

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 27 May 2008**

CASE NO: 2007-SOX-00072

In the Matter of:

**MARY E. MENZ,**  
Complainant

v.

**LANNETT COMPANY, INC.,**  
Employer

Appearances:

Nancy C. DeMis, Esquire  
For Complainant

Catherine T. Barbieri, Esquire  
For Employer and Carrier

Before: **RALPH A. ROMANO**  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This matter arises from a complaint filed under § 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“the Act”). 18 U.S.C. § 1514A. An action under § 806 of the Act will be governed by 49 U.S.C. § 42121(b), which are the procedural regulations governing the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century. 18 U.S.C. § 1514A(b)(2)(B). The Act affords protection from employment discrimination to employees of companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 and companies required to file reports under § 15(d) of the Securities Exchange Act of 1934. *See* 15 U.S.C. § 781. Specifically, the Act protects so-called “whistleblower” employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§ 1341, 1343, or 1348, or any provision of federal law relating to fraud against shareholders.

## PROCEDURAL HISTORY

On April 2, 2007 Mary Menz (“Complainant”) filed a complaint with the United States Department of Labor’s Occupational Health and Safety Administration (“OSHA”), alleging that Lannett Company, Inc. (“Respondent”) had unlawfully discharged her in violation of employee protection provisions of the Sarbanes-Oxley Act. On June 18, 2007, after an investigation of the complaint, the Acting Regional Administrator for OSHA issued a determination that the investigation disclosed that Complainant had not engaged in protected activity under the Act. (ALJ1). Complainant objected to the findings on July 20, 2007 and requested an administrative hearing. (ALJ2).

The case was referred to the Office of Administrative Law Judges (“OALJ”) and was assigned to me on July 24, 2007. Respondent filed a Motion for Summary Disposition on December 17, 2007 and Complainant filed an Opposition to Respondent’s Motion for Summary Disposition on January 2, 2008. (ALJ10A-ALJ10B). On January 3, 2008, I issued an Order denying Respondent’s Motion for Summary Disposition. (ALJ11).

The formal hearing in this matter was held in Philadelphia, Pennsylvania on January 7-8, 2008.<sup>1</sup> At that time, the parties were given the opportunity to examine witnesses and submit other evidence.<sup>2</sup> Following the formal hearing, the record was left open for sixty days for the submission of briefs. Final briefs were filed by March 21, 2008.<sup>3</sup>

This decision is rendered after careful consideration of the record as a whole, the arguments of the parties, and the applicable law.

## ISSUES

The issues presented for resolution include:

1. Whether Complainant engaged in activity protected under the Act.
2. If Complainant engaged in protected activity, whether Respondent was aware of this activity.
3. If Respondent was aware of the protected activity, whether this awareness contributed to Respondent’s decision to terminate Complainant’s employment.

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<sup>1</sup> The transcript of the hearing consists of 499 pages and will be cited as “Tr. at --.”

<sup>2</sup> I received eleven ALJ exhibits as “ALJX1-ALJX11.” (Tr. at 10). Complainant submitted twenty-nine exhibits which I marked and received as “CX1-CX15” and “CX17-CX29,” rejecting exhibit 16. (Tr. at 42, 44, 54, 60, 66, 69, 74, 82, 85, 86, 88, 92, 94, 105, 106, 114, 119, 126, 130, 134, 324, 327, 436, 489). Respondent submitted twenty-four exhibits which I marked and received as “RX2-RX5,” “RX7-RX15,” “RX22,” and “RX24,” rejecting exhibits 6, 16-21, and 23. (Tr. at 239, 340, 342, 368, 382, 385, 388, 393, 399, 425, 430, 436, 464).

<sup>3</sup> Complainant’s brief will be cited as “CB at --.” Respondent’s brief will be cited as “RB at --.”

4. If Complainant's protected activity is found to have contributed to her termination, whether Respondent would have terminated Complainant even in the absence of the protected activity.

## SUMMARY OF THE EVIDENCE

### A. Background

Respondent is the oldest generic drug manufacturer in the United States and is located in Philadelphia, Pennsylvania. Respondent has one hundred and eighty-one employees. (Tr. at 331). Arthur Bedrosian has been in the pharmaceutical industry for forty years. (Tr. at 332, 333). Mr. Bedrosian first became employed with Respondent in 2000 as Vice President of Business Development. (Tr. at 332). He became President of the company in May of 2002 and was promoted to Chief Executive Officer in January of 2006. (Tr. at 280, 331, 333). Mr. Bedrosian's duties as President include setting goals for the company, presenting the goals to the board of directors, and implementing the goals approved by the board. (Tr. at 334). Complainant has worked in the pharmaceutical industry since 1981. Complainant has a nursing and legal background. (Tr. at 31).

Mr. Bedrosian created a new position of Director of Regulatory Affairs. Mr. Bedrosian testified that the position was required because it was important to have someone that could understand the regulations of the generic drug industry and ensure compliance. (Tr. at 335-336). Complainant interviewed with Bernard Sandiford in December of 2005. (Tr. at 35). Mr. Sandiford has been in the pharmaceutical industry for approximately forty-four years and has been the Vice President of Operations with Respondent since November of 2002. (Tr. at 473). Mr. Sandiford testified that Complainant's medical and legal background would be useful in this new position. (Tr. at 474). Mr. Sandiford testified that Complainant did not express any concern in performing the role of Director of Regulatory Affairs during her interview with Mr. Sandiford and that she represented herself as capable of learning the generic drug industry based on her background although her regulatory experience was in the branded medications field. (Tr. at 32, 475, 478).

Mr. Bedrosian then interviewed Complainant for the position and discussed her resume. (CX1; RX2; Tr. at 37, 182, 285, 336-337). During the interview, Complainant "pitched herself as having this unique skill of being an attorney and a nurse, having work[ed] in the industry ten years" and indicated that she had experience working with FDA regulations for brand name drugs. (Tr. at 183, 337-338). Complainant informed Mr. Bedrosian that she only had experience in the brand name industry, but Mr. Bedrosian claimed that she never expressed concern regarding her lack of experience in the generic drug industry. (Tr. at 37, 285, 340). However, Complainant testified that she did express concern regarding her lack of experience in that field. (Tr. at 37). Complainant was under the impression after interviewing that Respondent was compliant with the regulations. (Tr. at 188).

Mr. Bedrosian and Mr. Sandiford made the decision to hire Complainant, sending her an offer of employment on March 9, 2006. (CX2; RX3; Tr. at 44, 191, 475). Complainant signed and accepted the employment offer on March 15, 2006. (CX2; RX3; Tr. at 44, 192-193).

Complainant began working for Respondent on March 31, 2006 at a salary of \$125,000 per year with eligibility for a discretionary bonus. (CX2; RX3; Tr. at 44, 191, 193, 341). Complainant was responsible for supervising seven employees in her department. (Tr. at 342). Complainant testified that she initially was unsure as to what her responsibilities were, but that she gradually found out that her duties included designing systems to remain compliant with the FDA regulations. (Tr. at 44, 343-344). Complainant was also responsible for insuring that drug listings are current. (Tr. at 367). Complainant understood that her job was to ensure that new products were compliant with the FDA regulations. (Tr. at 190). Complainant reported to Mr. Sandiford and Mr. Bedrosian. (Tr. at 297, 344, 475).

#### B. FDA Regulations and Inspection

Mr. Bedrosian testified that all generic pharmaceuticals must be approved by the FDA before they can be distributed and once a drug is approved and on the market many FDA regulations still apply. (Tr. at 347-349). The FDA conducts audits every two years. (Tr. at 357). Mr. Bedrosian testified that Respondent has been audited on sixteen occasions over the past seven years. (Tr. at 357). When the FDA performs an inspection, they provide a Form-482, notice of inspection. If the inspector has any observations or recommendations he fills out a Form-483 recommending how to improve. (Tr. at 284, 354, 358). The FDA provides a format to follow when drafting standard operating procedures. (Tr. at 355). If the company disagrees with the inspector they can respond to the Form-483 challenging the observation or recommendation. (Tr. at 358-359).

The FDA conducted a routine audit at Respondent in June of 2006. (Tr. at 52, 193, 361). The inspector made ten observations and issued his findings on a Form-483. (Tr. at 54-55, 195, 298, 361, 475). The investigator found that written procedures were not followed for annual reviews of certain batches of drugs and that the standard operating procedure for providing annual product reviews to the responsible officials failed to require notification of trends of the quality standards, changes in certain procedures, and product recalls or field alerts. (CX4; RX4; Tr. at 56, 298).

A team was assembled to draft responses to the observations. (Tr. at 55, 204). Complainant was assigned the task of responding to observations three and four, which dealt directly with her department. (Tr. at 55-56, 196, 204, 369). Respondent sent the district director of the FDA a response to those observations on June 30, 2006. (CX4; RX4; Tr. at 57, 212, 363). This response indicated that a team will be assembled to revise the standard operating procedures regarding annual product reviews by January of 2007, and that the annual product reviews would be up to date and current by April of 2007. (CX4; RX4; Tr. at 46, 58, 147-149, 196, 206-207). It was anticipated that a revised and approved process for the standard operating procedures would be in place by the first quarter of 2007. (Tr. at 59, 147-148, 213).

Complainant assigned Mark Kurtzman to oversee the team working on the annual product reviews procedures and improvements. (Tr. at 63, 67, 212). Mr. Kurtzman submitted a memorandum to Complainant and Mr. Sandiford on January 10, 2007 outlining the deficiency in annual product reviews due to insufficient staffing. (CX5; Tr. at 65). At Mr. Kurtzman's request, the Department of Regulatory Affairs hired an intern to assist in bringing annual product reviews

and annual reports up to date in 2006. (CX5; Tr. at 65, 241, 254, 366). Complainant testified that she requested six or seven fulltime employee to help with annual reports. (Tr. at 255, 258). Mr. Bedrosian testified that Ms. Menz' budget request for additional employees was accepted but that there was a hiring freeze in 2006. (CX5; Tr. at 255, 366). Complainant also put a team in place to create schedules for completing the annual product reviews. (Tr. at 215). Complainant assigned two employees in her department to work on that issue. (Tr. at 216). Complainant testified that the team was not making significant progress by June of 2006 because they had just begun to work on these issues. (Tr. at 216-217). Complainant testified that eight reports were overdue. In addition, six of the eight were completed by July 31, 2006. (Tr. at 219). Mr. Bedrosian testified that the annual product reviews were up to date by the fourth quarter of 2006. (Tr. at 214, 365).

Respondent was supportive of Complainant's efforts to comply with the Form-483. Complainant did not address the issues outlined in the Form-483 prior to the FDA investigation. (Tr. at 369). Mr. Bedrosian asked the department heads to submit updated reports to him and he received monthly reports from Complainant regarding the status of her department. (CX3; Tr. at 49, 302, 369, 370). Complainant's reports included the status of the FDA audit, her findings regarding current drug listings, the status of product labeling, and standard operating process reviews. (CX3; Tr. at 51-52). Mr. Bedrosian testified that Complainant never informed him that the issues on the Form-483 were not being achieved. Mr. Bedrosian also explained that those issues were not related to the financial aspect of the company. (Tr. at 370).

### C. Complainant's Performance

Complainant received a positive written evaluation in September of 2006. (CX6; RX5; Tr. at 68, 377, 479). Complainant considered the performance objectives, responsibilities, and expectations section of her review to be her job description. Complainant discussed this performance review with Mr. Sandiford. (CX6; RX5; Tr. at 69). Complainant had been employed for six months and received a bonus for her first quarter of employment. (Tr. at 377, 442). The bonus was based on Complainant meeting her objectives and goals. (CX7; Tr. at 70, 294, 479). Complainant's goals were created through a joint effort between herself and her supervisor, Mr. Sandiford. (Tr. at 73, 296). The bonus is discretionary and given to individuals that achieve their personal goals. The bonus and goals combined created a bonus goal for the whole company. (CX7; Tr. at 295).

There was an incident where Complainant informed Partha Basumalik, the Director of Operations, that he must submit failed bioequivalence studies to the FDA. (Tr. at 76-77; 377, 446). Mr. Bedrosian informed Mr. Basumalik that this was incorrect and instructed him to ask Complainant for the regulation citation requiring this. (RX7; Tr. at 377, 446). Mr. Basumalik emailed Complainant requesting the specific regulation on October 10, 2006. (CX8; RX7; Tr. at 77). Complainant responded to Mr. Basumalik's email suggesting that people that did not submit all of the studies to the FDA were disbarred and blacklisted for fraud. She further informed Mr. Basumalik that she would not sign off on any application that did not include the studies. (CX8; RX7; Tr. at 78, 246-247, 378). Mr. Bedrosian replied to Complainant's email because he believed that she misconstrued the issue and was suggesting that Mr. Basumalik was engaging in illegal activity. (CX8; RX7; Tr. at 78, 378). Mr. Bedrosian also requested a copy of the

regulation. (RX7; Tr. at 379). Complainant responded with a “guidance” issued by the FDA in 2003. (CX7; RX8; Tr. at 79, 245, 379). Mr. Bedrosian explained that “guidances” are not regulations, but merely ideas submitted to the industry in order to obtain feedback. (CX8; RX8; Tr. at 379). Mr. Bedrosian’s response to that was that she should have simply informed Mr. Basumalik that the regulations do not require submission of failed biostudies instead of alleging fraud. (Tr. at 382).

Complainant mentioned the issue in a later meeting and Mr. Bedrosian informed her again that the regulations do not require them to submit failed bio studies to the FDA. (Tr. at 383). Complainant also discussed this with one of her employees, Carman Suarez, and informed her that she would be debarred if she did not submit the information. Ms. Suarez informed Mr. Bedrosian of this incident. (Tr. at 387). Mr. Bedrosian contacted a consultant, Shrikant V. Dighe, who is a retired head of the Bioequivalency Division of the FDA. Dr. Dighe confirmed that there was no regulation requiring Respondent to submit the failed bio studies, but that there was a proposed rule that was never finalized that required them to submit the failed bio-studies. (CX10; RX9; Tr. at 84, 321-323, 383-385). Mr. Bedrosian formally reprimanded Complainant for this incident by memorandum on December 21, 2006.<sup>4</sup> (CX9; RX10; Tr. at 320, 386). Mr. Bedrosian attributed her inaccurate information to her lack of experience in the generic drug industry. (CX13; Tr. at 326). Complainant testified that she replied in a memorandum dated December 28, 2006 attempting to correct any misunderstanding and gain a better understanding of Mr. Bedrosian’s reprimand. (CX11; Tr. at 87).

Mr. Bedrosian and Complainant also had a disagreement regarding paperwork and Respondent’s lab in Armenia. Complainant refused to research the regulations and was unable to cite to them to support her position. (Tr. at 420). Mr. Bedrosian contacted Karen Campbell, the Assistant Director of the FDA. Ms. Campbell informed him on the proper procedure for this issue and Mr. Bedrosian informed Complainant that she was incorrect. (Tr. at 421).

Mr. Bedrosian testified about another incident where Kristie Stephens, an employee of Respondent, received a minor deficiency letter from the FDA and Complainant recommended that they suspend the product from the market. (CX12; Tr. at 88-89, 248, 321, 393-395). Mr. Sandiford explained that normally to recommend suspending the marketing of drug, a quality group is formed to review and finalize the decision. (Tr. at 493). Complainant did not discuss this recommendation with Mr. Sandiford or Mr. Bedrosian prior to sending it. (Tr. at 249-250, 493). Mr. Bedrosian responded to Complainant’s email informing her that she was incorrect because the FDA did not instruct Respondent to discontinue use of the product. (CX12; Tr. at 90, 394-395). Mr. Sandiford asked Complainant what her reasoning for this recommendation was and Complainant informed him that it was merely a suggestion to prevent embarrassment if there were ever a product liability suit. Mr. Sandiford informed Complainant that Respondent would continue to market the drug. (Tr. at 90-91). Mr. Bedrosian explained that Complainant ignored the regulations when she sent out this advice. (Tr. at 395). Mr. Bedrosian issued a reprimand to Complainant on December 21, 2006, telling her that she was incorrect and instructing her to not

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<sup>4</sup> Complainant asserts that the memorandum she received was identical in substance, but was dated December 28, 2006 instead. (Tr. at 83).

send emails of that nature again.<sup>5</sup> (CX13; RX11; Tr. at 92-93, 321, 396). Complainant sent a memorandum to Mr. Bedrosian in response to his reprimand on January 5, 2007 to correct any misunderstandings and explain her reasoning for the advice that she gave. (CX15; Tr. at 95-96). Mr. Bedrosian also sent a memorandum to Complainant on January 8, 2007 correcting his previous memorandum and informing her that she exceeded her authority in dealing with this issue. (CX14; RX12; Tr. at 94-95, 397-398). Prior to this incident Complainant believed that Mr. Bedrosian was pleased with her contributions to the company. (Tr. at 97).

Mr. Bedrosian testified that he continually found Complainant to be insubordinate regarding these and other issues. (Tr. at 388, 447). He discovered that Complainant was being “disrespectful to [his] position and to [him] individually. She made accusations about [him] doing things illegally, that things that, she had to get rid of [him]...if the company was going to move ahead.” (Tr. at 388). Mr. Bedrosian was concerned that Complainant was undermining his authority and telling people that the company was involved in illegal activity. Ms. Suarez informed Mr. Bedrosian of the things Complainant was saying about himself and the company. (Tr. at 389). Ms. Suarez indicated to Mr. Bedrosian that she relied on Complainant’s statements because she is an attorney. (Tr. at 390-391). Mr. Bedrosian requested that Partha Basumalik submit a report, in writing, regarding incidents with the Complainant. (Tr. at 391). Mr. Basumalik submitted an email to Mr. Bedrosian on December 7, 2006 outlining Complainant’s criticism’s of Mr. Bedrosian. (RX24; Tr. at 392, 448). Mr. Bedrosian also learned of comments made by Complainant to Ms. Stephens, Ms. Suarez, and Ms. Regitko, employees in her department, asserting that he was recommending that the company engage in illegal activities. (Tr. at 399). Complainant never came to Mr. Bedrosian to express her concerns that he was engaging in illegal behavior. (Tr. at 401). In addition, Mr. Bedrosian never confronted Complainant or attempted to schedule a meeting to discuss these issues. (Tr. at 452).

Mr. Bedrosian called a meeting with Complainant’s department to clarify these reports in October of 2006. (Tr. at 97, 226, 400-401). Mr. Bedrosian informed his colleagues to ensure that they have their facts straight before they make allegations. (Tr. at 400-401). Mr. Bedrosian asserted that he did not instruct his employees to not comply with FDA regulations. (Tr. at 401). Mr. Bedrosian instructed his employees to follow the standard operating procedures. (Tr. at 403-404). Complainant testified that she understood Mr. Bedrosian was encouraging a minimal number of standard operating procedures. (Tr. at 99). However, she also asserted that Mr. Bedrosian stated that he did not want his employees to violate the FDA regulations. (Tr. at 232). Mr. Bedrosian related a story of an attorney who quit his job rather than bill for hours he did not work as an example of integrity that he wanted his employees to follow: when you are faced with a decision, make the right decision. (Tr. at 100, 306, 404-405). In addition, Mr. Bedrosian discussed warning letters received from the DEA and Respondent’s stance that the DEA would have to file a complaint because the company had done nothing wrong. (Tr. at 100, 307-308). Mr. Bedrosian stated in the meeting that he felt the DEA had been retaliating against Respondent in an ongoing audit. (Tr. at 310). Complainant asserts that Mr. Bedrosian encouraged his employees to “push the envelope” and challenge the FDA. (Tr. at 101, 232). However, Complainant testified that it is unclear what Mr. Bedrosian meant by that statement. (Tr. at 232).

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<sup>5</sup> Complainant asserts that the memorandum she received was identical in substance, but was dated December 28, 2006 instead. (Tr. at 93).

Mr. Bedrosian informed his employees that gossiping in the company and making accusations without facts is the worst thing his employees could do. (Tr. at 313).

Complainant took handwritten notes during the meeting and transcribed them the following day. (Tr. at 226-227). Complainant testified that she felt that Mr. Bedrosian was trying to undermine her attempts to bring the company into compliance regarding standard operating procedures and timely reports. Complainant discussed the meeting with Mr. Sandiford the following day. (Tr. at 102). Mr. Sandiford advised Complainant to save her notes from the meeting and to relax. (Tr. at 104). Complainant did not discuss this meeting with Mr. Bedrosian after that day. (Tr. at 233). Mr. Bedrosian testified that he did not hold the meeting to get Complainant to resign. In addition, he did not intend for employees to challenge FDA or other governmental agencies. (Tr. at 406). Mr. Bedrosian was concerned that the employees in Complainant's department were being told by Complainant that they were doing something wrong if they listened to him. (Tr. at 418).

#### D. The Certification Statement

Brian Kearns has been the Vice President of Finance, Chief Financial Officer, Treasurer, and Corporate Secretary for Respondent since March of 2005. Mr. Kearns reports to Mr. Bedrosian. (Tr. at 455-456). Mr. Kearns asked Complainant to sign a certification for the quarter ending September 30, 2006, titled "Management Internal Controls and Fraud Certification Pursuant to Section 302 of the Sarbanes-Oxley Act of 2002" ("the Certification"). (CX17; RX15; Tr. at 106, 277, 456). The purpose is to ensure that issues of internal control, potential fraud, and potential illegal acts are brought to the attention of management in order for it to act on them. Respondent asks all managers that have functional department responsibilities to sign the Certification. (Tr. at 456-457). Complainant was initially provided a copy of the Certification by the corporate controller, Jim McMonagle. (Tr. at 106, 135, 457).

Complainant testified that she was uncomfortable signing the Certification because it was too broad. Her specific reasons include: it was unclear what her role involving FDA regulations were; the standard operating procedures in her department were not being operated effectively; she was making a number of changes in internal controls and procedures; she was not involved in financial reporting; she was not an expert at SEC regulations; she felt there were regulations that were not being followed; and she had no accounting experience. (CX17; RX15; Tr. at 107-111, 144, 157). However, Complainant testified that designing and implementing controls and procedures in her department was a work in progress and her goal was to ensure that all regulations and laws were being followed. (Tr. at 140). Complainant acknowledged that she was not being asked to certify that the whole company was in compliance, but that she was concerned that it was not clear regarding what she was certifying to. (Tr. at 144). She further explained that the form did not define the area of responsibility to which she would be certifying. (Tr. at 151). Complainant also explained that the Certification could be interpreted differently from somebody with regulatory responsibilities as opposed to somebody with financial regulatory responsibilities. (Tr. at 156). Complainant explained that she never even considered the part of the statement regarding whether she was aware of any fraud that involves management or other employees because she was unable to sign all of the other statements preceding that issue.

(CX17; RX15, Tr. at 111, 166-167). However, she did testify that she was not aware or concerned of any fraud at Respondent. (Tr. at 135, 167).

Complainant informed Mr. McMonagle and Mr. Sandiford that she would not sign the Certification. (Tr. at 107, 172, 477). Mr. Sandiford informed Mr. Kearns in mid-November of 2006 that Complainant refused to sign the Certification. (Tr. at 457-458). Complainant did not put her concerns regarding the Certification in writing. (Tr. at 173, 179). Mr. Kearns discussed the issue with Complainant during a telephone call on November 17, 2006. (Tr. at 107, 458). Mr. Kearns testified that Complainant informed Mr. Kearns that she was unwilling to discuss her reasons for refusing to sign the Certification at that time. (Tr. at 458). However, Complainant testified that she informed him that she was unable to sign the certification because it was too broad. (Tr. at 177). She informed him that she was unsure whether she knew of any illegal activity that Respondent had been engaged in. Mr. Kearns testified that he informed Complainant that it was okay if she was not comfortable signing the form, but that she needed to explain her reasons in writing. He informed her that she had several avenues to pursue, such as contacting the whistleblower hotline, the audit committee, or any board member, if she was uncomfortable providing the information directly to him. In addition, Mr. Kearns explained the reason for requiring the Certification. (Tr. at 459). At the end of the telephone conversation, Complainant instructed Mr. Kearns to contact her attorney. (Tr. at 460). Complainant testified that Mr. Kearns was upset and she was concerned that she would be fired. (Tr. at 114).

Mr. Kearns received an alternative certification from Complainant that only stated the facts of her employment, including her hire date, job position and duties, and who she reports to. (CX18; Tr. at 107, 170, 466). Complainant testified that she was comfortable signing the neutral statement based on her short time of employment thus far. (CX18; Tr. at 111, 172). Complainant does not mention any concern regarding fraud in this alternate certification. (CX18; Tr. at 169). Mr. Kearns did not view this alternative as an effort to certify that she was unaware of any problems within her department. (Tr. at 466).

Mr. Kearns met with Complainant on the following Monday and asked her if he could explain anything further about the process to her. (Tr. at 178, 460). Mr. Kearns testified that he reiterated the purpose for the Certification. (Tr. at 460). Complainant explained to him that she had not been with Respondent long enough to put in appropriate internal controls and felt she should not be held accountable for them. (Tr. at 178, 461). In addition, Complainant was not certain whether Respondent was in compliance with annual reports that needed filing with the FDA. During this meeting Complainant was reading from typed notes that she had prepared. (Tr. at 461). Mr. Kearns asked her whether she knew of any illegal activity that Respondent was engaged in and she informed him that she was not sure. Mr. Kearns instructed her to contact her attorney and get a “good understanding of exactly what this process is.” (Tr. at 462). During that meeting, Mr. Kearns asked Complainant to meet with Mr. Bedrosian. (Tr. at 178, 463). Complainant refused, explaining that she was not prepared to do so. (Tr. at 463). Mr. Kearns testified that Complainant did not request a meeting with her legal counsel present. (Tr. at 466). However, Complainant asserts that she requested to have a meeting with her attorney present and they refused to do so. (Tr. at 113, 178, 179). Mr. Kearns never discussed the Certification with Complainant after that meeting. (Tr. at 464).

Mr. Kearns contacted Complainant's attorney and put them in contact with Respondent's attorneys. (Tr. at 114, 460). Mr. Kearns never spoke directly to Complainant's attorney. (Tr. at 177, 460). In addition, Complainant was not aware of the discussions between her attorney and Respondent's attorneys. (Tr. at 180). Complainant's attorney contacted her in January informing her that Respondent had drafted a possible statement for her to sign and that she would either need to sign it or explain her reasons for refusing to do so. (CX20; Tr. at 116, 135, 180-181). Complainant testified that she planned to provide her reasons for being unable to comply with Respondent's request to sign this new document. (Tr. at 182). Complainant's attorney had been communicating with Respondent's attorneys regarding this statement since December 20, 2006. (CX19; Tr. at 116, 180). Complainant testified that she would still not have been able to sign this document as it was written, but that it was a good step toward creating a document she would be comfortable signing. (CX20; Tr. at 118, 180). Complainant did not voice her concerns regarding this new Certification to anyone at Respondent. (Tr. at 181).

Mr. Bedrosian testified that Respondent has a whistle blower policy in place. (RX14; Tr. at 300, 425). Employees may report allegations of fraud to their immediate supervisor, a member of the whistleblower committee, an attorney in an independent law firm, or an auditing committee of the board of directors. (RX14; Tr. at 301, 426-427). This policy is posted on the bulletin boards around the company. In addition, a hard copy was supplied to all employees along with their paycheck when this policy was first implemented. (Tr. at 428). The policy is also available on the employee public computer drive that Complainant had access to. (Tr. at 429). Mr. Bedrosian was unaware of Complainant utilizing these options to report her concerns. (Tr. at 428).

#### E. Complainant's Termination

Mr. Bedrosian made the decision to terminate Complainant after the meeting in October of 2006. (Tr. at 280, 421, 477). He spoke to the individuals in her department and uncovered "additional instances of what [he] consider[ed] misconduct; undermining my authority, threatening my position in the company..." (Tr. at 421). Mr. Bedrosian found it intolerable to work with Complainant as she would not meet with him to resolve the issues between them. (Tr. at 422, 431). Mr. Bedrosian informed Mr. Sandiford, Complainant's direct supervisor that he was considering terminating her, but he did not consult with him regarding the decision. (Tr. at 452, 481). Mr. Sandiford testified that he supported Mr. Bedrosian's decision after "due consideration of the circumstances involved." (Tr. at 477, 482). Mr. Bedrosian did not ask for Mr. Sandiford's input in deciding whether to terminate Complainant. (Tr. at 482). Mr. Bedrosian testified that the decision to terminate an employee requires a process and he attempts to resolve any issues prior to making that decision. (Tr. at 430).

Mr. Kearns testified that he did not recommend that Complainant be fired due to her failure to sign the Certification. (Tr. at 464). In addition, Mr. Kearns testified that he was frustrated with Complainant's failure to sign the Certification, but that he never expressed to Complainant that she would be fired for failing to do so. (Tr. at 465, 467). Mr. Bedrosian testified that he had nothing to do with the Certification situation, but that Mr. Kearns had informed him that Complainant would not sign the Certification prior to her being fired. (Tr. at 179, 330, 423-424, 452). Mr. Bedrosian did not consider Complainant's failure to sign the

certification in his decision to terminate her. (Tr. at 424, 495). Furthermore, two other managers noted concerns they had regarding the certification and neither of them were terminated. (Tr. at 424).

Mr. Bedrosian, Mr. Sandiford and the Personnel Director, Kevin Burgess, met with Complainant on January 17, 2007 and provided a termination letter to her. (CX21; CX29; RX13; Tr. at 120-121, 422-423, 485-486, 490). In the letter, Mr. Bedrosian describes the reasons for her termination to include her inability to effectively communicate and her open criticism of Mr. Bedrosian on several occasions. (CX21; RX13; Tr. at 423, 431).

Complainant testified that she was very upset about being terminated and was unable to drive home that day. (Tr. at 121-122). Her husband picked her up and she collected her belongings. (Tr. at 123). Complainant wrote a response to her termination letter on February 1, 2007. (CX22; Tr. at 125). Complainant began her new job search by contacting recruiters, networking at professional events, attending job fairs, and responding to internet job postings. (CX23; Tr. at 127). Complainant testified that she continued to experience anxiety during her job search because she was concerned about what Respondent would say. (Tr. at 265). Her stress included an occasional flashback. (Tr. at 268-269). Complainant did not seek treatment from a physician due to stress or anxiety relating to her termination until she was deposed in the present case. (Tr. at 264-265, 267). At that time, she requested medication to help her sleep because she was having flashbacks. (Tr. at 265, 269). Claimant began working as a paralegal for Devon Consulting making \$45.00 per hour. Her net income while working for Devon Consulting was \$6,390.00. (CX24; Tr. at 128). Complainant began working for the Emporium Group in Wayne, Pennsylvania on May 14, 2007 with an annual salary of \$125,000. (CX25; Tr. at 129, 131).

## ANALYSIS

### A. Credibility Analysis

Generally, I find Complainant's testimony to be credible as to her overall chronology of events. Observing Complainant's demeanor at hearing, however, I noted that her counsel continuously ask her leading questions which Complainant refused to answer directly, but instead, responded evasively, adding information that Complainant deemed relevant but which was not asked for. I find Complainant's testimony inconsistent, misleading, and contradicted, however, by an overwhelming amount of other evidence in the record which completely undermines her credibility with respect to proving the elements of her complaint. Based on the inconsistencies and contradictions in Complainant's testimony and behavior, I conclude that she was not a credible witness and accord little weight to her testimony regarding the events which took place.

I find Mr. Bedrosian to be the most credible of all the witnesses at trial as his testimony was consistent and effortless. Ultimately, his testimony made it clear and convincing to me that the termination of the Complainant was driven by his understanding of her being insubordinate and inexperienced for the position to which he had hired her. The remaining witnesses were credible in their testimony which was consistent with Mr. Bedrosian's.

## B. Standards of Review

*Carroll v. USDOL*, 78 F.3d 352 (8<sup>th</sup> Cir. 1996), sets forth a burden-shifting framework similar to that adopted in the Title VII context in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A complainant in a whistleblower case may satisfy his initial burden of establishing a *prima facie* case of retaliatory discharge by showing: (1) complainant engaged in protected activity; (2) respondent had knowledge of the protected activity; (3) a retaliatory employment action; and (4) the protected activity was likely a contributing factor in the unfavorable action. *Allen v. Administrative Review Board*, 514 F.3d 468, 475-476 (5<sup>th</sup> Cir. 2008); *Carroll v. USDOL*, 78 F.3d 352, 356 (8<sup>th</sup> Cir. 1996). See *Macktal v. U.S. Dept. of Labor*, 171 F.3d 323, 327 (5<sup>th</sup> Cir. 1999); *Welch v. Cardinal Bankshares Corporation*, ARB No. 05-064, Case No. 2003-SOX-15 at 8 (ARB May 31, 2007). See also *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9<sup>th</sup> Cir. 1984). The burdens of proof for establishing a claim under the Act are incorporated from the Whistleblower Protection Program of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, Pub. L. No. 106-181, § 519 (a), 114 Stat. 61, 145-49 (2000) (codified at 49 U.S.C. § 42121). See 18 U.S.C. § 1514A(b)(2)(C).

If the complainant fulfills this burden of proof, respondent may avoid liability under the Act by producing sufficient evidence to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action. It must show that it “would have taken the same unfavorable personnel action in the absence of that protected behavior.” *Allen*, 514 F.3d at 476. See 29 C.F.R. § 1980.101; *Yule v. Burns Int'l Security Serv.*, Case No. 1993-ERA-12 (Sec'y May 24, 1995). The burden shifts to the complainant who must then provide some evidence, direct or circumstantial, to rebut the proffered reasons as a pretext for discrimination.<sup>6</sup> Ultimately, “a reason cannot be proved to be ‘a pretext for discrimination’ unless it is shown both that the reason was false and the discrimination was the real reason” for respondent’s decision. *Hicks*, 509 U.S. at 515.

## C. Complainant's Prima Facie Case

### 1. Protected Activity

The Act protects employees who report activity that they “reasonable believed constitutes a violation” of the enumerated code sections pertaining to mail, wire, and other specified kinds of communications fraud, any SEC rule or regulations or “any provision of Federal law relating to fraud against shareholders.” 18 U.S.C. § 1514A(a)(1). A whistleblower need not cite the specific law or regulations that he believes is being violated in allegedly protected activity. See *Portes v. Wyeth Pharmaceuticals*, 2007 WL 2363356, No. 06 Civ. 2689 (S.D.N.Y. Aug. 20, 2007); *Fraser v. Fiduciary Trust Co. Int'l*, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006).

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<sup>6</sup> Although the “pretext” analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the “presumed” retaliation raised by a *prima facie* case, the inference “simply drops out of the picture,” and “the trier of fact proceeds to decide the ultimate question.” *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). See *Carroll v. USDOL*, 78 F.3d 352, 356 (8<sup>th</sup> Cir. 1996) (whether the complainant previously established a *prima facie* case becomes irrelevant once the respondent has produced evidence of a legitimate non-discriminatory reason for the adverse action.).

“[A]n employee’s protected communications must relate ‘definitively and specifically’ to the subject matter of the particular statute under which protection is afforded.” *Platone v. FLYI, Inc.*, ARB Case No. 04-154, 2006 WL 3246910 at \*8 (ARB Sept. 29, 2006); *Allen v. Administrative Review Board*, 514 F.3d 468 (5<sup>th</sup> Cir. 2008); *see also Harvey v. Home Depot USA, Inc.*, ARB Case No. 04-114 (ARB June 2, 2006). Where a communication is “barren of any allegations of conduct that would alert [a respondent] that [the complainant] believed the company was violating any federal rule or law related to fraud against shareholders,” the reporting is not protected under the Act. *Livingston v. Wyeth*, 520 F.3d 344 (4<sup>th</sup> Cir. 2008); *Portes*, 2007 WL 236356; *Fraser*, 417 F.Supp. 2d at 322. *See also Platone*, 2006 WL 3246910 at \*8 (“The relevant inquiry is not what [is alleged in the complaint filed with OSHA] but [what was] actually communicated to [the] employer prior to...termination.”). “An employee’s reasonable belief must be scrutinized under both a subjective and objective standard. The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Allen*, 514 F.3d at 477.

“Fraud” is an integral element of a cause of action under § 806 and incorporates a requisite accusation of intentional deceit that under the Act would pertain to a matter that is material to or that would impact shareholders or investors. *See Tuttle v. Johnson Controls*, 2004-SOX-76 at 3 (Sec’y Jan. 3, 2005); *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 at 40 n.40 (Sec’y Mar. 10, 2005) (citing *Hopkins v. ATK Tactical Systems*, 2004-SOX-19 (Sec’y May 27, 2004) (discontented employee’s request for explanation about projects, accounting, and software without reference to fraud or intentional deception of stockholders is not protected activity)); *Brookman v. Levi Strauss & Co.*, 2006-SOX-36 (Sec’y April 27, 2007) (report to SEC charging submission of fraudulent reports to EEOC does not qualify as protected charge of shareholder fraud or securities violations under the Act); *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-00008 (Sec’y June 15, 2004) (queries about classification of questionable entries on general ledger believed to reflect misrepresentation of true financial position to investors insufficiently specific to be protected in the absence of identified particular concerns about illegal behavior).

Complainant’s many explanations and conclusory assertions which attempt to expand or elaborate the scope of her reasons for refusing to sign the certification, (which she alleges comprises protected activity,) to establish a connection with shareholder fraud are immaterial. The relevant inquiry is not what Complainant has alleged or argued in her complaint, but what Complainant actually communicated to Respondent prior to her termination. *Platone*, 2006 WL 3246910 at \*17. *See also Lerbs*, 2004-SOX-8 at 13; *Trodden v. Overnite Transp. Co.*, 2004-SOX-64 at 5 (Sec’y Mar. 29, 2005). Until the alleged protected activity is shown to have a sufficiently definitive and specific relationship to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1), what Complainant might have believed regarding such false reporting is irrelevant and immaterial to the legal sufficiency of complaints under the Act.

Complainant alleges that signing the misleading and false certification would have been fraudulent conduct that would affect Respondent’s financial status and shareholders’ interest. (CB at 19-20). However, the allegation does not demonstrate how refusing to sign the

certification “definitively and specifically” implicates the substantive law of the Act and fraud on the shareholders, and thus the employee protection provisions of § 806 of that law. Complainant has failed to show that Respondent misrepresented anything.

In *Livingston*, 520 F.3d 344, Livingston complained that if Wyeth submitted data to the FDA without disclosing or correcting certain alleged deficiencies, Wyeth could be penalized by the FDA to its detriment, and could be violating some SEC rule or regulation or law relating to fraud against the shareholders. The Fourth Circuit held that “Livingston failed to produce evidence that he provided information or made a complaint to Wyeth about conduct which a reasonable employee in his position could have believed at the time constituted a violation of the securities laws.” *Id.* at 18. The alleged fraudulent conduct must “at least be of a type that would be adverse to investors’ interests” and meet the standards for materiality under the securities laws such that a reasonable shareholder would consider it important in deciding how to vote. *Platone*, 2006 WL 3246910 at \*15-16.

There is no allegation that Complainant expressly referred to fraud, shareholders, securities, or statements to the SEC in refusing to sign the certification. “The purported violations that Complainant was concerned with might have involved internal and FDA protocols, FDA regulations, and possibly other drug testing guidelines, but not SEC rules or other federal laws related to fraud against shareholders, and thus were not sufficiently related to shareholder fraud to constitute protected activity.” *Sylvester v. Parexel Int’l LLC*, 2007-SOX-39 and 42 (ALJ Aug. 31, 2007) (citing *Portes*, 2007 WL 2363356; *Livingston*, 2006 WL 2129794). The evidence does not establish that Complainant reported to Respondent that her concerns with signing the certification involved implications for Respondent’s reports to investors or the SEC, or that Respondent was engaged in other conduct “that would alert [a respondent] that [the complainant] believed the company was violating any federal rule or law related to fraud against shareholders.” See *Portes*, 2007 WL 2363356 (citing *Fraser*, 417 F. Supp. 2d at 322); see also *Hunter v. Northrop Grumman Synoptics*, 2005-SOX-8 (Sec’y June 28, 2005) (“[r]aising a concern about a violation of an ethics policy is not protected activity.”).

Complainant’s refusal to sign the certification does not satisfy these requirements because she alleges only that she was concerned that the certification was too broad, that it did not properly address the lack of compliance with the FDA regulations and the standard operating procedures, and that she did not have the accounting knowledge required to certify. Complainant also asserted that the “fact that the employer may be aware of substantial failure of compliance is irrelevant to whether the employee is protected for refusing to sign [the]...certification.” (CB at 8). Any such additional references to FDA regulations or violations thereof do not involve, inherently or otherwise, reference to shareholder fraud or violations of federal criminal statutes related to shareholder fraud or SEC statutory or regulatory requirements. Complainant herself asserted that her refusal to sign the form was not related to fraud in any way nor was she aware or concerned about any fraud.

Based on the foregoing, I find and conclude that Complainant has failed to establish her reasonable belief of fraudulent activity actionable under the Act.

## 2. Knowledge of Protected Activity

Assuming, *arguendo*, that Complainant established that she had engaged in protected activity, she would still have to establish that Respondent was aware of that protected activity. Knowledge of a protected activity is an essential element of the *prima facie* case. *Morris v. The American Inspection Co.*, 1992-ERA-5 (Sec'y, December 15, 1992), slip op. at 6-7. A manager's suspicions that the complainant filed complaints with government agencies may be sufficient to show respondent's knowledge. *See Pillow v. Bechtel Construction, Inc.*, 1987-ERA-311 (Sec'y, July 19, 1993), *citing Williams v. TIW Fabrication Machining, Inc.*, 1988-SWD-3 (Sec'y, June 23, 1992), slip op. at 6.

I find that Mr. Bedrosian was aware that Complainant refused to sign the certification when he terminated her employment on January 17, 2007. (Tr. at 179, 330, 424, 452). Had I found that Complainant's activities were protected under the Act, which I have previously concluded were not, I would find and conclude that Respondent was aware of the alleged protected activity when the decision to termination her employment was made.

## 3. Adverse Employment Action

The Act 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. *See* 18 U.S.C. § 1514A(a).

To establish an adverse employment action, there must be a tangible employment action, for example "a significant change in employment status, such as...firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Material adverse actions include discharge, demotion, loss of benefits and compensation, stripping an employee of job duties, or altering the quality of an employee's duties, if they have tangible effects. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *see also Halloum v. Intel Corp.*, Case No. 2003-SOX-7 (ARB Jan. 31, 2006); *Bechtel v. Competitive Technologies, Inc.*, 2005-SOX-33, at 24 (ALJ Oct. 5, 2005) ("An employment action must produce some tangible job consequence to be considered an 'adverse action' within the context of [the Act].").

The adverse action allegedly taken by Respondent is the termination of Complainant's employment on January 17, 2007. (CX29; Tr. at 120, 485). It is undisputed that Respondent terminated Complainant's employment. Therefore, had I found that Complainant had engaged in protected activity, which I did not, I would find that Complainant has established that Respondent took an adverse employment action against her.

## 4. Protected Activity as a Contributing Factor in Adverse Action

To prevail under the Act, the whistleblower must prove by a preponderance of the evidence that her protected activity was a contributing factor in the unfavorable personnel action. *Allen v. Stewart Enterprises Inc.*, ARB No. 06-081, 2004-SOX-60 to 62 (ARB July 27, 2006)

(citing 49 U.S.C. § 42121(b)(2)(iii) *aff'g sub nom. Allen v. Administrative Review Board*, No. 06-60849 (5<sup>th</sup> Cir.). In *Marano v. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the Court observed:

The words a “contributing factor”...mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a “significant,” “motivating,” “substantial,” or “predominant” factor in a personnel action in order to overturn that action.

*Marano*, 2 F.3d at 1140 (citations omitted). *See also, Collins v. Beazer Homes U.S.A., Inc.*, 334 F. Supp. 2d 1365, 1379 (N.D. Ga. Sept. 2, 2004). If the complainant succeeds in establishing that protected activity was a contributing factor, the employer may escape liability if it can establish by clear and convincing evidence that it would have taken the same adverse action in absence of the complainant’s protected activity. 18 U.S.C. § 1514A(b)(2)(C); 29 C.F.R. § 1980.109.

Complainant asserts that Mr. Bedrosian’s retaliatory motive can and should be inferred from the circumstances surrounding his actions. Complainant reasons that Mr. Bedrosian targeted her for “intense criticism in e-mails as well as memoranda and evidence against her was solicited after she declined to execute” the Certification. (CB at 24).

Having carefully considered Complainant’s arguments in light of the evidence in the record, I find that Complainant has not shown by a preponderance of the evidence that the alleged protected activity was a contributing factor in the unfavorable personnel action. Mr. Bedrosian credibly testified that he made the decision to terminate Complainant after the meeting in October of 2006. Mr. Bedrosian did testify that he was aware that Complainant refused to sign the certification when Complainant was terminated on January 17, 2007. Mr. Kearns and Sandiford both testified credibly that they did not recommend that Complainant be fired due to her failure to sign the Certification. Mr. Bedrosian also credibly asserted that the Certification was not a factor he used in choosing to terminate her employment. In addition, the evidence does establish that Respondent was working with Complainant’s attorneys to draft a statement that Complainant would be comfortable signing up until her termination. I find this evidence does not establish that Respondent responded in a negative manner against Complainant for failing to sign the Certification. In addition, I find this is not evidence of a discriminatory motive because Mr. Bedrosian had determined for legitimate reasons, discussed below, to terminate Complainant’s position after the October of 2006 meeting.

Therefore, the evidence establishes that Complainant’s refusal to sign the Certification, her alleged protected activity, did not play any role in Mr. Bedrosian’s decision to discharge her on January 17, 2007. In sum, Complainant has not established her case-in-chief. However, assuming, *arguendo*, that Complainant had satisfied her burden, I find that Respondent is able to carry its burden of rebuttal.

#### D. Nondiscriminatory Reason for Adverse Action

Even if the complainant had established a *prima facie* case of retaliatory discharge, an employer may escape liability if it can establish by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity. 18 U.S.C. § 1514A(b)(2)(C); 29 C.F.R. § 1980.109. If the respondent successfully rebuts the complainant's *prima facie* case, the complainant bears the ultimate burden of persuading that the legitimate reason articulated by the respondent was a pretext for discrimination, either by showing that the unlawful reason more likely motivated it or by showing that the proffered explanation is unworthy of credence. At all times, the complainant has the burden of showing that the real reason for the adverse action was discriminatory. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). In *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-38 (ARB, July 31, 2002), the ARB held that "it is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible . . . [rather] he must show that the explanation is a 'phony reason.'" quoting *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 277 (7th Cir. 1995), citing *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994). In addition, it is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination. *St. Mary's Honor Center*, 509 U.S. at 510-511.

I find that Respondent terminated Complainant for reasons other than her refusal to sign the Certification. Mr. Bedrosian explained that he had made the decision to terminate Complainant's position in October of 2006. He rationally and credibly explained that he made this decision because of several instances of misconduct by Complainant. Mr. Bedrosian explained that Complainant was undermining his authority and threatening his position in the company. Mr. Bedrosian credibly testified regarding several incidents where Complainant was unable to effectively communicate with Mr. Bedrosian, openly criticized him to other employees, and refused to support and cite to the regulations when making decisions and recommendations. In addition, Mr. Bedrosian and Complainant both testified regarding several incidents where Complainant was reprimanded for providing the wrong advice regarding regulatory issues to other employees. I find that the evidence abundantly establishes that Complainant refused to cooperate with Mr. Bedrosian on numerous occasions and was creating a hostile atmosphere within Respondent by criticizing Mr. Bedrosian to several employees, conduct which Mr. Bedrosian viewed as insubordination and grounds for terminating her employment. When Complainant's conduct is balanced against Respondent's legitimate interest in addressing employee misconduct and in having its employees engage in productive work, the scale tips decisively in Respondent's favor. Complainant's refusal to address her issues and lack of communication with Mr. Bedrosian despite his numerous attempts was patently unreasonable and Complainant has offered no evidence as to why she would have been reluctant to address her issues with Mr. Bedrosian before it escalated to formal reprimands.

I find that Respondent has established by clear and convincing evidence that it had sufficient non-discriminatory reasons to terminate Complainant. Complainant argues that Respondent's asserted reasons for terminating Complainant are "clear pretext" due to Mr. Bedrosian's lack of credibility regarding the circumstances of Complainant's termination. (CB at 26). However, as previously discussed, I find that Mr. Bedrosian's testimony regarding his reasons and the decision to terminate Complainant to be credible. Therefore, I find that this does

not establish that Mr. Bedrosian's reasons for terminating Complainant were false and thus "pretextual." Complainant also argues that Respondent's assertion that another factor in its decision to terminate Complainant was because "she was a supervisor to the person that headed the whistleblower committee" is evidence of pretext. (CB at 26). However, I find this to be a mischaracterization of the evidence. Respondent has not asserted, nor does the record establish, that this was a factor in Respondent's decision to terminate Complainant. As such, I find Complainant's argument to be irrelevant. As Complainant has not provided additional evidence to establish that Mr. Bedrosian's reasons for terminating her employment were false, I find that Complainant has failed to establish that Respondent's actions were "pretextual" and has not met her burden of establishing intentional discrimination.

### CONCLUSION

To summarize, Complainant has failed to establish a claim under the Act here invoked, i.e., that Respondent terminated her position as Director of Regulatory Affairs due to her failure to sign the Certification. Based upon the evidence as a whole, Complainant failed to prove that she engaged in protected activity or that her alleged protected activity led to her discharge. In the absence of such proof, Complainant's complaint must be dismissed.

### RECOMMENDED ORDER

It is hereby ORDERED:

The Complaint of Mary E. Menz against Lannett Company, Inc. under the Sarbanes-Oxley Act is hereby DISMISSED.

**A**

RALPH A. ROMANO  
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within **ten (10) business** days of the date of the administrative law judge's decision. See 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a). At the time you file the Petition with the Board, you must serve it on all parties as well as the

Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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