In the Matter of:

PATRICIA A. ALLEN,	**ARB CASE NO. 06-081**
LAURA L. WALDON,	**(formerly 05-059)**
and DANA BREAUX,	
	ALJ CASE NOS. 2004-SOX-60
COMPLAINANTS,	**2004-SOX-61**
	2004-SOX-62
v.	**DATE: July 27, 2006**
STEWART ENTERPRISES, INC.,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
William H. Reinhardt, Jr., Esq., Tiffany O. Cazabon, Esq., ***Blue Williams, L.L.P., Metairie, Louisiana***

For the Respondent:
Rebecca G. Gottsegen, Esq., ***Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P., New Orleans, Louisiana***

FINAL DECISION AND ORDER

The Complainants Patricia A. Allen, Laura L. Waldon, and Dana Breaux filed a complaint with the United States Department of Labor alleging that their employer, Stewart Enterprises, Inc., took various adverse employment actions against them and eventually terminated their employment because they engaged in certain protected activities. They claim, therefore, that Stewart violated the employee protection

provisions of the Sarbanes-Oxley Act (SOX).[1] After a hearing, a Department of Labor Administrative Law Judge (ALJ) dismissed their complaint. We affirm.

BACKGROUND

The Administrative Law Judge's February 15, 2005 decision provides a detailed accounting of the facts. We briefly summarize.

Stewart is a publicly traded corporation that the Securities and Exchange Commission regulates. Tr. 711. It is subject to the SOX. Tr. 11-12. Stewart provides death-care services and merchandise. Tr. 708. It contracts with customers for funeral and burial services either at the time of death or prior to death (pre-need). By executing pre-need contracts, customers make installment payments for services Stewart provides in the future. Stewart has a corporate division based in Jefferson Parish, Louisiana and four operating divisions (the Eastern, Central, Southern, and Western Divisions) that cover the entire United States and Puerto Rico. Tr. 709-10. Each operating division has a division president and a Chief Financial Officer (CFO). *Id.* The corporate division includes the corporate office and the Shared Services Center (SSC). The SSC handles accounting and administrative functions for the operating divisions. Tr. 944.

Stewart employed Breaux and Allen as Quality Assurance (QA) Representatives. Tr. 247, 302, 388-89. QA Representatives provided a liaison between the four operating divisions and the SSC. Tr. 304. Although Breaux worked in the Eastern Division and Allen in the Central Division, both employees were based in New Orleans and worked closely together. Tr. 249.

Waldon was employed as a Director of Administration (DoA) in the Central Division and also was based in New Orleans. Tr. 49. As a DoA, Waldon supervised three Records Management Centers (RMCs) in the Central Division. *Id.* Prior to assuming her DoA position, Waldon was a finance manager for Stewart in Kansas City, Missouri. During her employment as a DoA, she continued to maintain a home in Kansas City and leased an apartment in New Orleans. Tr. 49.

AS/400 Faulty Interest Calculations

From April 2003 until the end of their employment at Stewart, all three Complainants expressed concerns to Stewart managers about Stewart's AS/400 computer system. Tr. 257, 523. When a customer wanted to pay off the amount he or she owed before the end of the contract term, the AS/400 did not correctly calculate the interest owed on the principal. Tr. 863-64. Under these circumstances, the computer gave an incorrect payoff quote, and if the customer paid the quoted balance, either the customer would have a credit balance in the account or would owe additional payments. Tr. 592,

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[1] The SOX is entitled the "Corporate and Criminal Fraud Accountability Act." The employee protection section is found at 18 U.S.C.A. § 1514A(a)-(d). (West Supp. 2005). Regulations implementing the SOX are found at 29 C.F.R. Part 1980 (2005).

863-64, 1399. As a result, Stewart issued a refund to any customer who overpaid and wrote off any amounts that were underpaid after the account payoff. Tr. 64-66, 327-28.

Stewart first learned of the AS/400 problem after an internal audit in the fall of 2000. Tr. 1396. By the time the ALJ heard this case, Stewart employees had been working for four years to find a solution to the interest calculation problem. In early 2003, managers thought they had found a solution, but it failed during user testing. Tr. 923-24. While Stewart's technology personnel worked to correct the computer problem, its Special Projects team, a division of the SSC under Patricia Beatty's supervision, performed manual amortizations on all accounts that showed credit balances with a history of pre-payments on principal. Tr. 1400-01. As noted, if any amortization showed a refund due, Stewart refunded the money to the customer. *Id.* Stewart refunded money to customers for various other reasons such as cancellation of an account or overpayment. Tr. 614. The AS/400 interest calculation problem accounted for less than 10% of the approximately 1500 refunds that Stewart issued every month. Tr. 865. The SSC was responsible for calculating payoffs and refunds. Tr. 944.

When Waldon or Allen submitted an adjustment to Special Projects to correct an account on which the customer had been overcharged because of the AS/400 interest calculation problem, Beatty told them that these errors would be charged to their division on the contract error reports issued monthly for each division. Tr. 68-70, 403-04. Waldon and Allen testified that these errors were linked to their overall performance records and bonuses. Tr. 69, 119-20, 404. Both Waldon and Allen worked for the Central Division, which was Stewart's largest division and always had the largest number of errors. Tr. 768.

The Complainants testified that they never thought that Stewart intentionally programmed the AS/400 to overcharge customers. Tr. 171, 488-89. They were aware that Special Projects was performing manual amortizations as an internal control until the computer problem was fixed. Tr. 157. But although the Complainants knew that the company was actively working on a solution for the problem, they believed that Stewart was taking too long to fix it and that the delay was due to Stewart's desire to keep the problem a secret. Tr. 330-31.

On April 28, 2003, Breaux and Allen met separately with Beth Schumacher, Stewart's Director of Internal Audit. Tr. 258-59, 397-98, CX-27, -28. Schumacher was investigating numerous concerns that Sharon Kirkpatrick, CFO of the Central Division, had raised. Kirkpatrick had advised Schumacher to interview Breaux and Allen about the interest calculation problem related to refunds. Tr. 1406. Breaux and Allen complained to Schumacher that SSC personnel were "stonewalling" their efforts to accomplish their work. They also complained about the SSC's failure to communicate with the QA Representatives and the field offices' "unprofessional attitudes," untimely refunds, and inaccurate interest calculations. Tr. 260-61, 399-400. Breaux told Schumacher that she was concerned that Special Projects was not effectively communicating with the field offices about manual amortizations and that the Records Management Centers (RMCs) should have an amortization schedule so that they could do their own amortizations.

Both Breaux and Allen also told Schumacher that Angie Apolinar, an RMC director, had recognized the interest calculation problem and contacted Patricia Beatty, head of Special Projects. Tr. 260-61, CX-26, -27. According to Breaux, Apolinar told her that Beatty had referred to the interest problem as "hush-hush." Tr. 1406-08. Schumacher later contacted Beatty and Apolinar. Apolinar told her that Beatty had not used the word "hush-hush," but that Beatty had indicated that the company was not broadcasting the problem. Tr. 1411-12. Beatty testified that she had not used the word "hush-hush," but that she had told Apolinar that it was best to tell customers that that they were entitled to a refund because their accounts had been recalculated. Tr. 256-57, 869-70.

Breaux and Allen believed that Stewart's handling of amortizations and payoffs, resulting from the AS/400 interest calculation problem, violated a law, but they were not certain which law. Tr. 323-24. All three Complainants knew that the SSC was recalculating customer refunds when field personnel notified SSC or when a customer complained, but they were concerned that Stewart might be overcharging customers who did not complain. Tr. 58-60, 453, 511. All three Complainants were also concerned that Beatty was using incorrect calculations and different formulas to manually compute refunds, and that Beatty did not distribute a standard amortization table to employees in the field offices. Tr. 58-60, 317, 425, 524.

In June 2003, the QA Representatives convened a quality assurance conference in Dallas, Texas, at which both Breaux and Allen discussed the interest calculation problem, refund requests, and payoffs with field office directors. Tr. 320-21. Stewart sponsored the conference and paid for attendees' travel and lodging expenses. Tr. 427, 429-30.

Untimely Refunds

The Special Projects group, which calculated refunds and payoffs, was overloaded and had a huge backlog. Tr. 74, 251. In the Central Division, Special Projects took four to six weeks to calculate refunds. Tr. 119-21. Although Special Projects created an intranet database to track refunds, the database was inaccurate and not updated. Tr. 792-93; C. Exh. 98. Breaux, Allen, and Waldon testified that they believed that delayed refunds exposed the company to litigation from customers that could thereby affect shareholders. Tr. 299, 453. They were particularly concerned that the delayed refunds violated Missouri and Texas state law requirements that refunds be issued within 30 and 15 days respectively. Tr. 52, 423-24. They were afraid that this delay could lead to state sanctions, including revocation of Stewart's license. Tr. 173-74.

Pending Other Source (POS) Accounts

Allen and Breaux were also concerned about Stewart's "pending other source" (POS) system and reported their concerns to Beatty and the CFOs. Tr. 276, 442-43. Stewart's POS accounts are accounts that a third party, such as an insurance company, pays fully or partially. In situations where the customer paid their part of their account

balance, but the third party did not pay its part, the customer would receive a statement showing a zero balance. Tr. 442-43. Allen and Breaux believed that this POS billing system made it difficult for the company to collect the unpaid balance from the customer and that the company's "bad debt reserve" would increase and affect revenue if the other source did not pay the balance. Tr. 377. Stewart managers, however, testified that the POS billing system did not prevent the company from collecting the balance because customers with these accounts were contractually obligated to pay any amount not paid by the third party, and the company used collection agencies to collect from customers who refused to pay. Tr. 509-10, 838, 932.

SAB-101 Compliance

In 2000, the Securities and Exchange Commission (SEC) issued an accounting bulletin, Staff Accounting Bulletin 101 (SAB-101), which prohibits publicly traded corporations from recognizing sales revenue before they deliver merchandise to the customer. Prior to this bulletin, Stewart had recognized revenue at the time of sale. SAB-101 required that Stewart change its accounting practice and recognize revenue at the time Stewart actually delivered the merchandise. Tr. 1381.

After reviewing internal accounting reports and speaking with Beau Royster, head of internal audit, Waldon became concerned that Stewart was not complying with SAB-101. Tr. 107, 1363. Waldon was aware that Stewart did not submit these internal accounting reports to the SEC, but she was concerned that the company was overstating its gross profit. Tr. 184-86. She later discovered that the company was making adjustments for SAB-101 compliance in the third quarter of 2003. Tr. 98-99, 101.

Waldon became increasingly concerned about SAB-101 compliance when she heard Ken Budde, Stewart's CFO, tell investors during a September 2003 quarterly earnings conference call that costs were up for the most recent quarter due to an accounting "anomaly." Waldon believed that Budde was lying to investors about the "anomaly," and that the real reason that costs were up was because Budde had made adjustments in the accounting to comply with SAB-101. Tr. 102, 1345. Waldon thought that Budde was talking about costs in the funeral business, but Budde testified that his comment referred to the cemetery business, which was not affected by SAB-101. Tr. 1377.

Waldon discussed her concerns about SAB-101 compliance with Mike Hymel, head of Stewart's accounting department, who assured her that Stewart was working on making adjustments to its system for fiscal year 2003. Waldon did not ask Hymel about SAB-101 compliance for fiscal years 2001 and 2002. Tr. 185.

Workspace Relocation

Breaux, Allen, and Pedro DoCampo, the Southern Division QA Representative, testified that the QA department workspaces were moved at least four times during their employment. Tr. 348, 456-57, 1108. In October 2003 Stewart moved the QA office

spaces from the fourth to the first floor of the SSC office building to make room for employees moving in as a result of the relocation of corporate offices to the SSC in New Orleans. Due to extensive construction at the SSC building, many other employees were also moved around. Tr. 354-55, 509. According to the QAs, their new work space location was temporary, and their cubicles were not a standard size, did not have proper lighting, and were located next to a storage area. Tr. 248.

Hostile Work Environment

Breaux, Allen, and Waldon testified that after raising their concerns about Stewart's accounting practices, they began to experience stonewalling and resistance from the SSC, exclusion from e-mails and meetings, lack of notification of policy and procedural changes, and delays in receiving responses from the SSC. Tr. 117-19, 342-47, 393. Waldon also stated that she was not welcomed to New Orleans when she transferred there and that her supervisor, Bob Crane, began reviewing her expense reports. Tr. 206-07, 227. Thus, the Complainants argued that Stewart had subjected them to a hostile work environment. Post–Trial Memorandum Submitted on Behalf of Complainants (Post-Trial Memorandum) at 19, 21.

Reduction in Force (RIF)

In December 2003, after experiencing several years of declining revenue and decreasing earnings per share, Stewart announced a company-wide reduction in force (RIF). Bill Rowe, Stewart's Operating Officer, testified that he asked each division president to determine the positions within their divisions to be included in the RIF, but he told them that their RIF decisions should not have any impact on the quality of service provided to customers. Tr. 1260-62. The company did not give the division presidents any written criteria to assist them in making their RIF decisions. After the decisions were made the company gave them a handbook, providing guidance on how to communicate with their employees about the company's restructuring and the RIF. Tr. 1170-71, 1330-31; RX-8. Three division presidents testified that they focused on administrative positions that did not impact customer service, and they looked at job functions rather than the individuals in the jobs. Tr. 1175, 1227. The Complainants, on the other hand, argued that Stewart selected them for the RIF because they had complained about the firm's accounting practices. Post-Trial Memorandum at 18-19, 21, 22.

The presidents of the Eastern and Central Divisions decided to eliminate the QA Representative position because it was an administrative support position that did not directly affect customers. Tr. 1159-60, 1305-06. The Western Division president did not eliminate the QA position because he considered it to be essential to the Western Division's operating and training needs. The Western QA Representative was based in California rather than New Orleans and had different duties from those of the Representatives based in the other divisions. Tr. 1216-17. Breaux, Allen, and DoCampo were among the approximately 300 employees included in the RIF. Tr. 446, 1115-16, 1159-60.

The last day of employment for RIFed employees was December 3, 2003. They received placement services to help them find new employment, a letter of reference, use of Stewart's employee assistance program, 30 days' severance pay, health and other employee benefits, and a separation pay plan that included separation pay based on years of service. Tr. 1054-57. Since the RIF involved a restructuring of the company, the company added 150 new positions between November 25, 2003, and January 28, 2004, and Stewart provided a job hotline so that RIFed employees could inquire about the new positions. Tr. 1062. Many employees applied for jobs and were rehired. Tr. 1058-59. Breaux and Allen did not use the job hotline or apply for any of the new positions in the company. Tr. 1062-63. But DoCampo learned of a Corporate Training Consultant position from the employee hotline, applied for the position, and was re-hired, though at a salary 20% less than that of his QA position. Tr. 1118-20.

Waldon was not a QA Representative. She was the Central Division's Director of Administration and was not on Central Division President Bob Crane's original RIF list. In fact, Crane asked that Schumacher, Stewart's Director of Internal Audit, and Waldon work together to decide which administrative positions could be moved or included in the December 3 RIF. Tr. 1424-25. On October 31, 2003, Waldon asked Schumacher how the RIF would affect her position and whether her job was secure. Tr. 1425. Schumacher told Waldon that she had no knowledge that the RIF affected Waldon's job. She did indicate to Waldon, however, that it was possible that Waldon's position could be eliminated at a later date and that if it were eliminated, she would want Waldon to stay with the company in a training capacity in Kansas City. Tr. 1425.

On November 5, Waldon told Schumacher that she would not be interested in a potential training position and recommended another employee for the proposed position. Tr. 1451-52. She also told Schumacher that she would resign with two weeks' notice if the company did not meet the following list of demands: notice of her termination date, consideration for out-of-pocket expenses she incurred while she was residing in New Orleans, and assurances that she would receive her fiscal year 2003 bonus, her pro rata bonus, and a severance plan. Tr. 1428-29. After several e-mail exchanges between Waldon and Schumacher regarding Waldon's demands, on November 25, Schumacher e-mailed Waldon a draft separation agreement. Tr. 1436; RX-24. On November 26, Waldon's name was added to the Central Division RIF list. Tr. 1423; RX-20. After receiving the separation agreement from Schumacher, Waldon requested that Schumacher make several changes to it. Schumacher made the requested changes and e-mailed the agreement to Waldon on December 2. Tr. 1443: RX-27. Although Waldon never signed and returned the final draft of the agreement, Schumacher still believed that she and Waldon had reached an agreement that Waldon would stay with the company through January 31, 2004. Tr. 1446-47. Waldon, however, did not believe that she had reached an agreement with the company. Tr. 203-04. Nevertheless, Stewart paid for the cancellation of Waldon's apartment lease in New Orleans, paid her 2003 bonus, and paid for the expenses of her one business trip to New Orleans, all of which Waldon had requested in her original demands. Tr. 203-04. Waldon worked through the January 31 deadline and received the benefits of the RIFed employees. Tr. 204-05.

Procedural Background

On January 29, 2004, the Complainants jointly filed a discrimination complaint under the SOX with the United States Department of Labor (DOL). They alleged that Stewart had violated the SOX when it took various adverse actions against them and finally terminated their employment because they had complained to Stewart officers and managers that the firm miscalculated interest on customer accounts and failed to issue refunds in a timely manner in violation of state laws. On May 5, 2004, after investigating, DOL's Occupational Safety and Health Administration (OSHA) denied the complaint because it found that Stewart terminated the Complainants' employment for legitimate business reasons. The Complainants requested a hearing. A DOL Administrative Law Judge (ALJ) held a formal hearing from August 30, 2004, through September 7, 2004. In a Recommended Decision and Order (R. D. & O.) he issued on February 15, 2005, the ALJ concluded that Stewart did not unlawfully discriminate against Breaux, Allen, and Waldon in violation of the SOX, and he dismissed their complaint.

The Complainants then filed a Petition for Review with the Administrative Review Board (ARB or the Board) on March 22, 2005. The Board issued a briefing schedule and on April 12, 2005, the Complainants filed their opening brief. On May 2, 2005, Stewart filed a motion to strike the Complainants' brief because it exceeded the page limitations that the Board set in its briefing order. On May 5, 2005, the Board issued an Order to Show Cause and Suspending the Briefing Schedule, requiring the Complainants to demonstrate why the Board should not dismiss their brief on the ground that it exceeded the prescribed page limitations. On July 18, 2005, while the Board's decision on Stewart's Motion to Strike was pending, the Complainants informed the Board that they intended to pursue their SOX case in federal court.[2] Therefore, the Board dismissed their appeal. But on April 6, 2006, the United States District Court for the Eastern District of Louisiana issued an Order and Reasons granting Stewart's request for mandamus relief. The court ordered the Board to reinstate the Complainants' appeal and rule on its Order to Show Cause dated May 16, 2005.

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[2] If the Secretary of Labor, through her designees, has not issued a final decision on a SOX complaint within 180 days after the complaint was filed, and the delay is not due to the complainant's bad faith, the complainant may bring an action for de novo review in the appropriate United States district court. *See* 18 U.S.C.A. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the ARB.[3] Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.[4] Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[5] We must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party and even if we "would justifiably have made a different choice had the matter been before us de novo."[6]

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[7] Therefore, the Board reviews an ALJ's conclusions of law de novo.[8]

DISCUSSION

The legal burdens of proof set forth in 49 U.S.C.A. § 42121(b), the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), govern SOX actions.[9] Accordingly, to prevail, a SOX complainant must prove by a preponderance of the evidence that (1) she engaged in a protected activity or conduct; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity

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

4 *See* 29 C.F.R. § 1980.110(b).

5 *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), *quoting Richardson v. Perales*, 402 U.S. 389, 401 (1971). *See also Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at 7 (ARB July 29, 2005).

6 *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

7 5 U.S.C.A. § 557(b) (West 1996).

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

9 18 U.S.C.A. § 1514A(b)(2)(C)(West Supp. 2005).

was a contributing factor in the unfavorable action.[10] If the complainant succeeds in establishing that protected activity was a contributing factor, then the respondent 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.[11]

Before the ALJ, Breaux, Allen, and Waldon argued that (1) they had engaged in protected activity when they complained to their immediate supervisors and other Stewart managers about irregularities in Stewart's accounting practices; (2) Stewart was aware of their protected activity; (3) Stewart took adverse action against them, including termination; and (4) their protected activity contributed to the adverse action. Post-Trial Memorandum at 2-3. Failure to prove by a preponderance of the evidence any one of the above listed elements of proof warrants dismissal of their complaint. Although the ALJ concluded that the Complainants did not demonstrate by a preponderance of the evidence that they had engaged in protected activity, he nevertheless assumed arguendo that they had, and went on to analyze whether they had proved that Stewart had taken adverse action and whether their protected activity contributed to their termination.

We will therefore consider whether substantial evidence supports the ALJ's findings and conclusions as to each element of proof.

A. Protected Activity

The SOX prohibits retaliation against an employee who provides information to "a Federal regulatory … agency" or "person with supervisory authority over the employee" "which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders "[12] Reporting that a company violated its internal accounting controls may constitute SOX-protected activity.[13] Whether a whistleblower's belief is reasonable depends on the knowledge available to a reasonable person in the same circumstances and with the employee's training and experience.[14]

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[10] *See* 49 U.S.C.A. § 42121(b)(2)(B) (iii). *See also Getman,* slip op. at 8; *Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-10 (ARB Jan. 30, 2004).

[11] *See* § 42121(b)(2)(B)(iv). *See also Getman*, slip op. at 8.

[12] 18 U.S.C.A. § 1514A.

[13] *See Collins v. Beazer Homes USA Inc.*, 334 F. Supp. 2d 1365, 1378 (N.D. Ga. 2004).

[14] *See Stockdill v. Catalytic Indus. Maint. Co., Inc.,* No. 90-ERA-43, 1996 WL 171409 at *1 (Sec'y Jan. 24, 1996); *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-6, slip op. at 27 (ARB July 14, 2000), *appeal dismissed sub nom., Exxon Chems. Ams. v. Chao*, 298 F.3d 464 (5th Cir. 2002).

1. Faulty Interest Calculations Due to AS/400 Programming Errors

The Complainants argued before the ALJ that they engaged in protected activity when they complained to supervisors about Stewart's failure to correct its AS/400 computer program. Post-Trial Memorandum at 3-6. The problem with the computer was that it was not programmed to calculate interest correctly in quoting customer payoffs when a customer made a prepayment on principal and requested a payoff before the end of the contract term. The Complainants argued that this error in the program adversely affected stockholders' returns on their investments. While they recognized that Stewart did not intentionally program the computer to make errors, they believed that by keeping the AS/400 problem secret and thereby delaying refunds, Stewart was defrauding or attempting to defraud shareholders. *Id.*

Substantial evidence supports the ALJ's finding that the Complainants did not reasonably believe that Stewart's delay in reprogramming the AS/400 constituted a fraud on shareholders. The Complainants were aware that the interest calculation problems were the direct result of programming errors within the AS/400 system. They were also aware that Stewart was actively working on the problem, both by having technology personnel re-program the computer and by having accounting personnel perform manual amortizations of accounts as a temporary back-up to ensure payoffs were correctly calculated. Tr. 157, 312-13, 491. Finally, they were aware that Stewart at one point believed its staff had fixed the problem, only to have the program repair fail during testing. Tr. 90.

Breaux also believed that Stewart intentionally delayed implementation of a new AS/400 program because the company was trying to keep the problem a secret. She testified about the "hush-hush" comment that Beatty supposedly made when discussing the interest problem with Apolinar. Tr. 1406-08. But, as the ALJ found, Beatty did not say "hush-hush." Tr. 538, R. D. & O. at 90. Moreover, the record reveals that Stewart was not attempting to conceal the problem. First, Stewart listed correcting the AS/400 problem as a goal in the company's strategic plan for 2002-03. The strategic plan was distributed to team leaders, group leaders, and QA representatives within the company. Tr. 981-82. Second, Stewart sponsored a conference in Dallas where QA Representatives addressed the problem openly with field personnel and paid for attendees' travel and lodging expenses. Tr. 427, 429-30. Finally, Breaux knew that the company encountered problems in testing the new program it had developed to correct the problem. Thus, as the ALJ found, Breaux could not have reasonably believed that Stewart was hiding the problem.

Therefore, substantial evidence supports the ALJ's conclusion that the Complainants did not engage in protected activity when they expressed concerns to supervisors about faulty interest calculations.

2. Untimely Refunds

Breaux, Allen, and Waldon contended before the ALJ that they engaged in protected activity by complaining to managerial personnel about Special Projects's delays in issuing refunds. Post-Trial Memorandum at 6-8. They argued that the refund delays violated Texas and Missouri statutes and could possibly result in sanctions and revocation of Stewart's license in either or both states. *Id.* The ALJ found that the Complainants did not have a reasonable belief that Stewart was violating the federal fraud statutes that the SOX covers because they expressed concerns only about violations of state law, and the SOX does not provide protection for employees who report state law violations. R. D. & O. at 86, 90, 91.

Substantial evidence supports the ALJ's conclusion that the Complainants' concerns about delayed refunds do not constitute protected activity. The record reveals that the Complainants did not express concern to supervisors that delayed refunds violated any federal law or regulation pertaining to the SOX. Providing information to management concerning violations of state law, standing alone, is not protected conduct under the SOX.[15]

In addition, Waldon argued that delayed refunds could result in a state's revoking Stewart's license to operate and thus affect shareholders. Post-Trial Memorandum at 6-7. But the mere possibility that an act or omission could adversely affect Stewart's financial condition and thus affect shareholders is not enough to bring the Complainants' concerns under the SOX's protection. *Id.* Therefore, we affirm the ALJ's conclusion that the Complainants did not engage in protected activity when they complained about delayed refunds.

3. Pending Other Source (POS) System Errors

Breaux and Allen argued before the ALJ that they engaged in protected activity when they reported problems with Stewart's POS accounting system to supervisors. Post-Trial Memorandum at 10-12. As discussed above, POS or "pending other source," refers to those accounts for which a third party has responsibility for payment. Breaux and Allen claim that a problem arose with the POS statements when the third party refused to pay. In such a case, the computer system failed to recognize balances on the customer's invoice that third parties owed, and the customer received an invoice showing a zero balance. According to Breaux and Allen, this computer error caused inflated receivables, thereby affecting shareholders' financial statements, and Stewart regularly lost money on these accounts whenever a third party denied responsibility for payment. Tr. 334-35, 454.

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[15] *See Harvey v. Home Depot U.S.A.,* ARB Nos. 04-114, 04-115; ALJ Nos. 04-SOX-20, 04-SOX-36, slip op. at 14 (ARB June 2, 2006).

The ALJ concluded that Breaux's and Allen's reports about problems with the POS system did not constitute protected activity because they did not reasonably believe that Stewart was violating the fraud provisions of the SOX by issuing incorrect balance statements to customers. R. D. & O. at 91. Substantial evidence supports his conclusion. The record reveals that Breaux and Allen were aware that Stewart's customers were contractually obligated to pay any balance remaining when a third party refused to take responsibility for payment and that Stewart collected any remaining balances through its Customer Service office and outside collection agencies. Tr. 333-35, 377-78, 509-10. Since they knew that Stewart was not losing money on its POS accounts and was not in danger of losing money in the future, they could not have reasonably believed that incorrect POS statements affected shareholders in any way. Therefore, they did not reasonably believe that Stewart's flawed POS system violated federal fraud statutes or an SEC rule related to fraud against shareholders. Accordingly, substantial evidence supports the ALJ's finding that Breaux and Allen did not engage in protected activity when they complained about the POS system.

4. SAB-101 Compliance

The SEC's Staff Accounting Bulletin 101 (SAB-101) went into effect in 2001. The bulletin prohibits publicly traded corporations from recognizing sales revenue before delivery to the customer. SAB-101 required that Stewart change its accounting practice so that its SEC filings reflect revenue at the time of actual delivery, rather than at the time the customer contracted with Stewart. Tr. 96-97. Waldon argued before the ALJ that her reports to supervisors about SAB-101 compliance concerns were protected activity. Post-Trial Memorandum at 8-10.

She testified that Beau Royster, head of internal audit, led her to believe that Stewart was not complying with SAB-101 when he told her that Stewart had "dropped the ball in compliance." Tr. 98-99, 101. She stated that she became increasingly concerned about Stewart's compliance with SAB-101 when she reviewed Stewart's Central Division internal accounting statements, which showed cost adjustments for SAB-101 compliance only in the third Quarter of 2003 and when she overheard Kenneth Budde, Stewart's CFO, refer to an "anomaly" in a September 2003 quarterly earnings conference call with shareholders. After hearing this "anomaly" comment, she concluded that Budde had lied to shareholders and that the real reason that costs were up was that Budde had adjusted merchandise costs in the third quarter accounting to comply with SAB-101. Tr. 102, 1345. Finally, a phone call with John Ferguson in Stewart's accounting department convinced Waldon that Stewart did not intend to make adjustments to 2001 and 2002 accounting statements to comply with SAB-101. Tr. 103, 178. Waldon testified that she discussed her concerns with Mike Hymel, head of Stewart's accounting department, who assured her that Stewart was addressing the issue. Tr. 103-04.

The ALJ found that Waldon did not sufficiently complain or raise concerns about SAB-101 compliance to reach the level of protected activity. R. D. & O. at 87. The

record supports this finding. Although Waldon discussed SAB-101 compliance generally with Royster, Ferguson, and Hymel, she did not complain about Stewart's failure to comply in 2001 and 2002. Tr. 185. Moreover, the record contains no evidence that she raised her concerns about SAB-101 compliance with any other management official.

The ALJ also found that Waldon did not reasonably believe that Stewart was violating SAB-101. She testified that she based her concern about SAB-101 compliance on "internal consolidated financial statements" for the Central Division. Tr. 180, 185. It is undisputed that these documents were not filed with the SEC and thus did not have to be compliant with SAB-101. Moreover, Waldon herself testified that she was not aware of any SEC rule or regulation requiring that these internal documents be filed with the SEC or comply with SEC rules and regulations. Tr. 184-85.

Therefore, substantial evidence supports the ALJ's findings that Waldon did not inform any Stewart supervisor that she believed that Stewart was violating SAB-101, and that she did not reasonably believe that Stewart was violating the federal fraud statutes or an SEC rule related to fraud against shareholders. Accordingly, like the ALJ, we conclude that Waldon did not engage in protected activity when she complained about SAB-101 compliance.

B. Adverse Employment Action

Although the Complainants' failure to meet their burden of proof that they engaged in protected activity alone warrants dismissal of their complaint, the ALJ went on to determine whether Stewart was aware of the Complainants' alleged protected activity, whether Stewart subjected them to adverse employment actions, and, assuming protected activity, whether it contributed to the adverse actions. After finding that Stewart was aware of the Complainants' alleged protected activity, which is undisputed, the ALJ addressed the Complainants' allegations that Stewart subjected them to the following adverse employment actions: logging increased error rates against the Central Division (where Breaux and Waldon worked), relocating Breaux and Allen, creating a hostile work environment, and terminating each Complainant' s employment.[16] R. D. & O. at 92.

The SOX prohibits covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee in the terms and conditions of employment because of the employee's protected activity.[17] In

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[16] At the hearing, Allen also alleged, for the first time, that Stewart's "writing her up" for three instances of improper use of a company credit card in October 2002 and investigating her for altering a document in April 2003 constituted adverse actions. The ALJ correctly ruled that both of these claims were time-barred. R. D. & O. at 93. *See* 18 U.S.C.A. § 1514A(b)(2)(D).

[17] 18 U.S.C.A. § 1514A(a).

determining whether Stewart took adverse action against the Complainants, the ALJ applied both the "tangible job consequences" test[18] and the "detrimental effect" test.[19] A "tangible job consequence" is one that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits."[20] Under the "detrimental effect" test, an employment action is adverse if it is reasonably likely to deter employees from making protected disclosures.[21]

1. Error Rates and Workplace Relocation

Special Projects generated contract error reports each month as a training tool to help prevent errors and promote efficiency. A contract error is anything that would cause a data entry employee to enter incorrect data into the computer system, such as an incorrect address or a misspelled word. Waldon and Allen argued that Special Projects was charging errors against their division (the Central Division) in retaliation for their complaints about Special Projects's delays in issuing refunds. The ALJ found that the increased error rates did not constitute adverse action because the negative error reports against the Central Division did not result in tangible job consequences for Waldon and Allen. R. D. & O. at 94. Nor would the error rate reports deter others from engaging in protected activity. *Id.* at 95.

The record reveals that increased error rates had no effect on Waldon's and Allen's employment. Although error rates for the Central Division increased, the record contains no evidence that Waldon's and Allen's individual error rates increased. And since they continued to receive not only good work evaluations, but also pay raises and bonuses, the error reports would not have deterred others from protected activity. Tr. 203-04, 305-06, 457-58.

Substantial evidence also supports the ALJ's conclusion that Breaux's and Allen's workspace relocation was not adverse action. The new workspace was small, dark, and located next to a storage area. It also lacked overhead storage, a personal storage area, and the lighting and desk space of their previous work areas. Allen and Breaux testified, however, that these conditions did not affect their ability to perform their work. As noted above, they also continued to receive good evaluations and bonuses. Tr. 300, 306, 451, 458. Therefore, the relocation, though inconvenient and perhaps vexing, did not significantly change Breaux's and Allen's employment status. Furthermore, they

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[18] *See Shelton v. Oak Ridge Nat'l Labs.*, ARB No. 98-100, ALJ No. 1995-CAA-19, slip op. at 6-9 (ARB Mar. 30, 2001).

[19] *See Ray v. Henderson*, 217 F.3d. 1234 (9th Cir. 2000).

[20] *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 761 (1998).

[21] *Ray,* 217 F.3d at 1243.

adduced no evidence that the problems they experienced with their new locations would deter other employees from making protected disclosures. R. D. & O. at 95.

Accordingly, we affirm the ALJ's conclusion that neither the increased error rates nor the workspace relocation were adverse actions.

2. Hostile Work Environment.

The Complainants argued before the ALJ that stonewalling and resistance from the SSC, exclusion from e-mails and meetings, lack of notification of policy and procedural changes, friction with the SSC, and delays in receiving responses from the SSC constituted a hostile work environment. Tr. 117-19, 342-47, 393. Waldon also claimed that Stewart exhibited hostility by not welcoming her to New Orleans and by reviewing her expense reports. Tr. 206-07, 227. But the ALJ concluded that Stewart did not subject the three the Complainants to a hostile work environment. R. D. & O. at 97, 98.

A hostile work environment claim involves repeated conduct or conditions that occur over a series of days or perhaps years. To recover, the employee must establish that the conduct complained of was serious and pervasive. Circumstances germane to gauging a hostile work environment include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.[22]

We agree with the ALJ that the Complainants did not submit sufficient evidence to establish a hostile work environment. They did not allege or offer evidence that the "stonewalling" and "friction" they experienced in working with the SSC were severe, pervasive, or humiliating, or that these problems with the SSC interfered with their work performance. The other conditions that the Complainants cite as indicative of a hostile work environment are similar to the "petty slights, minor annoyances, and simple lack of good manners" that often take place at work and that all employees experience.[23] These ordinary tribulations of the workplace do not rise to the level of adverse actions because they do not result in tangible job consequences or deter employees from engaging in protected activity.

Waldon also argued that she was subjected to other conditions indicative of a hostile work environment, i.e., Stewart did not "welcome" her and give her a permanent office upon her arrival in New Orleans, and Crane began reviewing her expense reports.

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[22] *Erickson v. United States Envtl Prot. Agency*, ARB Nos. 03-002, -003, -004, -064; ALJ Nos. 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18, slip op. at 18-19 (ARB May 31, 2006) (citations omitted).

[23.] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2412-13 (2006).

But the record does not support these allegations. Rather, the record reveals that Waldon's office was still being built when she arrived in New Orleans and that she was provided with a rental car until a company car became available for her use. And according to Crane's testimony, which the ALJ credited, Crane began reviewing everyone's expense reports to monitor costs, and he reviewed Waldon's in particular because Stewart had agreed to pay some of her expenses while she worked in New Orleans. Tr. 1256-57.

Therefore, substantial evidence supports the ALJ's conclusion that the Complainants did not experience a hostile work environment.

3. The RIF Terminations Were Adverse Actions, but the Complainants' Alleged Protected Activity Did Not Contribute to the Termination of their Employment

Termination is, of course, an adverse employment action. The SOX specifically prohibits a covered employer from discharging an employee because of protected activity.[24] To prevail under the SOX, the whistleblower must prove by a preponderance of the evidence that her protected activity was a contributing factor in the unfavorable personnel action.[25] A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[26] The contributing factor standard was "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action."[27] As noted earlier, for purposes of his extended discussion, the ALJ assumed arguendo that the Complainants engaged in protected activity. He then concluded that the Complainants did not adequately prove that protected activity contributed to their terminations. R. D. & O. at 105-06, 108.

Breaux and Allen do not contest the fact that Stewart's decision to conduct a RIF was a legitimate business decision. Rather, they contend that their selection for the RIF was discriminatory retaliation for their protected activity. They argue that Stewart's lack of documentation to support their selection for the RIF and Stewart's failure to follow its own Manager's Resource Guide in making its RIF decisions prove that Stewart had a retaliatory motive. In other words, they claim that their selection for the RIF was a

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[24] 18 U.S.C.A. § 1514A(a).

[25] 49 U.S.C.A. § 42121(b)(2)(B)(iii).

[26] *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)(1) (West 1996).

[27] *Id. See also Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 04-SOX-11, slip op. at 18 (ARB May 31, 2006).

pretext. If Breaux and Allen were able to prove by a preponderance of the evidence that Stewart's reasons for selecting them for the RIF were false, they might have prevailed.[28] But the record does not support their pretext argument.

The testimony of three division presidents reveals that the decision to eliminate the QA positions in the Central and Eastern Divisions was a legitimate business decision. The Central Division President said that he considered the QA position primarily "back office people or support people," and he decided to eliminate the position because the duties of the QA position (Allen) did not include meeting with clients and because other RMC managers could perform the QA's liaison function. Tr. 1265-66. The Eastern Division President stated that he placed the QA position (Breaux) on the elimination list early in the process since he regarded the job as a disposable "support function." He did not review Breaux's performance record to determine if she was suited for another position with the division because the RIF was not a "redeployment" of personnel, but a restructuring of the division. Tr. 1159-60, 1195. The Western Division President stated that he concentrated on eliminating "functions" that were not "delivering services to the families." But he decided not to eliminate his QA position because the Western QA Representative was based in California, not in New Orleans like Breaux, and the position had different duties from those of the Representatives based in the other divisions. Tr. 1216-17. Finally, although the Southern Division President did not testify, the record reveals that he included the QA position on his initial RIF list as well. Tr. 1305-06.

This consistent testimony from the division presidents constitutes substantial evidence that they eliminated positions, not persons. The ALJ nicely summed up the evidence on this issue:

> The QA representative position was an entire job function with only one incumbent per division. It is undisputed that the QA representative did not deal with or interface directly with customers or clients. Each divisional president operated independently and used their judgment in selecting function elimination. I find the record is bereft of any evidence that Mr. Stephens [Eastern Division President] and Mr. Crane [Central Division President] conferred with [CFO's] Mr. Tullier and Ms. Schumacher, respectively, before selecting the QA function for elimination. Complainant's argument that the CFOs, who had knowledge of Ms. Breaux and Ms. Allen's alleged protected activity, influenced the divisional presidents to select the QA function is unsupported and without merit.

R. D. & O. at 104. Therefore, like the ALJ, we conclude that Breaux's and Allen's protected activity did not contribute to their RIF terminations.

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[28] *See Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248 (1981).

Waldon was not a QA, and her DoA position was not included on the Central Division's initial RIF list. On October 23, 2003, Waldon, who was aware of the impending RIF, asked Schumacher whether her DoA job was secure, and Schumacher told Waldon that she did not know. Schumacher did indicate, however, that it was possible that the company would decide to eliminate Waldon's job. She then asked Waldon if she would be interested in a new training position that might be created in the future. Tr. 128-29. Several days later Waldon declined the offer of a potential training position and presented an ultimatum to Schumacher, threatening to give her two weeks' notice of resignation if Schumacher would not give her a definite termination date, a severance plan, her bonus, and reimbursement for the expenses for her move to New Orleans. Tr. 1428-29. After several e-mail exchanges between Waldon and Schumacher regarding Waldon's demands, on November 25, Schumacher e-mailed Waldon a draft of a separation agreement. On November 26, Waldon's name was added to the Central Division RIF list. Tr. 1423, 1436; RX-20, 24. Waldon claims that Stewart terminated her employment. Post-Trial Memorandum at 18. Stewart argues that Waldon "opted to leave the company." Post-Trial Memorandum of Respondent, Stewart Enterprises, Inc. at 20.

Substantial evidence supports the ALJ's finding that Waldon was not RIFed. Waldon did not sign the separation agreement that she had been negotiating with Schumacher, but she nevertheless continued to work at Stewart after the RIFed employees left on December 3. Schumacher thought that she and Waldon had agreed that Waldon would stay until January 31, 2004. Tr. 1446-1447. The separation agreement specified as such. RX-24 at 2-3. And Waldon's last day of work was January 31. Tr. 133. Also, both Crane and Schumacher credibly testified that Waldon would still be employed as Director of Administration for the Central Division if she had not presented Schumacher with her list of demands. Tr. 1273, 1447; R. D. & O. at 107. Moreover, as additional evidence that Waldon was complying with the terms of the separation agreement, in March 2004, Waldon requested through her attorney that Stewart pay her lease expenses and a pro rata share of her 2004 bonus. Tr. 1445. The lease and bonus payments both were specified in the separation agreement. RX-24 at 2-3.

As noted above, all three Complainants contended before the ALJ that the lack of documentary evidence setting forth standards for managers to apply in selecting employees for the RIF is evidence that Stewart's reason for terminating them was a pretext and that its real reason was their protected activity. Post-Trial Memorandum at 25-26. The division presidents testified that they did not have written instructions for the RIF because CEO Rowe allowed them to make RIF determinations independently based on each division's particular needs. Moreover, Rowe told the presidents to keep the details of the RIF secret so that word would not leak out to employees. Tr. 1165-66. Finally, according to the presidents' testimony, they did not keep notes concerning their decisions, and they had no need to document standards because they were focusing on positions, not persons, and primarily eliminating administrative positions that had the least amount of interaction with customers. Therefore, we reject the argument that lack of documentary evidence evidences pretext.

Breaux and Allen also argue that Stewart's failure to follow its own Manager's Resource Guide, which the company distributed to give managers guidance in communicating with employees about the RIF, is evidence that their selection for the RIF was a pretext. Specifically, the Complainants contended that Stewart failed to follow the Guide's requirement that their supervisors evaluate their skills before selecting them for the RIF. Post-Trial Memorandum at 21, 23, RX 8 at 4. But the Guide provides that skills be considered only when the company reduced the number of employees in a particular job function. *Id.* In Breaux's and Allen's cases, Stewart eliminated their entire job function. In Waldon's case, skills did not come into play because Waldon chose to leave rather than wait for her job to be terminated at some unknown date. Tr. 200-01. Therefore we reject the argument that Stewart's failure to follow the Guide demonstrates pretext.

CONCLUSION

Substantial evidence supports the ALJ's conclusion that Allen, Breaux, and Waldon did not engage in protected activity when they complained about irregularities in Stewart's accounting practices. Substantial evidence also supports the ALJ's conclusions that the Complainants' increased error rates and Breaux's and Allen's workspace relocation were not adverse employment actions, and that none of the Complainants demonstrated the existence of a hostile work environment. Finally, even if we assume, as the ALJ did, that the Complainants had engaged in protected activity, substantial evidence supports the ALJ's conclusion that protected activity did not contribute to Stewart's decision to select the QA positions for the RIF. We therefore **DENY** their complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge