In the Matter of:

STACY M. PLATONE,

COMPLAINANT,

v.

FLYi, INC.,[1]

RESPONDENT.

ARB CASE NO. 04-154

ALJ CASE NO. 2003-SOX-27

DATE: September 29, 2006

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**

Michael M. York, Esq., Charles Hildebrandt, Esq., *Wehner & York PC, Reston, Virginia*

***For the Respondent*:**

Eugene Scalia, Esq., Jason C. Schwartz, Esq., Tanya Axenson Macallair, Esq., *Gibson, Dunn & Crutcher LLP, Washington, District of Columbia* and Peter J. Petesch, Esq., *Ford & Harrison LLP, Washington, District of Columbia*

---

[1] When the complaint was filed the Respondent operated under the name Atlantic Coast Airlines Holdings, Inc. On September 9, 2004, the Respondent requested that the case caption be amended to reflect its new identity, FLYi, Inc. The Respondent's motion is unopposed and therefore, we amend the caption accordingly. However, to avoid confusion and maintain consistency with the prior decisions, the text of the Administrative Review Board's decision will refer to the parties as originally identified in the complaint and the decisions below.

***For the Amicus Curiae*:**

Ann Elizabeth Reesman, Esq., Laura Anne Giantris, Esq., *McGuiness, Norris & Williams, Washington, District of Columbia* representing the Equal Employment Advisory Council and Stephen A. Bokat, Esq., Ellen Dunham Bryant, Esq., *National Chamber Litigation Center, Washington, District of Columbia* representing the Chamber of Commerce of the United States of America

FINAL DECISION AND ORDER

On April 2, 2003, Stacy M. Platone filed a complaint with the United States. Department of Labor under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX or Act).[2] She alleged that Atlantic Coast Airlines Holdings, Inc. (ACA Holdings) violated the employee protection provision of the Act when it suspended her and later terminated her employment effective March 19, 2003. After a hearing, an Administrative Law Judge (ALJ) issued an April 30, 2004 recommended decision finding that Platone had engaged in protected activity and her suspension and termination were causally related to the protected activity. In a supplemental decision dated July 13, 2004, the ALJ recommended awarding Platone damages, costs and attorney fees. ACA Holdings timely appealed the ALJ's decisions. Because the ALJ erred as a matter of law in finding that Platone had engaged in protected activity, we decline to adopt the April 30 and July 13, 2004 recommended decisions and deny Platone's complaint.

BACKGROUND

We have carefully reviewed the record and find that it generally supports the ALJ's recitation of the facts.[3] Therefore, we will summarize the relevant facts of the case. ACA Holdings was a publicly-traded holding company incorporated in the state of Delaware.[4] Atlantic Coast Airlines (ACA) was a wholly-owned subsidiary of ACA

---

[2] Pub L. No. 107-204, 116 Stat. 745, 802-04 (2002), 18 U.S.C.A. § 1514A (West Supp. 2005). The regulations implementing Section 806 are found at 29 C.F.R. Part 1980. (2006).

[3] Recommended Decision and Order, April 30, 2004 (R. D. & O.) at 2-18.

[4] Complainant's Exhibit (CX)-1 at 2. ACA Holdings/FLYi, Inc. common stock was previously listed on the NASDAQ stock market. CX-12. FLYi, Inc. filed for Chapter 11 bankruptcy protection on November 7, 2005, and suspended all flight operations effective January 5, 2006. On March 24, 2006, the parties submitted a Notice of Modification of Automatic Stay stating that the United States Bankruptcy Court for the District of Delaware had entered an order granting the motion of FLYi, Inc. and its affiliated debtors to modify the

Holdings and its principal operating business.[5] During the relevant time frame, ACA operated as a regional passenger carrier serving portions of the United States and Canada under marketing agreements with United Airlines, Inc. (d/b/a United Express) and Delta Air Lines, Inc. (d/b/a Delta Connection).[6] Based on ACA Holdings' 2002 annual report (SEC Form 10-K), the company derived "substantially all" of its revenues through its marketing agreements with United and Delta.[7] The annual report also indicated that the company had approached the pilots' union with the intent to negotiate wage reductions and work rule changes through voluntary concessions, with the goal of bringing its pilot costs in line with other competing regional carriers.[8]

In the summer of 2002, Jeffrey F. Rodgers, ACA's Senior Director of Labor Relations and Planning, sought candidates for the position of manager of labor relations.[9] Captain John Swigart, an ACA pilot and high-ranking union representative,[10] recommended Platone for the position.[11] At the time, Platone was an Air Line Pilots Association (ALPA) employee.[12] Swigart had known Platone since January 2001, and

---

automatic bankruptcy stay to permit the Administrative Review Board to issue its decision in this proceeding. *See* Order Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure Approving the Stipulation between the Debtors and Stacey M. Platone to Modify the Automatic Stay, Case No. 05-20011 (MFW) (Bankr. Del. Mar. 16, 2006).

5 CX-1 at 5. ACA was later renamed Independence Air, Inc.

6 *Id.*

7 *Id.* at 5. Revenue derived from the marketing agreement with United represented 82 percent of ACA's total revenue for the year ending December 31, 2002. *Id.* United and its parent company, UAL Corporation, filed for Chapter 11 bankruptcy protection on December 9, 2002, and United's financial difficulties ultimately affected ACA's operations. *Id.* at 4, 6.

8 *Id.* at 11. The existing collective bargaining agreement (CBA) with the pilots' union was ratified on February 9, 2001, and covered a four and a half year period through August 8, 2005. *Id.*; CX-38 (CBA, Section 28 ¶ C) at 160-161. In June 2003, the pilots' union and ACA agreed to a revised conditional contract that included, among other things, reductions in pay rates. CX-12; CX-39.

9 Hearing Transcript (TR) at 419, 422.

10 The Air Line Pilots Association (ALPA) represented ACA's pilots. CX 1 at 11. Swigart was then-chairman of ALPA's ACO Master Executive Council (MEC), a position he had held since March 1999. His term as MEC chairman was scheduled to expire at the end of October 2002. TR at 75.

11 TR at 430.

12 *Id.* at 70-72, 430. Platone had worked as an ALPA communications specialist since April 1998. Respondent's Exhibit (RX)-16 at 4.

the two were romantically involved when he recommended her for the ACA position, a fact Swigart did not personally disclose to Rodgers until several months later.[13]

In July 2002, Platone participated in a series of interviews with various ACA managers, including Rodgers.[14] Several interviewers expressed concern about Platone's ability to represent ACA's interests given her association with ALPA.[15] However, Platone was able to assuage those concerns, and ACA ultimately offered her the position of labor relations manager.[16] During the interview process with ACA, Platone did not disclose the full extent of her personal relationship with Swigart.[17] Platone assumed her new duties on August 19, 2002.[18]

One of Platone's responsibilities as labor relations manager was processing ALPA pilot-representative's requests for removal from flight service. Under the collective bargaining agreement (CBA) between ACA and ALPA, a pilot who was needed to perform ALPA-related business would request that he or she be removed from ACA's scheduled flight service. Depending on the needs of the airlines, ACA might agree to release the pilot and if it did, ACA nonetheless paid the pilot for the hours he or she would have otherwise worked. ACA also incured the cost of paying a substitute pilot to perform the services the ALPA pilot-representative would have performed. As a means of compensating ACA for the additional costs incurred (flight pay loss), ALPA agreed to reimburse ACA on a monthly basis for its payroll expenditures related to ALPA pilot-representatives removed from service (RFS).[19] The authorization, scheduling, tracking and billing procedures related to flight pay loss were divided among several ACA departments, including labor relations.[20]

---

[13] TR at 144, 150, 170, 325, 442, 547.

[14] *Id.* at 197, 422.

[15] *Id.* at 431-433, 615-616.

[16] *Id.* at 433; RX-15.

[17] TR at 190, 323-324, 617.

[18] *Id.* at 190.

[19] CX-38 (CBA, Section 25 ¶ J) at 140-143. According to the terms of the CBA, ACA billed ALPA 120 percent of the individual pilot-representative's hourly rate so as to recoup the additional expenses incurred for various employee fringe benefits. *Id.* at 141.

[20] TR at 712-713.

In September 2002, Tiffany de Ris, ACA manager of crew resources administration, advised Platone that there were some billing discrepancies concerning flight pay loss.[21] At the time, de Ris' department was responsible for billing ALPA.[22] She reported that the hours ACA billed were not necessarily the hours ALPA had on record.[23] Uncertain about how to proceed, de Ris brought the matter to Platone's attention because of her working relationship with ALPA and Platone's familiarity with the CBA.[24] According to de Ris, Platone told her to "hold off" while Platone looked into it.[25] Based on her conversation with Platone, de Ris stopped billing ALPA for flight pay loss.[26]

Apparently, there was a misunderstanding between de Ris and Platone as to what Platone meant when she told de Ris to "hold off." Whereas de Ris suspended billing in September 2002, Platone did not immediately pick up where de Ris had left off.[27] In early December 2002, Platone learned that ALPA had not been billed since June 2002, and at that time, Platone told de Ris to bill ALPA through October 2002.[28] Platone also requested various flight pay loss records and she advised de Ris that labor relations would play a more active role in subsequent billing periods.[29] According to Platone, as of February 2003, de Ris' department had yet to bill ALPA for flight pay loss dating back to summer 2002.[30]

---

21 *Id.* at 715.

22 Although the CBA called for monthly billing, de Ris testified that ACA had been billing ALPA on a quarterly basis based on a verbal agreement. TR at 715. When de Ris met with Platone in September 2002, ALPA had not been billed for flight pay loss since June 2002. *Id.* at 720-721.

23 *Id.* at 715.

24 *Id.*

25 *Id.* at 716.

26 *Id.* at 718-721.

27 Platone testified that she never told de Ris in September 2002 not to send bills to ALPA. TR at 370-371. Both Rodgers and Platone testified that billing was not originally part of labor relations' responsibility. *Id.* at 215, 278, 450. Platone ultimately assumed responsibility for billing ALPA in March 2003. *Id.* at 759, 761.

28 CX-23; TR at 219-220, 269, 270.

29 CX-23.

30 RX-19 at 13; TR at 274.

During the last week of February 2003, Platone conducted, in her words, a "very, very preliminary investigation," that uncovered four pilot-representatives who she believed had abused the flight pay loss system.[31] One of those individuals, Mike Rops, was a member of the ALPA/ACA scheduling committee.[32] By comparing pilot time cards and schedules, Platone believed that pilots had picked up trips on their scheduled days off and later dropped those same trips to attend to union-related business.[33] Platone further explained that at least with respect to scheduling committee participation, the pilot-representatives knew up to six weeks in advance the dates the scheduling committee planned to meet.[34] Therefore, when they received their flight schedule for the upcoming month, they could pick up assignments on days that were originally scheduled as off days knowing that they were unable to work those flights because of previously scheduled union business.[35]

Platone shared her thoughts about flight pay loss abuse with Rodgers in an e-mail dated March 3, 2003.[36] She noted that someone in the pilot union's accounting department had told her that ALPA's policy did not cover reimbursement for dropped trips picked up on originally scheduled days off.[37] Rodgers responded that "If National ALPA is not paying the company for pilots on their days off, then [ACA is] not paying the pilots."[38] Rodgers would later testify that this was the first instance he recalled that Platone raised the issue of flight pay loss abuse. [39]

---

[31] TR at 249-250, 264-265.

[32] *Id.* at 249. With respect to Rops, Platone identified five days in January 2003 that she believed were suspect. RX-19 at 13; TR at 274. On those five days Rops was removed from service for a total of 18.75 hours. According to Platone, Rops earned $60.79 an hour. TR at 267; CX-43. Rops' hourly rate ($60.79) multiplied by the number of hours (18.75), plus an additional 20% to cover employee fringe benefits equals $1,367.77 of flight pay loss in January 2003.

[33] RX-19 at 13; TR at 274.

[34] TR at 250-268.

[35] *Id.* at 250-268.

[36] RX-12 at 1-2.

[37] Platone would later identify Kitty Lee as the ALPA accounting department employee she had spoken with concerning ALPA's flight pay loss policy. TR at 280.

[38] CX-28.

[39] TR at 562.

On March 4, 2003, Platone spoke with Captain Christopher Thomas, the new MEC chairman, about the flight pay loss issue.[40] The following day, Thomas sent an e-mail to the MEC and other ALPA committee members concerning allegations that members may have picked up open flights in anticipation of later dropping those flights for ALPA business.[41] He characterized the alleged practice as "highly unethical" and reminded his members of the need to conduct themselves in a manner that would be above reproach.[42] Thomas forwarded a copy of this e-mail to both Platone and Rodgers.[43] Platone later advised Rodgers via e-mail that Thomas had previously told her that ALPA would pay for trip drops that were picked up on originally scheduled days off.[44] Platone, however, wanted Thomas to provide written assurance, and she felt that Thomas' e-mail was not consistent with their prior conversation.[45] In reply, Rodgers asked Platone how she was able to determine that the "trade or add of a trip was done with the intent to be paid for ALPA business."[46] She explained that certain trips were picked up or traded after the schedule construction e-mails were sent out.[47]

On Thursday, March 6, 2003, Rodgers met with Thomas and Rops. Rodgers did not recall the specific details of their conversation, but he did remember that Thomas told him he was "having difficulty working with Stacy."[48] That same day at approximately 6:00 p.m., Platone sent Rodgers, via e-mail, an initial draft of a letter she proposed sending to Thomas under Rodgers' signature.[49] The letter advised, among other things, that absent written notice from ALPA guaranteeing reimbursement, ACA would no

---

40 *Id.* at 281-284.

41 RX-3 at 2.

42 *Id.*

43 *Id.*

44 *Id.* at 1.

45 *Id.*

46 *Id.*

47 *Id.* The scheduling committee e-mail purportedly provided advance notice of the dates when the committee planned to meet. Therefore, the pilot-representatives would have been aware that they had a prior ALPA commitment when they added or traded a trip for those particular dates when the committee was scheduled to meet. TR at 259, 376.

48 *Id.* at 447, 461-462.

49 CX-32; RX-4.

longer pay ALPA pilot-representatives for ALPA-related business performed on days that were originally scheduled as off days.[50]

Rodgers responded to Platone's e-mail the following morning, March 7, 2003, indicating that he was "not interested in sending [the] letter."[51] Rodgers also asked "How far behind [was ALPA] in paying [its] bills?"[52] When Platone saw Rodgers later that day she asked if he wanted her to "take another stab" at the letter.[53] He reportedly told her "Don't bother."[54] Rodgers testified that he was unwilling to send the letter because he had already received assurances that ALPA would reimburse the company and Thomas had told Rodgers there was no evidence of any wrongdoing.[55] Rodgers also indicated that the letter involved an internal ALPA issue.[56] He asked Platone to focus on the bigger issue – getting the money owed ACA.[57]

Platone also received an e-mail from Thomas on March 7, 2003.[58] He noted that he had spoken with ALPA finance-payroll and one of the union's vice presidents regarding the removal from service issue. He further indicated that he did not think any of their practices was out of line and he asked Platone if she could refer him to the specific ALPA policy. Thomas also noted in his e-mail that he had reiterated ALPA's ethical responsibilities to his committee members.[59]

Platone responded that based on Thomas' e-mail it was her understanding that "ALPA will pay for pilots who pick trips on days dropped later for ALPA business." [60]

---

50 CX-33.

51 CX-32.

52 *Id*. Platone met with crew resources administration that same afternoon and assumed responsibility for ALPA flight pay loss billing. TR at 289; CX-34 at 4; RX-19 at 13.

53 TR at 288.

54 *Id.* at 289.

55 *Id.* at 456-458, 460-461, 572-574, 576-577.

56 *Id.* at 460.

57 *Id.* at 574.

58 RX-19 at 17.

59 *Id*.

60 *Id*.

She explained that as long as she had that understanding from Thomas, she was not worried about billing ALPA for the time. Platone further indicated that she could not provide a specific cite to the ALPA policy she previously mentioned, but it had come into play during her previous experience at ALPA.[61] Thomas responded that according to the letter of agreement, the company covers trips that get dropped for schedule/line construction and he asked that Platone provide the names, date and times regarding any ALPA members who had been less than honest. Thomas also stated that he realized that pilots may have picked up time that was later dropped for schedule construction, but this occurred when ACA had not notified the MEC Chairman of specific dates and times for the work. He again reiterated the union's position on ethical behavior regarding pilot-representatives.[62]

On Saturday, March 8, 2003, Swigart received a telephone call from MEC Chairman Thomas regarding Platone's employment with ACA.[63] And in an attempt to clarify the matter, Swigart called Rodgers and during this conversation he revealed that he and Platone were dating.[64] According to Rodgers, this was the first he had heard about Platone and Swigart dating.[65]

When he returned to work on Monday, March 10, 2003, Rodgers spoke with Michelle Bauman, director of employee services, about Platone's romantic relationship with Swigart and other performance issues.[66] Baumann recommended that Rodgers conduct two separate meetings with Platone, the first to discuss performance-related issues and a second meeting to discuss Platone's relationship with Swigart.[67] Rodgers met with Platone that afternoon as recommended.[68] He could not recall what performance-related issues were discussed, but according to Platone they discussed ALPA vacations, ALPA billing and ALPA scheduling committee meeting minutes.[69]

---

61 *Id*.

62 *Id*.

63 TR at 140-141.

64 *Id.* at 143-144, 463. Swigart called Rodgers to inquire about the accuracy of a report he had recently received from Thomas that ACA was investigating Platone. *Id.* at 140-141.

65 *Id.* at 464.

66 *Id.* at 467.

67 *Id.* at 467, 620.

68 *Id.* at 468.

69 *Id.* at 294-295, 467-468; RX-19 at 13.

With respect to ALPA billing, Platone recalled that she provided Rodgers a status update, which included various meetings she had with ACA's controller, accounts payable and crew resources department.[70] Platone also reported that the ALPA bill for June-September 2002 had just recently been sent and that she had directed crew resources to send out the bill for October 2002 as well.[71] She also reported that her department would handle ALPA billing from November 2002 forward.[72] Platone further indicated that after updating Rodgers about ALPA flight pay loss and billing, he reportedly stated, "Ok, I want my money."[73] Although unable to recall specific details, Rodgers indicated that he was satisfied with the outcome of the March 10, 2003 meeting, noting that Platone provided valid answers.[74]

The following day, March 11, 2003, Rodgers met with Platone to discuss his concerns about her ongoing personal relationship with Swigart.[75] According to Rodgers, Platone indicated that ALPA was out to get her and she felt she was working in a hostile and threatening environment.[76] Because of Platone's complaint of a hostile work environment, Rodgers ended their conversation and immediately called Bauman to investigate Platone's allegation.[77] Rodgers testified that Platone did not allege any wrongdoing on ACA's part in their meetings on March 10 and 11, 2003.[78]

Bauman and Susan J. Davis, an ACA employee relations specialist, met with Platone on March 12, 2003, to investigate her complaint of a hostile work environment.[79] Platone testified that she told Bauman and Davis about the concerns she had raised with Rodgers about flight pay loss abuse and how the pilot-representatives had cheated the

---

70 Platone prepared a May 17, 2003 statement for the OSHA investigator wherein she provided a detailed account of her March 10, 2003 meeting with Rodgers. RX-19 at 13.

71 *Id.*

72 *Id.*

73 *Id.*

74 TR at 468.

75 *Id.*

76 *Id.* at 469.

77 *Id*. at 303, 364, 469, 620.

78 *Id.* at 469-470.

79 *Id.* at 303-304, 622.

company out of money and now were angry with her for raising the issue.[80] According to Bauman, Platone did not accuse Rodgers of any wrongdoing or express any fear where he was concerned.[81]

On March 13, 2003, ACA suspended Platone with pay pending investigation of a conflict of interest.[82] After further deliberation, ACA terminated Platone's employment effective March 19, 2003, ostensibly because of the conflict of interest that arose from her relationship with Swigart.[83] Both Rodgers and Bauman testified that Platone's concerns about flight pay loss did not factor in the decision to terminate her employment.[84]

Platone filed a complaint with the Occupational Safety and Health Administration (OSHA) on April 2, 2003.[85] In her complaint she alleged that ACA had terminated her employment after she discovered and reported a scheme to defraud shareholders and members of the pilot's union.[86] Platone claimed that on or about March 3, 2003, she brought to Rodgers' attention her discovery that the company had created, or had acquiesced in, a scheme to funnel improper payments to members of the union's master executive council.[87] According to Platone's complaint, the payments totaled more than $125,000.00 since November 2002.[88] Platone indicated that she "reasonably believed" that the flight pay loss scheme she uncovered violated Federal mail and wire fraud statutes and SEC Rule 10b-5.[89] Platone also alleged that the losses had not been reported

---

[80] *Id.* at 304, 372. Davis did not testify at the ALJ's hearing. However, her notes from the March 12, 2003 meeting were submitted into the record as CX-53.

[81] TR at 628-629, 668. ACA's investigation of Platone's allegations of a hostile work environment concluded without further action on March 14, 2003. RX 19 at 21.

[82] TR at 473-474, 635; RX-19 at 20.

[83] TR at 474, 635-636.

[84] *Id.* at 474, 479-480, 636-637, 691.

[85] April 2, 2003 (OSHA) Complaint at 1.

[86] *Id*.

[87] *Id.* at 3-4, ¶ 10.

[88] *Id.* at 5, ¶ 14. The alleged $125,000.00 in ACA losses was calculated by taking a flight pay loss average of $25,000.00 per month and multiplying it by 5 months, covering the period of November 2002 to March 2003. TR at 589-590.

[89] OSHA Complaint at 6, ¶ 19.

to shareholders in violation of the laws and rules of the United States. Securities and Exchange Commission (SEC). [90] Additionally, she alleged that her March 19, 2003 termination for a conflict of interest was a pretext.[91]

OSHA denied Platone's complaint on July 18, 2003.[92] The denial was based upon Platone's failure to establish that she engaged in protected activity. On August 14, 2003, Platone requested a hearing before the Office of Administrative Law Judges.

After a four-day hearing, the ALJ issued her recommended decision on April 30, 2004. ACA Holdings had argued that Platone was not one of its employees, but was instead employed by ACA. And because ACA was not a Company or Company representative as defined under the Act and implementing regulations, Platone's complaint should be denied.[93] In addressing ACA Holdings' argument, the ALJ acknowledged the corporate law principle that a parent company was not liable for the acts of its subsidiary. However, she found that ACA Holdings had disregarded ACA's separate corporate identity in its dealings with the public, the SEC, and with its own employees. The ALJ, therefore, held ACA Holdings liable on the grounds that it was ACA's alter ego.[94]

With respect to the complaint's merits, the ALJ found that Platone had a "rational and reasonable basis for her belief" that Rodgers, and perhaps others at ACA, were "complicit" in a scheme to compensate pilots improperly in hopes of gaining contract concessions.[95] Additionally, the ALJ found that such a scheme, by its very nature, would involve the use of the mail and wires, and could constitute fraud on ACA Holdings' shareholders.[96] The ALJ, therefore, concluded that Platone engaged in protected activity under the Act when she reported her "suspicions" to Rodgers and then Bauman.[97] The ALJ further found that Platone's employer was aware of her protected activity and that her termination constituted an unfavorable personnel action.[98] On the question of causal

---

90 *Id.* at 5, ¶ 14.

91 *Id.* at 6, ¶ 18.

92 OSHA advised ACA Holdings of its decision on July 22, 2003.

93 Respondent's Post-hearing Brief at 29.

94 R. D. & O. at 20-21.

95 *Id*. at 25.

96 *Id.*

97 *Id.*

98 *Id*. at 26.

relationship, the ALJ found that Platone's termination was due to her protected activity as well as her failure to disclose her romantic involvement with Swigart.[99] But despite one non-discriminatory basis for the March 19, 2003 termination, the ALJ concluded that ACA Holdings had violated the Act because it was unable to demonstrate that it would have terminated Platone solely on the basis of her relationship with Swigart.[100]

The ALJ also issued a supplemental decision on July 13, 2004, recommending that Platone receive an unspecified amount of damages for back pay, vacation pay and medical expenses, plus litigation costs and attorney fees totaling $174,759.88. ACA Holdings filed a timely appeal on July 27, 2004.

ISSUE

The issue we consider dispositive is whether Platone engaged in protected activity under the Act.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Board.[101] In cases arising under the Sarbanes-Oxley Act, we review the ALJ's factual determinations under the substantial evidence standard.[102] However, the Board exercises de novo review with respect to the ALJ's legal conclusions.[103]

---

99 *Id*. at 29.

100 *Id*. at 30.

101 *See* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110 (2005).

102 20 C.F.R. § 1980.110(c). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-51, slip op. at 7 (ARB June 29, 2006)..

103 *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at 7 (ARB July 29, 2005).

DISCUSSION

Section 806 of the Sarbanes-Oxley Act prohibits covered employers from retaliating against employees for providing information or assisting in investigations related to listed categories of fraud or securities violations. This section provides:

> (a) Whistleblower Protection For Employees Of Publicly Traded Companies.– No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee–
>
> > (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by–
> >
> > > (A) a Federal regulatory or law enforcement agency;
> > > (B) any Member of Congress or any committee of Congress; or
> > > (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
> >
> > (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the

> Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.[104]

As pertinent to this case, the SOX's employee protection provision thus protects employees who provide information to a covered employer regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission (*see, e.g.*, 17 C.F.R. Part 210 (2005), Form and Content of the Requirements for Financial Statements), or any provision of Federal law relating to fraud against shareholders.

The Federal mail and wire fraud statutes Platone identified in her April 2, 2003 OSHA complaint, make it unlawful to use the mails, private parcel services, and various wire, radio, or television transmissions for purposes of planning or executing "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises…."[105] These statutes are not by their terms limited to fraudulent activity that directly or indirectly affects investors' interests.[106] However, when allegations of mail or wire fraud arise under the employee protection provision of the Sarbanes-Oxley Act, the alleged fraudulent conduct must at least be of a type that would be adverse to investors' interests.[107]

SEC Rule 10b-5, which Platone also referenced in her OSHA complaint, provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,

---

[104] 18 U.S.C.A. § 1514A.

[105] 18 U.S.C. §§ 1341, 1343.

[106] In contrast, 18 U.S.C.A. § 1348, entitled "Securities fraud," was enacted under Section 807 of the Sarbanes-Oxley Act of 2002, and by its terms, this section is also limited to fraud "in connection" with "any security" or the "purchase or sale of any security."

[107] The preamble to the Act states: "To ***protect investors*** by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes. Sarbanes-Oxley Act of 2002, Pub L. No. 107-204, 116 Stat. 745 (2002) (emphasis added).

> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.[108]

The elements of a cause of action for securities fraud, such as a violation of SEC Rule 10b-5, are rooted in common-law tort actions for deceit and misrepresentation.[109] The basic elements include a material misrepresentation (or omission), scienter, a connection with the purchase or sale of a security, reliance, economic loss and loss causation – a causal connection between the material misrepresentation and the loss.[110] A fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. [111] With respect to omissions of fact, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[112]

To prevail on her SOX complaint, Platone must prove by a preponderance of the evidence that: (1) she engaged in protected activity or conduct (i.e., provided information to a covered employer); (2) the employer 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.[113] If Platone succeeds in establishing that protected activity was a contributing factor, then the employer may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of her protected activity.[114]

---

[108] 17 C.F.R. § 240.10b-5 (2005).

[109] *Dura Pharm. Inc. v. Broudo*, 544 U.S. 336, 341 (2005).

[110] *Id.* at 341-42.

[111] *Basic v. Levinson*, 485 U.S. 224, 231-32 (1998).

[112] *Id.* at 231 (citing *TSC Indus., Inc. v. Northway Inc.*, 46 U.S. 438, 449 (1976)).

[113] *See* 18 U.S.C.A. § 1514A(b)(2)(C); 49 U.S.C.A. § 42121(b)(2)(B)(iii); *see also Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 & 04-115, ALJ Nos. 2004-SOX-20 & 2004 SOX-36, slip op. at 9-10 (ARB June 2, 2006); *Getman*, slip op. at 8.

[114] *See* 49 U.S.C.A. § 42121(b)(2)(B)(iv).

On appeal, ACA Holdings continues to object to its designation as a party to the complaint. For the purpose of our decision, we assume without holding that the ALJ correctly ruled that ACA Holdings was a proper respondent. Our review of Platone's whistleblower claim addresses the issue of whether she engaged in protected activity. Because we hold that she did not, her inability to establish that element of her SOX cause of action is fatal to her claim, and we need not address other issues raised on appeal.

Platone's Alleged Protected Activity

We disagree with the ALJ's legal conclusion that Platone engaged in SOX-protected activity. In defining the scope of protected activity under other Federal whistleblower protection provisions, the Board has held that an employee's protected communications must relate "definitively and specifically" to the subject matter of the particular statute under which protection is afforded.[115] The Corporate and Criminal Fraud Accountability Act of 2002 does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills. Rather, under the SOX, the employee's communications must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1). Thus, for example, an employee's disclosure that the company is materially misstating its financial condition to investors is entitled to protection under the Act. Applying these principles, we examine the information Platone provided to ACA.

Platone's flight pay loss investigation and her communications with Rodgers and Bauman regarding this particular issue occurred over a two-week period spanning late February and early March 2003. The relevant communications included various e-mail exchanges and conversations with both Rodgers and Bauman. ACA terminated Platone's employment on March 19, 2003, and she filed her OSHA complaint on April 2, 2003. In determining whether Platone engaged in protected activity, the relevant inquiry is not what she alleged in her April 2, 2003 OSHA complaint, but what she actually communicated to her employer prior to the March 19, 2003 termination.

Platone's March 3, 2003 e-mail exchange with Rodgers represents their first substantive communication regarding the flight pay loss issue. She forwarded him an e-mail she had originally sent to Schep which stated in relevant part:

> As you may know, there are instances where ALPA reps have picked up trips or traded for trips on originally

---

[115] *See e.g., Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 9 (ARB Sept. 30, 2003) (in whistleblower complaint arising under Energy Reorganization Act (ERA) of 1974, 42 U.S.C.A. § 5851 (West 1993), protected activity must "definitively and specifically" relate to nuclear safety).

> scheduled days off, which ended up being dropped for ALPA business. After speaking with someone in ALPA's accounting department, I was told that ALPA policy does not cover reimbursement to the company for billing the association for dropping trips picked up on originally scheduled days off.[116]

Platone also indicated that "[ACA is] paying the pilots for these occurrences now and billing ALPA for the time dropped."[117] She expressed concern that this practice could cause a problem for ACA accounting later as "ALPA does not pay."[118] Platone asked Schep for her advice on how to handle the situation. Schep recommended first advising ALPA of the situation and in the future, if a trip was picked up on an off day and later dropped for ALPA business, the time should then revert back to its original day off status.[119] Platone forwarded the Schep e-mail to Rodgers and asked him how she should proceed. His initial response was "If National ALPA is not paying the company for pilots on their days off, then [ACA is] not paying the pilots."[120]

Platone's March 3, 2003 e-mail exchange with Rodgers does not constitute protected activity. She did not provide information about conduct she reasonably believed constituted a violation of "18 U.S.C. [§§] 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders…."[121] Platone raised a possible violation of internal union policy and she expressed concern on how this might affect ACA's ability to collect a debt, but nothing approximating fraud against shareholders.

Over the next few days Platone continued to exchange e-mails with Rodgers regarding the flight pay loss issue. In a March 5, 2003 e-mail, Platone advised Rodgers that Thomas told her over the telephone that "ALPA would pay for trip drops that were picked up on originally scheduled days off" and she had asked him to put it in writing.[122] Rodgers' response was consistent with his March 3, 2003 response – "do not pay our

---

116 CX-28 at 2.

117 *Id*.

118 *Id*.

119 *Id*.

120 *Id.* at 1.

121 29 C.F.R. § 1980.102(b)(1); *see Getman*, slip op. at 9-10; *Harvey*, slip op. at 14-15.

122 RX-3.

pilots removed for ALPA business on days off" until Thomas sends a document stating that ALPA will pay for pilots on days off.[123] In a follow-up e-mail later that afternoon, Platone explained to Rodgers how she was able to determine that ALPA pilot-representatives had picked up trips with the intent of dropping them to attend previously scheduled union-related business.[124] Once again, the e-mails Platone exchanged with Rodgers on March 5, 2003, do not provide information concerning conduct that even arguably represents possible fraud against shareholders. What is evident is that Rodgers and Platone were working together to resolve a potential ACA billing problem. Consequently, Platone's March 5, 2003 communication with Rodgers regarding the flight pay loss issue does not constitute protected activity.

On March 6, 2003, Platone forwarded Rodgers a draft letter for Thomas regarding RFS and flight pay loss issues.[125] The portion of the draft regarding flight pay loss billing seeks clarification from the union about its policy regarding payment for pilots removed from schedule for days that were originally awarded as days off. The draft letter indicates that unless otherwise advised in writing, ACA will process the removal from schedule request as usual, but it would not pay the pilots for flight credit hours, and consequently, ACA would not bill ALPA for the time.[126] Rodgers responded the following day, noting he was not interested in sending the letter.[127] Rodgers did not offer any explanation, but he did ask Platone how far ALPA was behind in paying its bills.[128] Platone testified that she saw Rodgers later that day and she asked him if he wanted her to "take another stab" at the letter and he replied, "Don't bother."[129] Platone's March 6, 2003 e-mail, the attached draft letter and her brief exchange with Rodgers on March 7, 2003, do not constitute protected activity under the Act. She did not provide specific information regarding fraud against shareholders, but merely continued in her efforts to address the potential billing issue between ACA and ALPA regarding flight pay loss.

When Platone returned to work on Monday, March 10, 2003, Rodgers met with her to discuss a few job performance issues.[130] According to Platone, one of the issues

---

123 *Id*.

124 *Id*.

125 CX-32.

126 CX-33.

127 CX-32.

128 *Id.*

129 TR at 288-89.

130 *Id.* at 294-95.

was the status of ALPA flight pay loss billing. Platone indicated that she updated Rodgers on meetings she had with accounts payable, the crew resources department, and ACA's controller.[131] She also reported that ALPA had been billed through October 2002, and that labor relations assumed responsibility for ALPA billing beginning with the month of November 2002.[132] Additionally, Platone reported that Rodgers told her that he wanted to get the money owed ACA.[133] Much like the earlier conversations and e-mails exchanged between Rodgers and Platone, their March 10, 2003 meeting did not include any specific revelations about fraudulent activity affecting shareholder interests. As such, Platone's March 10, 2003 communication with Rodgers does not constitute protected activity.

Platone also met with Rodgers on March 11, 2003. Rodgers planned to discuss concerns about Swigart's recent disclosure of his romantic relationship with Platone. The meeting ended prematurely after Platone indicated that ALPA was out to get her and she felt she was working in a hostile and threatening environment.[134] Platone testified that the union had been aware that she and Swigart had dated for months and she told Rodgers she was upset about the union now making a big deal about their relationship.[135] Rodgers testified that Platone did not allege any wrongdoing on the part of ACA in their meetings on March 10 and 11, 2003.[136] Platone's March 11, 2003 conversation with Rodgers concerning her relationship with Swigart does not constitute protected activity under the Act.

Because of Platone's allegation of a hostile work environment, Rodgers arranged for her to meet with Bauman and Davis on March 12, 2003.[137] Platone testified that she told Bauman that she was "trying to get to the bottom of something with flight pay loss," and she thought "it was illegal … what some of the pilots were doing."[138] She also told Bauman "[t]hey were cheating … the company [out] of money…."[139] Platone also told

---

131 RX-19 at 13.

132 *Id.*

133 *Id.*

134 TR at 298-99, 303, 364, 469, 620.

135 *Id.* at 299.

136 *Id.* at 469-470.

137 *Id.* at 303.

138 *Id.*

139 *Id.*

Bauman that she and Rodgers had discussed the matter and she "wrote a letter and then nothing, and they're all mad about it now…."[140] Davis' notes of the March 12, 2003 meeting include at least two references to flight pay loss, one of which indicates Platone's belief that "ALPA [was] after her" for "questioning flight pay loss."[141] Bauman testified that Platone did not accuse Rodgers of any wrongdoing.[142] Platone similarly testified that she had not implicated Rodgers in any wrongdoing when she spoke with Bauman and Davis on March 12, 2003.[143]

Platone's March 12, 2003 conversation with Bauman and Davis does not constitute protected activity. She did not provide any information about fraud against shareholders. While she expressed her belief that the pilots were cheating the company out of money, the real victim of any alleged impropriety was ALPA. At that time, both Platone and Rodgers had received assurances from the union that ALPA would reimburse ACA for flight pay loss incurred on days that were originally scheduled as off days.[144] Rodgers represented that once ACA had been assured of reimbursement from ALPA, the issue of whether ALPA pilot-representatives had intentionally violated internal union policy was for ALPA to decide.[145]

After the March 12, 2003 conversation with Bauman and Davis, there is no mention of any additional substantive communications between Platone, Rodgers or anyone else at ACA regarding the flight pay loss issue. Platone learned of her suspension on March 13, 2003, and ACA subsequently terminated her employment on March 19, 2003.

Contrary to what she alleged in her April 2, 2003 OSHA complaint, Platone did not inform Rodgers and others at ACA that "the company had created, or had acquiesced in, a scheme to funnel improper payments to members of the union's master executive council."[146] The above-mentioned e-mails and conversations demonstrate that Platone did not provided her employer with specific information regarding "any conduct the employee reasonably believes constitutes a violation of 18 U.S.C. [§§] 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of

---

140 *Id.* at 304.

141 CX-53 at 3, 7.

142 TR at 628-29, 668.

143 *Id.* at 409-10.

144 *Id.* at 458, 481, 576; RX-3.

145 TR at 458, 481, 576.

146 OSHA Complaint at 3, ¶ 10.

the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders…."[147] Furthermore, Platone's April 2, 2003 allegation that ACA violated SEC Rule 10b-5 is baseless. Her revelations to Rodgers and others at ACA do not even approximate any of the basic elements of a claim of securities fraud – a material misrepresentation (or omission), scienter, a connection with the purchase, or sale of a security, reliance, economic loss and loss causation.[148] Additionally, Platone did not identify a fraudulent scheme "in connection with the purchase or sale of any security."[149] At the hearing, Platone testified to less than $1,500.00 of potential losses to ACA.[150] It is unlikely that a reasonable shareholder would find a loss of less than $1,500.00 material.

Thus, we decline to adopt the ALJ's finding that Platone engaged in protected activity. Because we hold that Platone did not engage in protected activity, we need not reach other issues raised on appeal, namely whether Platone's protected activity was a factor in her discharge, and whether ACA Holdings proved by clear and convincing evidence that Platone would have been discharged, notwithstanding her protected activity. Furthermore, because Platone has not prevailed on her SOX whistleblower complaint, she is not entitled to the damages, costs, and attorney fees the ALJ awarded in the July 13, 2004 Supplemental Recommended Decision and Order.[151]

CONCLUSION

Platone failed to establish that she engaged in protected activity under the Act. Accordingly, we do not adopt the April 30 and July 13, 2004 recommended decisions and

---

147 29 C.F.R. § 1980.102(b)(1); *see Getman*, slip op. at 9-10; *Harvey*, slip op. at 14-15.

148 *Dura Pharm. Inc.*, 544 U.S. at 341-42.

149 17 C.F.R. § 240.10b-5 (2005).

150 *See supra*, note 32. Platone alleged for the first time in her April 2, 2003 OSHA complaint that so-called "improper payments" to members of the MEC totaled more than $125,000.00. OSHA Complaint at 3-4, ¶ 10. However, at the ALJ's hearing Platone did not disclose any evidence that even remotely approached the $125,000.00 amount she alleged in her OSHA complaint.

151 *See* 18 U.S.C.A. § 1514A(c)(1), (2); 29 C.F.R. § 1980.109(b).

we **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge