

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 April 2008

Case No. 2007-SOX-00054

IN THE MATTER OF:

MALINDA KASER,

Complainant,

v.

A.G. EDWARDS AND SONS, INC.,

Respondent.

APPEARANCES:

Scott D. Spiegel, Esq.
Reva D. Campbell, Esq.
Lynch, Cox, Gilman & Mahan, PSC
Louisville, Kentucky
For Complainant

Nancy Anderson Tayborn, Esq.
St. Louis, Missouri
For Respondent

BEFORE: LARRY S. MERCK
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Sarbanes-Oxley Act enacted on July 30, 2002, technically known as the Corporate and Criminal Fraud Accountability Act, Public Law 107-204, 18 U.S.C. § 1514A, *et seq.*, ("SOX" or the "Act"), and the regulations promulgated thereunder at 29 C.F.R. Part 1980. This statutory provision prohibits any company with a class of securities registered under § 12 of the Security Exchange Act of 1934, or required to file reports under § 15(d) of the same Act, or any officer, employee or agent of such company, from discharging,

harassing, or in any other manner discriminating against an employee in the terms and conditions of employment because the employee provided to the employer or Federal Government information relating to alleged violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1388, any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of Federal law relating to fraud against shareholders.

PROCEDURAL BACKGROUND

Malinda Kaser, Complainant, filed a complaint on January 3, 2007, with the United States Department of Labor in which she alleged that A.G. Edwards and Sons, Incorporated ("A.G. Edwards") violated the employee protection provisions of the SOX, when it terminated her employment on October 6, 2006, because "[she] refused to shred important documents and reported this to her superiors." (RX A).¹ On May 1, 2007, the Regional Administrator, Occupational Safety and Health Administration, U. S. Department of Labor, dismissed Ms. Kaser's complaint. (RX C). Complainant requested a hearing and a formal hearing was held in Louisville, Kentucky, on October 24 and 25, 2007. All parties were afforded a full opportunity to adduce testimony, offer documentary exhibits, submit oral argument, and file post-hearing briefs. Documentary evidence was admitted as follows: JX 1; CX 1-32; and RX A-T and A-1 through E-1. (Tr. 6-8). Post-hearing briefs were received timely from Complainant and Respondent. I based the following findings of fact and conclusions of law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered.

ISSUES

1. Whether Complainant engaged in protected activity within the meaning of the SOX?
2. Whether Complainant suffered an adverse action(s)?
3. Assuming Complainant engaged in protected activity, was Respondent aware of the protected activity?

¹ In this Decision and Order, "RX" refers to Respondent's Exhibits, "CX" refers to Claimant's Exhibits, "JX" refers to Joint Exhibits, and "Tr." refers to transcript of the hearing.

4. Assuming Complainant engaged in protected activity and suffered an unfavorable personnel action, whether her activity was a contributing factor in Respondent's alleged discrimination against Complainant?

5. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action irrespective of Complainant having engaged in protected activity?

STIPULATIONS

The parties have stipulated to the following facts:

1. A.G. Edwards & Sons, Inc. ("Edwards") hired Complainant on September 16, 1996, to be a sales assistant to the financial consultants in its Louisville, Kentucky, branch.

2. On or about October 31, 1997, Complainant transferred to Edwards's New Albany, Indiana, satellite branch as a sales assistant/wire operator.

3. In September 1999, Complainant became the officer cashier/wire operator.

4. Edwards promoted her to be the operations supervisor on November 1, 2000, for the New Albany branch. As the operations supervisor, Complainant oversaw, under the direction of the financial consultant-in-charge and branch manager, the activities of the satellite branch's support staff, not including the financial consultants.

5. Complainant's son-in-law, Timothy Newman ("Newman"), was the [financial consultant] in charge of the New Albany satellite.

6. Complainant reported directly to Newman.

7. Richard Paris ("Paris") was employed at the New Albany branch as a financial consultant under Newman.

8. Complainant remained with Edwards until July 23, 2004, when she voluntarily retired.

9. In the Fall of 2004, Newman requested to step down from management to commit to his full time duties [as a financial consultant].

10. Paris became the branch manager for the New Albany branch.

11. In November, 2004, Paris accepted the position of branch manager of the Louisville branch.

12. Around the end of 2004, Paris contacted Complainant about returning to Edwards at its New Albany branch.

13. Complainant accepted a position at the New Albany branch as a cashier/wire operator.

14. Complainant worked at Edwards's New Albany branch from January 10, 2005 to September 15, 2006.

15. In August of 2006, four people worked at Edwards's New Albany branch - Tim Newman and Jeffrey Simmons, both financial consultants who worked as a team; Tonya Davis, a registered sales assistant for the financial consultants; and Complainant.

16. On August 3, 2006, the Edwards's New Albany branch was notified that it would close on September 30, 2006, and consolidate with the Louisville branch.

17. The New Albany branch closed on September 15, 2006.

18. The following Monday, Complainant went to work for Edwards's Louisville, Kentucky, branch ("Louisville") as a receptionist.

19. She worked at the Louisville branch from September 18, 2006, to October 6, 2006.

20. On September 26, 2006, Newman called Kevin Corlett ("Corlett") who was the Louisville branch assistant branch manager.

21. On September 27, 2006, Complainant, Paris and Corlett met in the morning at the Louisville branch and discussed the document shredding issue among other issues.

22. All three met again in the afternoon to discuss the document shredding issue again as well as other issues.

23. On October 4, 2006, Paris issued a written employee report to Complainant.

24. Complainant delivered a letter to Mr. Paris on October 6, 2006.

25. On or about October 10, 2006, Edwards's Human Resources department sent Complainant a severance package.

(JX 1). Additionally, at the hearing, the parties stipulated that A.G. Edwards was covered by the SOX. (Tr. 18-19).

SUMMARY OF THE EVIDENCE

Testimony of Malinda Kaser, Complainant

Ms. Kaser testified at the formal hearing. (Tr. 20). She is not currently employed, and she was last employed in June and July, 2007, as a temporary clerical worker for Newman Miyahara Investment Management. (Tr. 20-21).

She started working at the Louisville, Kentucky, branch of A.G. Edwards on September 16, 1996, as a financial associate, and was informed about the vacant position through her son-in-law, Timothy Newman, who, at that time, worked for A.G. Edwards in Louisville, Kentucky. (Tr. 21-22). After working at the Louisville location for eleven months, she was transferred to the New Albany, Indiana, branch and remained employed at that branch, except for five and one-half months in 2004, for nine years. (Tr. 22, 29). During the time that she worked at the New Albany office, her supervisors were Mr. Newman, her son-in-law, and then Mr. Paris in 2004. (Tr. 28-29). Her job responsibilities changed several times while at the New Albany branch, including positions as a financial associate, a sales associate, a cashier, and an operations manager. (Tr. 22-26; CX-

1, 11-15). She received excellent evaluations and pay increases by the two different managers. (Tr. 25-27, 59; CX 1). However, she testified that she had not received performance evaluations from 2001 until 2006. She noted that from the middle of July 2004 to January 2005, she worked for Progressive Health Rehabilitation, but went back to work for A.G. Edwards after Mr. Paris "begged [h]er to return." (Tr. 29-31). Although she did not have a copy of the 2006 evaluation, her evaluator, Mr. Paris, said she was doing an outstanding job and that the evaluation resulted in a 2 percent pay increase. (Tr. 27-28). As an operations manager she was responsible for the daily work activities of the support staff, excluding the financial consultants. She became familiar with company policies, including the document retention policies of A.G. Edwards. (Tr. 28, 84).

While Ms. Kaser was employed at the New Albany office, there were discussions by upper management about cost concerns within that branch. (Tr. 30). She was informed that there was a chance that the office would be closed, and in August 2006, a decision was made to close the New Albany office. (Tr. 31). She was told that the staff would retain employment at the Louisville, Kentucky, branch of A.G. Edwards. (Tr. 32).

On September 1, 2006, Ms. Kaser had a discussion with Mr. Paris, who was then in charge of the Louisville office and Ms. Bigler, the operations supervisor and Mr. Paris's personal assistant, regarding the need to go through the office files at the New Albany, Indiana, branch and shred appropriate documents. (Tr. 32). Complainant stated that Mr. Paris and Ms. Bigler sorted through the files and placed them into a "shred" pile or a "keep" pile. (Tr. 32). Neither Mr. Paris nor Ms. Bigler ever specifically ordered Ms. Kaser to immediately shred the documents, but stated that the documents could be shredded when time was available. (Tr. 91-92, 131). Upon reviewing the documents in the "shred" pile, Ms. Kaser found that some of the documents fell within required retention period; she stated that "a retention period is a length of time set by NASD [National Association of Security Dealers] that documents need to be retained." (Tr. 33). In particular, she found documents with original signatures and branch manager reports with handwritten notes, which, in her opinion, would be important in the annual compliance audit and might be important in on-going arbitration cases. (Tr. 33-34, 89). After discovering the questionable documents in the "shred" pile, Ms. Kaser contacted the company's compliance department at corporate headquarters, and was told to refer to the document retention list for guidance. (Tr. 37). She

took some of the documents to Mr. Newman, at the time the financial consultant in charge/branch manager at the New Albany office, rather than Mr. Paris because she believed that someone other than Mr. Paris should review the documents and Mr. Newman was onsite. (Tr. 37). She stated that Mr. Newman called Marty Altenberger, the Branch Administrator, on September 13, 2006, for advice about the documents; Mr. Altenberger advised Mr. Newman to send an e-mail to Mr. Paris about how to handle the documents. (Tr. 38).

Ms. Kaser stated that following the e-mail, the next contact regarding the shredding issue was a call from Ms. Bigler on behalf of Mr. Paris. (Tr. 38). Ms. Bigler wanted to know what documents had been found and needed to be retained; Ms. Kaser answered that she had found some long-term product disclosure documents that fell within the required retention period. *Id.* Ms. Bigler then told her to pull the documents that needed to be retained; Ms. Kaser followed Ms. Bigler's instruction, and laid them aside. (Tr. 39). On September 14, 2006, Ms. Kaser stated that she showed the documents to Mr. Paris, who reviewed the documents, and told Ms. Kaser to put the documents into a box for a later review. (Tr. 39-40). Ms. Kaser testified that for all the documents retained at a branch office that "document control" was sent the original or a copy. (Tr. 101-102).

On September 15, 2006, Mr. Newman resigned and went to work for Wachovia Securities, a competitor of A.G. Edwards. (Tr. 40, 85). After learning of Mr. Newman's resignation, Ms. Kaser met with Mr. Paris that afternoon, and was questioned about the phone call to Mr. Altenberger. (Tr. 41). She was also informed that the New Albany office was closing and she was to report to the Louisville, Kentucky, office on September 18, 2006. When she reported to the Louisville office, she assumed the position of receptionist. (Tr. 41-42). Mr. Paris notified Ms. Kaser that her compensation rate for the new position in Louisville, Kentucky would remain the same. (Tr. 94).

On September 27, 2006, Ms. Kaser had a conversation with Mr. Paris and Mr. Corlett. Mr. Paris "stressed that he needed [her] to be loyal to A.G. Edwards and to him and not to provide any information to Timothy Newman or to any departing [financial consultant]...." (Tr. 43). Mr. Paris told her to leave the negative things that occurred in New Albany behind and not to talk about sensitive issues with anyone. She believed that the sensitive issue was the shredding of the documents. (Tr. 42-43). Additionally, Complainant believed that Mr. Paris was

questioning her loyalty without reason and she felt humiliated. (Tr. 44).

On October 2, 2006, Matt Bishop, a client, made a request to her for a date-of-death value of his father's account to be given to Mr. Newman. (Tr. 44). Upon receiving the request, she relayed Mr. Bishop's message to Ms. Davis, a financial associate and Mr. Newman's former personal assistant, but stated that she did not share any confidential information with any former employee. (Tr. 44, 49). On October 3, 2006, she testified that Mr. Paris was very upset with her for having accepted the request from Mr. Bishop and she was orally reprimanded. (Tr. 45, 47). During the conversation, Mr. Paris asked her what were her future work plans. (Tr. 46). On October 4, 2006, she was given a written reprimand which stated that she was informed on September 27, 2006, not to provide any documents to Mr. Newman, directly or indirectly; and in violation of that instruction, on October 2, 2006, Complainant accepted instructions to provide account information for a client directly to Mr. Newman. The Employee Report noted that any future violations would result in her termination. (CX 3; Tr. 48-51). She was aware that A.G. Edwards had a policy of employment at will. (Tr. 105-106). She testified that she asked him to insert "per client's request" but he refused. (Tr. 50). She stated that she signed the "write-up" because she was pressured to do so. (Tr. 50). She was familiar with A.G. Edwards's policy that employees should not provide any information, either directly or indirectly, to a departing financial consultant. (Tr. 49, 84, 95, 99).

On October 6, 2006, she attended a meeting with Mr. Paris and Mr. Corlett and was told that her job had been eliminated. (Tr. 51-53). Just before being called into Mr. Paris's office, however, she had submitted a letter to Mr. Paris, Mr. Corlett, Ms. Bigler, Doug Medley, and the A.G. Edwards's human resources department. (Tr. 123). This letter, authored jointly by Mr. Newman and Ms. Kaser, referred to her lack of overtime pay, her lack of lunch breaks, and alleged workplace harassment. (Tr. 52, 63-68; CX-4). Upon leaving A.G. Edwards, the company sent Ms. Kaser a severance package offer and an audit questionnaire, but Ms. Kaser rejected the package and failed to complete the questionnaire. (Tr. 129-130; RX R). Several months after leaving the position at the Louisville, Kentucky, office, Ms. Kaser collected unemployment and has attempted to find other employment. (Tr. 54, 88).

Before the termination of her job, she had worked in the Louisville office for three weeks and was very busy. There was

no discussion about the office being overstaffed and she had received no complaints about her work. (Tr. 54-55) Since the termination, Ms. Kaser has suffered from depression because she was embarrassed and humiliated. (Tr. 55). She believes that she was terminated as a result of her questioning the shredding of certain documents. (Tr. 54).

Testimony of Timothy Newman

Mr. Newman testified at the formal hearing. (Tr. 134). Mr. Newman is self-employed by Newman Miyahara Investment Management, a subsidiary of Wachovia Securities. (Tr. 135). Before his current career, Mr. Newman worked for A.G. Edwards for fourteen years as a financial consultant and as a branch manager. (Tr. 135).

Mr. Newman stated that while he and Ms. Kaser worked together, she had been a diligent, detail-oriented worker, and he never had a cause to reprimand her. (Tr. 137). Part of her job as operations manager was to maintain documents "for NASD requirements." (Tr. 140). He stated that prior to the document-shredding incident, Ms. Kaser had never been disciplined by the company. (Tr. 155). After he became aware that the New Albany, Indiana, office would be closing, all of the workers, including Ms. Kaser, were guaranteed employment at the Louisville, Kentucky, office. (Tr. 139). Mr. Newman was aware in March 2006 that the office would be closed. (Tr. 138). When asked what his initial plans were when the office was to be closed, he stated he was waiting for Mr. Paris to be fired because he had so many civil complaints against him. (Tr. 139). The office closed on September 15, 2006, the same day Mr. Newman left the office and went to work for Wachovia. *Id.*

Ms. Kaser approached Mr. Newman, who at the time was her supervisor, regarding documents that had been set aside to be shredded. (Tr. 140, 142-143). Mr. Newman had previously given her a "heads-up" about the following documents: "Subpoenas had been received on a previous case and the documents were mishandled, and there was contamination of the chain of evidence, you know, and there were other documents that were incrimination against Mr. Paris and/or his family or team members that were protected from me." (Tr. 141). Additionally, Mr. Newman stated that he was concerned that some of these documents might need to be produced in four arbitration cases. (Tr. 147-149). Specifically, Mr. Newman testified: "[H]e was told by Mike Naccarato, the attorney for Richard Paris, that they had provided testimony in the case of the Shannon Rose

Nichols ones that—well, basically, as [he] told Mike Naccarato, there was false testimony.” (Tr. 149). Ms. Kaser told him that she called the compliance department to verify that the documents were required to be maintained; Ms. Kaser sought advice from Mr. Newman on how to handle the situation. (Tr. 142). Mr. Newman advised her to handle the situation internally and to make sure that the documents remained intact. (Tr. 143). Mr. Newman made a call to Marty Altenberger, a Regional Branch Chief, to discuss Ms. Kaser’s situation, and Mr. Altenberger responded with advice to send an e-mail to Mr. Paris in order to create a record of an attempt to preserve the documents. (Tr. 144; CX-6, 7). Mr. Newman sent the e-mail on September 13, 2006. (Tr. 145, CX 8).

Mr. Newman was aware of the A.G. Edwards policy on document retention; he noted that the majority of the rules were based on National Association of Security Dealer rules, New York stock exchange rules, and company policy. (Tr. 146, 198; CX 9). Mr. Newman was also aware of the policies regarding departing financial consultants, and knew that it would not be appropriate to give client information directly to a departed broker. (Tr. 168, 187).

Matt Bishop was one of his clients while at A.G. Edwards, and is one of his current clients at Wachovia. (Tr. 180). He advised Mr. Bishop to contact A.G. Edwards for a date-of-death value of his father’s account since it is required by I.R.S. regulations, and not for the benefit of Mr. Newman. (Tr. 182, 200). Mr. Newman never asked Ms. Kaser to provide him with any private client information. (Tr. 200).

After he resigned from A.G. Edwards, he talked with Ms. Kaser regarding her employment, and that everything was initially okay. (Tr. 165). Ms. Kaser also discussed her first reprimand with him. (Tr. 153). He told her that the reprimand was a way of building a record so that she could be fired. (Tr. 153). Mr. Newman also testified that he was involved in helping Ms. Kaser prepare her letter to Mr. Paris regarding the alleged harassment and request for overtime pay. (Tr. 154; CX-4). Upon learning of her departure from A.G. Edwards, Ms. Kaser explained to Mr. Newman that she was unsure of whether she was fired or given an absence because personnel would not be available to handle her case immediately. (Tr. 157). Mr. Newman testified that Ms. Kaser later temporarily worked for him on a part-time basis. (Tr. 157).

Testimony of Kenneth Lear

Mr. Lear testified at the formal hearing. (Tr. 204). Mr. Lear is a fifteen year employee of the CPA firm Jones, Nale and Mattingly and serves as the director of accounting and the auditing department. (Tr. 204-205). Mr. Lear is a member of the American Institute of Certified Public Accountants, the Kentucky and Indiana Societies of Certified Public Accountants, and has held committee chairs within those societies. (Tr. 206). Mr. Lear had never before testified in court proceedings. (Tr. 235).

He received Ms. Kaser's employment documents, including pay stubs, unemployment records, and 401(k) information. (Tr. 206). From the documents, Mr. Lear prepared a gross calculation of damages that she sustained as a result of her termination, and concluded that the projected compensation totaled \$157,928.53, which Mr. Lear thought was a reasonable and conservative amount based on accounting probability in the community. (Tr. 207, 213; CX-10).

The A.G. Edwards non-matching 401(k) policy would change Mr. Lear's calculation, resulting in a figure slightly less than originally calculated. (Tr. 217; RX G). Mr. Lear did not include compensation which Ms. Kaser earned while not employed by A.G. Edwards, and did not have the information for that time period. (Tr. 227).

Testimony of Jennifer Bigler

Ms. Bigler testified at the formal hearing. (Tr. 237). Ms. Bigler is employed as the operations supervisor with the Louisville, Kentucky, branch of A.G. Edwards since January 2005 and has been employed by that company for approximately ten years. (Tr. 238-239). Her duties as operations supervisor include document review for retention purposes. (Tr. 240, 283; CX 11). Additionally, Ms. Bigler is familiar with A.G. Edwards's policies regarding departing brokers. (Tr. 241).

Ms. Bigler was informed that the New Albany, Indiana, branch of A.G. Edwards would be closing, and that, due to an office expansion, employees of that branch would be retained at the Louisville, Kentucky, branch. (Tr. 243). Based on conversations

Ms. Bigler had with Ms. Kaser, she stated that Ms. Kaser was happy with being assigned as a receptionist in the Louisville office because she was ready to scale back her duties and responsibilities. (Tr. 244).

Ms. Bigler scheduled all of the pre-work that needed to be accomplished for the closing of the New Albany branch, and was asked by Mr. Paris to go to the branch to help box and organize the office in anticipation of the move. (Tr. 244). On September 1, 2006, Ms. Bigler testified that she and Ms. Kaser together began clearing out file cabinets and boxing documents into two stacks - one stack for retaining and moving to Louisville, and the other for destroying. (Tr. 245-246). At that time, Mr. Paris had not been involved in reviewing documents for shredding, but was reviewing the furniture throughout the office in preparation for his meeting with the moving company. (Tr. 247, 255-257, 271). Ms. Kaser never indicated to Ms. Bigler that she had a problem with any of the documents, and that broker copies were able to be shredded without breaking any rules. (Tr. 248-250).

Ms. Bigler became aware of Ms. Kaser's concern over documents when she was called by Mr. Paris and he told her that he had received an e-mail from Mr. Newman and "there was a question about some documents and asked [her if] there was a possibility that some documents might have gotten placed in the wrong pile." (Tr. 252). After speaking with Mr. Paris, she called Ms. Kaser to ask about the documents at issue, ultimately telling Ms. Kaser to keep any documents in question. (Tr. 253). Ms. Bigler told Ms. Kaser that she trusted Ms. Kaser's judgment regarding the retaining or discarding of the documents since Ms. Kaser had previously been through internal compliance audits. (Tr. 295).

After Ms. Kaser began working in the Louisville office as a receptionist, Ms. Bigler, based on discussions with Mr. Paris and Mr. Corlett, learned that Ms. Kaser had attempted to receive client information, and that Ms. Kaser intended to deliver that information to Mr. Newman, who no longer worked for A.G. Edwards. (Tr. 257). Ms. Bigler never discussed this information with Ms. Kaser, but did speak with Ms. Davis, a financial associate, regarding the situation. (Tr. 258). From her conversation with Ms. Davis, around October 1, 2006, Ms. Bigler learned that Ms. Kaser had sought a portfolio diversification for a client's date-of-death valuation, and that the portfolio diversification also contained client account information. (Tr. 258, 302).

Ms. Bigler found out that Ms. Kaser had been given a written reprimand, based on what she did with the client's request for information, but Ms. Bigler did not directly discuss the reprimand with Ms. Kaser. (Tr. 260). Shortly after, Ms. Bigler was told that Ms. Kaser was no longer an employee of A.G. Edwards, and that Ms. Kaser would be receiving a severance package. (Tr. 262). Subsequently, Ms. Bigler entered the company's database and noted that Ms. Kaser was no longer with the company because the receptionist position had been eliminated. (Tr. 285; RX Q). Ms. Bigler testified that she was told by Mr. Paris that the Louisville office was overstaffed since two financial consultants failed to transfer to that office. (Tr. 263).

On October 9, 2006 Ms. Bigler read the letter sent by Ms. Kaser, dated October 6, 2006. Ms. Bigler was angry because the document contained false statements. (Tr. 263). In particular, in the letter, Ms. Kaser complained that she did not receive overtime pay for the days she was not allowed or unable to take breaks or her lunch hour. Ms. Bigler stated that this was false in New Albany because "[Ms. Kaser] was the operations supervisor [and Ms. Kaser] was the one that designated when lunch breaks were taken, and [Ms. Kaser] was the one that approved time and overtime." (Tr. 264). Additionally, Ms. Bigler was the operations supervisor in the Louisville office and that everyone was allowed breaks and time for lunch. The employee was required to make sure the office had ample phone coverage. (Tr. 264; RX P). Ms. Kaser had never before approached her to address any of the perceived problems alleged in the letter. (Tr. 264-265).

Testimony of Kevin Corlett

Mr. Corlett testified at the formal hearing. (Tr. 313). Mr. Corlett is an eleven year employee of A.G. Edwards, currently holding the positions of financial consultant and assistant branch manager at the Louisville office. (Tr. 314-315).

Mr. Newman called him on September 26, 2006, and talked about a personal loan Mr. Corlett had made to Mr. Newman and to give him a "heads-up" regarding Ms. Kaser's document retention issue. (Tr. 323-324). Mr. Newman told him that Ms. Kaser was going through papers in a shred pile that were related to

arbitration cases and other documents that needed to be retained. (Tr. 324). Mr. Newman told him that Mr. Corlett could be blamed for the document shredding issue since he was the financial consultant in charge some of the time. *Id.*

On September 27, 2006, Mr. Corlett discussed the shredding issue with Mr. Paris. Mr. Paris told him there were no documents related to arbitration issues and that Mr. Paris told Mr. Newman and Ms. Kaser to "retain whatever is supposed to be retained, and whatever is past the retention date put those in the shred pile." (Tr. 325).

Mr. Paris called Ms. Kaser into his office and the three discussed the shredding issue. (Tr. 326). Mr. Corlett informed Ms. Kaser of the conversation that he had the day before with Mr. Newman. In response she stated that she had found items in a shred pile that should be retained. None of the documents related to arbitration. (Tr. 327). Later, after she sought guidance from Mr. Newman, Mr. Paris called her and told her to retain whatever needs to be retained. (Tr. 328).

After some confusion and discussion about the dates that the events occurred, Ms. Kaser was again called back into Mr. Paris's office. (Tr. 329-333). At this meeting, Ms. Kaser was asked if she would be loyal to A.G. Edwards. (Tr. 333). She stated that she wanted A.G. Edwards and her son-in-law to be successful. But if it was a choice between A.G. Edwards and her son-in-law, she would choose her son-in-law. However, she had made a promise to Mr. Paris to be loyal to A.G. Edwards and she would honor that promise. (Tr. 333). Mr. Corlett never again spoke with Ms. Kaser about the document shredding issue, nor did Mr. Corlett ever review the documents in question. (Tr. 334, 353).

On October 3, 2006, Mr. Corlett testified that Ms. Davis, his financial assistant was walking down the office hallway, carrying a packet of material. He asked her what she was carrying and she said it was information about a client's account values that Ms. Kaser requested; Ms. Davis told him that Ms. Kaser intended to give the information to Mr. Newman, who was no longer employed at A.G. Edwards. (Tr. 335). Mr. Corlett and Ms. Davis immediately went to Mr. Paris, and after Ms. Davis explained the situation to Mr. Paris, the men called Ms. Kaser into Mr. Paris's office. (Tr. 335). Ms. Kaser explained that she told the client that Ms. Davis could print out the requested information, and that she was willing to drop off the information to Mr. Newman. (Tr. 336). Mr. Paris informed Ms.

Kaser that her act was a violation of A.G. Edwards's protocol and her promise to be loyal. Ms. Kaser subsequently apologized and said she might have made a mistake. (Tr. 337).

The conversation led to a discussion of overstaffing and possibly having to eliminate a position at the company, as a result of Mr. Newman and Mr. Simmons leaving A.G. Edwards. (Tr. 338-340). Because Ms. Davis had a great deal of interaction with the clients from New Albany, she would be an integral part in trying to retain the customers serviced by Mr. Newman and Mr. Simmons. (Tr. 340-341).

On October 3, 2006, Mr. Corlett testified that Mr. Paris called human resources, who advised Mr. Paris to write up a disciplinary report because of the incident with Ms. Kaser. (Tr. 342). On October 4, 2006, Mr. Paris and Mr. Corlett again called Ms. Kaser into Mr. Paris' office, and discussed the disciplinary report, which Ms. Kaser signed. (Tr. 344). Ms. Kaser asked what was the likelihood that her position would be eliminated and Mr. Paris told her that "those decisions are somewhat driven by [his] bosses who look at our expense ratios, but realistically - - we don't have the numbers in from the month of September, but realistically that's a definite strong possibility." (Tr. 343). When told that any severance package would be based on a week's pay for every year she worked for A.G. Edwards based on the date of her current employment. Ms. Kaser stated that was not fair. However, Ms. Kaser was told that she was not being fired, her position was not eliminated, and to let him know if she wanted him to investigate a severance package. (Tr. 343-344).

On October 6, 2006, Mr. Corlett received a letter from Ms. Kaser in which Ms. Kaser complained that she had not received many of her break or lunch periods and she was owed overtime for several years. (Tr. 345-346; RX P). Subsequently, Mr. Corlett, Mr. Paris, and Ms. Kaser had another meeting, in which Mr. Paris spoke with Ms. Kaser about her letter. (Tr. 346-348). Mr. Corlett testified that Ms. Kaser agreed that Mr. Paris had not criticized her in public. However, when they had their disciplinary meeting it was not just between Mr. Paris and Ms. Kaser. (Tr. 348). The extra person she was disciplined in front of was Mr. Corlett. (Tr. 349).

Mr. Corlett was asked why, after his phone conversation with Mr. Newman on September 26, 2006, he did not report the issue of document shredding to the NASD. (Tr. 351-352). He replied that there was no requirement to report the possibility

of document shredding. Additionally, he discussed the issue with Ms. Kaser and she could not identify any specific documents. He did not go to New Albany to review the documents. (Tr. 352-353). He confirmed that Mr. Paris was aware of the document shredding issue as early as September 13, 2006. (Tr. 354). Mr. Paris did not tell him that he had reviewed the questioned documents. (Tr. 354-355). Mr. Paris told him that the questioned documents had been placed in a retention file. (Tr.355-356).

Mr. Corlett stated that Ms. Kaser's position was terminated on October 6, in anticipation that some clients from the New Albany, Indiana, office were not remaining with the new Louisville branch, and because of overstaffing. (Tr. 358-360).

Testimony of Richard Paris

Mr. Paris testified at the formal hearing. (Tr. 362). He has been employed by A.G. Edwards since 1995. (Tr. 363). Around October 2004, when Mr. Newman stepped down as the branch manager of New Albany office to concentrate on being a financial consultant, Mr. Paris was appointed. Mr. Newman recommended him for the position. (Tr. 364-365). Mr. Paris had a positive working relationship with Mr. Newman and Ms. Kaser, and became close friends with her family. (Tr. 367). In about November 2004, the regional manager asked him to become the branch manager in Louisville. (Tr. 365). This caused Mr. Newman to be appointed as the financial consultant in charge of the New Albany office. (Tr. 366-367). In November 2004, he asked Mr. Newman if Ms. Kaser would be interested in returning to work at New Albany. He then approached Ms. Kaser about the position and she was subsequently hired. (Tr. 369-370).

In September 2005, Mr. Paris and the regional manager asked Mr. Corlett to take over the position of financial consultant in charge so that Mr. Newman could concentrate on production. (Tr. 372). However, Mr. Corlett moved to the Louisville office around April 2006 and was appointed the assistant branch manager. (Tr. 373). Mr. Paris did give Ms. Kaser a performance review in early 2006 and it was outstanding or very good. (Tr. 374).

Because the New Albany office was not profitable, on August 3, 2006, Mr. Paris announced that the New Albany, Indiana, branch was going to close at the end of September 2006 and that every employee at the New Albany branch had a job at the Louisville, Kentucky, office. (Tr. 375). Mr. Paris had hoped

that Mr. Newman and Mr. Simmons would move to the Louisville branch to offset employee expenses for the positions held by Ms. Davis and Ms. Kaser. (Tr. 376).

On September 1, 2006, Mr. Paris, Ms. Bigler, and Ms. Kaser, were preparing the New Albany branch for its closure. (Tr. 377). He ordered Ms. Bigler and Ms. Kaser to handle all of the documents, and told them that he would focus on the furniture. (Tr. 378). Mr. Paris never reviewed any documents on that occasion, nor did Ms. Kaser address a document shredding issue. (Tr. 379). Mr. Paris became aware of Ms. Kaser's concern over documents upon receiving an e-mail from Mr. Newman nearly two weeks later. (Tr. 380). Mr. Paris then called Ms. Kaser to discuss her concern and told her to refer to the retention list; he told her to keep the documents that needed to be kept. (Tr. 381-382; CX 9).

On September 15, 2006, he received a phone call from Mr. Newman, informing him that Mr. Newman was leaving the company. (Tr. 383). Mr. Paris called Mr. Altenberger, a Branch Administrator, to inform him that Mr. Newman was leaving the company, and Mr. Altenberger replied that he had received a call from Mr. Newman regarding advice about the retained documents on September 8, 2006. (Tr. 383-384). Mr. Altenberger said he had advised Mr. Newman to direct his inquiry to Mr. Paris (Tr. 384).

On September 15, 2006, Mr. Paris asked Ms. Kaser privately about the e-mail from Mr. Newman, and went with Ms. Kaser to the storage room and made a cursory review of the documents; at that time, he told Ms. Kaser that the documents should remain in the storage room. (Tr. 385-388, 391). On September 27, 2006, during a meeting Mr. Paris held with Ms. Kaser and Mr. Corlett, Ms. Kaser stated that she did not see any documents in the pile in question that related to arbitration. (Tr. 390).

Mr. Paris stated that upon Mr. Newman's departure from the company on September 15, 2006, he had concerns regarding Ms. Kaser's loyalty to the company because of her familial relationship with Mr. Newman. (Tr. 393). He first spoke with Ms. Kaser concerning her loyalty on the day Mr. Newman left, and she claimed that she did not show any documents to Mr. Newman until the day Mr. Newman sent the e-mail inquiry to Mr. Altenberger. (Tr. 394-395).

On October 3, 2006, Mr. Paris stated that Mr. Corlett and Ms. Davis came to his office and informed him that Ms. Kaser had

asked Ms. Davis to print documents based on a request from a client. (Tr. 396). He was told that "Ms. Davis subsequently received an e-mail from the client confirming that Mr. Newman had told the client that his mother-in-law, Ms. Kaser, would be able to bring the documents to Mr. Newman, thus confirming that the client had requested of Ms. Kaser, can you print out this information and take it to Mr. Newman." *Id.* At a meeting with Mr. Paris, Mr. Corlett and Ms. Kaser, Ms. Paris apologized for her actions. (Tr. 396-397).

Also, on October 3, 2006, Mr. Paris called the A.G. Edwards human resources department to inform them of the situation and ask for advice on how to proceed. (Tr. 397). He explained to Mr. Mothersbaugh, a manager within the A.G. Edwards human resource division, the relationship between Mr. Newman and Ms. Kaser and what he had discovered. (Tr. 397). Mr. Mothersbaugh told him at the very least an employee report should be filled out and shared with Ms. Kaser. Mr. Paris also discussed with Mr. Mothersbaugh Ms. Kaser's ability to be loyal to A.G. Edwards, they were overstaffed, and what options were available to him. Tr. 398). They had discussions about eliminating an employee for cause and what happens if an employee's position is eliminated. Mr. Paris's understanding was that if an employee was eliminated for cause the employee received no severance package and if a position was eliminated the employee did receive a severance package. *Id.* Mr. Paris testified, that knowing that he was going to have to eliminate one or two positions at some point, "[his] concern specifically was that, with[his] lack of trust and having that trust breached regarding the confidentially and the integrity of that client information, eliminating the reception position would be the position most logical to eliminate, mainly because of the functions that it would serve." (Tr. 399).

On October 4, 2006, Mr. Paris had another meeting with Ms. Kaser and Mr. Corlett, where they filled out the employee conduct report. (Tr. 400; RX 0). Within that report, Ms. Kaser indicated that she was aware that company information was not to be given to departed financial consultants, and that she had accepted instructions to provide account information for a client directly to Mr. Newman, a departed financial consultant. (Tr. 401-402).

On October 6, 2006, Mr. Paris read the letter from Ms. Kaser, and noted that it "had Mr. Newman's prints all over it, that this is definitely the type of wording and action and spreadsheet-type work that he would do, it became apparent to

[him] that Ms. Kaser's loyalties and [his] ability to be able to trust her to keep confidential information from Mr. Newman was completely breached and gone at that time." (Tr. 406). He immediately called human resources to make the division aware of the allegations that Ms. Kaser was making about not receiving overtime pay. (Tr. 404-405; RX P). While on the phone with human resources, he additionally inquired about severance packages. (Tr. 406). Sherry Holtgreve, a human resources employee, advised him to tell Ms. Kaser that her position had been eliminated and to return home where she would receive a severance package in the mail. (Tr. 407).

Subsequently, on October 6, 2006, Mr. Paris along with Mr. Corlett asked Ms. Kaser about the letter to get clarification about the issues she had raised, and asked her whether anyone at the company had been rude to her. (Tr. 410, 457). Ms. Kaser informed him that no one had been rude to her and that she was never denied an option to take a lunch break throughout her career at A.G. Edwards. (Tr. 410). Mr. Paris then told Ms. Kaser that her position was being eliminated, that she would receive a severance package, and that an investigation would be conducted regarding her allegations. (Tr. 412). Ms. Kaser's position at A.G. Edwards was never refilled. (Tr. 480).

On cross-examination, Mr. Paris stated that he had given the following instructions regarding documents to Ms. Bigler and Ms. Kaser: "[T]hat they would tag boxes of documents that would need to be retained and would be subsequently moved in storage at the Louisville location, and that there would be boxes tagged that were past retention requirements that ultimately would be destroyed by Shred-It." (Tr. 421-422). He did not check the documents that were labeled to be shredded. (Tr. 423). Again, he stated that the first time he became aware of a shredding issue was on September 13, 2006, when he received an e-mail from Mr. Newman. (Tr. 423-424). Mr. Paris had doubts about the truthfulness of the document shredding issue on September 15, 2006, because of what was told to him by his branch administrator. (Tr. 425). He stated that on September 27, 2006, he attempted to reconcile the sequence of events and "she confirmed once again that she found the documents, went to Mr. Newman's office, sent the e-mail." This was different from the information he received from Mr. Altenberger. *Id.*

Mr. Paris confirmed that it is the policy of the company not to retaliate or adversely treat any employee who acted in good faith to satisfy his or her obligations under A.G. Edwards's ethical policies by reporting conduct the employee

believes to be illegal, improper or unethical. (Tr.426-429, 432-434). Additionally, A.G. Edwards's policy is that supervisors who receive reports of illegal, improper or unethical conduct should report the complaints through their ordinary reporting channels. Mr. Paris did not immediately report to his supervisor the e-mail he received on September 13, 2006, or the conversation he had with Ms. Kaser on September 13, 2006. (Tr. 429-434).

When asked if Ms. Kaser was reporting what she believed to be unethical or illegal behavior, Mr. Paris stated, he was asked what to do with documents that had been placed in the shred pile that should not be shredded. (Tr. 433-434). Mr. Paris testified that he thought the issue "was simply no big deal[.]" (Tr. 434). His direction was keep the documents that needed to be retained. *Id.*

When Mr. Paris was asked about a series of documents that Ms. Kaser "believes you ordered her to shred," Mr. Paris was unsure of the retention requirement on certain documents. (Tr. 442-448). Mr. Paris testified that on September 1, 2006, he indicated to Ms. Bigler and Ms. Kaser with regard to documents, "that they should label what needed to be kept and moved for retention, and then what needed to be shredded because it was outside of retention would be labeled as such. . . ." (Tr. 449). Mr. Paris stated that after the e-mail he received from Mr. Newman, he told Ms. Kaser to place any documents she believed should not be shredded in a box but did not specifically tell her to label the box. On September 15, 2006, Mr. Paris quickly went through the box. (Tr. 449-450). Mr. Paris believes that the box was retained at the Louisville office. (Tr. 450). The only documentation that Mr. Paris made about the shredding issue was the reply e-mail to Mr. Newman and notes he made after his discussion with human resources. However, he did not keep those notes. (Tr. 451). Mr. Paris agreed that compliance with retention of document requirements was a big concern within the company. (Tr. 453).

When Ms. Kaser moved over to the Louisville office, she moved into the receptionist position. (Tr. 454) Mr. Paris testified that at the time he moved her into that position he did not intend to eliminate it twenty-something days later. Mr. Paris stated that he was talking to the human resources department about eliminating her position on October 3, 2006. He did not make up his mind to eliminate the position until October 6, 2006. (Tr. 455-456). When Mr. Paris decided to eliminate Ms. Kaser's position on October 6, 2006, he asked her

about the letter because the letter raised issues that needed to be investigated. (Tr. 456-458). When asked why it was important to investigate the allegations regarding the letter but not the allegations regarding the document-shredding, Mr. Paris replied: "There was never an allegation that surrounded the document-shredding cases. There was a question about what should we do with these, we found them. [His] response was, retain them if they should be retained." (Tr. 458).

Mr. Paris further testified that Ms. Kaser's position was eliminated based on a "confluence of factors, one of those being elimination of the position of receptionist, the other being the lack of integrity and trust and loyalty to the firm." (Tr. 460). Mr. Paris noted that prior to September 13, 2006, Ms. Kaser had been an outstanding employee; and in fact he asked her to return to work in January 2005. (Tr. 461).

Testimony of Marty Altenberger

Mr. Altenberger testified at the formal hearing. (Tr. 481). Mr. Altenberger is a branch administrator, which means that he is the office liaison for the branch managers in his region for A.G. Edwards; he has worked for the company for twelve years. (Tr. 482, 486).

Mr. Altenberger testified that he received a phone call on September 15, 2006, from Mr. Paris regarding Timothy Newman's resignation. (Tr. 483). During that same phone call, Mr. Altenberger stated that he had talked to Mr. Newman on September 8, 2006, and Mr. Newman told him that he had a concern that they were being asked to shred documents that should not be destroyed at the New Albany, Indiana, office; and he advised Mr. Newman to contact Mr. Paris about the situation. (Tr. 484-485).

Testimony of Mike Naccarato

Mr. Naccarato testified at the formal hearing.² (Tr. 489-492). Mr. Naccarato is employed as a litigation attorney for

² Respondent's counsel offered the testimony of Mr. Naccarato because her interpretation of Mr. Newman's testimony was "that Mr. Naccarato advised him to lie and to falsify information with regards to an arbitration related to Mr. Paris." (Tr. 488). Claimant's counsel stated that this was a surprise witness and "goes to an issue that's really not very paramount in this anyway and should not be considered." *Id.* 29 C.F.R. § 1979.107(d) provides:

Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence shall be applied. The administrative law judge may

A.G. Edwards. (Tr. 492). Mr. Naccarato stated that he handled the customer arbitration of Rose, Fitzgerald, and Nichols versus A.G. Edwards, and had spoken with Mr. Newman about the arbitration since Mr. Newman was listed as a claimant's witness. (Tr. 494).

Mr. Naccarato stated that in every new account a card is completed that reflects the person's investment objectives. (Tr. 494). Mr. Naccarato was informed by Mr. Newman that Mr. Paris "had an incorrect understanding about what the compliance department had directed in regard to the order of investment objectives." (Tr. 497-498). Mr. Naccarato testified that he instructed Mr. Newman only to be truthful when testifying in the arbitration. (Tr. 498-499).

ANALYSIS AND DISCUSSION

Credibility Determinations

I have considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and have attempted to analyze and assess its cumulative impact on the record contentions. See *Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971). The Court stated:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable, and probable in view of the transaction which it describes or to which it relates,

exclude evidence which is immaterial, irrelevant, or unduly repetitious.

Mr. Newman's testimony does not reflect that he opined that Mr. Naccarato advised him to lie. (Tr. 147-149). Also, I find Mr. Naccarato's testimony to be immaterial and irrelevant to the issues under consideration. Accordingly, his testimony will not be considered in this Decision and Order.

as to make it easy to believe. . .Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 16 at N. 5 (3rd Cir. 1975). Moreover, I have heard the testimony firsthand; and, therefore, I have observed the behavior, bearing, manner, and appearance of the witnesses. I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic, probability, plausibility, and demeanor of each witness.

Applicable Law

Section 806 of Sarbanes-Oxley, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. Section 1514A provides in part:

(a) --No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), 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 [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, 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.

18 U.S.C. § 1514A.

The legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b), govern SOX whistleblower actions. 18 U.S.C. § 1514A(b)(2)(C).³ Accordingly to prevail on her SOX claim Complainant must prove by a preponderance of the evidence that she engaged in a protected activity or conduct as defined by the SOX; (2) her employer knew that she engaged in the protected activity; (3) employer took an unfavorable personnel action against her; and (4) the protected activity was a contributing factor in the unfavorable action. If the complainant 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 the protected activity. *Nixon v. Stewart & Stevenson Services, Inc.*, ARB No. 05-066, ALJ No. 2005-SOX-1 (ARB Sept. 28, 2007).

³ Because this case was tried on the merits, I need not determine whether Complainant presented a *prima facie* case. See, *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). (stating that the *prima facie* analysis is only conducted at the investigation level); *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006).

The SOX prohibits a publicly-traded company from retaliating against an employee who reports information to a supervisor "regarding any conduct which the employee reasonably believes constitutes a violation" of one of the six enumerated categories. 18 U.S.C. § 1514(a)(1). Complainant's belief "must be scrutinized under both subjective and objective standards, i.e., [she] must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable." *Melendez v. Exxon Chemicals Americas*, Case No. 1993-ERA-6 (ARB July 14, 2000). The reasonableness of a complainant's belief regarding illegality of a respondent's conduct is to be determined on the basis of "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." *Melendez*, supra, (quoting *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 7, n.5); see *Deremer v. Gulfmark Offshore, Inc.*, Case No. 2006-SOX-2 (ALJ June 29, 2007).

As stated in the language of the SOX, its purpose was to eliminate the perpetration of fraud against shareholders. *Deremer* at 49. The SOX does not protect all disclosures made by an employee from employer retaliation, but only conduct described in the Act. In determining whether an employee has engaged in protected activity, the Board has provided the following guidance: "[A]n employees['] protected communication must relate 'definitely and specifically' to the subject matter of the particular statute under which protection is afforded." *Platone v. FLYi, Inc.*, Case No. 2003-SOX-27 (ARB Sept. 29, 2006). As the Supreme Court has opined in other types of shareholder fraud cases, to "fulfill the materiality requirement there must be a substantial likelihood that the disclosure of the omitted (or misstated) fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available." *Deremer* at 49 citing *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1998) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)).

Protected Activity-Alleged and Analysis

Complainant alleged at the hearing that she reported to her supervisors the branch manager's intention to shred or cause to be shredded documents that fell within certain retention periods established by the National Association of Securities Dealers. It is unclear from the record whether the retention standards were based on company policy or a rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. However, as

previously discussed, the issue is whether Complainant reasonably and subjectively believed that Respondent was engaged in an activity that violated one of the six enumerated categories. 18 U.S.C. § 1514A. In particular, she testified that she found documents with original signatures and branch manager reports with handwritten notes, which, in her opinion, would be important in the annual compliance audit and might be important in ongoing arbitration cases.

Complainant's reasonable belief of material fraud must be supported by the facts available to her at the time she formed the belief. Such reasonable belief cannot be based upon inferences of additional impropriety, of which Complainant had no first hand knowledge. Not all fraud is actionable under SOX. Fraud is not significant to the "total mix" of information if it is not material to the company, and does not impact the shareholders. Even fraudulent activity is not actionable under SOX if it is so immaterial or insignificant that it does not constitute fraud against shareholders.

In this case, there is no evidence that the documents in question were material to the company or that the documents would have had any impact on shareholders. Complainant testified that the documents fell within required retention periods, but she was never directly ordered to destroy the documents. On the contrary, she was told to keep the documents that needed to be maintained for review by management. Additionally, there is no evidence in the record that the documents in question were directly related to ongoing arbitration involving the Respondent, nor was there evidence that the documents were originals without copies retained elsewhere.

Conclusion

Based on the foregoing, I find that Complainant has failed to establish, by a preponderance of the evidence, that she engaged in protected activity under SOX. Because I have found that Complainant failed to prove that she engaged in a protected activity, the remaining issues are moot.

ORDER

For the reasons stated in the foregoing discussion, Complainant did not engage in protected activity under the Act; and, accordingly, her complaint is **DISMISSED**.⁴

A

LARRY S. MERCK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. See 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).

⁴ Respondent, in its brief, requested that attorney fees and allowable costs be assessed against Complainant. The Respondent has not demonstrated that the claim was "frivolous" or brought in "bad faith." Accordingly, Respondent's request for attorney fees and costs is denied. *Reddy v. Medquist, Inc.*, Case No. 04-123 (ARB Sept. 30, 2005).

