



**Issue Date: 25 February 2011**

Case No.: 2010-SOX-00038

In the Matter of:

ANITA JOHNSON,

Complainant,

v.

WELLPOINT, INC.,

Respondent.

**ORDER GRANTING RESPONDENT’S MOTION FOR JUDGMENT ON THE  
PLEADINGS PURSUANT TO FRCP 12(c)  
AND  
ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION  
AND  
ORDER DISMISSING COMPLAINT AND CANCELLING HEARING**

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (Act), 18 U.S.C.A. § 1514A<sup>1</sup>, and its implementing regulations found at 29 CFR Part 190. Section 806 provides “whistleblower” protection to employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain “protected activity” by the employee. The Complainant filed this current complaint on January 20, 2009. The complaint was denied by the Regional Administrator, Occupational Safety and Health Administration, Atlanta, Georgia, on May 19, 2010. The Complainant filed a subsequent request for hearing before an Administrative Law Judge on June 23, 2010. Formal hearing in

---

<sup>1</sup> VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio and television fraud), 1344 (bank fraud) or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

this matter is scheduled to commence at 9:00 AM, Tuesday, March 8, 2011, in Savannah, Georgia.

On November 24, 2010, Respondent's counsel filed a "Motion to Dismiss Complaint" on the grounds that the Complainant's alleged statements to her supervisor, "that there were numerous deficiencies in Wellpoint's processing of Medicare-related correspondence, and that its 'reporting of correspondence inventory did not meet requirements for the administration of state health insurance programs [and that] the information [Complainant] supplied would have revealed that Wellpoint was failing to comply with its contractual obligations under health insurance contracts,'" do not constitute protected activity under §806 of the Act and thus fails to state a claim upon which relief may be granted, Federal Rules of Civil Procedure (FRCP), Rule 12(b)(6). Respondent's counsel argues that a breach of contract to a third party does not "definitely and specifically" relate to any of the categories of fraud set forth in the Act. He also submits that "complaints speculating about the possibility of some future violation of a law are not cognizable under [the Act]." He describes the complaint as a chain of speculation that (1) Respondent breached contracts with its clients to administer Medicare correspondence, (2) if the clients learned of the breaches then they might stop doing business with Respondent, (3) losing business would adversely affect Respondent's well being, (4) the value of Respondent's stock would be adversely affected. He argues that Complainant's allegations do not involve actual fraud but only deficient processing and flawed operations. He submits the absence of intent to defraud shareholders is fatal to Complainant's complaint.

On December 14, 2010, the now pro se Complainant filed her response to the "Motion to Dismiss" based on FRCP Rule 12(b)(6). In her 14 page response, the Complainant again set forth her allegations of conversations with her supervisor, J. Wade, from May 2007 through September 2008 as the actions composing "protected activity" under SOX. She attached as Exhibit 1, the June 23, 2010 "Objections to OSHA'S Findings and Request for Hearing" prepared by an attorney, who has since withdrawn from the case, that alleged violations of Section 10(b) and 13 of the Exchange Act and Sections 13 and 33 of the Investment Company Act of 1940 that were not alleged in her original SOX complaint.

On January 20, 2011, this Administrative Law Judge issued an "Order Granting Complainant Opportunity to Correct Deficiencies in Pleadings Prior to Final Ruling on Respondent's Motion to Dismiss Pursuant to FRCP, Rule 12(b)(6)." The deficiencies in pleading upon which the Complainant was provided an opportunity to correct were that "the Complainant has failed to set forth facts demonstrating communications to her supervisor during the May 2007 through September 2008 timeframe which expressed definitive and specific concern, to the supervisor, of Respondent having committed or committing mail fraud, wire fraud, stock fraud and/or fraud on shareholders." From prior rulings in this case, "supervisor" included statements to Ms. J. Wade and Mr. N. Hunt.

On February 3, 2011, Complainant filed her "Correction of Deficiencies in Pleadings Prior to Final Ruling on Respondent's Motion to Dismiss Pursuant to FRCP, Rule 12(b)(6)." The Complainant set forth additional specifics of conversations she asserts comprise "protected activity" under SOX. Those additional specifics are incorporated in the discussion section of this Decision and Order.

On January 31, 2011, Respondent filed a “Motion for Summary Decision” with attachments. Respondent submits that the evidence establishes that the Complainant did not engage in “protected activity” under SOX because she never complained of fraudulent activities to J. Wade (direct supervisor), N. Hunt (Ethics and Compliance Manager) or M. McGee (Human Resource Manager) and her stated belief that Respondent violated contractual requirements with respect to reporting of correspondence processing is not objectively reasonable. Respondent also submits that the termination of the Complainant’s employment was based on her misconduct in directing employees to prematurely close correspondence logs and improper treatment of employees as determined following an investigation by N. Hunt and M. McGee.

On February 14, 2011, Complainant filed a response to the “Motion for Summary Decision.” The Complainant restated her view of the complaint and attached nine sets of documents for consideration. The attachments included the December 9, 2010 deposition of J. Wade, the August 31, 2010 deposition of N. Hunt, the December 21, 2010 deposition of M. McGee, the December 22, 2010 deposition of M. Williams, the January 21, 2011 deposition of C. Mickle, and pages 246 and 247 of her own deposition of December 17, 2010.

### STATUTORY FRAMEWORK

*I. FRCP Rule 12(c) – Motion for judgment on the pleadings based on FRCP Rule 12(b)(6), failure to state a claim upon which relief may be granted.*

A motion for dismissal based on FRCP Rule 12(b)(6), for failure to state a claim upon which relief may be granted, is ordinarily filed before responsive pleadings are filed, though the specific defense may be raised at any time through the initial trial level. Once pleadings are closed, the defense may be addressed as a motion for judgment based on the pleadings under FRCP 12(c) or a motion for summary decision under 29 CFR §18.40 [see also FRCP 56]. In deliberating on a motion to dismiss under Rule 12(b)(6), the complaint, documents attached to the complaint, documents that the complaint incorporates by reference, and matter of which the Administrative Law Judge may take official notice may be considered. If the parties supply affidavits or other material in support or opposition of the motion to dismiss that are considered by the Administrative Law Judge, the motion must be addressed as a motion for summary decision. The judge may permit the non-moving party an opportunity to amend pleading defects unless the exercise is plainly futile.<sup>2</sup> See also *Horsley v. Feldt*, 304 F.3d 1125 (11<sup>th</sup> Cir. 2002); *Harris v. Ivax Corp.*, 182 F.3d 799 (11<sup>th</sup> Cir. 1999)

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Complainant can prove no set of essential facts in support of the complaint which would entitle the Complainant to the relief sought. *Conley v Gibson*, 355 US 41 (1957) “For the purpose of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and all facts alleged by plaintiff are considered true.” *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1322, 1325 (11<sup>th</sup> Cir. 2004) citing *Hishon v. King & Spalding*, 467 US 69, 73 (1984); *Wright v. Newsome*, 759 F.2d 964, 967 (11<sup>th</sup> Cir. 1986) The threshold for a complaint to

---

<sup>2</sup> See generally comments and cases cited Federal Civil Rules Handbook, 2009Thompson Reuters/West, Rule 12(b)(6).

survive a motion to dismiss for failure to state a claim is “exceedingly low.” *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700 (11<sup>th</sup> Cir. 1985)

In order to survive a motion to dismiss under Rule 12(b)(6), the non-moving party must amplify a claim for relief with plausible factual content, which if accepted as true, “allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. (2007) “Whether a complaint states a claim is context-specific, requiring the reviewing court to draw on its experience and common sense.” *Twombly*, id at 556. “The tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of action’s elements [which are] supported by mere recital of conclusory statements. ... While legal conclusions can provide the complainant’s framework, they must be supported by factual allegations.” *Ashcroft v. Iqbal*, id, at 1940.

Under the relevant portions of SOX, the Respondent may not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee ... to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344 or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by ... a person with supervisory authority over the employee ... An employee prevailing in any action [under SOX §1514A] shall be entitled to all relief necessary to make the employee whole.”

Thus, the Complainant must allege sufficient facts to show, when viewed in a light most favorable to her, that (1) she engaged in “protected activity” by providing information or a complaint to her supervisor or other individual authorized to investigate and correct misconduct where such information or complaint regarded conduct that she reasonably believed constituted one of six violation types enumerated in § 1514A(a) of the Act<sup>3</sup>; (2) the Respondent knew, actually or constructively, of the “protected activity”; (3) the Respondent discharged her or took another unfavorable personnel action against her; and (4) her providing the information or making the complaint aware of the violation(s) was a contributing factor to the discharge or other adverse personnel action taken by the Respondent.

The Complainant’s allegations related to “protected activity” under SOX must set forth facts that she provided definitive and specific information to her employer about conduct that she reasonably believed constituted one of six violation types enumerated in SOX 18 U.S.C.A. § 1514A(a). Though the employee need not cite a code section the employee believes was violated or being violated, “the reported information must have a certain degree of specificity [and] must state particular concerns, which, at the very least, reasonably identify a respondent’s conduct that

---

<sup>3</sup> The enumerated violations are: (1) 18 US Code § 1341, Frauds and swindles; (2) 18 U.S. Code § 1343, Frauds by wire, radio or television; (3) 18 U.S. Code 1344, Bank fraud; (4) 18 U.S. Code § 1348, Securities fraud; (5) company fraud related to any rule or regulation of the Securities and Exchange Commission; and (6) any violation of federal law relating to fraud against shareholders. 18 U.S. Code § 1514A(a)(1), *Livingston v Wyeth, Inc.*, 520 F.3d 344, 352 (4<sup>th</sup> Cir., 2008)

the complainant believes to be illegal.” *Bozeman v Per-Se Technologies*, 456 F. Supp. 2d 1282 (N.D. GA, 2006) citing *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 931 (11<sup>th</sup> Cir. 1995). “[The] protected activity must implicate the substantive law protected in Sarbanes-Oxley ...” *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D. NY, 2006) and cases cited therein. The communication made by the employee must identify the specific conduct that the employee reasonably believes to be illegal, even if it is a mistaken belief. General inquires do not constitute protected activity. When the communications are “barren of any allegations that would alert [a respondent] that [the complainant] believed the company was violating any federal rule or law related to fraud” the communication is not protected activity under SOX. *Livingston v. Wyeth*, 2006WL2129794 at \*10 (M.D. NC, Jul 28, 2006) *aff’d* 520 F.3d 344 (4<sup>th</sup> Cir. 2004); *Skidmore v. ACI Worldwide, Inc.*, 2008WL2497442 (D. Neb, Jun. 18, 2008); *Portes v. Wyeth Pharmaceuticals, Inc.*, 2007 WL 2363356 (S.D. NY, Aug. 20, 2007) Under SOX, the communications which may be considered as “protected activity” only involves what is actually communicated to the covered employer prior to the unfavorable employment action and not what is alleged in the complaint filed with OSHA. *Welch v. Chao, surpa*, citing *Platone v. FLYi, Inc.*, ARB Case No. 04-154 (ARB, Sept. 29, 2006); *aff’d* 548 F.3d 322 (4<sup>th</sup> Cir. 2008); *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D.NY, 2006)

The described conduct which the employee reasonably believes constitutes the violation must have already occurred or be in the process of occurring based on circumstances that the complainant observes and reasonably believes at the time the information was provided. A complaint relying on speculative future contingencies fail to establish the element of “reasonable belief” of a violation that has occurred or is in the process of occurring. *Livingston v. Wyeth, Inc.*, 520 F.3d 344 (4<sup>th</sup> Cir., 2008); *Welch v. Chao*, 536 F.3d 269 (4<sup>th</sup> Cir., Aug. 5, 2008), see also *Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006).; *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB, July 29, 2005) There must be an objective basis for suspecting fraud on the respondent’s shareholders. *Livingston v. Wyeth Inc.*, 2006 WL 2129794 (M.D. NC, 2006) citing the Senate Report No. 107-146, 2002 WL 863249 (May 6, 2002). It is enough if the employee’s communication or described conduct definitively and specifically related to the fraudulent activity. *Van Asdale v. International Game Technology*, 577 F.3d 989 (9<sup>th</sup> Cir. 2009) [where the terms fraud, fraud on shareholders and stock fraud not used in the communications but Sarbanes-Oxley or SOX may have been used]; *Day v. Staples, Inc.*, 555 F.3d 42 (1<sup>st</sup> Cir. 2009) [where communication indicated concerns involving defrauding shareholders]; *Welch v. Chao*, 536 F.3d 269 (4<sup>th</sup> Cir. 2008) [where complainant refused to certify two 10-QSB reports to the SEC and used terms Sarbanes-Oxley and fraudulent acts]; *Allen v. Administrative Review Board*, 514 F.3d 468 (5<sup>th</sup> Cir. 2008)

In order for an activity to be “protected activity” under the Act, there must be not only subjective/objective reasonable belief of activity that would violate one or more of the six protected areas of the Act, but there must also be a definitive and specific expression of concern to the employer over the perceived violation(s). Without both factors, there is no “protected activity” under the Act. *Welch v. Chao*, 536 F.3d 269 (4<sup>th</sup> Cir. 2008); *Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006) at page 11 and 15

## II. 29 CFR §18.40 – Motion for Summary Decision.

Respondents have requested the case be dismissed through summary decision. Summary judgment is proper if the pleadings, discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to a material fact and a party is entitled to judgment as a matter of law. The moving party bears the burden of establishing that there is no genuine issue of material fact when the material submitted for consideration is viewed in a light most favorable to the non-moving party. The non-moving party may not rest on mere allegations or denials in pleadings but must set forth specific facts showing that there is a genuine question of material fact for a hearing. *Celotex Corp. v. Catrett*, 477 US 317, 106 S.Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 US 242 (1986); *Webb v. Carolina Power and Light Co.*, 1993-ERA-042 (Sec of Labor, Jul. 17, 1995)

The same legal concepts of SOX set forth above concerning pleadings apply in evaluating the appropriateness of granting summary decision, except that for summary decisions, materials beyond the pleadings and answers may be considered to determine if the Complainant has established a prima facie case when all the relevant material submitted for consideration is viewed in a light most favorable to the Complainant.

In order to avoid a summary decision, the material considered, when viewed in a light most favorable to the non-moving Complainant, must show that there is at least one remaining genuine question of material fact, related to the issues that (1) she engaged in “protected activity” by providing information or a complaint to a covered supervisor or other individual authorized to investigate and correct misconduct where such information or complaint regarded conduct that he reasonably believed constituted one of six violation types enumerated in § 1514A(a) of the Act<sup>4</sup>; (2) the covered Respondent knew, actually or constructively, of the “protected activity”; (3) the covered Respondent discharged him or took another unfavorable personnel action against her; or (4) her providing the information or making the complaint was a contributing factor to the discharge or other adverse personnel action taken by the covered Respondent.

For the Respondent to prevail on a motion for summary judgment, the Respondent may point to the absence of evidence proffered by the non-moving Complainant to establish the existence of an essential element of the Complainant’s prima facie case.

If there is no genuine question of material fact, summary decision may be entered for either party if that party is entitled to summary decision. 29 CFR §§18.40 and 18.41

---

<sup>4</sup> The enumerated violations are: (1) 18 US Code § 1341, Frauds and swindles; (2) 18 U.S. Code § 1343, Frauds by wire, radio or television; (3) 18 U.S. Code 1344, Bank fraud; (4) 18 U.S. Code § 1348, Securities fraud; (5) company fraud related to any rule or regulation of the Securities and Exchange Commission; and (6) any violation of federal law relating to fraud against shareholders. 18 U.S. Code § 1514A(a)(1), *Livingston v Wyeth, Inc.*, 520 F.3d 344, 352 (4<sup>th</sup> Cir., 2008)

## DISCUSSION

*I. FRCP Rule 12(c) – Motion for judgment on the pleadings based on FRCP Rule 12(b)(6), failure to state a claim upon which relief may be granted.*

In its Motion to Dismiss Complaint on the grounds that the pleading fail to state a claim upon which relief may be granted, Respondent's counsel asserts that the Complainant's communications to her supervisor was not "protected activity" under SOX because her alleged communications to her supervisor lacked definitive and specific statements related to mail fraud, wire fraud, bank fraud, securities fraud, violations of rules or regulations of the Security Exchange Commission, or any other provision of federal law related to fraud against shareholders. Respondent's position also necessarily includes challenge to the essential element as to the Respondent's agent, who decided/directed the adverse employment action, actually or constructively knowing that the Complainant engaged in "protected activity" under SOX. The Respondent does not challenge that the Complainant suffered an adverse action. While the Respondent asserts that the Complainant's employment was terminated for other reasons, the proximity in time of the employment termination to Complainant communications with her supervisor J. Wade and investigator N. Hunt permit the inference of the causal link alleged by the Complainant. Accordingly, the necessary analysis on this motion need only involve the pleadings related to "protected activity" and Respondent's knowledge of the "protected activity."

a. Summary of relevant factual content of the complaint, amended complaint, documents attached to and/or referenced by the complaint and amended complaint, and matters of which official notice may be taken.

(1) In her initial SOX complaint dated January 20, 2009, the Complainant alleged -

- # 10. "On or about September 26, 2008, [Complainant] discussed the allegations [that Complainant and Harper had instructed employees to close out correspondence inquiries that had been logged into the system before the inquiries had been fully answered or resolved] with Jennifer Wade, Wellpoint's Vice President of Customer Services. During the conversation, [Complainant] told Ms. Wade that part of their proof that neither Complainant [or Harper] had caused or permitted premature correspondence inquiries closeouts was that they had no motive for doing so since the Company excluded open correspondence inquiries in its statistical reports to the state governments on the company's performance, thus leaving no advantage to [Harper or Complainant] prompting them to prematurely close out their correspondence inquiries before the matters had been fully resolved."
- #11. "Jennifer Wade was a person with supervisory authority of [Complainant], within the meaning of 18 U.S.C. §1514A(a)(1)(C)."
- #12. "Wellpoint's practice in excluding open correspondence inquiries from its reports to state government entities with whom Wellpoint maintained contracts was fraudulent, and it violated 18 U.S.C. §§1341 and 1343."

- #13. “Complainant’s actions in reporting the failure to report correspondence inquires that remained open at the end of the reporting period were protected activity under 18 U.S.C. §1514A.”
- #14. “On October 21, 2008, immediately after Jennifer Wade received the information from [Complainant] referred to in paragraphs 10, 11, 12 and 13, above, Wellpoint terminated Complainant’s employment.”
- #15. “Wellpoint’s decision to terminate [Complainant] was, in part, retaliation for [Complainant] engaging in activity protected under 18 U.S.C. §1514A, and thus violated subsection (a)(1)(C) of that Section.”

In the initial paragraphs of her January 20, 2009, complaint, her attorney summarized the action as –

“Wellpoint violated Section 806 of the Sarbanes Oxley Act, 18 U.S.C. §1514(a) when that company discharged the [Complainant] on or about October 21, 2008, after Complainant ... informed her supervisor of information that revealed that Wellpoint’s reporting of correspondence inventory did not meet the requirements for the administration of the state health insurance programs. The information [Complainant] supplied would have revealed that Wellpoint was failing to comply with its contractual obligations under its various state health insurance contracts.”

(2) In her June 23, 2010, request for formal hearing<sup>5</sup>, the Complainant alleged -

#B.2 Complainant raised concerns relating to the company’s policy of excluding open/pending correspondence logs from company reporting during her monthly meetings with Jennifer Wade , Vice President of Senior Operations, Customer Services, from on or around May 2007 through September 2008 and again on September 26, 2008.

#B.3 “ From on or around May 2007 through September 2008, [Complainant] raised the following concerns to Wade:

- a. the inadequacy of Wellpoint’s D950 correspondence processing system to support the required activities for correspondence processing;
- b. the lack of internal controls in place to ensure adequate processing of incoming claims;
- c. the failure of the current processes, which inhibited the associates’ ability to service the provider community;
- d. the absence of system reporting for correspondence;
- e. a flawed manual reporting system, which did not include all of the variables required by the states for which Wellpoint was administering Medicaid to capture an accurate projection of the inventory level;
- f. the lack of quality inspection on closed correspondence due to system limitations;

---

<sup>5</sup> Considered as an amending complaint for specific factual assertions.

- g. the dropping or loss of external vendor feeds which increased the number of original providers' claims submitted via the correspondence process;
- h. the dropping or loss of electronic provider claim feeds, resulting in the claims falling into a 'black hole';
- i. backlog of aged cases and the number of missing records; and
- j. incorrect CPT pricing tables."

#B.4 "Further, on September 26, 2008, [Complainant] raised concerns with Wade that the open correspondence in the D950 system was not being counted as part of the weekly inventory."

#B.5 "[Complainant] reasonably believed the above-referenced items she disclosed to Wade in monthly meetings from May 2007 through September 2008 and in the meeting of September 26, 2008, implicated violations of federal security law and regulations, including Section 10(b) of the Exchange Act; the internal accounting controls and books and records provisions of Section 13 of the Exchange Act; and Section 302, 404 and 906 of SOX."

#B.7 "... Wellpoint's stated reason for terminating [Complainant] was a pretext for discrimination. Wellpoint terminated [Complainant] for engaging in protected activity."

(3) In her December 14, 2010 "Response to Respondent Wellpoint Inc.'s Motion to Dismiss Complaint," the Complainant alleged –

- "From on or around May 2007 through September 2008 raised several issues in monthly meetings with Jennifer Wade, Vice President of Operations, Customer Services specifically that Wellpoint's D950 system was inadequate to support the required activities for claim correspondence processing of Medicaid Plans and Other State-Sponsored Programs. Johnson also discussed with Wade her belief that there was a lack of internal controls in place to ensure adequate processing of incoming claims, and that the process for reporting correspondence was inadequate and did not include all of the variables required to capture an accurate projection of inventory levels on which Wellpoint was to report its financial reports"
- "Additionally, on September 26, 2008, Johnson verbally reported to Wade that claims with open/pending correspondence logs were not reported internally or externally by Wellpoint as a practice despite the requirement that they do so and the impact that had on the accuracy of inventory representations which form a part of Wellpoint's liabilities and financial reporting and implicate compliance with contracts for Medicare Plans and Other State-Sponsored Programs."
- "On August 29, 2008 ... Johnson shared with Hunt the correspondence backlogged issue, initiatives implemented to become current and the current correspondence inventory level. Johnson also shared issues regarding the inadequacy of the D950 system for processing claim correspondence, the manual reporting process, and the limited reporting

capabilities for external/internal stakeholders as well as the lack of reporting employees' productivity. Johnson also explained that there was not a quality program in place to measure the effectiveness of the employees' work."

- "On September 26, 2008 ... Johnson informed Wade that the correspondence inventory did not include any open work-in-progress inquiries ... [and] 'The open correspondence in the D950 system was not being counted as part of the weekly inventory. We only counted the pieces of correspondence that were on the associates' desk and items that had been logged into the system but not assigned to an agent.'"

(4) In her February 3, 2011, "Correction of Deficiencies in Pleadings Prior to Final Ruling on Respondent's Motion to Dismiss Pursuant to FRCP, Rule 12(b)(6)," the Complainant alleged

(a) "During the August/September 2007 1:1 meeting with Ms. Wade, Johnson shared the following information regarding correspondence:

1. The trend analysis results for the 8,000+ pieces of discovered claim correspondence
  - 85-90% of the claim correspondence was from the provider community.
  - State breakdown of the 8,000+ pieces of correspondence which included Appeals: Ohio had 3,255 pieces and TX had correspondence with May 18, 2007 date.
  - The correspondence had not been logged into the D950 system. The process was to log the transaction into the D950 system when the claim correspondence was assigned to an associate to work.
2. Assessment of the correspondence process – The current environment had been in existence since the organization was created, i.e., no direct management attention, claim correspondence inventory was not being counted or reported, claim correspondence was not logged in the D950 system. The specific findings were:
  - The D950 system inadequate to support the required correspondence processing needs[.]... All transactions including basic processing steps require systems' workarounds, manual intervention and were very time consuming. The production standard was 25 pieces/day.
  - The D950 system lacked the ability to generate inventory management reporting, i.e., production reports, inventory receipts, ending inventory balances and associates' productivity reports that would allow in-house quality assessments to be performed.
    - a. The weekly reporting process was very manual i.e., actual pieces of correspondence were being counted.
    - b. There is no internal quality assessment performed by the Quality team on closed correspondence.

- An environment that inhibited associates' ability to provide efficient service to the provider community.
  - a. There was no claim correspondence manual, training manual, or desk procedure to instruct associates on how to process claim correspondence.
  - b. All training was done by word of mouth i.e., shadow your peer program.
- ... The known limitations of the D950 system did not adequately provide a mechanism for reporting aged claim correspondence inventory thereby, misrepresenting the true aged (sic) of the inventory and inventory levels of correspondence. Also, it impedes the timeliness productivity standards that are required per the contracts with the states."

(b) "During the October/November 2007 1:1 meeting with Ms. Wade, Johnson made the following statements to Ms. Wade regarding correspondence:

- CRC community has found out my name ... I am receiving calls from the CRC community requesting reconciliation and resolution of providers' submitted list of open claims correspondence, requesting the correspondence team to handle special projects pertaining to lost medical records and aged suspended claims. One CRC representative stated that she had a provider who has over 1,500 appeals that are still outstanding and she wanted the correspondence team to assist her in this project. Based upon research, it appears that the 'blackholes' generated from EDI and/or Source Corp feeds are the root cause and that these issues have been known for a while. The provider community via the CRC representative should not be the way we discover these missing feeds. The lack of internal control/system mechanism that alerts the IT community when incoming feeds fail should be of a major concern to us. Also, I am wondering about the accuracy of our reporting of claims and claims correspondence (Financial) given the number of transactions that fall into the 'blackholes' and the timeframe its (sic) takes us to find out about these feeds."

(c) "During March/April 2008 1:1 with Ms. Wade, we discussed the following correspondence relates (sic) issues: 'We are having a hard time getting Benefit Admin to update the CPT codes on the pricing tables (D950 system). A lot of aged correspondence is due to CPT tables not being loaded or loaded incorrectly. In addition, Cindy indicated that Claims were having the same problem with the CPT tables not being loaded with the correct pricing elements. These transactions are impacting the associates' productivity timelines thus impacting the associates' ability to properly service the providers.'"

(d) "During June 2008 1:1 with Ms. Wade, I stated ... 'Do you recall the email note from Mary and Linda regarding moving correspondence to the front end from Camarillo mailroom to Source Corp? I did the research and the findings were not that positive. There are some major feed issues between Source Corp and the D950 system; however, the recommendation was to have Source Corp perform the frontend processing and send the file via electronic mail. This solution would still achieve the objective of the

associates, eliminate the additional mailing expense and it will reduce the risk associated with them getting lost in the US mail system. The limitations of the D950 system in terms of internal controls and reporting really impact our ability to implement more cost savings initiatives.”

- (e) “On August 29, 2008, an investigator, Hunt from WellPoint’s Ethics and Compliance Division visited the Savannah site. I shared with Mr. Hunt the correspondence backlog issue, initiatives implemented to become current and the current correspondence inventory level. As a back drop I specifically stated ‘that the D950 system was inadequate for processing claims correspondence, the reporting process was manual and very time consuming, and that the limited reporting capabilities inhibited the accurate reporting for internal/external stakeholders as well as for employees’ productivity.’ Johnson also explained that there was not a quality program in place to measure the effectiveness of the employees’ work.”
- (f) “August 29, 2008 Discussion with Wade ... I stated ‘We had a visitor from Ethics and Compliance today, Nathan Hunt. He stated that he was here to do show and tells, per my earlier request to his manager. However, I am aware of a rumor that someone in Savannah called and reported that Carolyn Harper, (Harper) had instructed associates to close out correspondence before they were worked in the D950 system. It makes no sense ... we are not counting the open/pended claims correspondence.’ ... ‘the allegation lacked merit because the open/pended correspondence was not being counted as part of the overall inventory for internal or external reports, and that there was no motive to instruct employees to prematurely close them out.’”
- (g) “September 26, 2008 Discussion with Wade ... Johnson informed Wade that the correspondence inventory did not include any open work-in-process inquires and because of this, the allegation was not and could not be true. Johnson also requested to be present ... when the evidence/findings were presented to Wade ... I told Wade that:
- The open correspondence in the D950 system was not being counted as part of the weekly inventory. We only counted the pieces of correspondence that were on the associates’ desk and items that had been logged into the system but not assigned to an agent.
  - WellPoint was not counting work-in-progress correspondence as part of its overall inventory for internal or external reports, there was no motive to instruct employees to prematurely close them out.
  - Ms. Harper had not assumed her role as manager of this unit until August 1, 2008 but the allegations were made prior to her assuming those responsibilities.
  - My performance objectives did not include managing inventory level of open correspondence or the efficiency of the correspondence processing, I had absolutely no motivation to instruct or allow others to instruct subordinates to do this.
  - And, I believe that this whole thing to be a product of disgruntled associates who did not like schedule and other changes that we were implementing to streamlining processes.”

b. Analysis.

In her initial complaint filed on January 20, 2009, the Complainant alleged that:

- “#12. WellPoint’s practice in excluding the open correspondence inquiries from its reports to state government entities with whom WellPoint maintained contracts was fraudulent, and it violated 18 USC §§1341 and 1343.
- #13. Complainant’s actions in reporting the failure to report the correspondence inquiries that remained open at the end of the reporting period were protected activity under 18 USC §1514A.”

Title 18, U.S. Code §1341 “Frauds and swindles” (mail fraud) provides in pertinent part:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises .... for the purposes of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatsoever to be sent or delivered by the Postal Service, or deposits or cause to be deposited any matter or thing whatsoever to be sent or delivered by any private or commercial interstate carrier ... shall be fined under this title or imprisoned not more than 20 years, or both.”

Title 18 U.S. Code §1343 “Fraud by wire, radio or television” (wire fraud) provides in pertinent part:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, television communication in interstate or foreign commerce, any writings ... for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.”

In cases involving SOX complaints based on mail fraud and/or wire fraud, there must be adequate communication by the employee to the employer that the activity involved the elements of mail or wire fraud. Mail and wire fraud cannot be first mentioned to the employer after the adverse employment action in the initial SOX complaint. *Platone v. Department of Labor*, 548 F.3d 322 (4<sup>th</sup> Cir. 2008) Additionally, communicated actions of mail and wire fraud must relate to fraud on shareholders. *Platone v. FLYi, Inc.*, ARB Case No. 04-154 (Sep. 29, 2006); but see *Reyna v. Cibagra Foods, Inc.*, 506 F.Supp. 2d 1363 (MD GA 2007) and *Allen v. Administrative Review Board*, 514 F.3d 468 (5<sup>th</sup> Cir. 2008)

In this case, the alleged facts must contain not only the Complainant’s subjective/ objective reasonable belief of activity that would violate one or more of the six protected areas of the Act, but must also include a definitive and specific expression of concern communicated to the Respondent over the perceived violations. As noted above, without both factors, there is no

“protected activity” under the Act. *Welch v. Chao*, 536 F.3d 269 (4<sup>th</sup> Cir. 2008); *Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006) at page 11 and 15

When the complaint and related amendments to the complaint are scrutinized, the Complainant has failed to set forth any alleged fact in support of the requirement that her alleged concern over mail fraud and/or wire fraud being committed by the Respondent was communicated to any Respondent agent, let alone to the person she alleged made the decision to terminate her employment.

Her communications dealt with perceived deficiencies, inadequacies and limitations in the D950 system and remedial manual methods to track correspondence. Such discussions alone do not rise to protected activity nor to required knowledge by the Respondent of the alleged “protected activity”. *Morris v. The American Inspection Co.*, 1992-ERA-5 (Sec’y, Dec. 15, 1992) [Knowledge of a protected activity is an essential element of the prima facie case.]

It is additionally noted that the Complainant asserts in her alleged facts that she stated to her supervisor on August 29, 2008, that “It makes no sense [ to instruct associates to close out correspondence before they were worked in the D950 system.] ... we are not counting the open/pended claims correspondence ... the allegation lacked merit because the open/pended correspondence was not being counted as part of the overall inventory for internal or external reports, and that there was no motive to instruct employees to prematurely close them out.” Later on September 26, 2008, Complainant sets forth the conversation with her supervisor that “open correspondence in the D950 system was not being counted as part of the weekly inventory. We only counted the pieces of correspondence that were on the associates’ desk and items that had been logged into the system but not assigned to an agent. WellPoint was not counting work-in-progress correspondence as part of its overall inventory for internal or external reports, there was no motive to instruct employees to prematurely close them out.” Here the Complainant denies that any wrong doing was being committed within her unit of supervision which she subsequently alleged was the activity creating the violation under SOX. In addition to denying open correspondence was being handled inappropriately, the Complainant alleges no statements to her supervisor or the investigator on how not counting open correspondence was fraudulent activity under SOX. In her alleged facts she denies that such practice was occurring. Accordingly, such comments regarding the D950 system, remedial methods, and inventory are not “protected activity” under the Act. see *Gale v. World Financial Group*, ARB Case No. 06-083 (2008), *petition denied* 384 Fed. Appx. 926 (11<sup>th</sup> Cir. 2010) *unpub.*

The allegations of facts communicated to Respondent by Complainant fail to set forth any indication that she “definitively and specifically” communicated to her supervisor, to N. Hunt, or to any other Respondent agent, that Respondent’s conduct in handling correspondence had any required elements of violations of the federal statutes related to mail fraud or wire fraud, prior to her termination. Based on information in the complaint and amendments, the first mention of wire fraud and mail fraud to the Respondent came in the Complainant’s initial complaint filed after she her employment was terminated. Likewise, the first mention of “implicated violations of federal security law and regulations, including Section 10(b) of the Exchange Act; the internal

accounting controls and books and records provisions of Section 13 of the Exchange Act; and Section 302, 404 and 906 of SOX<sup>6</sup>” were first raised in her amended complaint of June 23, 2010.

In order for securities fraud to be alleged under Rule 10b of the Exchange Act, 17 CFR §240.10b, the facts alleged must at least approximate the basic elements of securities fraud. These elements include those related to (1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss. *Van Asdale v. International Game Technology*, 577 F.3d 989 (9<sup>th</sup> Cir. 2009) The employee must have an objective reasonable belief that the company intentionally misrepresented or omitted certain facts to investors which were material and which risked loss and would have been viewed by the reasonable investor as having significantly altered the total mix of information available. *Day v. Staples*, 5655 F.3d 41 (1<sup>st</sup> Cir. 2009) [where a disagreement with management about internal tracking systems not reported to shareholders, claim of needless loss of revenue, and generalized allegation of inaccuracy in accounting are not sufficient as shareholder fraud]; *Platone v. U.S. Dept of Labor*, 548 F.3d 322 (4<sup>th</sup> Cir. 2008) [where complaint involved billing discrepancies affecting near-term profits and no communication on defrauding shareholders made; allegation of mail and wire fraud first made in SOX complaint to OSHA]; *In re Software Toolworks, Inc.*, 50 F.3d 615 (9<sup>th</sup> Cir. 1994) “In cases involving the sixth ‘catch-all’ category, ... the employee must reasonably believe that his or her employer acted with a mental state embracing intent to deceive, manipulate, or defraud shareholders.” *Allen v. Administrative Review Board*, 514 F.3d 468 (5<sup>th</sup> Cir. 2008)<sup>7</sup>

In view of all the foregoing, this Administrative Law Judge finds that as a matter of law, the Complainant has failed to adequately allege an offense under SOX upon which relief may be granted. Accordingly, her Complaint, as amended, must be dismissed.

## II. 29 CFR §18.40 – Motion for summary decision.

### a. Summary of relevant factual content of material in support or opposition of the Motion for Summary Decision.

In addition to the relevant factual content set forth in the prior section related to pleadings, the following was also considered in deliberations on the Motion for Summary Decision.

---

<sup>6</sup> §302 and §906 of SOX deal with certifying corporate periodic reports filed under §13(a) or 15(d) of the Security Exchange Act of 1934; §404 of SOX deals with annual assessment of the effectiveness of internal control structure and procedures for financial reporting

<sup>7</sup> The Court of Appeals for the Fifth Circuit specifically declined to address whether the first five listed categories of violations in 18 USC §1514A required some form of scienter related to fraud against shareholders; but invited comparison with of the strict construction taken by the federal Court in *Reyna v. Cibagra Foods, Inc.*, 506 F.Supp. 2d 1363 (MDGA 2007) with the approach of the Administrative Review Board in *Platone v. FLYi*, ARB Case No. 04-154 (Sep. 29, 2006) and various subsequent decisions by ALJs. Footnote 8, 514 F.3d 468 at 480; see also *Day v. Staples*, 555 F.3d 41 (1<sup>st</sup> Cir. 2009)

*(1) December 17, 2010 deposition of Complainant (RX E; CE 8)*<sup>8</sup>

On December 17, 2010 the Complainant testified by deposition that she graduated from college but had not completed her MBA from Xavier and that she had extensive background in human resources. She reported that she was an “at will” employee with WellPoint and had received a copy of the employee handbook. She stated she began employment with WellPoint in April 2002 where she worked in human resources for five years before beginning to work directly for J. Wade in May 2007 as Director of Customer Service/Care.

The Complainant testified that she received ethics compliance training at WellPoint, including ethics-and-retaliation policy, in 2002. She reported viewing the company’s video on ethical conduct and receiving the associates’ guidelines for business and ethical conduct with its supplement for conducting business with the U.S. government. She did not recall completing “I.M. WellPoint Ethics and Compliance and Fraud and Abuse” training in 2008. She stated that as a manager she was responsible for enforcing company ethics. She testified that she was aware that the company had an ethics and compliance department, was aware of the company helpline for ethics and compliance, and was familiar with how to use the ethics and compliance helpline. She stated that she did not recall completing the associate 2007 fraud and abuse [wave 2] course.

The Complainant testified that as a manager under J. Wade, she supervised more than 100 people, but could not recall if the number was 162 or over 150. During the period from May 2007 to her employment termination, she named seven managers who reported to her. She testified that C. Harper was one of the managers reporting to her as a customer care one manager. In her duties, Ms. Harper would assign correspondence to agents and do inventory snapshots by comparing daily receipts and correspondence on agents’ desks. Ms. Harper’s work goal was to resolve correspondence efficiently and make sure agents worked and resolved their correspondence efficiently. There were no goals or time periods associated with processing correspondence. Open correspondence that was not resolved would become aged, though it was no one’s responsibility to reduce aged correspondence. She testified that when she “received the correspondence operation ... correspondence function, it had over 8,000 items that were sitting in a file cabinet somewhere aging in California ... this says that the customer is not being served properly.” She testified that “most of the correspondence contained claims, and claims are a form of payment for the providers. Ninety percent of the correspondence we receive are from providers and that means providers did not get their money. ... the provider had provided the claim information[multiple times], and so therefore the provider was not getting serviced correctly. ... [based] on my experience looking at the correspondence and the type of inquiries that was (sic) coming in.” She reported that she did not personally review correspondence which was the job of the agents, but that a backlog of inventory “[is] a sign that there is (sic) defects that’s happening on the front end of the process [and] I was responsible for advising my manger [J. Wade] that the system had defects.”

With respect to customer care manager A. Bowman, the Complainant testified that Ms. Bowman was in Savannah, Georgia office and was having difficulty managing correspondence processing of her customer base and that the correct handling of correspondence became part of her

---

<sup>8</sup> RX – Respondent’s Motion for Summary Decision attachment number; CX – Complainant’s Response to Motion for Summary Decision attachment number.

responsibilities in January 2008. She also denied that she was responsible as a Director for making sure correspondence was resolved efficiently, or that correspondence was handled correctly, or that the people reporting to her were “doing what they were supposed to do.” She stated that she did not handle correspondence herself.

The Complainant testified that she met with Ms. Wade at least once a month from May 2007. She reported that most of the meetings were one-to-one and concerned correspondence. She testified that beginning September 2007, she reported “some of the problems I was experiencing with correspondence and with the system associated with correspondence and the process flow of correspondence.” She indicated that “most of the reports were I would say from a generic standpoint was about performance. Performance within the call center. It was a performance report according to correspondence ... I had to give her a report that indicated what our correspondence level was as it relates to the various states. ... I had to tell her the inventory level ... The receipts, incoming, what we got in, and what was on the agent’s desk, those two things added together gave us what we called the inventory level.” She stated that performance reporting is a requirement within WellPoint. She stated that backlog is inventory and she developed action plans to reduce correspondence. The Complainant testified that she discussed the backlog and inventory level, as well as ways to deal with the backlog, with Ms. Wade.

The Complainant testified that CCB stood for “call care browser” which was a front-end system enhancement for the telephone side of the house on the D950 system. She stated that SSB stood for “State-sponsored business” related to correspondence. She reported “correspondence is a written claim that you get in the mail from providers/members regarding an issue.” She described “a provider [as] a doctor or a hospital or some facility that WellPoint has engaged to have them provide medical services to a member [and] a member is someone who is signed up to have insurance coverage/health insurance coverage by WellPoint.” She reported that correspondence was a letter and a telephonic question was a phone inquiry. She reported that it was appropriate to close correspondence or phone inquiry “once the problem has been resolved.” She reported that the managers count open correspondence on Thursday evenings and submit the tallies to her on Monday.

The Complainant testified that “D950 is the name of the system that we use to capture our State-sponsored correspondence information and to resolve it.” It included state Medicaid activity. She identified an e-mail copied to Ms. Wade which identified a backlog of 8,000 correspondence items “found in the Camarillo location ... sitting in the file cabinet.” She reported that she worked with Ms. Wade in identifying ways to reduce the backlog in Camarillo location and that “the D950 correspondence reduction plan” should result in aged and backlogged D950 being complaint by October 19<sup>th</sup>.

The Complainant testified that she was not aware of the average amount of money paid out on processed correspondence claims. She reported that at staff meetings from 2007 the challenges that the SSB claims system was facing was a constant topic. She noted that she did not personally work with the D950 system and did not have access to the D950 system, but had “looked at various screens because someone wanted to show me something.” She reported that she was aware in June 2008 that WellPoint had started to look into replacing the D950 and was negotiating with Parot.

The Complainant testified that “performance guarantees” refers to “an element that’s in a contract that basically says that ... WellPoint guarantees that we’re going to provide a certain level of performance service to you.” She stated that she never seen any performance guarantee provisions in State contracts with WellPoint. She reported that the performance guarantees related to claim process times were on the company’s score card report. She testified that she never asked Ms. Wade or others what the specific performance guarantees were in contracts. She testified that she was not aware of whether there were reports given to the States that tracked how timely correspondence was processed or closed.

The Complainant testified that she complained to Ms. Wade that WellPoint was violating State contracts “before the August 31<sup>st</sup> time frame and ... my termination, October 2008.” She testified that “I didn’t find out that [correspondence that was on the D950 system] did not get counted until after the investigation started. ... I do know that it was not counted during my tenure [because I was terminated]. I do know that it was ultimately counted after my departure.”

The Complainant testified that WellPoint considers correspondence in its financial reserves or in other portions of its financial statements from her personal financial background and understanding of consolidated balance sheets and the process flow of correspondence from one entity to another. She denied ever discussing this matter with anyone at WellPoint. She stated that she that a 1% reserve should have been in reserve and wasn’t.

The Complainant testified that she told J. Hennessey that he didn’t know anything about the D950 system and could she explain the system to him. She stated that she became aware that J. Hennessey had contacted the Ethics and Compliance department.

The Complainant testified that she first met with N. Hunt, from the Ethics and Compliance department August 13, 2008, Savannah, Georgia. She subsequently met with N. Hunt and M. McGee twice in September 2008. She reported that she didn’t care if people from Ethics and Compliance were at the Savannah office because “I felt the truth would come out because I hadn’t done anything.” She reported that N. Hunt’s return in September 2008 was “to finish up the investigation of correspondence, the allegations regarding correspondence being processed prematurely, being closed out prematurely.” During the September 26, 2008 meeting, she discussed with N. Hunt and M. McGee topics including T. Hall, J. Hennessey and M. Reece’s termination.”

The Complainant testified that J. Wade told her that her employment was terminated on October 21, 2008, in the presence of D. Andrews. She reported the reason given by J. Wade as “your employment is being terminated due to ... your awareness of files being, correspondence being closed, instructing employees to close out files before they were worked.” She testified that her response was “I said you’re terminating me because I’m aware of something? And I said, then somehow Ms. Harper’s name got into it. And I said are you, somehow Ms. Harper’s name got into it, but basically I put the company on notice that I was going to file a lawsuit, and immediately the meeting was over with.” She testified that she told Ms. Wade that “I want to go on the record that I’m putting you all on notice [about] filing a lawsuit about terminating me because you think that I’m aware of somebody, of a manager telling someone to close out files.”

The Complainant testified that she did not mention any sort of fraud at the October 21, 2008 termination meeting, did not mention any breach of contract with the States, did not mention a violation of any securities laws, did not mention any fraud on shareholders, and did not mention any other sort of fraud. The Complainant testified that while an employee, she never called the company ethics hotline and never complained of fraud to the Ethics and Compliance department, to human resources, or any sort of audit committee, even though she was aware of the procedure to do so. She testified that she complained to her manager, J. Wade.

The Complainant testified that J. Wade was her supervisor who's work title was "VP of customer services at WellPoint."

*(2) December 9, 2010 deposition of J. Wade (RX D; CE 2)*

On December 9, 2010, J. Wade testified in deposition that she works for WellPoint in the current position of Vice President of Operations - Process Improvements, which she has held for 14 months. Prior to this position she was the Vice President of Consumer Operations for 2-1/2 years. She stated that she received an undergraduate degree from the University of Phoenix in Business Administration and Business Management in 2004.

Ms. Wade testified that she had been with WellPoint or one of the companies making up WellPoint for 25 years. That work was all in operations, "starting in a clerical position in the mail room going forward to claims examiner, to customer service associate, to team leader, to director, to regional vice president, to finally vice president."

Ms. Wade testified that she was a vice president during the May 2007 to October 21, 2008 time period while the Complainant worked for her. As such, she "had responsibility for operational areas under our business segment titled consumer operations. Within that section there was a division for senior operations for state-sponsored business operations and for individual operations. Within those operational areas there was responsibility for claims centers, call centers, and in the senior area, enrollment and billing." She reported that "for state-sponsored business I had claim centers and call centers" and that the Complainant worked for her on the team for state-sponsored business. Ms. Wade testified that the Complainant "had responsibility for the customer service center that comprised of a team located in Savannah, Georgia, and part of the team in Camarillo, California [and] had responsibility for the customer contact centers that included the call centers where members or providers would call in and ask questions, and also there was written questions that were received by the team and would be completed by the center." She reported her immediate supervisor was G. McCarthy, with M. Boxer and L. Glasscock above G. McCarthy. Ms. Wade testified that during the period March 2007 through October 21, 2008 she "did have regular monthly one-on-one [meetings] with my immediate supervisor" but never met with the CEO or COO.

Ms. Wade testified that "call center activity typically includes correspondence because call centers receive their work within two different ways. You have written inquiries and you have telephone inquiries. ... Written inquiries are documents that are received from an external place, whether it be from a provider or a member or someone acting on their behalf; and they are sending in a document for a variety of reasons to ask a question. ... The reasons could range

from anything like a document request, can I get a new ID card, can I get a copy of my benefits, can I get a provider directory, all the way through to questions of how a particular claim was processed.” She reported that it helps to have a general knowledge of the claims side when working in the customer service side. She stated customer service reps are trained on how to respond to a question but if a claims adjustment is needed, the issue would be routed systemically over to the claims center because a different skill is needed, though she had seen simple adjustments made in the customer service side.

Ms. Wade testified that the Complainant was director of a combined call center made up of customer service representative teams in Camarillo and Savannah. She stated that written correspondence would be most productively handled within a customer service unit with the involvement of other partner areas, such as a claims examiner, based on the nature of the inquiry. She reported that written correspondence is read, logged into the computer, processed through standard operational procedural steps to get resolution, the step taken are put into the computer, and when the issue is resolved, it is closed out in the computer. The inquiry should remain open in the computer until completed and finalized. If a claim inquiry comes in from a provider, the inquiry usually is a tracer looking for payment information for that particular claim. The response would provide the payment information (remittance generated by the mainframe computer system) or indicate what information is required to complete processing the claim, though if claim processing is involved, the inquiry would be routed to the claims teams and a claims examiner. The claims examiner would then complete the adjustment activity, readjudication, and in the end the mainframe computer would trigger a remittance to be mailed from the central mail room. She reported that “if customer service representatives are trained to complete adjustments, they would read the document [written correspondence], they would research the question within the computer screens. If they determined additional payment was needed and they were trained to do so, they could complete the electronic transaction and then the claim would flow through the system.” She testified that at some point written correspondence was transferred from the Camarillo facility to the Savannah facility.

Ms. Wade testified that the Complainant was a Director I as Director of Customer Services. The Complainant’s responsibility included oversight of the call centers to ensure that written and telephonic inquiries were handled appropriately and processed timely and accurately for the Medicaid customers for the D950 and WGS systems. She reported she did not have a detailed working knowledge of the D950 system; but considered the D950 system for written correspondence as not “robust” but, from reports by others, it had aspects people reported as “liked” and things reported as “disliked.” Sometimes there were needs for manual reporting on the system. There were challenges with the system. She stated that the majority of State-sponsored membership was on the WGS system; that is all the California Medicaid customers. “The D950 handled roughly 371,000 members comprised of other states’ memberships” where a member is a person who “carry our ID card.” The D950 was used to process claims and inquiries. She reported that standard claims forms come in from hospitals and physicians either in an electronic format or hard-copy document. For documents, “if nothing is written on it and it is just a claim form, it would go through a claim process.” It would fall into the correspondence category if something was written on the form that would indicate that the document is not the first time the claim came in for processing.

Ms. Wade testified that the D950 system there was a challenge in tracking the volume and inventories within the system more than actually processing correspondence within the system. She reported that during the time the Complainant worked for her, there were “hundreds” of projects and requests out to the information technology department to enhance the D950 system, “so I’m sure there were some for correspondence.” She stated that she did not recall a quality control process for correspondence but that there was a quality team that reviewed telephone calls and open inquiries at the call centers. The majority of transactions were telephonic transactions.

Ms. Wade testified the Ethics and Compliance organization was part of Human Resources team and conducted annual training. They operated under strict protocols. She stated that when Ethics and Compliance came in for an investigation, she was provided an overview of how the investigation would be conducted and if she had questions she would contact N. Hunt and M. McGee who assisted her in all her human resources activities. She reported N. Hunt and M. McGee “conducted the complete investigation [into the Complainant’s and Ms. Harper’s actions as managers] and then came back to me with their findings.” She reported that she did not receive an initial complaint but that an allegation had been made to the ethics team “that the management team, which included [the Complainant] and Ms. Harper, had instructed associates to prematurely close out written correspondence logs before they were finalized.” She did not know who made the allegation because of the high degree of confidentiality in human resources investigations. The investigation also looked at how the termination of another employee was handled. She testified that she did not receive documents related to the investigation but was “walked through what their findings were and then they made a recommendation” during a conference call. She indicated that it was around October 17, 2008 when she was briefed on the investigation results and “conferred” with D. Finkel regarding the Complainant’s termination. During the conference call, “we talked about the results about the 60 logs that were – and the ones that were closed improperly” as well as options and recommendations. She did not see any of the documents in the investigation because of confidentiality of the investigation. Ms. Wade testified that “based off of my working knowledge with the facts of the investigation and the outcomes, I discussed that with my boss [D. Finkel] and we made – you now I made the determination to follow through with the recommendations, with one change to the recommendations.” She stated that during her 25 years employed with WellPoint, this was the first investigations she was involved in as a manager with the ethics and compliance department. She reported that she “felt comfortable when the results were put back in front of me that they were accurate results.”

Ms. Wade testified that she had a telephone discussion with the Complainant about J. Hunt coming to Savannah and didn’t know why he was coming; but later learned it was for an ethics investigation. She did not remember the date of that conversation. She reported that she had several telephone conversations with the Complainant during the investigation about the fact the ethics team was in Savannah.

Ms. Wade testified that “there was a telephone conference call that explained through the investigation they quoted the numbers of contact logs that had been closed inappropriately without the work being completed. [The investigation team] also walked through the results of some general overall human resource issues, and based off of the results of the investigation,

they recommended termination [of the Complainant] and I supported their recommendation. .. with the caveat [that] they were recommending written warning for [A.B.] and I felt strongly that if you were being terminated and [C.H.] were being terminated, that [A.B.] should also be terminated. ... based on the fact that the associates had come to [A.B.] with serious allegations and as a manager she did not do anything with their allegations.” She testified that she did not have any concerns on her part about ‘any kind of violations of SEC rules.” She stated “I’m certainly no expert in SEC rules, but no, the allegations that were presented to me were operational in nature and I understood the concerns that it was against policy and procedure.” She reported that she had never had such an allegation made against a management team. She stated that “I do know that there have been times when an associate on my team would be terminated for not doing their job or following policies and procedures.” She reported “there are expectations out there that if you receive an inquiry and you are supposed to work it completely before closing it out.” If something is closed inappropriately, an error results.

Ms Wade testified that there are a number of standard metrics under which WellPoint tracts operations, such as claims timeliness, inventory levels, average speed of answering telephones, volume of open inquiries and age of open inquiries. She stated that the team evolved and she received State-sponsored business metrics in the weekly operating report that she and her supervisor received. If the metrics were below target there were discussion about when we expected to be back on target and action steps to get there.

Ms. Wade testified that she was asked to lead the State-sponsored team because there were a number of well known backlogs. When she first formed her management team she “was looking for a level of expertise that would allow us to develop the action plans and move forward to bring inventories, whether they be called or claimed, [to] a current state. ... There was a large amount of overtime ... [and] focusing on prioritization, because we could not do it all at once.”

Ms. Wade testified that “performance guarantees are where an external party comes to WellPoint and as a part of being awarded the business, there’s a contractual agreement establishing certain metrics of how we would perform, and there’s usually guidelines that say if you fall below that performance, there’s a warning level, and then there’s a threshold level. If you fall below that, WellPoint would actually pay performance financial penalties back to their customer because they failed to meet the contract. ... There were multiple states and each state had their own unique set of guarantees, and so it would not be unusual for an individual state to have as many as five or six just within the call and claim production areas.” She reported that during Complainant’s tenure with the team there was “one state where performance guarantees were paid out” which was Texas.

Ms. Wade testified that she is not familiar with the False Claims Act. She stated that after the investigation was completed, there were steps to “make sure there was support for the Savannah team.” She remained on site, human resources had an onsite presence, and M. Williams was reassigned to the team “to make sure that the work flows were appropriate due to the ethics nature of the complaint.” She indicated that conversations were had to ensure “everyone understood the proper workflow for correspondence to make sure that all items would be completed prior to any closure of inquiries.” Ms. Williams was to “make sure that the associates have operating procedures so that they were clear on what they could and could not do.” She stated that the termination of three of the five managers was “unusual and unfortunate.”

Ms. Wade testified that she recalled a conversation with the Complainant involving documents that were found in a filing cabinet and that a method of manually tracking those documents and counting down the drawers on a weekly basis. The documents were aged documents and had not previously been counted in inventory. Once they were counted, they were expected to be processed in the usual fashion.

Ms. Wade testified that one of the results of the investigation was the recommendation to terminate the Complaint and that "I gave my permission to terminate you."

Ms. Wade testified that the Complainant's job involved the oversight of the call centers located in Camarillo and Savannah. The responsibilities included managing direct and indirect reports, budgetary functions, responses to management on processes, inventories and work flow, interaction with customers if there was an onsite visit, and representation of the operational area on internal committees and task forces. She reported that the management team had been thin and there had been no director for the call center for 6 months before the Complainant was hired. She stated that it appeared things were getting better at the call center from interaction and inventory reporting from Complainant. She reported that after the Complainant and other two managers had been terminated she received a letter from D. Andrews that was of the type normally turned over to the legal department. Ms. Wade testified that in 2008, prior to the Complainant being hired for the call center, there was a large task force looking at the D950 system and means to move away from that system or upgrade the system since the contract was soon to expire. She stated that she "was not aware of any investigation that is specifically tied to the accuracy of correspondence reporting ... correspondence reporting does not have a direct tie to our financial systems. ...Based on my operational knowledge, correspondence is tracked from inventory perspectives, but the information that would flow to our financial systems would be actual claims processed, because that affects monies that go out the door [and] also would affect everything from our pricing, our operating cost, et cetera, and correspondence is not tied directly into that system."

*(3) January 26, 2011, Affidavit of J. Wade (RX A)*

This exhibit is an affidavit from J. Wade. J. Wade avers that from April 1, 2007 through September 1, 2009 she was WellPoint's Vice President of Consumer Operations and that one of WellPoint's specialized units is its State-Sponsored Business unit, which provides managed care alternatives to members who are part of the Medicaid and Medicare populations. She was assigned to resolve a large backlog of correspondence that had built up over time. She was aware that the D950 system had limitations which was part of the reason for the backlog. She was assigned to construct a new management team for the Camarillo and Savannah call centers. The Complainant was selected as a director in the Savannah site and assumed that position in May 2007. The Complainant was charged with reducing the backlog in a timely and efficient manner and with ensuring that the correspondence was properly worked and resolved. The Complainant also managed calls received by the call centers and managing associates in the call centers. WellPoint entered contracts with 7 states to administer Medicaid and Medicare benefits. The contracts provided for various types of performance guarantees. Only the South Carolina contract required productivity or timeliness standards with processing Medicaid-related correspondence. No sanctions were paid to South Carolina during 2008.

J. Wade avers that she discussed complaints of D950 system shortcomings with the Complainant as well as M. Williams from Indiana and D. Mosher from Camarillo, the aging inventory and steps to resolve the problems.

J. Wade avers “at no time did [the Complainant] ever tell me that WellPoint or any of its employees were engaging in fraudulent conduct of any type. Indeed, [the Complainant] never indicated or made any statements suggesting that WellPoint was engaging in any conduct that defrauded, deceived, or intentionally misled any of its clients, shareholders, or any other entities or individuals.”

*(4) August 31, 2010, deposition of N. Hunt (RX C; CE 4)*

On August 31, 2010, N. Hunt testified by deposition that he has been an Ethics and Compliance manager at WellPoint since August 2008. He reported an undergraduate degree in Health and Human Services Administration as well as a Masters in Business Administration. He reported that in 2002 he joined a subsidiary of WellPoint as a senior ethics and compliance analyst before being promoted to an ethics and compliance manager, with a brief period as risk mitigation manager. As an ethics and compliance manager he reports to a staff vice president over ethics compliance investigations in Indianapolis. As an ethics and compliance manager for WellPoint he has completed over 100 investigations.

Mr. Hunt testified that he understood the False Claims Act as being a federal law that prohibits an organization or individual to defraud the government by claiming to provide services or goods that were not provided and billing for those services. He reported that investigations are entered into an electronic database called TrakWeb. He would look to TrakWeb to see if there had been similar allegations made in earlier cases investigated.

Mr. Hunt reported that he had no specific understanding about Medicaid policies or procedures that control the processing of Medicaid correspondence at WellPoint prior to doing his investigation of Complainant. He stated that he is not an accountant but has a general understanding of internal controls put in place to ensure the organization needs to do is actually done.

Mr. Hunt testified that when assigned an investigation he reviews the allegation for detail and understanding, then log information into the database, determine who will be assigned to assist the investigation, and decide how to proceed. During the investigation he will not have access to personnel records, will speak to witnesses and eventually speak with the person who is the subject of the allegation. Generally, the person who is subject to the allegations gets some type of opportunity to respond to the allegations.

Mr. Hunt testified that the investigation involving the Complainant was based on an allegation by J. Hennessey that contact logs were being closed prematurely, which was subsequently repeated in an anonymous letter. The investigation was commenced by the staff vice president and C. Saunders with telephone interviews of J. Hennessey. He was asked to take over the investigation in early August 2008 because he already had travel plans to Atlanta, Georgia on another ethics and compliance investigation. He reported that from August 2008 until the

investigation closed in October 2008, he consulted with his leadership J. Degan and J. Bixler, legal support from R. Wertheimer and assistance from D. Andrews, K. Fraser and M. McGee. He stated that M. McGee became involved in the investigation because there was allegation from T. Hall that needed investigated by human resources. The allegation was that the Complainant did not handle T. Hall's termination in accordance with human resources protocol.

Mr. Hunt testified that he provided updates on his investigation verbally while the investigation was being conducted. He sought assignment of "subject matter experts" in areas he needed assistance, like the ability "to pull a universe of correspondence logs" and assistance in "reviewing the correspondence logs to determine whether they had, indeed, been worked or not worked, in accordance with the allegations." He stated that D. Mosher and T. Contreras actually reviewed samples of logs and were considered subject matter experts in claims processing with the D950 system. He also interviewed a number of staff members who worked for the Complainant, Harper and Bowman.

Mr. Hunt testified that the Complainant referred to problems he determined to be "general management problems related to the processing of correspondence logs, primarily dealing with a large backlog and a system that I think all described as challenging ... that it was not an ideal system." The Complainant had reported to him there was a significant backlog of unprocessed Medicaid claims correspondence when she assumed her management position. He was unaware of any claims that claims correspondence was being closed out prematurely prior to Complainant becoming a manager. He stated that the backlog was not within the scope of his investigation. He reported that as a general principal, "if logs have not been appropriately worked, but reporting indicates that they were closed, they are not therefore worked and that violates any number of principles, including just the integrity of [WellPoint] reporting." He did not know if anyone at WellPoint had analyzed whether the premature closing of contact logs could have an adverse impact on the accuracy of WellPoint's financial reporting. He stated his understanding that the contact logs were a work record to track correspondence at the facility while the problem in the correspondence is being worked to resolution. He denied knowing if the correspondence related to claims subject to reimbursement under state Medicaid programs. He was not aware of a written policy or procedure for the processing of Medicaid claims correspondence.

Mr. Hunt testified that he did not provide information about his investigation to Ernst & Young<sup>9</sup> nor did he recommend to anyone that his conclusions be reported to Ernst & Young. He testified that he did not have any concerns, based on his investigation, that there might be any liability to WellPoint or WellPoint's financial reporting. He stated that had he any concern about the accuracy of WellPoint's financial reporting it he "would immediately refer that to my management as a very specific concern, and if I felt they were not taking that seriously, I would contact my vice president." He did not report that type of concern in the investigation of the Complainant. He had not been interviewed by anyone concerning False Claims Act incidents.

Mr. Hunt testified that one of the allegations he looked into was that 15,000 pieces of correspondence had been processed incorrectly. His conclusion was that the entire backlog inventory was around 8,000 so it seemed improbable that 15,000 would have been processed

---

<sup>9</sup> Auditors who prepared WellPoint schedule 10-K, an exhibit by reference in the deposition transcript but not submitted with documents considered in the Motion for Summary Decision.

incorrectly. He reported that J. Hennessey made the original complaint but did not have direct working knowledge of the allegation that managers had directed correspondence prematurely closed since he was a trainer. He expanded his investigation to people who worked with correspondence and found that those without specific training in processing contact logs “were advised on closing contact logs without being provided other training ... [and] didn’t find out that they were processing logs incorrectly until later on when they had lunchroom conversations with individuals who were normally assigned to correspondence processing and at that time they found out what they were doing was incorrect.” He reported that there was no allegation that personnel at the Camarillo facility were processing correspondence incorrectly.

Mr. Hunt testified that he interviewed the Complainant three times with a number of questions about contact logs and processes. He also asked her why she felt that she was implicated in the allegations and “why are multiple associates making this allegation that you directly told them that you gave contact logs with the direction to close them inappropriately.” He recalled being told by the Complainant and Ms. Harper that if he took specific logs and had them reviewed to determine if they had been worked or not “they would be fine, that I would not find examples of unworked items; that the instructions that management gave to associates would have been clear and that I was not going to find examples of unworked items.” He stated that “we had four employees that specifically named [the Complainant] indicating that they were brought in [for] putting the accounts together, they were brought large stacks of contact logs and told to close them. That’s a very serious allegation and not one I would take lightly. ... We actually had six [associates involved] but four of them specifically named [the Complainant and] indicated that they were very clearly, and that they understood, that they were to close the logs without working them; and they gave various statements to support what they represented to be [the Complainant’s] instructions.” He stated one associate indicated that, after he had started his investigation in Savannah, the associate was given a stack of correspondence that had been previously closed and was told to work the claims even though they had been closed. He reported his investigation disclosed that two associates contacted manager Bowman on her personal time off to report that they had been instructed to close contact logs incorrectly and the manager had told them to report it to ethics and compliance. He stated the manager received corrective action because she did not take appropriate corrective action when the associates brought the problem to her attention.

Mr. Hunt testified that during interviews with the Complainant she reported “the concern that the [D950] system did not provide a strong real-time inventory reporting and this led to ... actually doing their [correspondence] report via hand count” which included a weekly manual count of pieces of correspondence in storage and on associate’s desks. The associate would have to report how many they processed during the day or timeframe. He had no allegation that the hand counts were incorrect, but in an ideal world you would have automated system. He testified that he did not recall the Complainant “express any other concerns to [him] besides the general personnel concerns that [he] described earlier, general concerns about the D950 system.” He reported that he conducted August interviews by himself and conducted September interviews with M. McGee present. He reported that as of January 2009 he “was aware that there had been a complaint made, I believe to the EEOC.”

Mr. Hunt testified that he and M. McGee prepared the report of investigation before the Complainant was terminated and that the D950 system was not within the scope of his investigation. It was his understanding that J. Wade made the decision to terminate the Complainant's employment. Termination of the Complainant's employment was his recommendation in the investigation report summary. He reported that he did not share his investigation report with the Complainant and that "typically the conclusions would be shared with a member of management who is over the person who the allegation is against." He stated that he became aware that the Complainant had filed a claim of retaliation under Sarbanes-Oxley because of the deposition. He reported that "WellPoint's standards of business conduct directs an associate who has concerns about internal control irregularities and Sarbanes-Oxley concerns ... to call a 1-800 number that is listed ... on WellPoint.com ... and that line ... goes directly to the vice president of ethics and compliance phone line."

Mr. Hunt testified that his report to J. Wade included an allegation of retaliation and human resources concerns. One allegation involved the Complainant calling J. Hennessey back into the building after his shift to ask why he was making reports to ethics and compliance. J. Hennessey's allegation was confirmed by another associate who saw the Complainant take him into a room after his shift and by the Complainant in her September 26, 2008 interview though she had denied knowledge of associate concerns over closing contact logs at the September 25, 2008 interview. He reported "it would be inappropriate for [the Complainant] ... to question an employee who has made a good faith report to ethics and compliance, particularly when that employee does not report to her. ... By its very nature, being brought in and questioned over the very making of that report for over an hour would not be appropriate management activity." He reported that A. Bowman also alleged retaliation by the Complainant because she was being treated very differently after his investigation visits to Savannah by not being included in meetings and not being spoken to, as examples. He stated that another associate made similar allegations to A. Bowman. Additionally, there was an allegation that A. Bowman was being treated differently as a member of management after she had participated in ethic and compliance interviews. That treatment was witnessed by M. Settle. He testified that A. DePlacido reported she refused to close logs without working on them and was scolded for her slow performance when compared to her peers who she suspected were closing their logs incorrectly.

*(5) January 26, 2011 affidavit of N. Hunt (RX I)*

In this exhibit N. Hunt avers that he is employed by WellPoint as an Ethics and Compliance manager and that the attached Exhibit A is a true copy of his investigation report and Exhibit B is a copy of an anonymous letter sent to Ethics and Compliance.

Exhibit A contains results of N. Hunt's investigation involving the Complainant as well as several unrelated complaints. The report indicates that the Complainant denied ever instructing associates to close contact logs before working the case. The recommendation related to the Complainant was "termination of employment for advising associates to close contact logs inappropriately, for mishandling employee termination [involving T. Hall], and for retaliation [involving J. Hennessey]."

*(6) December 21, 2008 deposition of M. McGee (RX J; CE 5)*

On December 21, 2008, M. McGee testified by deposition that she is employed by WellPoint as a human resources manager. She has an undergraduate degree in psychology. She began work with WellPoint as a generalist performing recruitment and associate relations 8 to 10 years then recruitment went to a specialized team, so then human relations issues where a manager needs assistance. In the past she supported a customer service unit in Louisville for three years prior to 2006. She reported being involved in one investigation dealing with the premature closing of correspondence logs where she “assisted the compliance officer in the investigation by interviewing associates about their knowledge of the situation” and conferring with the compliance officer on recommendations after the investigation was completed.

M. McGee testified that she participated in the discussion of the investigation results with management. She reported that the compliance officer took the lead on the closing of logs and she was involved in other things related to associate treatment like a termination of T. Hall and a resignation of M. Reese that people were talking about and came up during the compliance officer’s initial interviews. She opined that no human resource policies were violated in the termination or resignation items.

M. McGee testified that she became involved in the investigation in Savannah in September and during the investigation interviews she would take her own notes and N. Hunt would take his own notes and they would talk about each interview afterwards. She reviewed the interview notes of N. Hunt for the interview of C. Harper for which she was present and stated that the contents related to C. Harper’s comments on the termination of T. Hall, resignation of M. Reese, correspondence backlog and work flow were accurate. She reported that one associate “said that she herself had closed out hundreds, maybe even thousands” and that the associate may have been M. Reese. She reported that she knew there were serious potential violations of company policies.

M. McGee testified that she is familiar with Sarbanes-Oxley Act. When asked if she had any discussions with N. Hunt involving SOX, she stated “Our discussion focused on the inappropriateness of [closing contact logs without working the correspondence] and getting to the bottom of why associates were doing this, who was telling them to do this, and that was my involvement in that discussion.” She denied being involved in any conversation regarding possible Security Exchange Commission violations.

M. McGee testified that she was not surprised with the termination conclusions because “WellPoint holds managers to a higher standard, higher level of expectations, and if something is going wrong in their area, they are ultimately responsible.” She reported that she was not surprised A. Bowman was terminated when a lesser degree of correction was recommended “because of holding true to ethics and compliance’s training to make sure that you report any suspicions, anything that you think is going on, and she did not do that.” She stated A. Bowman reported during her interview that she received calls from associates concerned about being asked to close out logs while she was on personal time off, but did not further investigate or report the concerns because she did not know if they were true.

M. McGee testified that the decision to terminate the Complainant would be made by her supervisor, J. Wade. She reported the “associates, in general, fear retaliation, fear unfair treatment.” In the investigation, the allegations of retaliation “were discussed ... [and] corroborated, but not further investigated.”

M. McGee testified that she and N. Hunt “on the last day of our visit in Savannah, we met with [the Complainant] and let [the Complainant] know what the allegations were and gave [the Complainant] an opportunity to, you know, share what you knew or confirm or deny.” She stated that she was not involved in the Complainant’s unemployment application. She reported that she had received a hard copy of the Complainant’s attorney’s letter that was written shortly after the Complainant’s employment was terminated and took no action regarding that letter.

*(7) December 22, 2010 deposition of M. Williams (CE 6)*

On December 22, 2010, M. Williams testified that she was the Director of Operations from May 2007 through October 2008 and “had oversight to provide strategic direction for an inbound call center, including written correspondence.” The majority of the responsibility of the team was “to respond to customer inquiries via an incoming 800 number ... and to respond to written correspondence on behalf of providers.” She supervised the Indianapolis call center and the correspondence function in Camarillo, California which only handled Medicaid claims for California. Indiana, Kansas, Texas, Ohio, West Virginia, California and South Carolina participated in the State-sponsored programs for which she had oversight.

M. Williams testified that the D950 system state “being behind in terms of timeliness and high in volume.” She reported that there was a backlog of D950 correspondence “over the expectation in volume and timeliness” when the correspondence in Camarillo, California, was reassigned to the Complainant. She stated that J. Wade was aware of the inventory. She reported that the process for handling correspondence was the same in Camarillo and Savannah. “WGS correspondence” referred to California Medicaid or California products like Healthy Families, Major Risk Program, CMSP and AIM. She reported that some weekly reports involving the D950 system required manual information gathering partly because of “the system’s inability to receive, track, count on an automated fashion.” She described the dispute forms and follow-up claims forms used by providers and considered written correspondence.

M. Williams testified that she remembered the Complainant conducting a presentation to the network management team on the D950 system process and that the Complainant was invited to do the presentation because “our customers, particularly network management, were receiving multiple phone calls regarding lost correspondence, lost medical records, and they wanted to understand the workflow.” The lost correspondence involved “correspondence in which the provider indicated to [the network management team] had submitted that had not surfaced in our systems, D950.” The training would assist the network management team members on where to look when they received an inquiry from a provider. Some state teams had the in-house expertise to sign on to the system and get the information they needed, some did not. D950 system deficiencies were known and had been discussed with J. Wade in meetings.

M. Williams testified that allegations that an employee had been given direction “to close correspondence that had been processed prior to all the actions being completed” was a serious allegation and that had she received such a report it “would warrant further explanation.” It “would alert me that I potentially have an issue with some associates not completing their transactions all the way through, which has an MTM impact, it has an impact to provider satisfaction and repeat escalated issues, associates not following the direction that has been set before them, because the direction would be you do your work until it’s done ... and some concern about the manager that was providing oversight of this function.” She stated it would not create concern “about any possible violation of the Securities Exchange Commission” and it would not cause an alert of the False Claims Act “at this stage.” She reported that the allegation would prompt her “to do some validation and interviews to determine what the facts are and my next steps.” It would not cause any concern related to process guarantees at that point.

M. Williams testified that she assumed responsibility for the Savannah facility on October 21, 2008 after the Complainant’s employment was terminated. She discussed the assumption of responsibility for the “leadership of the functions within the Savannah site, which include the call center function and the correspondence function” with J. Wade on October 21, 2008.

*(8) January 21, 2011 deposition of C. (Harper) Mickle (CE 7)*

On January 21, 2011, M. Mickle testified that her maiden name was Harper and that her employment with WellPoint ended on October 21, 2008. She briefly described the handling of correspondence at work and that most of the written correspondence came from providers.

M. Mickle testified that she believed her employment was not terminated because of race but “that I was terminated because it was retaliation because we had information that indicated that federal regulations were broken.” She stated she believed the retaliation was by J. Wade and N. Hunt. She stated “when I was terminated, I was told that I had told associates to close out logs without them being resolved, which was a federal violation. So if it was a federal violation for me to instruct somebody to close them, then I thought it was a federal violation and had to be a violation of some federal law for us to not be counting the pending logs that we had, the pending correspondence logs.” She reported the federal law to be “a contract between the State and WellPoint ... [and]used the same rationale with them telling me it was a federal violation, so I used the same rationale; must be some federal violation also.” She reported that she could not identify any federal law violated. She stated that she had not seen any WellPoint contracts with a State but was aware of performance guarantees in the State contracts from her claims work with Blue Cross of Georgia.

M. Mickle testified that she never discussed performance guarantees with J. Wade or anyone else prior to her employment termination. She reported that she feels N. Hunt retaliated against her because “it’s unimaginable that I was terminated ... In all my 30 years of working for WellPoint, I could never terminate anybody without talking with them about the reason that they were being terminated.” She stated that she talked with N. Hunt on August 14, 2008 and September 26, 2008. During the last 10 minutes of the September 26, 2008 hour meeting N. Hunt “said to me that there were allegations made against management that they instructed associates to ... close logs without resolving them and that I was implicated.” She stated her response was that she

never directed associates to close out logs without resolving them and that she had never been instructed by another to do so. She considered that since she never directed associates to close out logs without resolving them, then somebody lied and there must be another reason she was terminated. She stated that she did not know who was interviewed by N. Hunt or what information he considered during his investigation. She testified that she never told N. Hunt or J. Wade that pending logs were not being counted.

M. Mickle testified that she never made any complaints about misconduct to the ethics and compliance department, to human resources or her manager, the Complainant. She reported that she did not have normal work interaction with J. Wade. She reported that when the Complainant was her supervisor, she worked in the Savannah call center and was manager to 20 to 30 associates. She reported that correspondence that is aging and getting older is backlog which would be a concern. The target was to complete correspondence by day 14, but there were some that would reach 30; but she could not recall a severe backlog.

M. Mickle testified that she was made aware of a significant backlog at the Camarillo site and that she helped get the associates in Savannah to work the backlogged files Camarillo sent to Savannah. Those files were worked and resolved, though not smoothly and required a lot of calling back and forth because they had not done any of the correspondence at Camarillo.

M. Mickle testified that an associated came to her and reported that J. Hennessey “was going to report the Ms. Johnson and I had told him to close out logs without working them.” Then M. Reese “came the next day and told me that Jamie were (sic) asking her questions about the logs, the closing the logs and the instructions she had been given and that she was confused” by the questions he was asking. She testified that she did not discuss the matter with J. Hennessey but reported it to her supervisor, the Complainant. She stated that the Complainant told her she had talked to J. Hennessey and told him “that we had no reason to close logs and asked him where did he get that from.” She reported that the first time she discussed the investigation of N. Hunt with the Complainant was after they were terminated. M. Mickle testified that the day M. Reese came to her she went to every associate to ensure they understood the correct instructions for processing and to make sure correspondence was resolved. She also specifically went to M. Reese to be shown what she was doing with correspondence and directed her to go back over her files and make sure they were resolved.

M. Mickle testified that on October 21, 2008 she was out of work sick and J. Wade called her on the telephone to tell her that she was terminated. J. Wade told her “that I was terminated because I had instructed associates to close out logs inappropriately without being resolved.” She reported her response to J. Wade was that it was not true. Later she talked with D. Andrews who stated that it was a federal violation and that she would be sending the termination form and COBRA forms in the mail.

M. Mickle testified that from time to time an operation expert would report to her that an associate had prematurely closed out a log because they were having problems going into the file to work on an issue, but never had that problem at the Savannah site. As to the Camarillo site, she reported that the Complainant “said that she had gotten a directive that we needed to ensure that associates ... were not closing out logs.” She stated “it’s an aged, old problem for someone

to close out a log without working on it ... but you never ever want anyone to close out a log without working on it, Never, ever. ... we covered it in one of our meetings that if they closed out a log prior to it being resolved, it could result in termination.”

M. Mickle testified that she and the Complainant had several discussion on which of the associates lied about being told to close out logs without resolving them and concluded it must have been someone on Mickle’s team.

On cross-examination, Ms. Mickle testified that the correspondence received in Savannah was from State-sponsored Medicaid providers and that she could not recall ever receiving correspondence from an individual member. She stated that after she was terminated she discussed the matter with her sister who was a Medicare coordinator for Blue Cross of Georgia and was told “they had to report to Medicare the age and inventory of their pending logs.”

Ms. Mickle testified that prior to the Complainant taking over the Savannah site the associates had inappropriately handled calls, had sky-high absenteeism, morale was down and there was anger over work hours. Most of the complaints to human resources and ethics and compliance were not true. She reported that when an account is lost it could mean associates lose jobs or hours would be changed. She stated that prior to taking over correspondence in August 2008, her team normally handled telephone inquiries, though there were times her team would assist in correspondence processing. She reported that it was ludicrous to think an associate closed out 15,000 files because “we don’t close out” that many. She reported that when she was in charge of the correspondence team there was some concern about instructions from a lady in California who directed closing out some cost containment correspondence that she had to take corrective actions with her associates to stop the closing of logs.

Ms. Mickle testified that between 4 and 500 pieces of correspondence would come in each day while she had the correspondence team, that amounted to thousands each month.

b. Analysis.

The additional material considered for consideration on the issue of summary decision confirms the facts alleged in the complaint, as amended through Complaint’s response to correct deficiencies in her SOX complaint.

The Complainant worked as a Director in the Respondent’s Savannah call center from May 2007 through October 21, 2008. During that period her immediate supervisor was J. Wade. Also during that period she had numerous conversations with J. Wade on the processing of telephonic and written inquiries in a timely manner. The Complainant’s duties at one point also involved handling the written correspondence backlog from Camarillo, California. During that period, the Complainant routinely supervised up to five subordinate team managers who supervised their respective call center teams.

The Complainant discussed with the work processing methods for handling inquiries with her peers in the Camarillo call center and Indianapolis call center. She discussed the deficiencies in

the D950 system for tracking correspondence with J. Wade and implemented plans and procedures for consistent tracking of correspondence and reduction in backlog inventory.

Following allegations of inappropriately closing open correspondence at the Savannah call center was made to Respondent's Ethics and Compliance department, Respondent began an investigation of the Savannah call center in August 2008. Throughout the investigation and up to her termination on October 21, 2008, the Complainant denied that the Savannah call center was inappropriately closing open correspondence. At no time during the investigation did the Complainant report any allegation of actions implicating mail fraud by Respondent, wire fraud by the Respondent, violations of SEC regulations by the Respondent, or other activities related to fraud on shareholders.

The Complainant first complained of SOX specific violations in her initial complaint to OSHA after she was terminated. This cannot be considered "protected activity" under SOX.

After deliberation on the arguments, supporting briefs, and supporting documents submitted by counsel, and considering all matters in a light most favorable to the Complainant, this Administrative Law Judge finds that the Complainant has failed to establish that she communicated to appropriate personnel that fraudulent activity with the scope of SOX had occurred, or was ongoing; has failed to establish she engaged in "protected activity" as required by SOX; and had failed to establish that the Respondent knew of activity engaged in by the Complainant that would be protected by SOX. Accordingly, there are no genuine issues of a material fact and the Respondent is entitled to summary decision and dismissal of the complaint.

### III. The remaining issues raised by the Parties are moot.

In that the Complainant has failed to establish a prima facie case, due to the lack of engaging in protected activity, the remaining procedural issues raised by the Parties are now moot.

## **FINDINGS OF FACT**

After deliberation on all the submissions of the Parties, this Administrative Law Judge finds:

1. As a matter of law, the Complainant has failed to allege a claim under §1514A of SOX upon which relief may be granted, such that the complaint must be dismissed pursuant to FRCP Rule 12(c).
2. As a matter of fact, the Complainant has failed to set forth sufficient evidence to establish:
  - (a) That she engaged in activity protected by SOX while Director of the Savannah call center prior to her termination of employment on October 21, 2008;
  - (b) That Respondent was aware of the Complainant engaging in activity prior to her termination of employment on October 21, 2008, that would constitute protected activity under SOX; and,

(c) That a genuine question of a material fact involving the alleged violations of §1514A of SOX does not exist.

3. The Respondent is entitled to summary decision and dismissal of the complaint filed January 20, 2009, as amended.

## ORDER

It is hereby **ORDERED** that:

1. Respondent's "**Motion for Judgment on the Pleadings Pursuant to FRCP 12(c)**" is **GRANTED**;
2. Respondent's "**Motion for Summary Decision**" is **GRANTED**;
3. **Complaint's complaint, as amended, filed January 20, 2009, is DISMISSED**; and,
4. The **formal hearing** scheduled to commence 9:00 AM, Tuesday, March 8, 2011, in Savannah, Georgia is **CANCELLED**.

A

ALAN L. BERGSTROM  
Administrative Law Judge

ALB/jcb  
Newport News, Virginia

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: [ARB-Correspondence@dol.gov](mailto:ARB-Correspondence@dol.gov).

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).