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**Issue Date: 13 January 2006**

**Case No.: 2005-SOX-46**

**IN THE MATTER OF**

**DR. DANIEL ULIBARRI,**
**Complainant**

**vs.**

**AFFILIATED COMPUTER SERVICES,**
**Respondent**

**********

**Case No.: 2005-SOX-47**

**IN THE MATTER OF**

**ELENA MASON,**
**Complainant**

**vs.**

**AFFILIATED COMPUTER SERVICES,**
**Respondent**

# *DECISION & ORDER*

## PROCEDURAL BACKGROUND

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002[1] (the Act) and the regulations promulgated pursuant thereto[2] brought by Complainants Daniel Ulibarri and Elena Mason against Respondent Affiliated Computer Services (ACS).

[1] 18 U.S.C. § 1514A *et seq.*
[2] 29 C.F.R. Part 1980.

On or about 8 Nov 04, Complainants filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent violated their rights under the Act. OSHA conducted an investigation and issued its findings on or about 23 Mar 05. On or about 11 Apr 05, Complainants objected to the findings and requested a formal hearing. On 20 Apr 05, I issued an order setting the matter for formal hearing to be held on 1 Jun 05.

On or about 29 Apr 05, Respondent filed a motion to dismiss or stay the proceedings and compel arbitration. On or about 5 May 05, Complainants filed a formal complaint, their initial answer in opposition to the motion to dismiss or stay the proceeding, and a request for an additional 20 days to supplement their answer. On or about 11 May 05, Respondent filed a reply to Complainants' answer.

I denied the motion for summary disposition, finding genuine issues of material facts. I limited the formal hearing on 1 Jun 05 to consideration of (1) whether the complaint should be dismissed as the matter is subject to compulsory arbitration, (2) whether the complaint or the initial submission to OSHA were untimely and barred, and (3) whether the complaint fails to state a claim upon which relief can be granted.

On 1 Jun 05 a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments and submit post-hearing briefs. All parties were represented by counsel. Complainants were represented by Richard Deaguero. The hearing lasted from 1300 to 1840 hours. At the close of the hearing, the parties agreed that they would rest and the closed record would consist of the testimony presented and five exhibits offered by Respondent.[3]

On 29 Jul 05, Respondent filed its post-hearing brief, along with a motion to strike the exhibits Complainants had submitted on or about 5 Jul 05.[4] On 10 Aug 05, Complainants Mason and Ulibarri filed by fax directly with the court a single page memo asking for an extension to obtain new counsel. They complained that Mr. Deaguero was ill-prepared and not giving adequate attention to their case. On 16 Aug 05, Mr. Deaguero filed a motion for leave to withdraw as counsel and for an extension of time to allow Complainants to retain new counsel. Respondent did not oppose the extension or the withdrawal and both were granted.

On 17 Oct 05, Complainants, through new counsel, filed their post hearing brief. It included six exhibits as attachments. On 14 Nov 05, Respondent filed its reply brief.

## THE RECORD

The threshold issue in this case is whether the post-hearing documents submitted by Complainants should be considered part of the record. There are two sets of such documents. The first set was the subject of Respondent's motion to strike. The second set was attached to Complainants' post-trial brief.

[3] Tr. 297.

[4] While the office damage and move following Hurricane Katrina resulted in involved transporting records, the file has no such exhibits and the computer database shows no such filing by Complainants in June or July.

Under the Act, formal hearings are conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges.[5]

Unless otherwise directed, the record is closed at the conclusion of the hearing and no additional evidence shall be accepted into the record, except upon a showing that new and material evidence not readily available prior to the closing of the record has become available.[6]

At the conclusion of the hearing, the parties were specifically advised that the record would not be held open and that it would consist exclusively of the testimony adduced and exhibits accepted.[7] Moreover, Complainants' new counsel offers no suggestion (nor any evidence) that the exhibits in question were not readily available prior to the closing of the record. [8]

Therefore, the post-hearing exhibits are not included as part of the record and were not considered in this decision.

Consequently, my decision is based upon the following:[9]

Witness Testimony of
Complainants
Donald DeLorenz
Lora Villarreal

Exhibits
Respondent Exhibits (EX) 1-4, 6

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

## STIPULATIONS

The parties stipulate and I find as fact that Complainants' employment with Respondent was terminated on 9 Aug 04.[10]

[5] 29 C.F.R.§ 1980.107(a).
[6] 29 C.F.R. § 18.54.
[7] Tr. 297.
[8] While the exhibits that were the subject of the 29 Jul 05 motion to strike never reached the court, the same logic would apply.
[9] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[10] Tr. 35.

# EVIDENCE

***Complainant Daniel Ulibarri testified in relevant part as follows:***[11]

He has a Ph.D. and joined Respondent in December, 2001, as Vice-President of Human Resources. He was the vice-president of the western region, which he believes was Respondent's largest domestic population and included all of the states west of the Mississippi, with the exclusion of Texas. Employees in that region would go to their regional human resource generalist, and the regional human resource generalists reported to him. He held that position until February or March of 2003. By then Respondent had already implemented the Dispute Resolution Plan (DRP).

In 2003 he became Vice-President of International Human Resources, which was then changed to Vice-President of Human Resources Global Delivery Services. He held that position until he was terminated. He covered the mergers and acquisition portion of human resources, domestically and internationally.

It would not be fair to say that one of his duties or responsibilities was to be familiar with the DRP when it was implemented and to help employees understand it. He was aware that the DRP was implemented, but it was not his responsibility to be up to speed on what was in it.

He received some training in 2004 from Don DeLorenz on how to conduct an investigation. He did not receive training on the DRP itself, but got a PowerPoint summary of the stages of the DRP. That summary is the only thing that has ever been presented to him or any employee that he knows of. The DRP itself, as a full and complete document, is not presented to employees. They have to go get it. They can get it through Infobank, if they have access to their computers. He did not know when it became available on Infobank, but was personally aware of its presence on Infobank and had access to it. He never reviewed the DRP on Infobank because he never had time. He never read the DRP until about three days before the formal hearing.

He completed ethics training, but it only covered the stages of the DRP and did not explain how to initiate it. It basically covered the options with respect to getting an investigation, access to the ombudsperson, mediation, and arbitration. The training just explained what options existed, not how to go about getting access to them. There were no filing forms provided. An employee contacts his human resource person and depends upon them to forward the request. RX-2 could be the ethics training he went through, but he doesn't recall for sure. He is pretty sure that the DRP or the DRP summary was contained in the ethics training.

[11] Tr. 44-167.

Claimant knew there was an ethics phone line. It was only after he was fired that he became aware it was a way to contact the ombudsman and part of the DRP.

He understood that the DRP applied to all of Respondent's employees, including him. He understood that he was subject to the DRP if he had a claim against or an issue with the company.

He contacted Gladys Mitchell on August 10, when he sent an e-mail, with copies to Jeff Rich and Don DeLorenz, requesting an investigation and reporting unethical conduct. He complained that his termination was too fast and he did not receive all of his material. In addition, he was never informed of his rights with respect to health insurance. He did not have an exit interview and had several problems with the way Respondent conducted the investigation against him. He specifically asked for an investigation into Lora Villarreal's behavior, attitude, and unethical actions, which included asking him to buy her expensive gifts.

Respondent breached the DRP because even though the DRP says that one of human resource's responsibilities is to make sure the employees have access to the DRP, human resource employees were ordered not to suggest the DRP. Every request for an investigation or DRP was turned down. From July 29 until he was terminated, Lora Villarreal turned down his requests for investigations.

The company policy was to try to resolve all complaints within the investigative procedure and never mention or remind people that there were alternatives. Regardless of whether employees knew about the DRP, nobody remembered it. The company will never invoke the DRP on its own, even though the DRP expressly says it will resolve all workplace disputes using the DRP. Human resource personnel employees were ordered not to encourage employees to use DRP or to inform them of their rights to it.

When he raised the DRP he was told no and to "butt out." He believes that he was terminated because he advised Ms. Mason that instead of resigning, she should make use of the DRP process and file a request with Don DeLorenz. She followed his advice, but they never initiated an investigation. Respondent breached the DRP by retaliating against him and Ms. Mason for invoking it.

From July 29 until he contacted his attorney, he requested the DRP on 30 to 40 occasions. That includes the occasions on which he either made a complaint which should have triggered the DRP or the company itself should have invoked it on its own as part of its responsibility. The DRP says the company agrees to use the DRP as the sole means for resolving workplace disputes.

It was not until he read the DRP that he understood a request for an investigation is part of the DRP. Until then, he never considered that asking for an investigation or just simply raising a dispute invoked the DRP. At that point, he realized every time he asked Ms. Villarreal to conduct an investigation and she refused, a violation of the DRP occurred.

After his termination, he wrote to Lora Villarreal telling her that he was unhappy that even though he had offered to resign, she proceeded to terminate him anyway. He requested to be allowed to resign. He did not mention the DRP in that letter. He understood that whenever a workplace dispute is raised, the DRP is automatically invoked and the company has an obligation to inform the employee of the appropriate procedure.

Lora did not respond to his letter, but Tas Panos did. Tas Panos informed him that allowing a resignation was against company policy and absolutely impossible. Tas Panos also said there was nothing else that could be done, there were no avenues open, the matter was dead, and the case was closed. He interpreted Panos' words to mean that he had no options, including the DRP.

His post termination communications with Respondent related to problems arising both before and after his termination. He never specifically said he wanted to invoke the DRP and does not remember whether he even mentioned the DRP. He believes he did not have to do so. Respondent breached the DRP agreement because it refused to invoke it when he requested it. Respondent also breached it when they sent him termination paperwork asking him to waive his rights to DRP.

Another breach by Respondent occurred during mergers and acquisitions. Whenever an employee from another company refused to sign the DRP, Ms. Villarreal and Mr. DeLorenz said to tell them they do not have to sign the DRP agreement. Those employees would be led to believe that they were not waiving their rights, when in fact they were.

He contacted the ombudsman on August 10 by e-mail, but does not know if there was ever an investigation. The e-mail was also an attempt to initiate mediation, even if it did not specifically request mediation. The problem is that for an employee to take advantage of the DRP, they have to be experts in the DRP. When an employee has an issue, the company should disclose the options, and in his case, should have recommended going to mediation. Whether or not he specifically asked for mediation is irrelevant. The point is that she knew that he had filed a complaint and asked for an investigation, and she did not comply.

He never contacted AAA or JAMS to request arbitration. Before he was terminated, he had no knowledge that he needed arbitration. Lora Villarreal told him on the Wednesday and Thursday before he was terminated that the issue was over and it was resolved. Then Elena Mason filed a complaint on his advice and within two days, they were fired. It was a Friday and he could not contact AAA or JAMS. There was no phone number to contact them.

When he had asked for access to the alternate dispute resolution procedure it was through either Ms. Villarreal or Mr. DeLorenz.

The DRP does not apply to him because Respondent breached it.

Respondent never extended an offer to move the case to arbitration, mediation or alternate resolution in the time between his termination and Mr. Zurik's appearance of record in this case.

At one point, Ms. Mason wanted to drop the case because she was so scared. He and Ms. Mason went to their attorney and he wrote to Jeff Rich and Mark King asking for access to DRP. They did not get the DRP.

His understanding is that either party can invoke any part of the DRP.

When he requested DRP from Ms. Villarreal and Mr. DeLorenz, he did not specifically mention the word arbitration. He said that he and Ms. Mason were treated unfairly. By doing that, he invoked the DRP, but Respondent refused to do anything. For some reason Ms. Villarreal refused to believe anything they said or to allow them access to any of the information.

Once he and Ms. Mason retained counsel, there was a point at which Tas Panos communicated an offer to enter DRP.

On several occasions, he asked for DRP on behalf of Elena Mason. The first time was when he met with Lora Villarreal offsite on July 29. Ms. Villarreal said there were a lot of rumors about Ms. Mason. He replied that they were only rumors and that on July 16; Ms. Mason gave him a written complaint, which he was investigating. Ms. Villarreal told him to stop the investigation and that she did not want to hear about it.

On another occasion, he told Lora Villarreal that Ms. Mason was being unfairly treated and punished for things she did not do. He said there should be an investigation into the rumors and the allegations. Ms. Villarreal told him to "butt out."

After retaining counsel, he and Ms. Mason sent letters with their narratives of what happened. The letters did not request the DRP. It did say they had previously requested DRP, it had been denied, and that if there was no response, they were going to take legal action. Respondent did not respond.

During his termination, he never specifically brought up the DRP. He was in shock. He just wanted an investigation. He wanted to know why he was being terminated and to have his name cleared. There was no real investigation in response because none of the proper procedures for conducting an investigation were followed.

***Complainant Elena Mason testified in relevant part as follows:***[12]

She has a Bachelor's degree. She worked for Respondent from 2 Feb 04 to 9 Aug 04 as the international human resources generalist for Asia Pacific. She was in charge of the Asia Pacific human resources liaison between the Asia and Dallas offices.

She knew that Respondent had a DRP and that it applied to all employees, including her. She was not familiar with the entirety of the DRP, but has some knowledge of it.

While she was employed with Respondent, she was given a booklet, told it was the DRP, and asked to sign a paper acknowledging receipt. The booklet was only a few pages and a summarized version. RX-6 is the acknowledgment she signed.

She took part in the training course given by Don DeLorenz, about conducting an investigation and how it will lead to a resolution of any workplace dispute. She also received ethics training, but does not remember that it included a section on the DRP. She was aware the DRP was available on Infobank. Page 2 of RX-4 is a document she reviewed on the Infobank.

If employees had general questions about the DRP, as a human resource generalist, it was her responsibility to point them in the right direction to someone who could answer them.

Respondent breached its DRP contract because on several occasions she asked for it and they did not give it to her.

After her termination, she submitted a copy of her written complaint to Gladys Mitchell. It was 2 to 3 months before she received a response. Respondent also breached the DRP with another employee.

Her first request for DRP was on July 16. She wrote a letter to her supervisor, Dr. Ulibarri, asking him to investigate the rumors that certain employees were spreading about her sleeping at work. Dr. Ulibarri told her that he would do something about it. However, he returned and said that he was told to stop investigating. She did not take that to another level after Dr. Ulibarri.

The second DRP invocation was on the August 5. She orally complained about the same rumors to Don DeLorenz and Pablo Soria. She also raised accounting fraud in India. She said she needed to go through due process and the DRP. Mr. DeLorenz told her to put it in writing.

[12] Tr.168-223.

The third occasion was on the August 9. At one o'clock in the morning, she sent an e-mail which contained the substance of her oral complaint of August 5. Later that day, Mr. DeLorenz called her into his office only to toss the report away and say he was not going to investigate it. He gave the impression that he did not care about what she had to say, all he cared about was the allegation of the rumors about her, and that was all he wanted to investigate. No one ever came to her and questioned her about the factual background of the narrative she presented to Mr. DeLorenz and she does not believe an investigation was ever done.

She never contacted AAA or JAMS or demanded mediation or arbitration. She did not know that there was an AAA or JAMS and never had a full copy of the DRP until she got it from her lawyer. She did know that the process and the DRP are available on the Infobank.

Her lawyer sent Respondent a narrative of what happened and asked for DRP. He lawyer received a copy of the DRP two or three months later.

Even though she knew the DRP was available on Infobank, she did not have to review it. She might have glanced at it when she accessed it one time. She was under the impression that what she did was enough to request alternate dispute resolution and did not need to make a communication to AAA and JAMS.

The open-door policy starts when a complaint is made. She sent two e-mails to Ms. Villarreal with copies to her boss to give them a suggestion on how to solve the problem and to kill all the rumors. She was denied access when Lora Villarreal figuratively shut the door in her face and told her she did not need her suggestion. There was no open-door policy, just a solid wall of people not wanting to listen to what she had to say.

She never requested mediation or arbitration, but did ask for an investigation into the matter and a review of her termination. That was all she asked.

***Donald DeLorenz testified in relevant part as follows:***[13]

He is currently employed by Respondent. In August 2004, he was Vice-President of Employee Relations and Governance. He was largely responsible for the administration of the DRP program and employee relations. That would involve, among other things, investigation of complaints and dealing with the resolution of employee-relations issues out in the field.

The DRP is a dispute resolution plan. It is a way for employees or terminated employees to bring concerns that they may have to the company and to try to secure a resolution. There are four parts to it.

[13] Tr. 223-254.

The open door option is very informal. It is as simple as an employee going to the manager and saying that they have a problem. Many times, the issue is resolved right then and there.

The second option is an internal conference. If employees are not satisfied going up the chain to their manager, they can contact the ombudsman, Gladys Mitchell. Either she or a member of her staff will typically hold a conference that will involve the employee and the employee's manager or possibly a higher-level supervisor. She may talk to them individually or collectively. She will try to arrive at a resolution, but she is not an adjudicator.

The third option is mediation. This option is somewhat like an internal conference, with an outside third-party taking the place of the ombudsman.

There is no set order to the options and an employee can skip any of the other three steps and go straight to arbitration. If the employee says the magic word of arbitration, they go to arbitration. There is a simple form that goes to JAMS or AAA. At that point, JAMS or AAA will initiate the proceedings, which result in a full and final decision by an independent third party.

It is a fair expectation that anyone who wants to call him or herself a human resource professional with Respondent will be trained on the DRP. They sign the form when they start as an employee. Anybody who deals with employee relations has to know about the DRP. Since it is the way of resolving employee-relations disputes, to not know about the DRP basically means a human resource employee could not do his or her job.

Dr. Ulibarri never requested or discussed the DRP with him in the context of any of these matters. Dr. Ulibarri never mentioned the DRP in any conversation regarding any of this.

He was initially asked to do an investigation into some allegations against Dr. Ulibarri and Ms. Mason. He interviewed people and conducted the investigation. On Monday morning when he got to work, there was a lengthy e-mail from Ms. Mason with some exhibits attached to it. He met with her that morning. He told her he had the e-mail and was going to deal with the pending complaint first. He continued the investigation from the preceding week and later that day Ms. Mason was terminated.

He understands that Ms. Mitchell ultimately undertook some investigation of the allegations in Ms. Mason's complaint and responded saying that it had been looked into.

Dr. Ulibarri was terminated at the conclusion of his investigation. He did not inform Dr. Ulibarri of all the specific accusations. When he was terminated, Dr. Ulibarri did not ask him to conduct an investigation, but rather asked why he was being terminated. Dr. Ulibarri knew an investigation had already been conducted.

He met with Dr. Ulibarri and heard Dr. Ulibarri's version of the facts. Dr. Ulibarri expressed a number of concerns about questions that related to the allegations against him and wanted to know what the witnesses had said.

In Ms. Mason's 13 page e-mail complaint there was only about one sentence mentioning false allegations of fraud that might have occurred at some point in India. Ms. Mason did not ask to investigate that. Her complaint was a complaint against Stella Thevarakam.

To his knowledge, Dr. Ulibarri did not ask for an internal conference. Dr. Ulibarri certainly knew Gladys Mitchell's name and how to contact her. Dr. Ulibarri did not ask to speak to Lora Villarreal, who would have been his boss at that time.

Once Ms. Villarreal made her decision and terminated Dr. Ulibarri, Mr. DeLorenz was not going investigate anything else about Dr. Ulibarri's concerns.

All Ms. Mason had to do was what a lot of other employees have done. She apparently called Gladys Mitchell, who addressed the complaint. Ms. Mason's dissatisfaction with the resolution has nothing to do with whether or not she was afforded DRP.

Like a lot of other employees, Ms. Mason could have simply paid her $50 or $100 fee or asked for a waiver of the fee and asked for mediation or arbitration.

The DRP is very clear that the employee needs to invoke it. The company cannot tell every employee with an issue to go and invoke arbitration. It would be a ridiculous way to conduct business.

Elena Mason never invoked mediation or arbitration. She asked for a resolution of and an investigation into her claims against Ms. Thevarakam in her e-mail. However, it became moot at that point, because Ms. Mason was already terminated.

A fired employee complaining about his termination can use the DRP open door option. Ms. Mason could have gone and talked to Lora Villarreal about it. If Lora Villarreal, for whatever reason, was not the appropriate person, she could have gone to Mark King. If she did not want to do that, she could have gone straight to Gladys and asked for an internal conference. What Mason asked for was an investigation, and an investigation is different. An investigation and the DRP is not the same thing. A DRP is a dispute-resolution mechanism. An investigation is optional with the company.

Elena Mason did not ask him for alternate dispute resolution. She asked Gladys Mitchell for an investigation, which is probably an invocation of the DRP, but it sounds like the procedures were invoked and followed.

If the Complainants wanted mediation, they should have invoked it. If they wanted arbitration, they should have invoked it. If they wanted an internal conference, they could have called Gladys Mitchell and asked for a meeting where Mark King and Dan Ulibarri and/or Elena Mason could sit down together. They never chose to do any of those things. They asked for an investigation. Investigations and the DRP are not the same thing.

***Lora Villarreal testified in relevant part as follows:***[14]

She has been Respondent's chief people officer for seven years. She has responsibility for all of human resources, both in the United States and globally.

Employees are informed of the DRP and their rights under the DRP in a number of ways. Brand-new employees get that information in a new employee orientation. Existing employees get it as a part of their annual ethics training. For human resource employees, it is part of being a human resource professional that you must understand the DRP in order to explain it to other people.

There is also a threefold pamphlet, like page 2 of RX-4, which gives an overview and the mechanisms for an employee to utilize if they want to invoke the DRP. It is given to every employee. The DRP is also mentioned in ELI training, which is given to anyone who manages people.

The DRP is on Respondent's Infobank and easily available. It is also in every single facility in a hardbound copy and is on CD-ROM if people want to check it out and take it home with them. It is RX-1. Employees are not going to take the time to read the full DRP. They are going to go to the pamphlet. The company wants to make sure that they understand the plan and that the plan is available.

RX-2 is an example of the ethics training that employees go through regarding the DRP. RX-2 is seen by every employee at least once a year.
RX-3 is a record indicating that Dr. Ulibarri and Ms. Mason received DRP training as part of their ethics training.

As human resource employees, Dr. Ulibarri and Ms. Mason were responsible for understanding or knowing the DRP. They should have been at the forefront.

She never told Dr. Ulibarri to discourage employees from invoking the DRP or not to mention it.

Dr. Ulibarri never actually invoked the DRP. The decision to terminate Dr. Ulibarri was very hard. It is not something that happened overnight. When she met with Dr. Ulibarri he never asked to go to the DRP or mentioned the DRP. He never gave any information that would lead her to believe that he had made some kind of DRP complaint.

[14] Tr. 255-293.

Ms. Mason never requested or discussed invoking the DRP. There was no mention of anything that would lead her to believe Ms. Mason was making a DRP complaint. She never refused to speak to Ms. Mason or give her access. She never ignored either of the Complainants.

She knew that Ms. Mason eventually made a complaint against Stella Thevarakam. That complaint was investigated.

There is no requirement under the DRP that Respondent has to investigate any type of issue at work. She had no responsibility in connection with making DRP procedures available to Dr. Ulibarri or Ms. Mason. An employee has the responsibility to do that for themselves. If something went wrong with their career, it was not up to Respondent to invoke that policy. They had every right when they left to invoke the DRP. They had the brochures. They had the letters. They had everything that had been handed out during training. They had it all. All they had to do was either write a note or say they wanted the policy.

Elena Mason could have called the number to the ombudsman. She could have requested an internal conference. She could have requested an open-door policy. She could have done mediation. She could have invoked arbitration. If she did not have the money, Respondent would have taken care of it.

A request by a terminated employee to investigate the circumstances involving the termination is not an internal conference. An internal conference involves mediation with the ombudsman, the supervisor, and whatever other employees the terminated employees would like to have. Talking to the supervisor may be the open door part of the DRP if an employee and the supervisor understands that to be the case. By talking to Dr. Ulibarri and then to Ms. Mitchell, Ms. Mason may have used the DRP. Ms. Mitchell handled it appropriately. She investigated and coordinated with human resources.

Even though Elena Mason opposed her termination, she was not terminated without any chance to present her side of the story. There was a full investigation conducted on the allegations that soon became facts.

The company does not offer to employees' alternative dispute resolution when it terminates them. The employees have to ask for it or invoke it themselves. She did not advise Dr. Ulibarri or Ms. Mason of their options after they were terminated. Once employees are terminated, Respondent has no affirmative obligation to chase after them and ask them if they want to take advantage of alternative dispute resolution.

*The DRP document and summary states in relevant part that:* [15]

> The DRP is designed to resolve conflicts between the company and current and former employees. It does not change the at-will nature of the employment relationship and is not intended to expand or abridge substantive legal rights, except for the right to go to court. Unless otherwise specifically provided, substantive legal rights, remedies, and defenses are preserved. An arbitrator under the DRP can order any and all relief a party could obtain in a court of competent jurisdiction. The plan applies to all legal and equitable claims and controversies arising between employees subject to the DRP and Respondent.
>
> All disputes not otherwise resolved by the parties are subject to final and conclusive binding arbitration. Prior to binding arbitration, the parties may use the other DRP processes - open door, internal conference, and mediation.
>
> The DRP may be amended or terminated unilaterally by Respondent with at least 10 days notice. However, no amendment or termination may apply to a dispute if an attempt at resolution was already initiated under the DRP.
>
> The terms of the DRP are severable and the invalidity or unenforceability of one provision will not void another. The effective date of the plan is 13 Apr 02 and an application for continued employment beyond that date constitutes consent to be bound by the DRP.
>
> The DRP is the exclusive option for resolving workplace disputes over legally protected rights, including disputes arising after an employee is no longer working for the company. Respondent and its employees who accept or continue employment after the plan is implemented agree to use the DRP rather than the court system. If any employee files a lawsuit Respondent will move to have the suit dismissed and the dispute referred back to the DRP process.
>
> To invoke arbitration a party simply contacts either JAMS or AAA at the addresses or phone numbers provided. The employee must pay a $100 fee to invoke arbitration, although that fee may be waived in cases of hardship. The balance of the arbitrator fee is paid by the company. Discovery for arbitration is governed by the Federal Rules of Civil Procedure and at the hearing the parties have the right to cross examine witnesses. Each party must bear its own expenses and attorney's fees, although the arbitrator may award a prevailing employee a reasonable attorney's fee (notwithstanding otherwise applicable law). The arbitrator is a neutral, selected by the parties from lists provided by JAMS or AAA. The arbitrator's decision is final and cannot be appealed except in very rare circumstances.

[15] RX-1.

***The DRP training program states in relevant part that:*** [16]

> The DRP covers all new and existing employees (with limited exceptions) and includes four options: Open Door, Internal Conference, Mediation, and Arbitration. In the arbitration option, a neutral arbitrator hears evidence and arguments and makes a binding decision. There is no jury, but the arbitrator can grant any award authorized in a court of law.

***The DRP rules state in relevant part that:*** [17]

> The rules may be amended at any time by Respondent, but the amendment will not apply to any dispute proceeding already initiated. An employee may initiate arbitration by sending a written request to JAMS, AAA or Respondent's DRP administrator. Parties may be represented by counsel or any other authorized representative. The arbitrator may take an oath and require witnesses to be sworn. Evidence is not subject to formal rules, but rather subject to the arbitrator's determination of its relevance, credibility, and materiality. The arbitrator may subpoena witnesses at a party's request or on his own initiative.

***Training records show:*** [18]

> Complainant Ulibarri completed ethics training in 2002, 2003, and 2004. Complainant Mason completed the new hire and ethics courses in 2004.

***The DRP pamphlet states:*** [19]

> The DRP covers almost all employees and includes the Open Door, Internal Conference, Mediation, and Arbitration options. In the arbitration option, a neutral arbitrator hears evidence and arguments and makes a binding decision. There is no jury, but the arbitrator can grant any award authorized in a court of law. The DRP is the exclusive option for resolving workplace disputes over legally protected rights, including disputes arising after an employee is no longer working for the company. Respondent and its employees, who accept or continue employment after the plan is implemented, agree to use the plan rather than the court system. If any employee files a lawsuit Respondent will move to have the suit dismissed and the dispute referred back to the DRP process.

[16] RX-2, 1-51.
[17] RX-2, 73-86.
[18] RX-3.
[19] RX-4.

***The DRP acknowledgment form states:***[20]

> Complainant Mason recognized she was subject to the DRP as the exclusive forum for resolving workplace disputes and understood she was waiving her right to go to court.

## POSITIONS OF THE PARTIES AND ISSUES

Respondent argues that: (1) Complainants failed to file their administrative complaint within 90 days of their termination, as required by the regulation. (2) Complainants are subject to the mandatory arbitration provision of their employment contracts and the case should be dismissed.[21]

Complainants respond that: (1) They filed their complaint in a timely fashion. (2) If they did not, Respondent is equitably barred from raising the issue because it encouraged Complainants not to file. (2) Their employment contracts with Respondent did not include a mandatory arbitration clause. (3) If the contracts initially included the clause, Respondent breached the contract and can not seek enforcement of the arbitration clause.

## TIMELINESS

Administrative proceedings under the Act are subject to the rules promulgated at Parts 18 and 1980 of Title 29 of the Code of Federal Regulations. They set forth the procedures for submission of complaints, investigations, issuance of findings and preliminary orders, objections to findings and orders, and litigation before administrative law judges.[22]

A complainant must file his compliant within 90 days after an alleged violation of the Act. The date of the postmark, facsimile transmittal, or e-mail communication will be considered the date of filing.[23] The computation of time elapsed begins with the day following the act, event, or default, and includes the last day of the period. If the last day is a Saturday, Sunday, or a legal holiday the time period includes the next business day.[24]

In this case, the parties stipulated that the termination of the Complainants took place on 9 Aug 04. The 90th day was Sunday, 7 Nov 04. Under the rules, the complaint had to be filed by the next Monday, 8 Nov 04. The administrative file includes a copy of the complaint letter sent to OSHA, dated 8 Nov 04. One of the exhibits offered by Complainants was a document from the investigator stating that the complaint was filed on 8 Nov 04. Conversely, Respondent cites a sworn affidavit by Complainants Ulibarri stating that he filed the complaint on 9 Nov 04. The

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[20] RX-6.
[21] Respondent's objection that Complainants failed to submit a timely witness and exhibit list was made moot by the fact that Complainants did not call a witness and offered no exhibits that were admitted.
[22] 29 C.F.R.§ 1980.100(b).
[23] 29 C.F.R.§1980.103(d).
[24] 29 C.F.R.§18.4.

affidavit was attached to a brief filed in earlier motions; however, both parties were informed that exhibits and documents filed with previous motions were not considered part of the record for the formal hearing.[25] Consequently, based on the administrative record, I find as fact that the complaint was filed on 8 Nov 04 and was timely.

## COMPULSORY ARBITRATION

### *Parties Arguments*

Complainants argue that the contract to arbitrate is void *ab initio* for two main reasons: (1) Continued at-will employment is insufficient consideration to support a modification of a contract and the Respondent's unrestricted ability to rescind its promise to arbitrate at anytime deprives the transaction of mutual consideration, thus making the agreement illusory. (2) Even if the agreement is not illusory, it is unconscionable because the arbitration provision fails to provide employees with the funds to obtain legal counsel for the arbitration.

Complainants argue in the alternative that even if there was a binding agreement to arbitrate, Respondent breached the agreement by failing to comply with its own rules and guidelines governing the DRP.

Respondent concedes that while continued at-will employment may be insufficient consideration to support creation or modification of a binding contract, it is evidence of acceptance of otherwise valid terms. Respondent also disputes the factual predicate of Complainants argument and maintains that it did not have the unrestricted ability to rescind its promise to arbitrate at anytime. Respondent disputes that the failure to provide financial aid to an employee who seeks legal counsel for the arbitration process makes the agreement to arbitrate unconscionable as a matter of law. Finally, Respondent asserts that any allegations of failure to comply with the non-arbitration provisions of the DRP are irrelevant to the determination of whether Complainants' current complaint is subject to arbitration. Respondent further argues that it did not fail to comply with its obligations related to arbitration, since Complainants never invoked their rights to that process.

### *Law*

The Federal Arbitration Act (FAA) enforces contractual waivers of the right to judicial resolution of disputes in favor of arbitration. It provides that "[a] written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[26] The FAA requires that any proceedings brought upon any issue referable to arbitration under the terms of such a contract shall be stayed pending arbitration upon application by a party who is not in default in the arbitration.[27]

[25] Tr. 7.
[26] 9 U.S.C. §2.
[27] 9 U.S.C. §3.

Although the agreement to arbitrate must be written it need not be signed.[28]

The party arguing that a claim based upon a federal statute is not subject to the stay has the burden of showing Congressional intent to exempt the claim from the FAA. "There is nothing in the text of the statute or the legislative history of the Sarbanes-Oxley act evincing intent to preempt arbitration of claims under the act."[29]

The threshold question of whether there was a valid agreement to submit to arbitration should be decided by ordinary state-law principles that govern the formation of contracts.[30] State law applies to govern the general validity, revocability, and enforceability of such contracts, along with generally applicable contract defenses such as fraud, duress, or unconscionability. State law may not invalidate arbitration agreements under provisions applicable only to arbitration provisions.[31] The specific aspects relating to arbitration are determined by the FAA, and federal rather than state law is controlling as to a provision's validity.[32]

Under federal law, arbitration is not barred by an assertion that the entire contract was induced by fraud. There must be a specific claim that the arbitration provision itself was fraudulently procured[33] However, absent clear and unmistakable evidence, parties should not be forced to arbitrate the very question of whether the agreed to arbitrate.[34]

Under Texas law, an employee accepts a change in the terms of an at-will employment when he continues working after notice of the change. A provision for mandatory arbitration is valid if it is binding upon the employer even after termination of the employment and is not subject to revocation by the employer.[35] However, a contract modification may lack mutuality of consideration if the employer retains the right to unilaterally revoke its promise to arbitrate without prior notice.[36] There are both procedural and substantive aspects to the unconscionability analysis of an arbitration clause in evaluating the validity of an arbitration provision. The fact that continued employment is dependent upon the acceptance of new employment terms does not make the terms procedurally unconscionable since that is the essence of employment at-will.[37]

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[28] *M & I Elec. Industries, Inc. v. Rapistan Demag Corp.*, 814 F.Supp. 545 (E.D.Tex.1993).
[29] *Boss v. Salomon Smith Barney Inc.*, 263 F.Supp.2d 684, 685 (S.D.N.Y.2003).
[30] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1924).
[31] *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).
[32] *Tullis v. Kohlmeyer & Co.*, 551 F.2d 632 (5th Cir.1977).
[33] *Electronic & Missile Facilities, Inc. v. U.S. for Use of Mosley*, 306 F.2d 554 (5th Cir. 1962), *reversed on other grounds*, 374 U.S. 167 (1963).
[34] *Kaplan*, 514 U.S. 938.
[35] *In re Halliburton Co.*, 80 S.W.3d 566 (Tex.2002).
[36] *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223 (Tex.2003). *Davidson* does not mark a significant change in law from *Halliburton.* It simply found that the language was ambiguous as to whether the employer had retained the right to revoke without notice its promise to arbitrate.
[37] *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002).

While state contract law defenses apply in general, any state law regarding substantive unconscionability of an arbitration clause that applies only to such clauses would yield to federal substantive law,[38] although the federal court may look to state law.[39]

A disparity in size or resources between the parties is insufficient to establish unconscionability.[40] Requiring both sides to share the costs and fees associated with the arbitration does not automatically make the agreement to arbitrate unconscionable,[41] so long as the cost allocation is disclosed in the agreement.[42]

Factors that weigh in favor of conscionability include provisions for neutral arbitrators, more than minimal discovery, a written award, and no requirement to pay either unreasonable costs or any arbitrators' fees or expenses.[43] While it is not mandatory that the arbitration allows for all statutory remedies otherwise available, precluding remedies would weigh toward a finding that the agreement's provisions as a whole are substantively unconscionable.[44] A provision that the employer will pay some of the employee's attorney fees up front and that further fees may be included in the arbitrator's award will also weigh in favor of conscionability.[45] The key question is whether the employee can effectively vindicate his statutory cause of action in arbitration.[46]

The rule mandating a stay was not intended to limit dismissal of a case in the proper circumstances and dismissal of the case may be appropriate when all issues raised are subject to arbitration.[47]

## *Analysis*

Both Complainants testified that they knew the DRP existed and that they were subject to it. At the outset of the litigation they conceded that there was a binding contract to arbitrate, but that it had been breached by Respondent. It was only at the formal hearing that they amended their position to include arguments that there was never a valid enforceable contract to arbitrate. They base that argument on unconscionability and a failure of mutuality of consideration.

### Mutuality of Consideration

Complainants' argument that Respondent's unrestricted ability to rescind its promise to arbitrate at anytime deprives the transaction of mutual consideration is inconsistent with the actual terms of the DRP. It provides (1) that Respondent agrees to be bound by the plan and (2)

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[38] *See Casarotto*, 517 U.S. 681;. *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998).
[39] *Harris v. Green Tree Financial Corp*, 183 F.3d 173 (3rd Cir. 1999).
[40] *Stedor Enterprises, Ltd. v. Armtex, Inc.* 947 F.2d 727, 733 (C.A.4 (S.C.)1991) *citing Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334 (7th Cir. 1984).
[41] *Doctor's Associates, Inc. v. Hamilton* , 150 F.3d 157 (2d Cir. 1998).
[42] *Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975 (2d Cir. 1996).
[43] *Cole v. Burns Intern. Sec. Services*, 105 F.3d 1465 (D.C. Cir. 1997).
[44] *In re Luna*, 175 S.W.3d 315 (Tex. 2004).
[45] *In re Halliburton Co.*, 80 S.W.3d 566.
[46] *Cole*, 105 F.3d 1465.
[47] *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992).

while Respondent may unilaterally amend or terminate the plan, it must give at least 10 days notice and may not do so if an attempt at resolution has already been initiated under the plan. Similarly, the rules may be amended at any time by the Respondent, but the amendment will not apply to any dispute proceeding already initiated.

Were Respondent seeking to have this dispute resolved in court rather than submitted to arbitration, Complainants would be able to enforce Respondent's promise to arbitrate. Respondent promised to arbitrate and the limits placed upon its ability to amend or withdraw from that commitment were sufficient to establish mutuality of consideration.

Complainants' brief also argues that continued at-will employment does not constitute consideration in the case of a modification. The DRP was a term of Complainant Mason's original employment contract. It was not so with Complainant Ulibarri. However, the continuation of his at-will employment was sufficient to indicate his consent to the amendment of the contract to include the addition of the DRP. The promise to be subject to the DRP was the consideration.

The contract to arbitrate was supported by mutual consideration.

Unconscionability

Contracts can be deemed unconscionable because of the circumstance surrounding their formation or because of their substantive provisions.

*Formation*

Complainant Ulibarri had a Ph.D. and had been working for Respondent in a high level human relations position for a couple of months when the DRP became effective. Complainant Mason was a college graduate applying for a human relations position when she entered into a contract that included an arbitrate clause. The full terms of the DRP were available to Complainants. Both Complainants testified that they knew about the DRP in general, knew where to get more information about the DRP, and did not read the DRP because they did not have time. The DRP summary is 18 pages of relatively large type. It is not particularly long or complicated.

The fact that there was an imbalance in the relative size of the parties or that the DRP was a take it or leave it proposition does not make the contract unconscionable in its formation.

*Substance*

The central test in the substantive unconscionability analysis is the degree to which the arbitration clause allows the employee to fully vindicate his or her rights to the same extent he could have in court. Complainants rely heavily on the fact that the arbitration agreement does not require Respondent to pay for Complainants' attorneys in advance. While that is true, the contract does provide for (1) a minimal or waived arbitration fee, (2) a neutral arbitrator, in whose selection the employee has a role, (3) discovery consistent with the Federal Rules of Civil

Procedure, (4) the ability to call and cross examine witnesses, (5) a written decision, (6) any relief available under the same law a court would apply, and (6) reasonable attorneys fees if the employee should prevail.

Were there no arbitration clause and the case were tried in court, Respondent would have no obligation to pay Complainants' attorney's fees in advance. A promise to do so does weigh in favor of conscionability. However, in this case the absence of such a provision does not outweigh the remaining provisions which allow the Complainants to effectively vindicate their rights in the alternative forum of arbitration.

The contract to arbitrate is not unconscionable.

Breach

Complainants suggest that the DRP, in general, was a "sham." They argue that Respondent refused to follow the DRP and even advised its human relations specialists not to encourage employees to use the DRP or to inform them of their rights to it. In addition to the "general" breach of the DRP, Complainants also maintain that Respondent specifically breached as to them by refusing to follow the DRP in their cases. Complainants concede that they never specifically requested arbitration, in writing or otherwise. They argue that by various complaints and requests for investigations, they invoked the DRP and placed the burden on Respondent to invoke the process. Respondent failed to properly respond to their complaints or investigate their allegations and thereby breached the DRP, extinguishing Complainants' obligation to arbitrate.

The first question is whether a breach of any of the DRP provisions not related to arbitration would impact the parties' obligations to arbitrate. The DRP consists of four discrete options, none of which require the parties to utilize another as a predicate. Employees can immediately seek arbitration, if they desire. Arbitration, while one of four options within the DRP construct, is an independent process which stands on its own. Moreover, the DRP provides that terms of the plan are severable and the invalidity or unenforceability of one provision will not void another. Thus, even if Respondent breached any of the DRP provisions relating to the other three options, Complainants were still bound to address those breaches and any other issue in arbitration. Consequently, whether or not Respondent breached any non-arbitration provision is not relevant to the question of whether the parties are bound to arbitrate.

The terms of the arbitration contract clearly provided that in order to invoke his or her right to arbitration, an employee needed to either contact JAMS or AAA at the addresses or phone numbers provided or send a written request to the company's DRP administrator. That requirement was not hidden from Complainants. They testified they knew where the DRP was but did not have time to read it. Complainant Ulibarri testified that he did not call JAMS or AAA because it was a Friday, he could not contact them and there were no phone numbers. Complainants testified that they asked for investigations and contacted the supervisors and the ombudsman. They believed that the burden shifted to Respondent to either invoke arbitration on its own or in the alternative to remind Complainants about the availability of arbitration and how to go about invoking it.

The testimony was consistent, however, that Respondent believed that once it made its employees aware of the DRP program and explained to them how to obtain more information about it, it had no obligation to affirmatively advise employees to use the DRP or give unprompted information on how to invoke arbitration. Respondent believed that it would be a bad management practice to encourage employees who had complaints against it to invoke arbitration. Respondent instructed its human relations employees not to do so.

Although they testified they did not have time to read the DRP, Complainants had time to make statements and request investigations. The fact that Respondent did not invoke arbitration itself, or respond to Complainants' complaints and requests by suggesting they invoke arbitration, does not mean Respondent breached its obligation to submit to arbitration. This is particularly true given Complainants' educational levels and status as human relations employees. Complainants never asserted their right to arbitrate and Respondent never refused to submit to arbitration. There was no breach.

Whether or not Complainants' substantive complaints are meritorious, they entered into a binding agreement with Respondent to arbitrate those complaints. Respondent has not breached that agreement and its motion to stay this proceeding pending arbitration is granted.

## ORDER

Respondent's motion to stay is granted. Respondent will provide an arbitration status report to this Court with a copy to Complainants, starting on 1 Mar 06 and every 45 days thereafter with a final report and motion to dismiss not later than 15 days after conclusion of the arbitration.

**So ORDERED.**

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**PATRICK M. ROSENOW**
**Administrative Law Judge**