway. Mr. Harvey remains on the schedule at the new store for one week.

September 20, 2003. After learning that Mr. Harvey never went to work at the new Safeway store and thus missed all six of his scheduled shifts the first week of September, Mr. Wescott completes the separation paperwork terminating Mr. Harvey pursuant to the company's absenteeism policy. After an employee has three consecutive, unexcused absences, Safeway will terminate his or her employment on the basis of job abandonment.

Issue No. 1 – Motion to Dismiss[10]

At the hearing, after the completion of Mr. Harvey's case-in-chief, Respondent's counsel presented a Motion to Dismiss the SOX complaint (TR, page 109). Counsel asserted that Mr. Harvey's allegations of wage violations of the FLSA were not protected activities under SOX because they did not involve violations of a federal law relating to fraud on the shareholders. In particular, Mr. Harvey did not report any violations of securities laws or cooperate in an investigation relating to securities. His simple assertion that the FLSA is a law relating to fraud against the shareholders is insufficient to establish that he engaged in protected activity. SOX was not intended to capture every complaint an employee might have as a violation of the Act.

In response, Mr. Harvey objected to the Motion to Dismiss because he reasonably believed that he had reported information involving a violation of federal law (Fair Labor Standards Act) that caused a fraud on the shareholders. When Mr. Harvey complained to store management and wrote a letter to company executives about not being paid for the hours he worked, he was reporting a violation of the FLSA. The violation of that law caused improper accounting of company funds and resulted in additional costs to the company, which adversely affects the investment of its shareholders.

Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not contain a section pertaining to such a motion to dismiss, 29 C.F.R. § 18.1 (a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. In turn, FED. R. CIV. P. 12 (b) (1), addresses a motion to dismiss for lack of subject matter jurisdiction. The courts recognize two approaches in considering a 12 (b) (1) motion.[11] The first consideration of a 12 (b) (1) motion is whether the pleading, or complaint, on its face is sufficient. The second consideration under 12 (b) (1) concerns a factual consideration of the complaint. In this "factual" analysis, no presumption of truthfulness applies to the allegations in the complaint. Instead, I may rely on affidavits and other documents submitted in support of the motion. Due to the timing of the Motion to Dismiss, after the presentation of Mr. Harvey's evidence, I will focus on the factual, rather than facial, sufficiency of his SOX complaint.

The first requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, U.S. Department of Labor, ("Secretary") has broadly defined protected activity as a report of an act, which the complainant reasonably believes is a violation of the subject statute. The standard for determining whether a

[10]At the hearing, I deferred a decision on this motion and gave the parties an opportunity to address it in their closing briefs.

[11]*See Ohio National Life Insurance Co. v. United States*, 922 F.2d 320 (6th Cir. 1990).

complainant's belief is reasonable involves an objective assessment and the allegation need not be ultimately substantiated. *Minard v. Nerco Delamar Co*., 92 SWD 1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must at least "touch on" the subject matter of the related statue. *Nathaniel v. Westinghouse Hanford Co*., 91 SWD 2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and *Dodd v. Polsar Latex*, 88 SWD 4 (Sec'y Sept. 22, 1994).

The implicit purpose of the employee protection provisions of SOX, to encourage the reporting of matters involving or related to violations of any federal law or SEC violation, regulation, or standard concerning fraud against the shareholders, also affects the scope of protected activity. 18 U.S.C. §1514A. The Supreme Court noted in a parallel statute, that the statute's language must be read broadly because "[a] narrow hyper-technical reading" of the employee protection provision of the Act would do little to effect the statute's aim of protecting employees who raise safety concerns. *Kansas Gas & Electric Co.*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986). Such statutes have a "broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984). As a result, the courts and the Secretary have broadly construed the range of employee conduct which is protected by the employee protection provision contained in nuclear and environmental acts. *See S. Kohn, The Whistle Blower Litigation Handbook*, pp. 35-47 (1990).

Although the above principles were developed in environmental whistleblower cases, the underlying purpose for whistleblower protection and associated principles are readily adaptable to SOX cases. Consequently, a protected activity under SOX has three components. First, the report or action must involve a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complainant must communicate his safety concern to either his employer, the federal government or a congressional member.

In addressing the Motion to Dismiss in Mr. Harvey's case, the central focus relates to the first component of a protected activity. The fundamental protected activity under SOX involves an employee providing information to supervisory authority based on a reasonable belief that at least one of six SOX violations has occurred. Under the statute, 18 U.S.C. § 1514A (a) (1), the subject matter of that information, or the purported SOX violation, must relate to at least one of the following specific categories:

1. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1341, Frauds[12] and swindles. This provision establishes that use of the Post Service or private or commercial interstate carrier as a means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

2. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1343, Fraud by wire, radio, or television. This provision establishes that use of wire, radio, or television

[12]Fraud is defined as "false representation of a matter of fact. . .which is intended to deceive another so that he will act upon it to his legal injury." BLACK'S LAW DICTIONARY 788 (4th ed. 1968).

communication as means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

3. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1344, Bank fraud. This provision establishes that executing a scheme or artifice to defraud a financial institution is a felony crime punishable by not more than thirty years imprisonment.

4. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1348, Securities fraud.[13] This provision establishes that executing a scheme or artifice a) to defraud any person in connection with any security of an issuer of a class of securities registered under Section 12 of the Securities Exchange Act or that is required to file reports under Section 15 (d) of the Securities Exchange Act; or b) to obtain by means of false or fraudulent pretenses any money or property in connection with the purchase of such security identified in a) above is a felony crime punishable by not more than twenty-five years imprisonment.

5. Any rule or regulation of the Securities Exchange Commission.

6. Any provision of federal law relating to fraud against shareholders.

Based on the presented evidence and my findings of fact, the first five types of SOX violations are not applicable in this case. As a result, I must determine whether any, or all, of Mr. Harvey's complaints about the underpayment of his weekly wages, to the assistant store manager, store manager, corporate counsel or company president involve the sixth category of SOX violation – a provision of federal law relating to fraud against shareholders. In turn, that determination requires consideration of whether an employer's actions or omissions which may violate the Fair Labor Standards Act[14] constitute violations of federal law relating to fraud against shareholders. For the reasons set out below, while complaints of systemic violations of FLSA might reach the necessary magnitude to effectively perpetrate a fraud on shareholders, I conclude Mr. Harvey's particular reports of discrepancies in his weekly paychecks do not constitute protected activities under SOX.

As a first step, I turn to a brief consideration of the two statutes. The Fair Labor Standards Act, 29 U.S.C. §§ 201 to 219, as amended, provides for minimum standards for both wages and overtime entitlement, and spells out administrative procedures by which covered work time must be compensated. Its central focus is employee compensation and not the prevention of fraud against shareholders. In contrast, the Sarbanes-Oxley Act, is a prophylactic federal law aimed at preventing fraud against shareholders. As set out in the SOX preamble, Congress imposed additional, specific legal requirements and standards on corporations, directors, senior financial officers, lawyers, and accountants to protect shareholders by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws and for other purposes. For example, SOX includes Section 302 (corporate officer certification

[13]This criminal provision was added by Section 807 of the Sarbanes-Oxley Act (2002).

[14]Although Mr. Harvey filed a FLSA complaint with the U.S. Department of Labor, the final resolution of his complaint, and whether an FLSA violation was established, is not in the record.

that a financial disclosure is accurate and does not contain any untrue statement of material fact), Section 401 (enhanced disclosure requirements for mandated financial reports), and Section 406 (code of ethics for senior financial officers).

Despite these contrasting statutory purposes, an argument may be made that in light of SOX's mandate for corporate accounting accuracy, a complaint about incorrect withholding of employees' wages in violation of FLSA within a publicly traded company draws in the FLSA as a federal law which includes a concern about fraud against shareholders. That is, Safeway's under-compensation of its employees could impermissibly alter the accuracy of its financial disclosures mandated by SOX.

While this presentation has some logical appeal, the connection between individual FLSA violations and SOX becomes tenuous upon close examination of SOX. Specifically, Section 302 establishes a requirement for the accuracy of material facts relating to finances. This provision demonstrates Congress' intention to protect shareholders by requiring accurate reporting of significant information concerning a corporation's financial condition.

In light of that congressional intention, Mr. Harvey's reports of the underpayment of his wages fail to reach the requisite level of materiality. Although understandably significant to Mr. Harvey, the shortages in his weekly paycheck of up to eight hours at an hourly rate of $6.60 to $7.60 an hour over the course of four weeks, if uncorrected, would have a microscopic, if any, effect on any financial report prepared by Safeway for the benefits of its shareholders. Additionally, since Safeway attempted to remedy Mr. Harvey's underpayments in a timely manner, its financial reports were not likely affected by the temporary wage shortages.[15]

In terms of systematic wage underpayments by Safeway, Mr. Harvey asserted in his October 20, 2003 complaint to the Secretary that based on his wage problems and the inaccurate wage payments of at least ten other employees "it appears Safeway is increasing its profits on unaccounted wages from the salaries of employees which are not paid to these employees." However, in the June and July 2003 correspondence that represents his alleged protected activities, Mr. Harvey did not include factually or reasonably viable complaints of company-wide wage underpayments.

In his June 2003 complaints to the assistant store manager and store managers, Mr. Harvey presented only concerns about his own pay. Likewise, in his July 2003 letters to Safeway executives, Mr. Harvey only provided details about his own wage shortfall and a wage issue for one other employee while tangentially raising the possibility of a broader wage accounting problem without any specificity. In his July 7, 2003 letter to corporate counsel, Mr. Harvey simply asked Mr. Gordon to consider whether other employees could be experiencing the same underpayment problem. In his July 29, 2003 letter to the president of Safeway, Mr. Harvey merely commented he agreed with Ms. Madert's suggestion that he keep track of his hours because he and other employees were not being paid for hours worked.

[15]By the time of Mr. Harvey's July 21, 2003 meeting with Ms. Madert, Safeway had paid him for the missing hours to his satisfaction.

In summary, Mr. Harvey's personal wage payment problems did not have necessary magnitude to raise a concern about fraud against the shareholders of Safeway. Additionally, Mr. Harvey's personal experience over the course of a couple of weeks with Safeway and an antidotal report of one other employee's wage concerns did not provide an objectively reasonable factual foundation for an additional complaint about systematic wage underpayment. As a result, Mr. Harvey's wage underpayment complaints to store managers and company executives relating to the FLSA did not include an objectively reasonable complaint that Safeway was also engaged in a significant, material and company-wide underpayment of its employees to the extent a fraud was being perpetrated on its shareholders. Since his wage complaints did not relate to federal law involving shareholder fraud, Mr. Harvey has failed to establish one of the necessary elements – a SOX violation - for proving that he engaged in protected activity. Accordingly, Respondent's Motion to Dismiss Mr. Harvey's October 2003 SOX discrimination complaint must be granted.

Case-in-Chief

Although I have granted the Respondent's Motion to Dismiss, I will nevertheless proceed to adjudicate the remaining portion of Mr. Harvey's complaint as though his wage discrepancy reports were considered protected activities under SOX. Because the Sarbanes-Oxley Act was only recently enacted, applicable precedent is almost non-existent. Therefore, for purposes of judicial efficiency, and in the event appellate courts eventually conclude that a reported violation of FLSA is a *per se* violation of a federal law relating to fraud against shareholders, I will continue with the consideration of the remaining portion of Mr. Harvey's SOX case-in-chief.

As previously noted, Subsection 1514A (a) of the Act and 29 C.F.R. § 1980.102 of the implementing regulation prohibit a company subject to SOX from discharging, demoting, suspending, threatening, harassing or in any manner discriminating against an employee in the terms and conditions of employment because an employee engaged in a SOX protected activity. By reference,[16] SOX incorporates the procedural provisions and rules of the employee protection provisions of the Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121 (b). Under 449 U.S.C. § 42121 (b) (2) (B) (iii) and 29 C.F.R.. § 1980.109 (a), to establish that a respondent has committed a violation of the employee protection provisions of SOX, a complainant must prove by a preponderance of the evidence that an activity protected under SOX was a contributing factor in the adverse or unfavorable personnel action alleged in the complaint. Courts have defined "contributing factor" as "any factor which, alone, or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action, *Marano v. U.S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). Thus, based on these principles, to establish a violation of SOX, a complainant must prove three elements: 1) protected activity; 2) adverse or unfavorable personnel action; and 3) causation in terms of a contributing factor. Having previously discussed the first element, protected activity, I turn to the second element of entitlement, adverse personnel action.

[16] 18 U.S.C. § 1541A (b) (2) (A).

Issue No. 2 – Adverse Personnel Action

Based on the allegations in his October 2003 SOX complaint, Mr. Harvey claims to have suffered the ultimate adverse personnel action, twice. First, on July 27, 2003, he received a phone message indicating that he should not come into work because he was not on the schedule, which he believed was a termination action. Second, after he was reassigned to a new store, in the first week of September 2003, an assistant store manager refused his request to delay his start of work by one day due to personal hygiene problems which caused Mr. Harvey not to report to work. Mr. Harvey considers this second incident a constructive discharge. For the reasons discussed below, I find neither incident alleged in Mr. Harvey's SOX complaint represents an adverse personnel action.

At the same time, the evidentiary record provides support for a finding that Safeway took an unfavorable personnel action against Mr. Harvey on September 20, 2003.

July 27, 2003

Reviewing the events leading up to the July 27, 2003 phone message helps place into context Mr. Harvey's state of mind at that time and provides some understanding for his subjective conclusion that he had been terminated. Concerned about the consistent shortfall in his weekly paycheck, somewhat upset by the grocery manager's lack of concern, and apparently dissatisfied with Ms. Knoll's explanation about computer errors, Mr. Harvey authored his July 7, 2003 letter to the Safeway's corporate lawyer. In the letter, he hinted at his state of mind by indicating that one of the possible reactions he anticipated due to his correspondence was the termination of his employment by the company. Although Mr. Gordon seemed to react favorably to the letter and tried to alleviate Mr. Harvey's termination concerns, Mr. Harvey had also heard a rumor that Ms. Knoll was angry about inclusion of her letter of explanation in his July 7, 2003 letter to corporate counsel. Additionally, just before July 27th, the new grocery manager had questioned the quality of Mr. Harvey's stocking work and suggested Safeway couldn't keep all its night stockers. Thus, on July 27, 2003, when Mr. Harvey heard that Ms. Knoll wanted him informed the he should not to report to work because he wasn't on schedule, he assumed that he had been terminated.

However, despite Mr. Harvey's state of mind, which may also explain his failure to seek any type of clarification from Mr. Mercer, the store manager, about his employment situation and his subjective termination assumption, the preponderance of objective evidence demonstrates that Safeway did not terminate Mr. Harvey's employment on July 27, 2003. First, on its face, the simple phone message by Ms. Barnes did no more than pass on to Mr. Harvey the message by Ms. Knolls not to come to work at 11:00 p.m. on July 27, 2003 because he wasn't on the schedule. Second, though Mr. Harvey subjectively interpreted that message as a notice of termination, in fact, Ms. Knoll had not completely removed him from the schedule; he remained assigned to several shifts as a Safeway night stocker for another two weeks after the July 27th phone message.

Additionally, although understandable, Mr. Harvey's subjective interpretation of a termination by Ms. Knolls was not objectively reasonable. While Ms. Knolls, an assistant store

manager, might have been unhappy with his July 7, 2003 letter, Mr. Harvey had received assurances from Safeway's corporate counsel that he would not be terminated for raising his concerns. Further, as evidence of the company's good faith response, Mr. Gordon's intervention lead to the July 21st meeting with Ms. Madert and Ms. Knolls. The focus of that meeting was forward-looking, with the intention to resolve Mr. Harvey's pay issues. After that meeting, on July 22, July 23, and July 24, Mr. Harvey worked at Safeway without any apparent interference from the assistant store manager, Ms. Knolls.

More importantly, another significant event, which occurred in mid-August 2003, definitively undermines Mr. Harvey's assertion in his October 2003 SOX complaint that he suffered an adverse personnel action on July 27, 2003. When Mr. Wescott met with Mr. Harvey in mid-August 2003, he explained that the July 27, 2003 phone message simply meant that he wasn't on the schedule that night. He told Mr. Harvey that for the following two weeks after July 27th, he remained on the work schedule. Consequently, as Mr. Harvey acknowledged during cross-examination during the hearing, at the conclusion of his mid August 2003 meeting with Mr. Wescott, he understood that he had not been terminated on July 27, 2003.[17]

September 2, 2003

Mr. Harvey also alleges that he was constructively discharged on September 2, 2003 when Mr. Marlow refused his request to delay his report to work by one day due to loss of water and corresponding personal hygiene issues. Mr. Harvey stated he felt threatened by Mr. Marlow's words and believed he was continuing to be retaliated against for raising concerns about not being compensated for all of the hours he worked. However, the preponderance of the evidence in this case demonstrates that Safeway did not engage in a termination action; and, the circumstances of that evening do not establish a constructive discharge.

Mr. Marlow's negative response to Mr. Harvey's request did not represent a termination action for two reasons. First, in a pattern similar to the July 27th incident, Mr. Harvey never clarified whether he was to report to work for a subsequent shift at the new store and again acted under another incorrect assumption that he had been again terminated by Safeway. In fact, also once again, Mr. Harvey remained on the work schedule at the new Safeway store for a week after his September 2, 2003 conversation with Mr. Marlow. Mr. Wescott initiated the final separation action in compliance with company policy only after Mr. Harvey failed to report to work for three consecutive shifts.

Second, at the conclusion of their phone conversation, Mr. Marlow believed he and Mr. Harvey had come to the agreement that Mr. Harvey would come into work. Yet, after their conversation, Mr. Harvey chose not to report to work that night, or ever again at Safeway. At the hearing, Mr. Harvey explained that due to the assistant manager's apparent insensitivity to his

[17]Even though not included in Mr. Harvey's SOX complaint, I have considered whether the drop in Mr. Harvey's total weekly hours from near 40 hours to 24, which is a significant change in the terms and conditions of his employment, may represent an adverse personnel action. However, I find the Respondent provided a valid explanation for its business decision to reduce the number of hours for Mr. Harvey. Additionally, any harm Mr. Harvey may have suffered by that reduction in his weekly hours was rendered moot by his assumption on July 27th that he had been terminated and his corresponding failure to report to work after July 27th.

personal situation, he became "angry," was "fed up," and decided he was "just through" with the company. On cross-examination, Mr. Harvey admitted his understanding that by not reporting to work as directed he was effectively terminating his employment with Safeway. Mr. Harvey's admission at the hearing establishes that Safeway did not take a terminate action against Mr. Harvey's employment on September 2, 2003.

Establishing a constructive discharge claim requires the showing of an even more offensive and severe work environment than is needed to prove a hostile work environment. *Berkman* (ARB Feb. 29, 2000)*; Brown v. Kinney Shoe Corp*., 237 F. 3d 556, 566 (5th Cir. 2001). To demonstrate that he was constructively discharged, a complainant must show that his employer created "working conditions so intolerable that a reasonable employee would feel compelled to resign." *Williams*, 376 F.3d at 480 (quoting *Hasan v. U.S. Dept. of Labor*, 298 F.3d 914, 916 (10th Cir. 2002)); *see also Talbert v. Washington Public Power Supply System*, 1993-ERA-35 (ARB Sept. 27, 1996). In other words, the working conditions were rendered so difficult, unpleasant, and unattractive that a reasonable person would have felt compelled to resign, such that the resignation is effectively involuntary. *Johnson v. Old Dominion Security,* 1985 CAA 3 to 5 (Sec'y May 29, 1991). Such an environment may be established by evidence of a pattern of abuse, threats of imminent discharge, and marked lack of response by supervisors to the complainant's concerns (emphasis added). *Taylor v. Hamilton Recreation and Hamilton Manpower Services,* 1987 STA 13 (Sec'y Dec. 7, 1988). If the resignation was not a constructive discharge, then a complainant is not eligible for post-resignation damages, pay, and reinstatement. *Derr v. Gulf Oil Corp.,* 796 F.2d 340, 343 (10th Cir. 1986).

In terms of constructive discharge, Mr. Marlow's refusal of Mr. Harvey's request to delay his reporting one day, even if coupled with Mr. Harvey's prior one month employment history with Safeway, does not establish the requisite pattern of abusive associated with an intolerable work environment. Further, in his sole exchange with Mr. Harvey concerning a request to delay his report to work by one day, Mr. Marlow, the assistant store manager at the new store: a) clearly expressed his expectation that Mr. Harvey was to report to work that night; and, b) implicitly stressed the importance of his attendance by adding, "or else." While the threatening tone of the phrase is evident, Mr. Marlow's one statement did not represent a series of threats. Finally, although Mr. Marlow arguably was somewhat insensitive to Mr. Harvey's hygiene concerns, his denial of Mr. Harvey's request was not so intolerable that a reasonable person would have been compelled to resign.[18]

For these reasons, I conclude Mr. Harvey did not suffer the adverse personnel action of termination on September 2, 2003 when Mr. Marlow told him to report to work as scheduled.

September 20, 2003

During the first week of September 2003, although Mr. Harvey was scheduled to work at the new Safeway store in Chevy Chase, he did not report for work at any of the scheduled shifts.

[18]Even if Mr. Marlow's refusal constituted a constructive discharge, Mr. Harvey would be unable to prove that his protected activities caused or contributed to Mr. Marlow's response. The record contains no evidence that Mr. Marlow, an assistant store manager at the new store, had any knowledge of Mr. Harvey's previously stated concerns about the payment of his wages.

When Mr. Wescott was informed about Mr. Harvey's absences, he initiated separation paperwork for job abandonment, which became effective September 20, 2003. That employment termination was an adverse personnel action and satisfies the second requisite element for a viable SOX complaint.

Issue No. 3 – Causation

As previously mentioned, to establish a violation of the SOX employee protection provisions, a complainant must prove that his protected activities were a contributing factor in the alleged unfavorable personnel action. I have determined that the preponderance of the evidence does not support Mr. Harvey's assertions of adverse personnel actions on July 27, 2003 and September 2, 2003. Nevertheless, again on the premise that Mr. Harvey's stated concerns about potential FLSA violations might be protected under SOX, and in light of Safeway's subsequent termination action, I must determine whether Safeway's separation of Mr. Harvey from its employment on September 20, 2003 was caused in part by these potential protected activities.

In terms of circumstantial evidence supporting causation, the record establishes that the Safeway executive who took the separation action was aware of Mr. Harvey's potential protected activities. Specifically, having been detailed to address Mr. Harvey's concern about his perceived discharge on July 27, 2003, Mr. Wescott, who signed the final separation paperwork, was very familiar with Mr. Harvey's wage concerns. Additionally, within two months of Mr. Harvey's correspondence to the company president about his situation, Mr. Harvey's employment was terminated by Safeway.

While I have considered the above noted circumstances, the direct evidence in this case (Mr. Wescott's credible testimony) overwhelms the circumstantial evidence because it clearly demonstrates that the sole cause of Mr. Wescott's administrative action to separate Mr. Harvey on September 20, 2003 was Mr. Harvey's self-imposed failure to report to duty at his newly assigned store for three consecutive shifts during the first week of September 2003. As a result, in accordance with the company's written absenteeism policy, Mr. Wescott ended its employment relationship with Mr. Harvey due to abandonment of his job

Accordingly, Mr. Harvey is unable to establish by a preponderance of the evidence that any SOX-related protected activity contributed to the unfavorable personnel action taken by Safeway on September 20, 2003.

CONCLUSION

Mr. Harvey's complaints of individual wage irregularities by Safeway as violations of the FLSA do not fall under any of the six categories of SOX violations, including a provision of federal law involving fraud against shareholders. Consequently, his stated wage concerns were not protected activities under SOX. Accordingly, the Respondent's Motion to Dismiss Mr. Harvey's complaint of illegal discrimination under SOX must be granted.

Even if Mr. Harvey's wage complaints were considered protected activities, the preponderance of the evidence indicates that he did not suffer the requisite adverse personnel action on July 27, 2003 or September 2, 2003. Additionally, even though Safeway took an adverse personnel action against Mr. Harvey by terminating his employment on September 20, 2003, a SOX protected activity did not cause or contribute to that adverse personnel action. Thus, Mr. Harvey has failed to prove by a preponderance of the evidence that a SOX protected activity contributed to his loss of employment at Safeway. Accordingly, because Mr. Harvey failed to carry his burden of proof, his SOX discrimination complaint must be dismissed.[19]

ORDER

1. The Motion to Dismiss the employment discrimination complaint of MR. COLIN HARVEY against SAFEWAY, INC., brought under the employee protection provisions of SOX, is **GRANTED**.

2. The employment discrimination complaint of MR. COLIN HARVEY against SAFEWAY, INC., brought under the employee protection provisions of SOX, is **DISMISSED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: February 10, 2005
Washington, D.C.

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

[19]Even if a complainant proves that his protected activity was a contributing factor in the unfavorable personnel action, 49 U.S.C. § 42121 (b) (2) (B) (iv) and 29 C.F.R. § 1980.109 (a) state no relief is available to the complainant if the respondent proves by clear and convincing evidence that it would have taken the same unfavorable personnel action even in the absence of any protected activity. Since Mr. Harvey cannot establish that his employer took adverse action against him based on a SOX protected activity, I need not address the fifth issue, whether the employer would have taken the same action against Mr. Harvey in the absence of his alleged protected activity.

date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210. *See* 29 C.F.R. §§1980.109(c) and 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"; 29 C.F.R. Part 1980