U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 January 2007

Case No.: 2005-SOX-00097

In the Matter of:

NAOMI WILLIAMS-WILSON,
Complainant,

v.

NDC HEALTH CORPORATION,
Respondent.

Appearances:

For Complainant:
Gordon S. Johnson, Esq.

For Employer:
Clare Draper, Esq.
Erin L. Connolly, Esq.

Before: Alan L. Bergstrom
Administrative Law Judge

DECISION AND ORDER – DENYING COMPLAINT

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (Act), 18 U.S.C.A. § 1514A[1], and its implementing regulations found at 29 CFR Part 190. Section 806 provides "whistleblower" protection to employees of publicly traded companies against

[1] VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio and television fraud), 1344 (bank fraud) or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

discrimination by employers in the terms and conditions of employment because of certain "protected activity" by the employee. The Complainant filed her complaint under the Act on September 24, 2004 (ALJX[2] 1). The complaint was denied on July 13, 2005 and a subsequent request for hearing before an Administrative Law Judge was filed on August 15, 2005 (ALJX 1 and 2).

The hearing scheduled to commence October 5, 2005 before U.S. Administrative Law Judge R.E Huddleston was continued at Complainant's counsel's request. The rescheduled December 15, 2005 hearing was continued to April 18, 2006 on joint motion of the Parties. Subsequently the Complainant's counsel withdrew and Complainant's request for a continuance to obtain representation was granted March 16, 2006. Judge Huddleston retired and the case was reassigned to this Administrative Law Judge. Following a June 29, 2006, telephone conference with Complainant and Employer's counsel, the hearing was set to commence October 10, 2005 in Atlanta, Georgia. On July 25, 2006, Complainant's final request to cancel the October 2006 hearing in order to obtain counsel was denied. On October 10 and 11, 2006, a hearing was held before this Administrative Law Judge in Atlanta, Georgia. The Complainant appeared and was represented by an attorney. Post-hearing briefs were received December 12, 2006 (Respondent) and December 14, 2006 (Complainant).

At the hearing ALJX 1 through 16 were admitted without objection (TR 11, 261, 262). Complainant's exhibits CX 1 through 13, 16 through 21, 22 [pages 1 through 4], 23, 25 through 27, 42, 44, 49 through 51, 53 and 58 through 69 were admitted without objection (TR 14). CX 40 was withdrawn (TR 16). Employer's exhibits previously marked as 6, 10, 11, 13, 17 through 21, 23 through 25, 79 through 81, 83, 86, 88 through 90, 109, 161 through 166 were admitted without objection (TR 21, 25). The objections to EX 1 were overruled and the exhibit admitted (TR 181). The objections to CX 28, 39, and 41 were sustained and the exhibits were marked for review (TR 139 and 152). Objections to CX 15, 24, 38, 43, 45, 54, 55, 56, 57 and paragraphs 4 and 5 of CX 52 were overruled and the exhibits admitted (TR 139, 140, 143, 152 and 153).

PROTECTIVE ORDER

On November 4, 2005, Judge R. Huddleston issued an Order to protect the confidentiality of particular information related to Respondent's business practices, financial information, customer and vendor information, wage and salary data, sales data and related to Complainant's financial information, medical information and other sensitive personal and private information (ALJX 14). Original counsel were advised that the Order did not extend to the Court records and the application of the Freedom of Information Act to those records. see 29 CFR Part 70

The following exhibits are considered within the scope of the protective Order:

1. Complainant exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68.

[2] "ALJX" refers to Administrative Law Judge exhibits. "CX" refers to Complainant's exhibits. "EX" refers to respondent Employer exhibits. "TR" refers to a hearing transcript page(s).

2. Respondent exhibits: 6, 10, 11, 13, 17, 18, 19, 20, 21, 23, 24, 25, 79, 80, 81, 83, 88, 89, 90, 109, 161, 162, 163, and 164.

3. Hearing transcript pages/lines: page 30 - lines 4 through 21, page 51 – line 6 through page 52 – line 11, page 58 – lines 1 through 24, page 70 – line 10 through 20, page 79 – line 8 through page 80 – line 20, page 83 – line 13 through page 84 – line 16, page 88 – lines 1 through 17, page 90 – line 9 through page 92 – line 5, page 99 – lines 7 through 10, page 99 – line 23 through page 101 – line 4, page 101 – line 14 through page 104 – line 6, page 108 – line 21 through page 109 – line 5, page 109 – line 25 through page 111 – line 3, page 132 – lines 17 through 24, page 136 – lines 17 through 22, page 137 lines 5 through 16, page 138 – lines 13 through 17, page 154 – lines 23 through 25, page 156 – line 10 through page 157 – line 12, page 166 – lines 8 through 11, page 172 – lines 7 through 15, page 207 – line 4 through page 215 – line 1, page 287 – line 7 through page 289 – line 10, page 325 – line 8 through page 327 – line 6, page 341 – line 23 through page 342 – line 5, page 393 – lines 2 through 14, page 396 – line 25 through page 397 – line 9, page 398 – line 22 through page 399 – line 7, page 415 – lines 1 through 7, page 417 - lines 3 through 5, and page 421 – lines 13 through 21.

ISSUES

The following issues remain to be determined:

1. Did the Complainant file timely complaint(s) under the Act ?

2. Is the Complainant's alleged activity protected under the Act ?

3. Did the Employer know of the alleged activity ?

4. Did the Complainant suffer an unfavorable personnel action as alleged ?

5. Did activity protected under the Act contribute to the unfavorable personnel action alleged by Complainant.

6. Would the Employer have taken the same alleged unfavorable personnel action in the absence of activity protected under the Act ?

STIPULATIONS OF FACT

At the hearing the Parties orally stipulated to the following facts (TR 11, 12):

1. Respondent, NDC Health Corporation was a corporation subject to the provisions of the Sarbanes-Oxley Act of 2002, Corporate and Criminal Fraud Accountability Act, 18 U.S.C., § 1514A, et seq. for the calendar periods 2004 and 2005.

2. NDC Health Corporation is currently a wholly owned subsidiary of Per-Se Technologies as of January 2006.

3. The Complainant was hired by Respondent on March 8, 2004 and is covered under the provisions of 18 U.S.C., § 1514A, et seq.

POSITIONS OF THE PARTIES

Complainant contentions:

The Complainant, through counsel, contends that protected activity under the Act includes reporting an attempt to circumvent a company's systems of internal accounting controls required by the Securities Exchange Act of 1934, Section 13 at 15 U.S.C. § 78m(b)(3)(B)(5). Complainant submits she believed C. Young, T. Watson, J. Clinton and C. Armes attempted to circumvent Employer's system of internal controls by "a lack of segregation between auditing and billing functions within billing, recognizing revenues before services were performed, a lack of contract back up for NDC charges to customers, questionable management competence, over-billing and under-billing errors." Complainant alleges that she made protected disclosures to her immediate supervisor T. Watson and to supervisor J. Clinton and supervisor C. Armes.

Complainant alleges that she was subjected to unfavorable personnel actions in the form of: (1) harassment by supervisors T. Watson and J. Clinton; (2) Complainant needing to depend on analyst C. Young cooperation after reporting prior errors by C. Young; (3) Complainant needing to report to T. Watson after reporting errors by T. Watson; (4) company human resources personnel being misled on the nature of the problems between Complainant and other employees; (5) human resource department personnel not fully investigating hostility between Complainant and analyst C. Young; (6) Complainant being directed to "get along with and work as a team player with T. Watson, T. Everhart and C. Young"; (7) Complainant being required to take a leave of absence due to stress following a September 14, 2004 meeting with human resource director S. Cullinan; (8) inaccurate summaries of meetings by C. Armes to support a case for termination; (9) rewriting of performance criteria to support termination; (10) denying the Complainant "the prospect of seeing any of these problems handled according to NDC policies"; and (11) Complainant being forced to submit her resignation in March 2005.

Respondent Employer's contentions:

The Employer, through counsel, submits that the "Complainant failed to show that she engaged in protected activity for purposes of establishing a SOX claim … [and failed to show] that NDC took any unfavorable personnel action against her." The Employer describes the Complainant's job duties as a financial analyst to include "primary responsibilities was to find billing errors made with respect to certain customer accounts and to report them to NDC management so that they could be corrected … conducting billing for specified internal Pharmacy customers as well as taking on special projects assigned to her by NDC management. … Complainant did not … play any role in preparing or maintaining NDC's financial statement or general ledgers, nor did she play any role in preparing or reviewing information sent to NDC's shareholders."

The Employer submits that Complainant attended a September 13, 2004, meeting with S. Cullinan and T. Watson to address Complainant's workplace behavior, as a result of a September 9, 2004 e-mail from Complainant, and Complainant's findings regarding her price increase analysis of fifteen customer accounts. Employer argues that Complainant became increasingly agitated with T. Watson's discussion of the analysis, was disrespectful and the discussion was at an impasse when S. Cullinan intervened and "told Complainant that she could take the rest of the day off and consider her options with respect to continuing with the [Pharmacy] Group." Employer argues that the Complainant first brought up resigning her employment at the September 13, 2004 meeting and that the Complainant was not told "that she needed to consider resigning her employment."

Employer submits that at a September 14, 2004 meeting the Complainant stated "that although she did not believe she was a fit for the Pharmacy Group, she would not resign and NDC would have to fire her." Employer states that C. Armes then took over the September 14, 2004 meeting and conducted a conversation regarding specific ways the Complainant could become successful in her position and assist in building a more cohesive team environment.

The Employer states that the Complainant did not attend a scheduled meeting on September 24, 2004 with T. Watson, J. Clinton and R. Bresch to go over her reported billing discrepancies upon review for price increases to fifteen customer accounts because of illness and that she "went out on a leave of absence on September 29, 2004. … [and] admits that she is unaware of any billing errors at NDC that went uncorrected." The Employer submits that the Complainant was on short-term disability in 2004 commencing on September 29, 2004. The Employer states that independent reviews of the Complainant's alleged billing discrepancies on the price increase analysis by supervisor T. Watson, another by chief accounting officer J. Fitzgibbons, and another by the Director of Internal Audit D. Rabideau, each indicated "that Complainant's analysis was incorrect."

The Employer acknowledges that supervisor T. Watson discussed a mid-year PMP with Complainant January 20, 2005 prior to the PMP being reviewed by C. Armes. C. Armes revised the PMP which included new objectives related to the type of work Complainant performed and that the Complainant submitted a written response February 7, 2005 "in which she refused to take on any new job responsibilities and stated that the deadlines placed on the mid-year PMP were unattainable." A meeting was held on February 23, 2005 to discuss the revised mid-year PMP.

The Employer submits that on March 17, 2005, Complainant was advised by T. Watson and later by J. Clinton on a change to entering credit memos, she "refused to make an adjustment in the system to a CVS credit memo", tried to tape record conversations with T. Watson and J. Clinton, and intimidated J. Clinton by her conduct. At a March 18, 2005 meeting with C. Armes, S. Cullinan and D. Rabideau to address a prior e-mail, her behavior towards J. Clinton and the price increase analysis, Complainant refused to speak with the participants without counsel. The in-house counsel was called to the meeting and C. Armes advised the Complainant that her recent workplace behavior "was unacceptable and that unless her behavior improved, she would be subject to disciplinary actions." The Complainant was directed to return to work.

On March 21, 2005, Complainant resigned by voicemail to T. Watson and a letter sent to NDC management. Employer submits that the resignation was voluntary and had been contemplated for several months.

Employer argues that the report of purported billing mistakes was part of her job responsibilities with NDC, the Complainant never asserted that the billing mistakes constituted an attempt to defraud shareholders, and the Complainant is unaware of any uncorrected billing mistakes. The Employer submits that the Administrative Review Board holding in *Platone v. FLYi, Inc*., 2006 WL 3246910 (ARB, Sept. 29, 2006) requires a finding that the reporting of billing mistakes alone cannot be deemed activity protected under the Act. Employer also submits that Complainant's belief that "NDC violated the law by making billing mistakes and improperly reporting revenue are not objectively reasonable" under the standards set forth in *Harvey v. Home Depot, U.S.A., Inc.*, 2006 WL 1587403 (ARB, June 2, 2006).

Employer submits that the Complainant's contentions, that she was subject to a hostile work environment sufficient to constitute an adverse personnel action, would not be held by a reasonable, objective person not suffering from paranoia like the Complainant. Employer also argues that the work conditions and events were not so intolerable that a reasonably prudent person would be compelled to resign, as alleged by Complainant.

Finally, Employer submits that the Complainant's repeated unprofessional behavior, refusal to perform certain job duties and refusal to listen to instructions from her supervisor required the performed counseling and ultimate instruction "that if she did not improve her behavior, she would be subject to disciplinary action." Employer submits that these same actions would have been taken regardless of whether the Complainant filed a complaint and that regulations at 29 C.F.R. § 1980.109 require the complaint be denied.

DISCUSSION

In order to prevail in a complaint filed under the Act, the Complainant must prove by a preponderance of the evidence that: (1) she engaged in protected activity or conduct; (2) the Respondent knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. A respondent will not be found liable if the respondent can establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Halloum v Intel Corporation*, ARB No. 04-068, ALJ No. 2003-SOX-7 (ARB, Jan 31, 2006); *Collins v. Beazer Homes USA, Inc*., 334 F. Sup 2d 1365 (N.D. Ga, 2004); *Bozeman v Per-Se Technologies, Inc*., 456 F. Supp. 2d 1282 (N.D. Ga 2006); 49 U.S.C.A. § 42121(b).

I. The Complainant has filed only one complaint under the Act.

On September 24, 2004, the Complainant filed a written complaint with the Department of Labor alleging that "On August 20, 2004, [she] completed performing an audit on various pharmacy chains and vendors and reported [her] findings of billing discrepancies and improper reporting of

revenue to [her] manager Tony Watson, Director Jim Clinton, and Vice President Carol Armes." She alleges that as a result of that report she was 'subjected to general harassment" from those three individuals and Stacy Cullinan and that she is "being forced to quit in reprisal for having reported discrepancies in billing and for having reported practices made unlawful under Title VIII of the Sarbanes-Oxley Act of 2002" (ALJX 1 at page 3). There were no other written complaints made by the Complainant; though the Complainant's counsel submits in his written October 11, 2006 response to Respondent's request for summary judgment that several additional reporting events occurred in 2005 and later submits in his written post-hearing brief that there were approximately a dozen adverse personnel actions made by the Employer through March 2005.

A complaint filed under the Act need not be in any particular form but it "must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations." 29 CFR § 1980.103(b) The complaint must be filed "within ninety (90) days after an alleged … discriminatory decision has been made and communicated to the complainant." 29 CFR § 1980.103(c) When a complaint has been forwarded to the Office of Administrative Law Judges for formal hearing, the "complaint may be amended once as a matter of right prior to the [Employer's] answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint. … The administrative law judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved." 29 CFR § 18.5(e) and 29 CFR § 1980.107(a)

The Complainant filed her request for a formal hearing on August 15, 2005 (ALJX 2). The Employer filed an "Answer and Affirmative Defenses" on August 29, 2005 (ALJX 3). The Employer also filed a Motion for Summary Decision that expanded on its position in the case related to the original complaint (ALJX 15). It was not until the Complainant's counsel filed "Complainant's Response to Respondent's Motion for Summary Decision and Directed Verdict" on October 11, 2006, that the Complainant raised, in written form, the events related to using "her Oracle log-on ID to make a $434,456.34 a debit adjustment to reconcile a CVS account" and events related to changes in her performance management plan (ALJX 16; TR 30, 32). Complainant argues that Employer's actions were "an attempt to circumvent a company's systems of internal accounting controls required by the Securities Exchange Act of 1934, Section 13 at 15 U.S.C. § 78m(b)(3)(B)(5)." Complainant also argues that continued hostile work environment forced her to resign from her job in March 2005. (Complainant's Post-hearing brief) The Respondent objects to consideration of the 2005 events beyond the relevance they may have to deciding the September 24, 2004 complaint (TR 271 to 272).

The contested events related to "a $434,456.34 debit adjustment to reconcile a CVS account", change in performance management plan, and the Claimant's March 2005 resignation are unique events. The performance management plan changes did not occur until late January 2005 (CX 31 and 32; EX 79 through 86, 162). The debit adjustment event did not occur until the March 15 to 17, 2005 timeframe (Complainant's testimony at TR 166 to 172; CX 22 pages 1 through 3; EX 88; EX 165 pages 108 through 113, 365 through 371; T. Watson testimony at TR 409 through 416). The resignation occurred March 21, 2005 (CX 29; EX 89). Since the January 2005

performance management plan revision, the March 2005 CVS account adjustment issue, and the alleged "constructive employment termination" on March 21, 2005, were not part of the original September 2004 complaint, were not part of a proper amended complaint, were not in some form of a written complaint until October 2006 (more than 90 days from Complainant's resignation), and are only relevant to the 2004 issue of a course of conduct giving rise to a hostile work environment and appropriate relief required, if any, this Administrative Law Judge finds that events surrounding the January 2005 performance management plan revision, the March 2005 CVS account adjustment, and the March 21, 2005, resignation may not be considered separate covered protected activity or violation(s) under the Act which would give rise to a cause of action before this Administrative Law Judge. see *Willis v. Vie Financial Group, Inc*., 2004 WL 1774575 (E.D. Pa, 2004) and cases cited therein.

Under the facts of this case, only alleged Act violations which occurred within the period 90 days prior to the September 24, 2004 complaint may be considered in evaluating whether the Claimant is entitled to the relief requested under the Act. Thus, only the Parties' activities prior to September 24, 2004 may be considered in determining if the Complainant engaged in protective activity under the Act and whether the Employer was aware of the relevant protected activity. See *Bozeman v Per-Se Technologies*, 456 F. Supp. 2d 1282 (N.D. Ga. 2006) citing *Murray v. TXU Corp*., 279 F. Supp. 2d 799 (N.D. Tex. 2003)

II. The Complainant did not engage in protected activity under the Act prior to her September 24, 2004 complaint.

In order to establish that she engaged in protected activity under the Act, the Complainant "must prove that [she] 'provided information' about conduct that the complainant reasonably believed constituted one of six violation types enumerated in SOX. 18 U.S.C.A. § 1514A(a). … Where a complainant refuses to act but does not relate such refusal to a concern about potential fraud or other possible SOX violation, such refusal does not necessarily 'provide information' about a SOX violation." *Henrich v. ECOLAB, Inc.,* ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006); *Getman v. Southwest Sec., Inc*., ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB, July 29, 2005) In order for an activity to be "protected activity" under the Act, there must be not only reasonable belief of activity that would violate one or more of the six protected areas of the Act, but there must also be manifest an expression of concern over the perceived violation(s). Without both factors, there is no "protected activity" under the Act. *Henrich,* at page 11 and 15. "The reported information must have a certain degree of specificity [and] must state particular concerns, which, at the very least, reasonably identify a respondent's conduct that the complainant believes to be illegal." *Bozeman v Per-Se Technologies*, 456 F. Supp. 2d 1282 (N.D. Ga, 2006) citing *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). [The] protected activity must implicate the substantive law protected in Sarbanes-Oxley …" *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D. NY, 2006) and cases cited therein. There must be an objective basis for suspecting fraud on the respondent's shareholders. *Livingston v. Wyeth Inc*., 2006 WL 2129794 (M.D. NC, 2006) citing the Senate Report No. 107-146, 2002 WL 863249 (May 6, 2002).

Summary of Relevant Evidence.

The Complainant was hired by Respondent on March 8, 2004 (Stipulation No. 3) to perform duties as a Financial Analyst reporting to T. Watson, Manager of Revenue Accounting. The duties of Financial Analyst initially involved learning the business process within the Revenue Accounting section of the Pharmacy Division under T. Watson, learning the information management system sign-on and navigation, understanding contracts used, and completing special projects that were of a research nature, as well as finding and reporting billing errors. The Complainant was subsequently assigned to the ComCare project, Cardinal Health statement, the McKeeson Integration project, price increase analysis project, CVS statement, "Chains & Vendors" audit, and Canadian billing and revenue reporting. Her position included the responsibility to bring account billing discrepancies to the attention of her supervisor, T. Watson. (Complainant TR 184 to 189; C. Armes TR 283 to 284, 324; S. Cullinan TR 369 to 370; T. Watson TR 419; CX 65; EX 6)

The ComCare project was the first major project assigned Complainant after beginning work for Respondent. It entailed retrieval of financial documents and summary reports used for invoicing and financial statements, reviewing back billing to 2003, transaction account numbers, and transaction figures. Complainant discovered several incorrect transaction account numbers and billing amounts. She reported her findings to her immediate supervisor, T. Watson who directed her to advise the billing clerk, C. Young, of the errors for correction, which she did. (Complainant TR 53 to 57, 193 to 194; C. Armes TR 324; T. Watson TR 392 to 395)

The Cardinal Health account was the Complainant's next assignment (Complainant TR 57). For the Cardinal Health account, the Complainant would prepare the monthly revenue statement using the respective service contract and billing/credit information from J. Becker, the NDC account manager for the Cardinal Health account. (Complainant TR 50 to 51; CX 46) She performed a review of the account history from March 2003 through June 2004 and reported her findings to her superiors, T. Watson and J. Clinton, and the Cardinal Health account manager. Her analysis disclosed "formula" errors in the May 5, 2003 statement and the June 5, 2003 statement and a "statement total" error on the January 6, 2004 statement amounting to "roughly $100,000.00" credit to the client. The Complainant testified that J. Clinton wanted "a $472,000.00 funding or invoice" recognized for Cardinal which she refused to recognize because the services had not been rendered. The account statement was reconciled in June 2004 and communicated to the client in July 2004. The Complainant testified that she corrected the billing discrepancies she found. (Complainant TR 51, 52, 57 to 60, 111, 138, 192; CX 14, 15, 47, 48)

The Complainant was assigned to the McKeeson integration project as the billing lead for the Respondent's Pharmacy Services Department. The project was to integrate McKeeson and its independent pharmacies billed by McKeeson under an Omni Link system into the NDC billing system. The Complainant's duties were to set up customer accounts, enter contract information into the Oracle information management system, set-up account numbers, and generate timely invoices for billing and revenues. Before the independent pharmacies were added to the billing process, billing invoices to McKeeson were believed to be without error. Not all of the approximate 400 additional independent pharmacies were billed directly by Respondent's billing system because the independent pharmacy accounts were "kicking out on the error report" at the end of August 2004. The Complainant reported to C. Young and T. Watson that some of the billing for the individual pharmacies had been billed to McKeeson in error. She reported on

September 9, 2004, that the independent pharmacies had not been billed and her belief that an analysis "during the CB20, CB30 and CB40 levels" would have discovered system error that had prevented the billing at that time. The billing error was corrected. The Complainant was given a performance bonus/award for her work on the McKeeson project, no adverse action was taken against her for reporting the billing errors or failure to provide billing numbers to account manager D. Cox as directed by her immediate superior. (Complainant TR 61 to 75, 199 to 206; C. Armes TR 292 to 294, 357 to 360; T. Watson TR 403 to 404; CX 21, 47, 59)

The Complainant was assigned by C. Armes, to assist external auditors Ernst & Young by retrieving and copying contracts, amendments, general ledger print, and requested information in a timely manner. (Complainant TR 75, 76)

On or about July 27, 2004, the Complainant was assigned to conduct a price increase analysis for sixteen specific customers regarding what NDC was "currently billing for Network and PPE services." The specific format for the report was set forth by L. Spindler, Manager for Account Services. The Complainant retrieved contracts, amendments, addendums, invoices, customer profile changes, sales turnover documents, and system screen prints. The Complainant reported her initial findings on August 19, 2004 to T. Watson and L. Spindler, including her finding that K-Mart had been under-billed and ShopCo was over-billed. She was directed to "prepare a more in depth analysis on K-Mart." She testified that she did not recommend a price increase if the spreadsheet column "Current Pricing … (not reviewed by legal)" did not match column "Current Pricing, Confirmed/Determined by Billing." T. Watson proposed a meeting to review the Complainant's findings involving misinterpretation of the underlying contracts after she returned from her absence for surgery; however, the Complainant never attended such a meeting. T. Watson held the meeting to review the reported discrepancies with R. Bresch and J. Clinton. R. Bresch and J. Clinton agreed with T. Watson's assessment. The Complainant testified that she never told her supervisor, T. Watson, or any other person in NDC Health that she thought the company was violating security laws related to the price increase analysis or defrauding its shareholders. (Complainant TR 76 to 81, 206 to 218; C. Armes TR 290, 324 to 327; T. Watson TR 400 to 403; CX 19, 63; EX 13)

In the August/September 2004 timeframe, Complainant was assigned, by C. Armes, to an account analysis of the CVS account to show true correction against the CVS pre-payment credit balance. The account statement was corrected to reflect billing for work done by NDC on May 5, 2003 invoice # 2416583 for $29,855.52, May 5, 2003 invoice #2414194 for $325,000.00, and October 6, 2003 Invoice #2506026 for $351,590.19. The changes were reflected in the account's revised statement of September 9, 2004 and the pre-paid balance properly debited. The Complainant testified, without specifying the timeframe, to a request by J. Clinton to key in a $10,000.00 credit memo into the CVS account that did not have an approval signature on the bottom and she would not do so. (Complainant TR 81 to 87, 110 and 137, 194 to 197; C. Armes TR 325; T. Watson TR 397, 409 to 416; CX 16, 17, 18; EX 109)

In the August 2004 timeframe, the Complainant was assigned to perform a "Chains & Vendors" audit involving review of those vendors' pharmacy billings from January 2003 to August 4, 2004. Walgreen Drug Store, ShopCo, Ahold USA, and K-Mart were vendors included in the review. The Complainant submits that her review through August 20, 2004, demonstrated that

Walgreen Drug Store was over-billed $168,243.85 for network services and over-billed $81,424.46 for pre and post editing services; that ShopCo was over-billed a total of $26,633.02; that Ahold USA was under-billed $817,711.59 for pre and post editing services and over-billed $60,802.80 for network services; and that K-Mart was under-billed $314,928.07 for network services and under-billed $2,293,434.21 for pre and post editing services. The Complainant testified that she reported her findings to T. Watson who opined that she "misunderstood the contracts ... [and] needed to learn more about how billing was done and how it was interpreted." On August 26, 2004, T. Watson proposed K-Mart be billed $306,476.83 for an eleven month period to reflect an uncollected increase in billing rate after the "introductory rate" expired. On August 27, 2004, the Complainant was directed to discontinue the "Chains & Vendors" audit. The Complainant testified that she never told her supervisor, T. Watson, or any other individual that she thought the company was defrauding its shareholders as related to the "Chain & Vendor" audit. Prior to her filed SOX complaint being reported to NDC Health, the Complainant did not indicate to her supervisors in any way that she believed the reported billing errors constituted fraud against shareholders or any other illegal activity under the Act. (Complainant TR 88 to 109, 111 to 113, 197 to 199, 206 to 218; T. Watson TR 397 to 401; CX 1 to 13, 20, 36, 37, 62; EX 13)

On September 13, 2004, a meeting was held with the Complainant, T. Watson, and S. Cullinan present. The meeting was to address issues raised in an e-mail sent by the Complainant on September 9, 2004 that was considered inappropriate by management supervisors. During the meeting the McKeeson integration project and billing related independent pharmacies were topics addressed by T. Watson and Complainant. No meaningful dialog was achieved between the Complainant and T. Watson on the perceived problems. The meeting was adjourned and the Complainant given the rest of the day off to defuse the stalemate between the Complainant and T. Watson and provide Complainant with "decision-making leave to consider her choice to remain in her position at NDC Health." The Complainant alleges she was asked to consider resignation by S. Cullinan and that a main topic of the meeting was related to telling D. Cox that the independent pharmacies had not been billed. Management denied the word "resign" was used at the September 13, 2004 meeting. At a follow-on meeting on September 14, 2004, with the Complainant, T. Watson, J. Clinton, S. Cullinan and C. Armes present, the Complainant expressed "she did not feel that she was a fit, but that she did not wish to resign." The September 14, 2004, meeting was to reach an agreement on steps to better integrate the Complainant into the "Services team" through end of month joint post-mortem on billing and revenue recognition, perception of job performance, increased personal interaction among employees with less e-mail interaction, maintaining open communications for discussions between the Complainant and management members. Billing practices were not a topic of the meeting. Complainant did not allege Respondent was violating any security laws or defrauding its shareholders. Complainant testified that she was not asked to resign because of her work related to the price increase analysis. Subsequently, Complainant sent an e-mail to T. Watson on September 20, 2004, stating she was going home for the day due to stress of being asked to resign at the September 14, 2006 meeting. In response, C. Armes hand-delivered a memorandum to Complainant on September 23, 2004 stating that none of the management individuals present at the meeting had asked the Complainant to resign and reiterated steps to take to better integrate the Complainant into the Pharmacy Services team. The Complainant responded in writing on September 25, 2004, stating that the had-delivery of the memorandum

and discussion held at that time "caused severe stress, chest pains and [led] me to the hospital [that night] through Friday 9/24/04." The Complainant restated her belief that S. Cullinan asked her to consider resigning her position, that she would not resign her position, that she was not receiving adequate training or cooperation from others, and that she did not perceive that she was not doing a good job or that she was making mistakes. (Complainant TR 113 to 127, 226 to 229; C. Armes TR 296 to 304, 347 to 348, 355 to 357; S. Cullinan TR 371 to 377, 385 to 386; T. Watson TR 405 to 408, 426 to 428; CX 34, 35, 36; EX 17, 21, 23, 24, 25)

C. Armes testified that she was the Director of Accounting and Billing for the hospital division of Per-Se Technologies and had served as the Vice President of Contract Revenue cycle for NDC. She testified that Respondent considered fees charged for transactions earned in the month when the transaction occurred, codes were used to record transactions that would point to the transaction billing, and that not all billing discrepancies necessarily impact revenue recognition. She identified EX 163 as the "Procedures for Reporting Improper Activities" as posted on the NDC Health's intranet. She reported that Respondent used a fiscal year running from June through May. C. Armes became aware of Complainant's filed complaint in October 2004 prior to earnings release. She pulled all the contracts for each customer involved in the audit described in the September 24, 2004, complaint and discussed her findings with J. Fitzgibbons, the Chief Accounting Officer. They agreed that K-Mart had been under-billed and the account had been corrected, that T. Watson's findings that the Complainant had been mistaken on 85% of the reviewed contracts for the other accounts, and that there was nothing evident that would have materially impacted external reporting such as the 10Q. C. Armes did not discuss her findings or the September 2004 complaint with the Complainant. T. Watson became aware of the SOX complaint when he pulled documentation for review by D. Rabideau, the Director of Internal Audit, who completed an independent review of the contracts underlying the complaint and reached the same conclusions as the Armes-Fitzgibbons review. (C. Armes TR 275 to 284, 304 to 306, 349 to 353, 361 to 365, 367; T. Watson TR 408 to 409, 416 to 419, 421, 426, 430 to 431, 433; Complainant TR 435 to 437; EX 163)

The Complainant testified that she tried to call the Respondent's "Whistle Blower Hotline" about the time she filed her September 21, 2004, dated complaint with the Department of Labor; but that the line was not operative at the time. She testified that she tried to call members of the company ethics committee also, but there was not one in the position and that "It was very difficult to get in touch with anyone who I felt as though would possibly assist me with what I had experienced in the billing department." The Complainant testified that no one at the company mentioned her filing a "whistle blower complaint" to her and no one at the company ever tried to get her to drop the complaint or mentioned the complaint until March 2005 when D. Rabideau mentioned in a meeting that the complaint had been filed. (Complainant TR 134, 230 to 232; S. Cullinan TR 382; EX 90) It is specifically noted that the complaint in the current case was filed with the Department of Labor until September 24, 2004 (ALJX 2).

The Complainant started short-term disability leave on September 29, 2004 and remained away from her workplace until January 2, 2005. She testified that no adverse actions were taken against her by Respondent while she was out on leave from September 2004 to January 2005. She returned to work on decreased hours and subsequently resumed a leave status from January 5 , 2005 to January 14, 2005. She returned to her former position with Respondent with the

same pay, duties and benefits as existing prior to her September 2004 excused absence. Training on audit billing and revenue intricacies were recommended for the Complainant in her performance management plan by her supervisors. A detailed meeting was held with Complainant to review revised objectives and work being on track for the reporting cycle. The detailed performance management plan was unrelated to the September 2004 SOX complaint. (Complainant TR 118 through 119, 146, 232, 236 to 240, 254; C. Armes TR 307 to 314, 329 to 339; S. Cullinan TR 377 to 380; T. Watson 422 to 424; EX 79, 80, 81)

On March 18, 2005, C. Armes prepared a written "Final Written Warning regarding Performance and Behavior" directed at the Complainant for her "recent inappropriate behavior in the workplace … lack of performance since February 11, 2005, and … response to [her] mid-year review …" which management described as being "extremely disruptive to the work environment, are creating an environment where individuals are uncomfortable working with [her], and are critically impacting the level of performance and level of work being performed in the department." Nine specific areas of concern, including tape-recording superiors and co-workers, were addressed in the memorandum. The memorandum was delivered to the Complainant at a meeting with C. Armes and S. Cullinan. D. Rabideau had left the meeting after stating Complainant's log-on ID had not been fraudulently used. When the Complainant refused to talk to C. Armes and S. Cullinan, Respondent's general counsel, A. Rosenberg, attended the meeting as the memorandum was delivered and then read aloud to the Complainant by C. Armes. When general counsel became aware of Complainant having retained counsel, he ended further discussions by telling the Complainant to return to work and she was not fired. The Complainant subsequently resigned from her position on March 21, 2005. (C. Armes TR 314 to 323, 344 to 347, 365; S. Cullinan TR 380 to 384, 389 to 390; T. Watson TR 409 to 412; Ex 89, 109, 164)

The Complainant was not assigned to audit any specific individual, such as her supervisor, T. Watson, or billing clerk, C.Young. She stated that in the course of her assigned duties that there were occasions when her supervisor or Ms. Young would have been the individual who had made an entry she considered a billing error. She testified that she played no role in the accounting department, had no responsibility for preparing or maintaining the company financial statement, and played no role in preparing or reviewing information sent to company shareholders. (Complainant TR 186 through 190)

Discussion.

The Canadian Billing and Revenue Reporting assignment was during the 2005 timeframe and after the September 24, 2004 complaint filing. Any alleged reporting activities by the Complainant are outside the scope of the current complaint and not considered on the issue of protected activity under the Act. (Complainant TR 154 through 155, 190; CX 24) Likewise, the events surrounding the debiting of the deferred revenue account for CVS in March 2005 is outside the scope of the current complaint and not considered on the issue of protected activity under the Act. (Complainant TR 156 through 162; CX 25)

The Complainant testified to various difficulties obtaining information or cooperation from other employees in obtaining access to documents. She also testified to her medical history involving paranoia and anxiety. The interpersonal conflicts during the Complainant's entire period of

employment did not constitute a continuing course of harassment under the Act directed at the Complainant by Respondent and did not rise to protected activities under the Act.

The Complainant's reported discrepancies made "on August 20, 2004, … [related to] an audit on various pharmacy chains and vendors and reported findings of billing discrepancies and improper reporting of revenue to … Tony Watson, Director Jim Clinton, and Vice President Carol Armes" is the basis of her complaint under the Act.

The Complainant's review of account contracts, invoices, amendments, billing documents, and computerized account entries were part of her normal day-to-day employment duties as a fiscal analyst. Her fiscal analyst duties also included reporting discrepancies to her immediate superior, T. Watson, and occasionally to other management personnel. Prior to filing her SOX complaint on September 24, 2004, the Complainant routinely found account discrepancies during her review and reported those findings to members of management. After review of her August 2004 findings on numerous accounts reported by spreadsheet, management took steps to correct those reported discrepancies found to be with merit. Numerous discrepancies reported by the Complainant, found to be without merit because of mistaken interpretation by the Complainant, were identified by her supervisor and efforts were made to communicate to the Complainant how she was mistaken on those entries. The Complainant was not receptive to discussing the perceived mistakes on her spreadsheet analysis.

Prior to filing her September 24, 2004, the Complainant never indicated to her superiors that she believed the reported account discrepancies constituted a fraud on shareholders or any other illegal activity prescribed by the Act. Complainant's superiors did not learn that the Complainant thought the reported account discrepancies constituted a violation of the Act until October 2004 when a copy of the complaint was received by Respondent. The receipt of the complaint precipitated two additional reviews of the reported discrepancies and supporting documentation. Both reviews agreed with the prior review by her immediate supervisor that she was mistaken in most of the alleged discrepancies and that the few correctly reported discrepancies had been corrected when reported.

Specific reports of questionable financial actions by a company only rises to "protected activity" under the Act when there is both (1) a specific description of the perceived questionable financial actions by the company, and (2) reasonable identification of the financial action to a perceived violation of one of the six protected areas of the Act. see *Henrich v ECOLAB, Inc*., ARB No. 50-030, infra; *Bozeman v Per-Se Technologies*, WL 2947533 (N.D. Ga, 2006); *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D. NY, 2006) Here the Complainant gave specific description in her August 20, 2004 report, of what she perceived as questionable financial actions by Respondent. However, this was her duty as a financial analyst. Without the additional indication by her that she believed that these discrepancies involved a violation of one of the six protected areas of the Act, her reporting activities did not rise to the level of "protected activity" under the Act. Here there was no such indication made by her until Respondent received a copy of the filed September 24, 2004, SOX complaint. Accordingly, this Administrative Law Judge finds that the activity upon which the original complaint in this case is founded is not "protected activity" under the Act and the Complainant is not entitled to relief on this complaint under the Act. Thus, further issue analysis is not required.

FINDINGS OF FACT

After deliberation on all the evidence of record, this Administrative Law Judge finds that:

1. The Complainant reported specifically perceived fiscal action discrepancies to her superior on or about August 20, 2004.

2. The reported perceived fiscal action discrepancies were reported as part of the Complainant's assigned duties as a fiscal analyst under the employment of Respondent.

3. Prior to filing her complaint on September 24, 2004, the Complainant did not indicate to her superiors that the reported perceived discrepancies constituted a violation of one of the six protected areas under the Title VIII of the Sarbanes-Oxley Act of 2002.

4. The majority of the perceived fiscal action discrepancies were due to mistaken interpretation by the Complainant of fiscally related data.

5. The Complainant's reporting of her alleged perceived fiscal action discrepancies did not rise to the level of "protected activity" under the Act.

6. The Complainant failed to timely file an amended complaint, under federal regulations, or additional written complaint, under the Act, related to perceived adverse employment actions in 2005.

7. The Complainant is not entitled to relief under the Act.

ORDER

IT IS HEREBY ORDERED that the Complainant's September 24, 2004, complaint is **DENIED.**

A

Alan L. Bergstrom
Administrative Law Judge

ALB/jcb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution

Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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