

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 29 October 2012**

**CASE NO.: 2010-SOX-00037**

**IN THE MATTER OF**

**DERRICK JOHNSON,  
Complainant**

**v.**

**U.S. BANKCORP/U.S. BANK NATIONAL ASSOCIATION,  
Respondent**

**APPEARANCES:**

Chellie M. Hammack, Esq.,  
Brian F. Fresonke, Esq.,  
C.M. Hammack Law Firm,  
For the Complainant

Janie F. Schulman, Esq.,  
James Oliva, Esq.,  
Morrison & Foerster, LLP,  
For the Respondent

**BEFORE:**

Clement J. Kennington  
Administrative Law Judge

**DECISION AND ORDER**

This case arises under Section 806 of the employee protection provisions of the Sarbanes-Oxley Act of 2002 (SOX) and its implementing regulations, 18 U.S.C.A. §1514 A; 29 C.F.R. Part 1980 (2009). Derrick Johnson (Complainant) filed a complaint on November 13, 2007, with the United States Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that Respondent violated SOX by suspending him on April 13, 2007 and then discharging him on August 15, 2007, for engaging in SOX protected activities. OSHA investigated the charges and found that Respondent had indeed violated SOX by suspending and discharging him. Respondent appealed and a hearing was held before the undersigned in Seattle, Washington on April 30, 2012 through May 4, 2012 and May 7 through May 12, 2012. The parties submitted Post-Hearing Briefs on August 28, 2012 and Response Briefs on September 27, 2012.<sup>1</sup>

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<sup>1</sup> Response briefs were limited to 20 pages. Complainant submitted a brief of 30 pages, to which Respondent objected and moved to strike. While Respondent's brief was limited to 20 pages it also included an extra 23 pages

## I. BACKGROUND

U.S. Bancorp is a company within the meaning of 18 U.S.C. § 1514A with a class of securities registered under Section 12 of the Securities Exchange of 1934 and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934. U.S. Bank National Association is a wholly owned and integrated subsidiary of U.S. Bancorp and is covered by the Securities Exchange Act of 1934. U.S. Bancorp and U.S. Bank are collectively referred to as Respondent or U.S. Bank.<sup>2</sup>

Respondent's supervisory structure in its consumer and small business lending division, the division primarily involved in these proceedings, consists of Richard Davis, Chairman, President and CEO. Reporting to Davis is Richard Hartnack, Vice Chairman of Consumer and Small Business Lending. Hartnack supervises Ross Carey, Vice President of Western Region who is responsible for the oversight of the regional managers in the Western Region. In 2007 Carey supervised 7 regional managers including Chris Heman, who was regional manager for the Washington Metro Region 41. Heman supervised 4 district managers in district 140, 141, 142, and 143 who in turn supervised branch managers responsible for the operations of 70 branches offices. The district manager for district 141 was Kim Thompson. She supervised 14 branch managers including Complainant.<sup>3</sup> (Tr. 660-662, 2990-2992).

In addition to its consumer and small business lending division, Respondent operated a corporate security division and a human resources and legal division. In 2007, the corporate security division was managed by Executive Vice President and Chief Risk Officer, Richard Hidy and employed a security officer, assigned to Washington State by the name of Kim Reichert. In early 2007, Katie Lawler was acting Chief Employment Counsel and was transferred to Human Resource Director in April 2007 at its corporate office in Minnesota. Respondent employed Helen Creekmore Eaton in 2007 as its local Human Resource employee working under the supervision of Janice Coonley. As will be later shown, both Reichert and Creekmore, and to a lesser extent Hidy, play a significant role in Complainant's case. (Tr. 935, 1183; CX-254).

Respondent employed Complainant as branch manager in its consumer and small business bank division at the Spring Glen branch in Renton, Washington from July 6, 2004 to August 15, 2007. (Tr. 56; CX-214). Before this time Complainant never worked in the banking industry, spending his time in the retail restaurant business. As a branch manager he was responsible for supervising branch employees consisting of a banker, responsible for sales of bank products consisting of demand deposits accounts (DDA or checking accounts), credit cards and loans and a customer service manager or teller coordinator who was responsible for directing the work of various tellers who interacted directly with customers.<sup>4</sup>

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of exhibits. Since both parties exceeded the allowed page limit, neither party is prejudiced by the others failure to comply with the undersigned's order.

<sup>2</sup> References to the transcript and exhibits are as follows: Transcript: Tr.\_\_; Complainant's Exhibits: CX-\_\_; and Respondent's Exhibits: RX-\_\_. Where the record contains duplicate exhibits reference is made only to Complainant's exhibits because of his more complete listing.

<sup>3</sup> District 141 had 18 branches including: Ranier Valley, Vashon Island, West Seattle, Renton Highlands, Georgetown Renton Main, Federal Way, Skyway Park, Renton Hills, White Center, Boulevard Park, Spring Glen, Tukwila Andover, Benson Center, Kent, Auburn, Burien and Covington. (CX-81, pwc 2259).

<sup>4</sup> In theory branch managers have 14 essential functions including supervising branch staff and making decisions regarding employee compensation, promotion, discipline and termination. In practice, Complainant knew that he as branch manager should consult with human relations and the district manager before trying to terminate an employee as happen in the case of Tim Adams. Regional manager, Kim Thompson transferred Adams into Complainant's branch with Complainant's knowledge or consent. Complainant found Adam's conduct

Branch employees, including manager, compensation were based upon a salary plus quarterly incentive (Tr. 60-63). Incentive compensation for the branch banker was based upon a point structure for each of the products sold with branch managers paid quarterly incentives based on the revenue produced by the branch and then placed in a share and compare group of like branches and paid based upon a percentage of growth of revenue. District managers were paid based upon the number of branches participating in the incentive with regional managers paid on an annual basis determined by the region's net revenues. (Tr. 664-672).

Respondent also provided employees with opportunities to win trips and prizes by high sales performance during quarterly campaigns. In the fourth quarter of 2006, which ran from October 14, 2006 to January 12, 2007, Respondent's campaign was called "Surfin' U.S.," providing trips to the branch managers within the top six districts nationwide in the metropolitan group sales in credit cards, checking, consumer lending, and small business lending. In order to win, each branch must achieve at least 100% of the overall goal, be at least 85% in all categories, and have a positive consumer loan growth and a positive net DDA. (RX-8).

In connection with its compensation systems Respondent provided its employees with two documents: a code of ethics and business conduct and a policies and program employee handbook. (RX-9, RX-10). The section of its code of ethics which pertains to this case deals with incentive plans and provides as follows:

U. S. Bank believes that incentive plans provides employees an opportunity to earn financial rewards for performing at their highest level while executing their jobs in the best interest of the shareholders and customers. Employees may not at any time attempt to circumvent the incentive programs by creating bogus sales or transactions or by sharing business in the Company in order to meet respective incentive programs. Furthermore, customer sales must be based on the requests or needs of the customers at all times, as opposed to those that will meet incentive program goals. Behavior intended to circumvent the incentive systems, or to create false results may be considered a violation of our standards. (RX-9, pp.21, 22).

The section of its employee handbook entitled "Performance and Conduct Counseling" which is also important to this case provides as follows:

Our objective is to retain employees who demonstrate the skills, knowledge, and behavior consistent with the goals and values of the U.S. Bank. If your performance or conduct does not meet the expectations of the company, counseling or coaching may be offered to provide you with a reasonable opportunity to make the necessary improvements in order to succeed. In all cases however, U.S. Bank has the discretion to immediately terminate an individual's employment. (RX-10, pp.10).

When hired, Complainant's district and regional managers were Chris Heman and Jeff Shular. In 2005, Complainant's supervisory structure changed with Heman promoted to regional manager and Kim Thompson promoted to district manager. (Tr. 661- 663, 2106-2108). Soon after being hired, Complainant

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unacceptable shortly after being transferred into his region and unsuccessfully tried to have him investigated and terminated. Complainant had him terminated only after there was abundant evidence of credit card and DDA slamming by Adams and improper referrals in the 1<sup>st</sup> quarter of 2007. (RX-5, Tr. 224-230, 259-263.323).

encountered major problems associated with about 300 bogus DDA (checking accounts) which he closed, only to incur the anger of Robb Hawkins, a business banker at the Federal Way branch and mentor appointed by Heman. (Tr. 62, 63, 121).

In addition, Complainant encountered ethical problems caused by the former Spring Glen branch manager, Derek Parker, and the then current banker, Jackie Palumbo. Parker had engaged in credit card slamming, i.e. opening up lines of credit not authorized by customers while Palumbo had engaged in DDA slamming, i.e. opening of checking accounts not authorized by customers. Both of these employees had been trained by Chris Heman. Complainant reported the slamming to Heman who seemed to be more frustrated than alarmed. He asked Complainant if there were other complaints and said they would talk later. Before Heman got back to Complainant, Complainant that Palumbo met with Heman and Helen Eaton and had been terminated. When Heman finally contacted Complainant it was merely to ask him to be present after-hours so Palumbo could come by and clean out her desk.

In the process of cleaning out her desk, Palumbo told Complainant that she had done only what Heman and Parker had told her to do and that they, rather than her, should be terminated. (Tr. 64-66).<sup>5</sup> Several months later when presented a check at an awards banquet based upon Palumbo's performance, Complainant returned the check to a female supervisor of Carey saying that he thought she knew Palumbo had been terminated for slammed sales. (Tr. 67-69).

Shortly after this event, Shular reached out to Complainant and met with him and Heman. However, subsequent client complaints against Parker and Heman's failures to address such led Complainant to send a letter to Shular dated September 14, 2004. In that letter Complainant told Shular of Palumbo and Parker's misconduct while calling into question the integrity of Heman. (CX-1; Tr. 70). Nevertheless, Derek Parker remained as branch manager of Federal Way and Heman was later promoted in 2004 to regional manager and replaced by Kim Thompson as district manager.<sup>6</sup> Despite the initial controversy Complainant received an overall manager rating in 2004 from Heman as a 3 i.e., solid performance that consistently fulfills and at times exceeds expectations. In 2005, Complainant received the same rating from Thompson. (Tr. 74, 75; CX-215).

## II. CURRENT CONTOVERSY<sup>7</sup>

On March 5, 2007, Complainant emailed district manager Kimberly Thompson asking for her to call him at his branch. (CX-2; Tr. 95-98). On the following day, March 6, 2007, Complainant emailed Human Relations Specialist, Helen M. Eaton, asking for her assistance in dealing with branch banker, Tim Adams, who Complainant confirmed had ordered two credit cards for a customer who told him he had not requested such. In the past Complainant had received similar allegations of credit card slamming by Adams but upon further inquiry learned contrary to the present case that the cards had in fact been requested by the customer. Complainant asked Eaton's advice on the discipline to impose. Further, he was concerned about Adams' daily bathroom breaks taking up to 20 minutes each time spending a total of 1½ hours per day after which he would emerge noticeably sniffing as if on drugs. When confronted by

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<sup>5</sup> During the subsequent investigation Eaton told Lawler on June 22, 2007 that Thompson had difficulty dealing with ethical issues in her district because of employees telling her that Heman directed them to do something which she considered unethical. (CX-22).

<sup>6</sup> Neither Shular nor Parker testified in these proceedings. Heman denied any improper training while Carey denied receiving any check back from Complainant.

<sup>7</sup> Many of the following events were confirmed by Complainant's exhibits and were, for the most part, uncontradicted.

Complainant about his bathroom behavior Adams merely replied that he was healthier than the rest of the team. (CX-3; Tr. 99).

On Thursday, March 15, 2007, Complainant, receiving no answer from Eaton concerning the credit card slamming incident, emailed Thompson about this incident and another slamming incident involving Sanjay Shirude of Social Solutions COM Inc. wherein Shirude complained of receiving not only an unsolicited credit card but an unsolicited line of credit booked by Adams. Complainant expressed a need to act soon because the reputation of the bank was on the line. (CX-4; Tr.100-102).

On Tuesday, March 20, 2007, Complainant, having heard no response from Thompson, emailed her again informing her of additional slamming incidents by Adams involving credit cards to the Gordon's account, an unsolicited and unwanted line of credits to Joseph Ti, and unsolicited card to Steven Delahunt who accused the bank of fraud. (CX-5; Tr.102, 103). On March 21, 2007, Complainant reported additional incidents of credit cards slamming by Adams to Eaton, Thompson, and Andrea M. Tempe of customers Melanie L. Patterson, Lowell Norris, and Leonard D. Whalen. (CX-7; Tr.105).

On March 22, 2007 at 7:00 a.m., Thompson called Complainant who, according to a letter sent to Thompson on the same day, accused her of telling him to turn his head in the other direction because they were at the end of the quarter and if Complainant were correct she would have to back out those products or sales apparently related to Adams and were improper but apparently already counted in the branch and district sales for that quarter. Complainant further stated that he was not concerned about being sued as Thompson stated could happen. Rather he would continue to turn over "any stones" that he saw. (CX-8; 106-108).<sup>8</sup>

On March 22, 2007 at 12:28 p.m. and 1:13 p.m., Complainant filed ethics complaints against Adams for fraud concerning the credit card and credit slamming events, most of which he learned of after returning from a Pinnacle trip to Arizona, and against Thompson who had told him to stop turning over stones and making the problem bigger than it already was. (CX-9, 10; Tr. 108-111). On March 22, 23, and 24, 2007 Complainant also informed Cindy Jurado (in charge of campaign audits for the branch) and Pete Selenke (retail quality assurance regional manager) concerning his problems with Adams. (CX-11-15, 17; Tr.111-119, 122-123).

On March 23, 2007, Complainant sent a letter to regional manager Ross Carey complaining of Adams' conduct and Thompson's alleged indifference telling him not to spend his time uncovering rocks and backing out any more numbers from quarter 1 and asserting that U.S Bank had tellers, bankers, managers and district managers that were stealing from the bank by slamming products on customers and paying them by salary and incentive pay. Complainant stated that employees and even district managers were afraid to address this situation because to do so would be political suicide. He also complained of bankers arranging for secondary mortgages without requiring the first mortgage to be paid off, resulting in homes valued at \$300,000.00 with loans amounting to \$500,000.00. Complainant told Carey that such conduct amounted to crisis management which was no way to run a business. (CX-16; Tr. 120).

Based upon what he had seen and experienced involving regional manager Heman and Parker, Palumbo, Douglas Cook, and Adams. Complainant was concerned that the problems he encountered were more widespread than initially thought. Further, when considering the weekly, monthly, and quarterly reports generated by Respondent and considering Hawkins' activity and numerous conversations with investments bankers, business bankers, and branch manager, Complainant was convinced that unethical conduct was occurring throughout the region. (Tr. 121, 122).

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<sup>8</sup> Thompson denied telling Complainant to turn his head in the other direction. Rather, she allegedly told Complainant not to accuse Adams until Complainant had all the facts. (Tr. 2249).

On March 24, 2007, Complainant emailed Eaton and Thompson about additional problems of product slamming by Adams. (CX-18, 124, 125). On March 26, 2007, Eaton and Thompson discuss the Adams situation involving product slamming with only the tellers making the customer contact or Adams' practice of opening two checking accounts for customers when only one was requested. (CX-19; Tr. 125). On the same day Corporate Security Senior Vice President, Terry Gerling emailed Christopher Heman telling him that Complainant's complainants should initially be treated as valid in that they are against his own interests since Complainant stood to lose incentive compensation if proven to be true. (CX-21, pp. USB-ALJ-009923).

On March 28, 2007, U.S. Bank terminated Adams for misconduct. i.e. product slamming or ordering credit cards and lines of credit without the customers consent. (CX-30, pp. 0011010). This did not stop Complainant from complaining about improper teller referrals which Eaton investigated on April 2, 2007 and tellers admitted receiving. On April 3, 2007, Complainant met with Eaton at her office and said other ethical issues were rampant in the district and involved Chris Heman with bankers selling dual checking accounts; Rob Hawkins whitening out loan documents; Kim Thompson moving sales from branch to branch so she could meet company goals, tellers across the district taking improper referrals while employees across the region were afraid of complaining and losing their paychecks. (CX-25).

On the same day Complainant emailed Eaton stating that he had a banker, Eric Allison, who approved a third mortgage resulting in a house valued at \$380,000.00 covered by 3 loans of \$472,000.00 (the first loan was for \$75,000.00, the second for \$200,000.00 and the third loan by U.S. Bank was for \$197,000.00). The second mortgage should have been paid off but never was. Complainant stated that Allison's practice of not paying off the second loan was common. (CX-26; Tr. 127, 128).

On April 4, 2007, Complainant emailed Eaton about another situation involving a home valued at \$300,000 with a debt of \$500,000.00 for which the bank was completely at risk. At this point the strain of dealing with these problems became too great and Complainant asked the bank for a severance package because he was not in a position to quit being a single father of 5 (CX-27; Tr. 131).

On April 8 and 9, 2007, Complainant sent an email to Eaton where Complainant informed Eaton that Adams had sent a customer of the bank, Teresita C. Estrella, to a broker outside the bank (against Respondent's policy) for a second loan of \$250,000 at 12.99% which was almost the same as her first loan of \$454,00 at 4.99% . Her husband had a stroke and she could not keep up with both payments and was about to lose her home. As a result, not only was the customer to lose her home but, the bank was to lose a loan or have a loan run off. (CX-28, 29; Tr. 132-137).

Finally on April 13, 2007, Complainant sent a letter to U.S. Bank CEO, Richard Davis stating he was completely frustrated with the illegal practices of the region, had been in contact with the Washington State Board of the FDIC and had retained an attorney to look into the illegal and intentional fraudulent practices that have caused bank customers to lose their home. In his first 6 months with U.S. Bank Complainant stated he terminated U.S. Bank's top banker, Jackie Palumbo for unethical practices despite the defense of Chris Heman and Derek Parker. Complainant told Davis he got so frustrated over the past few weeks that he asked for a severance package just to leave but never heard from anyone. Further, he had tried for over a year to get rid of a banker (Adams) but was not able to get any response and, as a result, a bank customer, Mrs. Estrella, was about to lose her home. Complainant asked to hear from someone that day. (CX-31).

About 30 minutes later Richard Hartnack, vice president and vice chairman, called and placed Complainant on indefinite administrative leave allegedly to protect him and allow him to assist investigators in a full investigation of his charge. Further, Complainant was told to leave his keys and

take no documents with him following which Heman and Eaton would come to the branch and close it down. (Tr.138-143). Thereafter Complainant was not allowed to return to the bank to assist in the investigation because in Carey's words Respondent wanted "...to keep the investigation as pure as possible..." by not allowing Complainant "...to continue to connect with branch employees and ask questions ...." (Tr. 676, 677).

On April 13, 2007, Respondent contacted Kevin Krebs of Pricewaterhouse Coopers to assist in reviewing the allegations raised by Complainant's letter to Richard Davis (CX-32, 33; Tr. 144). On April 14, 2007, Krebs contacted Complainant and told him he had been assigned to investigate his allegations. Complainant agreed to meet with him and a bank representative to discuss the issues he had raised at Dorsey and Whitney's office in downtown Seattle. In Krebs's words Complainant was "very cooperative at this point and did not hesitate at all about meeting." (CX-34, pwc 02159). In anticipation of the meeting, Complainant told Krebs he had already provided Pete Selenke with a package of information.

On April 16, 2007, Katherine Lawler, Respondent's Human Resources Director emailed Krebs the information provided to Respondent by Complainant. (CX-35). That information, which also was provided to Carey, included 26 pages detailing (1) his correspondence to Kim Thompson of March 22, 2007 in which she allegedly told him to turn his head in the other direction and ignore improper sales of bank products because she would have to back out these numbers from her quarter sales and result in suits against himself; (2) a March 23, 2007 letter to Carey in which Complainant alleged up to 40% of Respondent's production for the past three years of being unethical, Thompson's comments to him, unethical product slamming of DDA's during and following Heman's tenure as district manager; (3) a letter to Jeff Shular dated September 14, 2004 implicating Heman and Derek Parker in unethical credit card slamming; (4) emails from Complainant to Thompson and Eaton re: banker Tim Adams, dated March 6, 15, 20, 21, 23, 24, and 30, 2007 and April 3, 2007 (improper loans by Eric Allison), April 4, 2007 (request for severance by Complainant because of his frustration in continuing to deal with unethical conduct since joining Respondent); (5) emails from Complainant to Kimberli Reichert of Corporate Security concerning credit card and DDA (checking account) slamming dated April 4, 2007 with Complainant not sending additional evidence of misconduct Respondent already had information despite Janice Cooley, Human Resources Director statement saying allegations needed to be investigated. (CX-36).

On April 17, 2007, Krebs signed a contract with Respondent agreeing to assist Respondent and its counsel (Michael Droke) in conducting an investigation into those issues raised by Complainant, not to serve in the capacity of an expert witness beginning on April 18, 2007 with a meeting with Complainant in the Seattle area at the partner rate of \$595 per hour under the AICPA standards for consulting services. (CX 37). On the same date Droke sent Krebs information from Reichert including a copy of Respondent's handbook of ethics and agreed to forward spread sheets created by Respondent's fraud detection department pursuant to the investigation. (CX-38). Also on the same date, Lawler sent Droke copies of letters from Complainant to Selenke, Shular, and Carey with copies of emails from Complainant to Thompson and Eaton. (CX-39).

Also on April 17, 2007, Reichert sent to Droke ten pages of documents which included various spread sheets confirming Tim Adams' misconduct for which Adams was scheduled to receive awards in Chicago and which the district manager, Kim Thompson, allegedly dismissed despite evidence clearly showing "suspicious accounts and product openings" which Terry Gerling, senior vice president and director of corporate security viewed as supporting Complainant's allegations since by reporting such he

stood to lose incentive compensation. (CX-40).<sup>9</sup> On same day Lawler in a telephone call to Droke referred to Complainant's complaint to Davis as a "packet of crap" and stated that Complainant had reported Adams for ethics violations in the past year. (CX-44). At the beginning of 2006 Adams, who had previously been trained by Derek Parker and placed by Kim Thompson as personal banker, started to cause Complainant to worry about the loss of \$1.5 million in consumer loan which he associated with Adams' partnerships with friends in the mortgage business. Complainant reported Adams to Corporate Security who later told him to forget the matter since there was not enough information to support his suspicions. (RX-98, Tr. 85-88)

On April 18, 2007, Thompson emailed Droke documents showing Derek Parker, Complainant's predecessor at Spring Glen, being given a final written warning on October 26, 2004 by Heman for giving tellers unqualified sales that resulted in unearned incentives in violation of Respondent's Code of Ethics and Business Conduct standards (tellers were supposed to first have interaction with the customer, including a discussion about purchasing a product or service, before being credited with a customer sale and that once this was brought to Parker's attention tellers were still given such referrals contrary to his instructions). Heman warned Parker that further violations would result in immediate termination. On October 12, 2000, Heman gave verbal warning to Parker for telling customers to forge a secondary signer name on signature card or loan documents. On August 7, 2000, Heman gave Parker a written warning for accepting business from mortgage brokers after being told previously in the last week of April not to do and instead work directly with customers in all instances. As a result the bank's fraud department discovered an address mismatch that caused the bank to close all accounts on a legitimate customer. (CX-41).<sup>10</sup>

Before meeting with Kreb and Droke, Complainant met with Matthew Purcell, a former branch manager of Respondent who was a peer of, attended meetings, and was on the leadership council with Complainant. Purcell told Complainant that Heman had a hands-off policy which meant: "Don't get your hands dirty. Don't ever get caught in the spotlight." Purcell had been terminated by Respondent because he had been caught doing improper things for financial gain. Purcell told Complainant that his contact with Heman was only through his cell phone and was well organized and involved numerous persons including Andrew Moritz, Derek Parker, Kevin Hilderman, Bud Brown, Theresa Bickle, Eric Allison, and others. Purcell stated that Heman had brought in an individual from underwriting by the name of Shannon Pouge who trained an elite group of 10 to 15 individuals on how to beat the underwriting system. (Tr. 138, 145-148).

On April 17, 2007, Lawler sent Droke a message in which she referred to Complainant's charges as a "packet of crap" with Complainant unsuccessfully trying to fire Adams a year previous and warning Droke that Complainant likes to tape record conversations without the other persons knowledge in violation of Washington state law and Respondent's code of ethics. (CX-44).<sup>11</sup>

### **III. THE INVESTIGATION**

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<sup>9</sup> Among the conduct Adams engaged in was: (1) opening business check cards for customers that already had a card and did not use it; (2) opening bill pay for customers who never used the services; (3) opening credit cards for customers that have never been activated, used and closed soon after opening; (4) accounts opened for customers with no social security numbers; and (5) accounts opened for direct deposits with no activity in the account. In addition, Adams had a high number of referring employees with excessive services sold including bill pay, overdraft protection.

<sup>10</sup> A copy of Respondent's Code of Ethics and Business Conduct and Policies and the Program Employee Handbook appears as CX-49 and CX-50 respectively.

<sup>11</sup> Respondent's initial investigation had already led to the termination of Adams.

On April 18, 2007, Michael Droke and Kevin Krebs met with Complainant at the Dorsey and Whitney offices. Before meeting with Droke and Krebs Complainant called Hartnack and told him he was meeting with investigators Droke and Krebs, Harnack told Complainant to tell them everything he knew so as to get the mess cleaned up. (Tr. 144-149). During the meeting, which lasted between 5-7 hours without breaks, Droke did most of the questioning in an atmosphere which Complainant considered hostile. (Tr. 152). Droke told Complainant he was hired by Respondent to investigate Complainant's allegations. Complainant believed his allegations affected shareholders in that shareholders would rely on Respondent's reported information concerning the number of loans, checking accounts, and deposits as being accurate. If those numbers were not real or false as Complainant believed then this information is fraudulent. (Tr. 153, 154).

Droke and Krebs told Complainant they were hired to investigate his allegations and proceeded to question Complainant about: (1) his background before coming to the bank; (2) the problems he encountered in 2004 with Jackie Palumbo, Derek Parker, and Heman; (3) the termination of Palumbo who said she was merely following what Parker and Heman had told her to do when slamming products; (4) Complainant's September 2004 letter to Jeff Shular that was never responded to; (5) the current problems of product slamming; (6) loans on properties in excess of their value; (7) use of white out on tax documents by Robb Hawkins to support business loans; (8) two overdraft fees for one transactions<sup>12</sup>; (9) and the improper use of the Bravo Account by Heman.<sup>13</sup> Complainant told Krebs and Droke that all his information was at his desk at the bank on a CD and further, that a confidential source that could provide more information would come forward if Respondent would indemnify said individual. (Tr. 151-161; CX-53, 54). Complainant left the meeting disheartened. (Tr. 162). The work of Krebs and Pricewaterhouse Cooper was determined by Droke. (CX-59; CX-62). Complainant was never allowed to return to his desk although he was allegedly put on administrative leave to assist in the investigation.

On April 19, 2007, Lawler discussed with Droke the imaging of Parker, Heman, Thompson, Eaton, Adams, Hawkins, Bridges, Moritz, and Alison's computer and the issue of SOX as it pertains to the manipulation of incentive plans for personal gain. (CX-54). Lawler apparently believed SOX did not apply. On the following day, Droke sought advice from Joe Genereaux of Dorsey and Whitney on SOX as it pertains to the investigation. (CX-55). On April 23, 2007, Droke commenced an investigation of Complainant's personal life when Vicki Osborn sent Droke a copy of the pleadings from Complainant's divorce file. (CX-55).<sup>14</sup>

On April 24, 2004, Complainant called Krebs and told him he had not heard from anyone and did not know how to react when people at the bank asked if he was being investigated or had been terminated since he was "the only one not at their desk." Krebs told Complainant that the investigation was progressing and he was not in a position to provide him with information. In the meantime he should "sit tight." Complainant told Krebs to tell Eaton to get overdraft fees erased since he had closed 3 and not 4 accounts. At this point Complainant had been on leave for about two weeks. (Tr. 163, 164; CX-60).

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<sup>12</sup> The issue of double charging or dipping for overdrafts was brought up before at the leadership council meeting. At this meeting, Heman replied that Respondent was working of the problem which was a "glitch" in Respondent's system. However this problem had existed on almost a year and has not been resolved by Respondent. (Tr. 159).

<sup>13</sup> Heman used the account to reimburse Complainant for money he had to spend for painting at Branch that had occurred before Complainant was employed as branch manager.

<sup>14</sup> On May 17, 2007, Droke confirmed that investigation involved a Sarbanes-Oxley issue. (CX-87).

On April 25, 2007, Krebs called Complainant, told him that Respondent would not indemnify any confidential source but wanted the source and him to provide additional information and asked what Complainant wanted, i.e. to come back to work or a severance package. Complainant stated he had already provided the bank with information about names and accounts and that at first he was hoping that Respondent would clean up the unethical conduct but now all he wanted was to leave and indicated he would entertain a severance package because he is not used to sitting at home wants to “either move on or get back to work.” (CX-62, pwc 02225, 02226; CX-64). On April 26, 2007, Droke sent an email to Kathy Westlund, Lawler, Krebs, and Terri Gerling outlining the scope of investigation. (CX-66). On April 30, 2007, Droke sent to Krebs various reports on suspect DDA accounts provided to Lawler on April 27, 2007 by Gerling. (CX-67).<sup>15</sup> On the same day Droke emailed Lawler a script to use in a call with Complainant, indicating Respondent was willing to work out a severance package in exchange for his cooperation but the key questioned remained: “What if he says no?” (CX-68).

Before his termination Complainant went to the Spring Branch on one occasion following a customer’s call to his cell phone wherein Complainant learned that his personal items had been removed from his desk and placed in a box in another room. Upon his arrival, Complainant was treated like a bank robber. Thereafter, Complainant had his truck broken into and documents taken from his brief case. In addition Complainant’s wife had her car broken into and had \$8,000.00 in items taken from her car. Also, Complainant subsequently learned that Droke had hired a private investigator to look into the details of court records about Complainant’s prior divorce. (Tr. 165-169).

On May 22, 2007, Droke instructed Lawler to tell Complainant not to talk with branch employees or customers. (CX-92). On the same day Lawler told Droke that Respondent will offer 2 months of pay (\$9,000) 2 months of out placement plus a lump sum of \$5,000 to \$20,000 if Complainant agrees to cooperate and maintains confidentiality with customers and employees and has no further contact with branch employees. (CX-93). Also on May 22, 2007, Lawler sent an email to Droke indicating 17,183 suspect DDA accounts for the first quarter of 2007 as opposed to 18,717 suspect accounts for the last quarter of 2006. (CX-97).

On May 23, 2007, Krebs called Complainant and asked what he wanted. Complainant responded he wanted accountability and then half-jokingly said he wanted a trip to Disney World for his family. Krebs said he was still looking into allegations. A short time later in June 2007 Carey called Complainant and asked if he would be willing to take 2 months of severance pay plus \$5,000.00 and agree not to talk to customers or clients. Complainant rejected the offer expecting something in the range of \$50,000.00 to \$200,000. (CX-98, Tr. 170-172, 207-210).

On May 25, 2007, Lawler emailed Droke the internal resource on the credit card issue wherein John Cable was assigned as the key contact person to spot check slammed credit cards. On the same day, Krebs forwarded data to Conrad Hanson of PWC on DDA slamming by bankers in region 41 with more than 20 suspect accounts for 2006. (CX-100, CX-106, CX-109).

On June 4, 2007, Droke received a bill from a private investigator he hired to provide a report on liens, judgments, and other unspecified database inquiries on Complainant. (CX-100). On the same day, Droke and Krebs had a telephone conference during which it was mentioned that Complainant was clearly

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<sup>15</sup> Those DDA accounts listed as suspect were those on one chart with less than \$1.01, less than 3 credits to account and with previous cycle ledger of less than \$100.01. On the second chart bankers with more than 4 suspect accounts with greater than 30% suspect percent of sales and accounts with less than \$0.00 current balance. Those bankers listed in Region 41 came from branches other Spring Glen were 6 and showed suspect sales in 2006 between 30% and 52%. Kimberly Thompson district had 52.88% of credit cards never used. (CX-72, pwc 2266).

frustrated with Respondent's offer, felt he was being shut out, and proposed a counter-offer of a 2 year severance package and \$50,000 to sign a nondisclosure agreement. (CX-111).

On June 5, 2007, Carey sent Lawler an email telling her they need to take action on Complainant including proceeding with Respondent's separation agreement, terminating him on his own actions (7 checking accounts), or putting him back to work and monitoring his actions through corporate security or doing another background check. (CX-114, pp. USB-ALJ-2132).

On June 7 and 8, 2007, Westlund and Krebs provided additional data to Droke concerning credit card slamming from January 2003 through 2006 showing between 26% and 39% of issued credit cards not used in Chris Heman's region, with Derek Parker receiving the most incentive pay, \$76,191.00, of branch managers during that time period (CX- 118, CX- 119). Additionally, Kimberly Thompson had high percentages of unused cards with some branches having over 50% of non-used cards (CX-121). On June 8, 2007, Lawler emailed Droke telling Complainant they were going to wrap up the investigation in the next week and reminding him not to contact employees or customers, (CX-122, CX-124). On June 12, 2007, Hanson emailed Droke and Krebs spreadsheets for credit cards showing Kimberly Thompson with 4 out of the top 10 branches with never used credit cards. (CX-128, pwc2641). Thereafter, on June 14, 20, 29; July 5, 6, 10, 23; and August 1, 2007, additional information on credit card slamming was provided to Droke and Krebs. (CX-134, 135, 136, 168, 169, 170, 171, 173, 178, 179, 187). The records of June 29, 2009 showed a number of potential offenders which John Gable, branch credit card channel manager, was supposed to follow up on by calling customers. Subsequently, Gable was directed to limit his calls to those customers (109) to whom cards were issued in April and May 2007 (CX-179). Respondent did not follow up with Gable on those who did not answer when called or indicated no authorization for issuance of card.

On June 21, 2007, Hanson sent an email to Droke and Krebs wherein Hanson stated that Westlund sent him DDA accounts for persons in District 141 from August 2006 forward with multiple accounts. Hanson further limited accounts that: (1) closed within 4 months of opening with minimal opening balances; (2) opened with less than \$10 or less than \$100 balance and minimal activity in 2007; and (3) closed with less than \$10 or less than \$100 opening balance. Among those listed were Complainant, who opened 4 accounts on January 12, 2007, and 15 other employees including customer service managers (Connie Byers and Raluca Tibelea); service coordinator (Brittany Wene); personal bankers (Tim Adams, Gwen Chu, Joshua Latta, Troy Maravilla). (RX-66). On June 22, 2007, Lawler sent an email to Carey informing him of the information only as it concerned Complainant. (RX-6).

On June 25, 27, and July 10, 2007, Hanson provided Droke and Krebs with additional information on the DDA account issue. (CX-158, 164, 165, 173). The reports for districts other than 141 showed that a number of potential issues raised by managers in those districts were never investigated. (CX-165).

On June 21, 2007, Westlund, without any explanation, sent Hanson information on DDA accounts open for employees in region 141. Among those noted as having potential problems were 50 employees (the first being Complainant who opened 4 checking accounts on January 12, 2007 with Tim Adams listed as the sale employee). The analysis for pulling these accounts included: number of accounts by person; sales person opening account (data available from August 2006 forward); accounts closed within 4 months of opening with minimal opening balances; accounts opened with less than \$10 or less than \$100 balance and minimal activity in 2007; and closed accounts with less than \$10 or \$100 opening balance. (CX- 153). On June 25, 2007, Hanson forwarded this information to Droke and Krebs. (CX-159).

On June 27, 2007, Hanson sent an email to Krebs dealing with the payoff of first mortgages wherein the checks issued to the first mortgagor were not used to pay off the first mortgage which

supported Complainant's allegation and supported an extension of the investigation which was never done. (CX- 163).

On July 31, 2007, Hanson emailed to Droke a summary of the investigation which showed: (1) 20 or more in Region 41 with 20 or more suspect accounts in a quarter regardless of the respective percent of total accounts opened; (2) 6 people in Region 41 with suspect accounts in 2006 of 30% or greater than their total accounts and 15 other people with more than 20 suspect accounts in 2006 that did not exceed a 30% suspect ratio; (3) individuals within the top 10 branches of credit cards never used from January 2005 to May 2007 of which Gable was to call 109 recent card accounts to determine if any cards were slammed; (4) no evidence to support allegation of insiders group close to Heman that received unfair or inconsistent incentive payments with Kim Thompson receiving secondary bonus of \$49,997.00 in addition to incentive program payout of \$11,197.00 considered high but out of line with peers; (5) no evidence to support white out of tax returns by Hawkins or participation in broker fees; (6) no evidence to support allegation of bank, rather than paying off refinanced mortgage directly from proceeds, issued proceeds to customer jeopardizing bank lien position; (7) statements that Hanson was not allowed to perform any work on the issue of double dipping on NSF charges or use of pass through revenues allowing district managers and branches to get points they do not deserve, or issue of unethical behavior by bank officials resulting in various customers facing financial hardship; and (8) Complainant had 9 accounts opened and recently closed 5 of them. (CX-184).

On August 1, 2007, Hanson sent to Droke the results of the credit card slamming of 109 customers by customer service group. Of these customers 58, or 53%, could not be contacted and 17 had invalid phone numbers. Of the 34 persons contact 11, or 1/3, of them had potential issues, i.e. indicated no request for credit card. (CX- 187). On the same date Lawler sent to Droke information on 4 accounts opened by Complainant in January on last day of campaign with no activity and closed. For those individuals opening accounts before 2007 Lawler told Droke to give "Amnesty Program." On accounts opened in 2007, which were determined not to be legitimate, Lawler told Droke to have them closed or face termination in next audit. (CX-188).

On August 15, 2007, Lawler called Complainant and told him the investigation had concluded and they should talk about their findings. Lawler and Carey met with Complainant at Droke's office. Droke remained out of sight in a near office. Lawler and Carey began the session by telling Complainant they could not prove any of his allegations and then shifted the focus of the meeting to Complainant's 18 accounts which they eventually narrowed to 4 DDA accounts Claimant had opened on the last day of the 2006 campaign, January 12, 2007, for 4 of his minor children (Aimee Johnson, Aaron Johnson, Terrin Preston, and Abby Preston). (CX-240, CX-242, CX-239, CX-241). Complainant asked to see the signature cards which neither Lawler nor Carey had. Complainant told them he had no idea what they were talking about at which point both Lawler and Carey left the room and went next door to confer with Droke and returned after several minutes, later telling Complainant he was terminated for scamming the system by opening the accounts for his minor children allegedly to win points only for the bank's fall surfing campaign rather than to create accounts for legitimate customer needs. In other words Complainant created bogus sales in violation of Respondent's code of ethics. (Tr. 174, 175, 359-362).

Lawler and Carey also stated that Complainant was terminated for failing to manage Adams better and pressuring employees to open accounts they did not need. However, no employees confirmed Lawler or Carey's assertions about being pressured to open such accounts. In fact, if their investigation showed anything, it was Complainant disapproved of improper teller referrals by Adams. Carey also admitted that much of Adams' misconduct regarding product slamming had occurred during Complainant's attendance at Pinnacle, after which, he promptly reported customer complaints about product slamming. (Tr. 833, 834).

Before his termination, Complainant had never been disciplined before. (Tr. 176-177). Further, there was no evidence that Respondent had terminated any employee, including branch managers, for opening family accounts allegedly to scam any incentive system. However, following Complainant's termination Respondent terminated William Yu, branch manager of Renton Main for opening up family accounts for no useful purpose other than at the request Heman so that Heman could meet his quota. (CX-207; Tr. 177-181). In fact, had Complainant wanted to scam the incentive system he could have easily opened his children accounts as business accounts and had them count as 12 points instead of 4. (Tr. 184). Complainant opened his minor children's accounts to eventually use them for child support payments and to show them what spending and account activity looked like. In fact, he had already established such accounts for his older children. (Tr. 185).

The 4 minor accounts opened on January 12, 2007 were for Terrin Preston, Aimee Johnson, Abby Preston and Aaron Johnson, ages 11, 3, 12, and 5. Complainant did not remember the dates he opened the accounts and asked to see the signature cards which would show the date in question but neither Lawler nor Carey had possession of them. The amount deposited in Terrin's account was \$5.00 which was withdrawn on February 14, 2007 for his mother's valentine gift. On March 5, 2007, \$10.00 was deposited and withdrawn on March 7, 2007 for his sister's birthday gift.

Aimee's account started with a \$5.00 deposit on January 12, 2007 followed by a Valentine's Day withdrawal on February 14, 2007. (CX-240). Abby's account started with a \$5.00 deposit on January 12, 2007, followed by a Valentine's Day withdrawal on February 14, 2007, followed by a deposit on March 5, 2007 of \$10.00 which was withdrawn on March 7, 2007 for her sister's birthday gift. (CX-241). Aaron's account had the same \$5.00 and \$10 deposit and withdrawal as Abby's account.

At hearing, Complainant adduced testimony from Michael F. Richards, bank consultant, in order to support Complainant's contention that the conduct reported constituted enumerated violations under SOX. Richards opined that DDA slamming violated the Fair Trade Commission Act and Truth in Savings Act; Credit Card slamming violated the Fair Trade Commission Act and Truth in Lending Act; and that the alteration of mortgage loan documents could be a potential fraud against shareholders. (Tr. 1245-46, 1253-54, 1261-73).

#### **IV. ACCUSATIONS AND FINDINGS**

While many of the aforementioned facts were uncontested the parties disagree from the conclusions to be drawn from such with Respondent maintaining contrary to Complainant that it did not tolerate unethical behavior on the part of its employees. Unfortunately, I cannot agree with that conclusion as demonstrated in the case of Heman, Respondent's Regional Manager for Region 41, who supervised 4 district managers responsible for seventy branches. Complainant informed Regional Manager Shular on September 14, 2004 of Heman's improper training of banker Palumbo and Parker. This resulted eventually in Palumbo's firing. However Parker was transferred to a better office as branch manager, Federal Way, and Heman was promoted to regional manager. Heman tolerated Parker's misconduct despite having given him several warning in past for misconduct. When Complainant took over the Spring Glen Branch it had 300 bogus DDA accounts which should not have existed if Respondent did not tolerate such conduct. Further, an investigation should have been conducted and discipline imposed. However, it was never done. Rather Parker and Heman were promoted. Neither Parker nor Shular testified about their involvement. Moreover, Hawkins, who cursed out Complainant for closing the bogus account, never testified about this incident or his statement about whitening out tax documents to qualify for loans. Hawkins' loan files frequently showed no verification of income by obtaining an IRS form 4506 which was never done. In like manner the investigation showed no evidence of Hawkins being disciplines even when he violated Respondent's rule of using outside brokers and agreeing to pay them referral fees for helping to secure a business loan.

In processing loans for a second mortgage, bank employees were required to verify income by obtaining tax returns or an IRS form 4506, run a credit report, and obtain information on the value of the property from the county assessor's office website. Once this was done the information was forwarded to the bank's computer system where the loan processing center was supposed to approve, deny, or counter the loan application. Respondent only focused on employee alteration of documents and not if actual mortgages exceeded any required loan to value ratios as Complainant had identified, for example, Mrs. Teresita Estrella. Even when focusing on altered records Respondent failed to detect and prevent loans being paid when documents were altered in Tacoma by Ian Zimmerman, Matthew Purcel, and Kevin DeSouza. Purcell told Complainant that he had been trained to do it by Shannon Pouge, a trainer sent in by Chris Heman. Although Hanson suggested further inquiry into this matter Respondent did not elect to do so. Heman was allowed to clear his name with no investigation of his involvement in this matter or unethical product slamming despite the concern of Kim Thompson who was repeatedly told of Heman's involvement in this practice.

In addition, Respondent made no attempt and in fact Droke or Lawler instructed Kreb and Hanson not to investigate double NSF charges, use of pass through revenues by Thompson to alter revenues among the branches. From the beginning of the investigation Respondent and Droke took measures to ensure their ability to shield information in the event of litigation by asserting attorney/client privilege although it was clear from the outset that Respondent used him as a principal investigator.

Indeed, Respondent produced no evidence of any attorney/client information provided by Droke to Respondent although Droke clearly billed for research of SOX issues and the Fair Credit Reporting Act on several occasions. The failure to produce any research on the SOX or Fair Credit Reporting Act raised inferences supporting Complainant's allegation that Droke was not acting as legal counsel but rather an investigator who targeted Complainant from the very beginning for retaliation. This is especially true when considered in the context of not letting Complainant return to his former job without justification and failing to investigate other branch managers and customer service managers who had a number of "suspicious accounts."

Respondent could have easily checked signatures on the "suspicious accounts" of supervisors however, they did not. The so called granting of "amnesty" before January 2007 confirms the fact that Complainant was singled out for discriminatory treatment along with the omission of at least 7 branch managers from the list of 18 branch managers from CX-153 including Derek Parker. While Respondent's listing of accounts as "suspicious" does not necessarily indicate fraud, Respondent's failure to inquire further into those accounts while singling out Complainant initially for discharge convinces me that Respondent wanted to rid itself of a manager who was not afraid of going to the top to expose improper conduct.

Concerning Complainant's discharge, Respondent argues Complainant cannot show it was the result of action in filing complaints with management where he alleged system wide fraud. I disagree. While neither Lawler nor Carey accepted Complainant's explanation I credit his reason for opening the accounts especially in view of the fact that neither Lawler nor Carey could show any advantage Complainant gained by making these transactions. Further, there were much better ways of "gaming" the system if Complainant had that objective in mind. It makes no sense moreover that he would chose Tim Adams to help him scam the system when in the past he had tried unsuccessfully to terminate him and was eventually successful in having him terminated. Adams was aware of Complainant's actions against him and certainly could but did not raise Complainant's children's accounts as a defense in his termination proceedings.

Also, I find from Helen Creekmore Eaton's testimony that Lawler and Carey, prior to meeting with Complainant, had already made up their minds to terminate Complainant. (Tr. 882, 883). In fact, only Complainant and Yu had been singled out for any discipline including termination. (Tr. 985-989). When Lawler and Carey met with Complainant and told him all issues he raised were not supported this was not true especially with regard to credit card and DDA slamming.

Indeed, all the fingers in the investigation regarding unethical DDA and credit card issues pointed to Heman, who tolerated repeated misconduct on Derek Parker's behalf and knew of the double-dipping on overdraft fees with the bank taking no action to correct such charges for over a year and calling such practice a "glitch" in the system. In fact, Lawler and Carey knew that no investigation had been undertaken to investigate the issue of pass-through revenues or Respondent's practice of allowing mortgages to exceed home evaluations or allowing and even training managers to frequently manipulate the loan system as Purcell and others had done.

Heman was repeatedly given a pass and allowed to clear his name before an investigation was initiated, when serious questions were raised about his training of managers to get loans approved without going through the normal security procedures in Respondent's banking system. (Tr. 975-982). Many issues were still left to be investigated further especially with regard to credit card slamming which showed many calls by Gable showing non-existent numbers.

## V. DISCUSSION

The law governing this case is the Sarbanes-Oxley Act enacted by Congress on July 30, 2002, as part of a comprehensive effort to address corporate fraud. In order to encourage employees to report fraudulent behavior, Congress incorporated into Section 806 certain whistle blower provisions at § 1514(A) which read in relevant part as follows:

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. -- No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee --

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud] 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--....

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)[.]

18 U.S.C. § 1514(A).

The enumerated violations cited in § 1514A(a)(1) are as follows:

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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing[.]

18 U.S.C.A. § 1341 (West).

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, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice[.]

18 U.S.C.A. § 1343 (West).

Whoever knowingly executes, or attempts to execute, a scheme or artifice--  
(1) to defraud a financial institution; or  
(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises[.]

18 U.S.C.A. § 1344 (West)

Whoever knowingly executes, or attempts to execute, a scheme or artifice--  
(1) to defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or  
(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))[.]

18 U.S.C.A. § 1348 (West)

The legal burdens of proof are set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C.A. § 42121. To prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that: (1) he or she

engaged in activity or conduct that the SOX protects; (2) the respondent took unfavorable personnel against him or her; and (3) the protected activity was a contributing factor in the adverse personnel action. *Zinn v. American Commercial Lines, Inc.*, ARB No.10-029 (March 28, 2012); *Vannoy v. Celanese Corporation*, ARB. No. 09-118 (September 28, 2011); and *Sylvester v. Paraxel International, LLC*, ARB No. 07-123 (May 25, 2011).

To sustain a complaint of having engaged in protected activity where a complainant's asserted protected conduct involves providing information to one's employer, a complainant need only show that he/she reasonably believes that the conduct complained of constitutes a violation of the laws listed at Section 1514. This requires the complainant to show a subjective belief that the complained of conduct constitutes a violation of relevant law (an actual belief the conduct complained of constituted a violation of pertinent law plus an objective belief of such a violation based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee. An employee's reasonable belief is protected if the belief is mistaken and an actual violation never occurred. *Allen v. Admin. Rev. Board*, 514 F.3d 468 (5th Cir. 2008); *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008). The legislative history of SOX makes it clear that its protections include all good faith and reasonable reporting and that there should be no presumption that reporting is otherwise. *Van Asdale v. Intl Game Tech.*, 577 F.3d 989 (9th Cir. 2009).

In this case, Respondent alleges that *Van Asdale* governs and that Complainant failed to show to "definitively and specifically" a violation of a specific federal criminal fraud statute, a rule or regulation of SEC or a provision of federal law related to shareholder fraud. Respondent asserts that the conduct he alleged did not involve the use of the mails or wires, had no specific relation to bank fraud (fraud on and not by a bank), did not involve the purchase or sale of a security and had no relation to an SEC rule or regulation because it did not involve the dissemination of false information in the market on which a reasonable investor would rely. Further shareholder fraud was not involved because it did not involve Respondent intentionally conceal information from its shareholders whereby they would were misled and would have acted differently had they known the true facts.

In *Van Asdale*, the Ninth Circuit adopted the ARB's statutory interpretation of SOX in *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006), that "to constitute protected activity under Sarbanes-Oxley, an employee's communications must 'definitively and specifically' relate to [one] of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1)." *Van Asdale*, 577 F.3d at 996-97 (internal quotes omitted). Agreeing with its sister circuits, though not stating reasons of its own, the Ninth Circuit "similarly defer[ed] to the ARB's reasonable interpretation of the statute." *Id.* at 997 *see Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009) (agreeing with *Welch, supra*, that "the DOL regulations, ... are entitled to *Chevron* deference" and that "[t]he employee must show that his communications to the employer specifically related to one of the laws listed in § 1514A); *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008) ("[W]e afford deference to the ARB's interpretation of § 1514A of the Sarbanes-Oxley Act."); *Allen v. Admin. Review Bd.*, 514 F.3d 468 (5th Cir. 2008) (holding that the court "agree[s] with the ARB's legal conclusion that an employee's complaint must 'definitively and specifically relate' to" one of the rules, regulations, or laws listed in section 806). Indeed, only the First and Fourth Circuits have specifically recognized the ARB's statutory interpretation of SOX pursuant to the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, the other Circuits that have cited *Platone*, including the Ninth Circuit, have agreed with the ARB's interpretation of § 1514A.

In *Chevron*, the Supreme Court set forth a two-step framework for reviewing how an administrative agency interprets a statute. First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, the courts and administrative agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. However, if

Congress has not spoken directly on the issue and has delegated enforcement authority to an administrative agency, then “Congress has explicitly left a gap for the agency to fill,” and the courts should not impose their own statutory interpretation. *Id.* at 843-44. Courts must instead defer to the agency’s interpretation if allowed under the statute. *Id.* at 843. Such deference only applies if Congress has delegated the authority to administer the statute to the administrative agency. The enforcement authority over Section 806 of Sarbanes-Oxley has been explicitly delegated by Congress through formal adjudication to the Secretary of Labor. *See* 18 U.S.C. § 1514A(b)(2)(A) (2006). In turn, the Secretary has delegated this authority and assigned responsibility over SOX cases to the ARB. *See* 67 Fed. Reg. 64272-73.

Whether or not an agency’s revised or modified interpretation of a statute should be afforded Chevron deference was addressed by the Court in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). The Court held that a change in statutory interpretation should be given deference as long as the agency “provide[s] [a] reasoned explanation for its actions” that includes an acknowledgement of the changing position, shows good reasons for the change, and that the agency believes it to be better. 556 U.S. at 515.

The ARB, sitting *en banc*, held in *Sylvester v. Parexel International, LLC*, 2011 WL 2165854, ARB No. 07-123 (en banc), ALJ Nos. 2007-SOX-39, 2007-SOX-42 (ARB May 25, 2011), that a whistleblower does not need to report conduct that “definitively and specifically” relates to a violation of one of the rules, regulations or laws listed in Section 806 to engage in protected activity. The ARB conducted a thorough analysis of the legislative history of SOX, statutory construction, and statutory interpretation. *See Id.* at \*11. Finding that the purpose of Section 806 is to protect and encourage greater disclosure, requiring a complainant to quantify the effect of the wrongdoing by alleging, proving, or approximating the violation would not comport with such an interpretation. *See Id.* at \*18. Accordingly, a complainant engages in protected activity when he reports conduct that he reasonably believes violates Section 806. Reasonable belief requires a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and also a belief that is objectively reasonable such that he actually believed respondent was in violation and that belief was reasonable for an individual in complainant’s similar circumstances, knowledge, and experience. *See Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 28 (ARB July 14, 2000). The ARB further examined complainant’s reasonable belief by stating:

To satisfy the subjective component of the “reasonable belief” test, the employee must actually have believed that the conduct he complained of constituted a violation of relevant law. *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009)...[T]he objective component “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.*

*Parexel*, 2011 WL 2165854 at \*11-12.

In accordance with *Chevron* and *Van Asdale*, I find that ARB’s decision in *Parexel* is controlling and thus apply the Board’s “reasonable belief” test in this case.

Respondent argues that Complainant fail to show under the less-demanding standard of *Parexel* because he did not have either a subjective or objective belief that Respondent violated relevant law and regulations because subjectively Complainant knew that Respondent had terminated individuals that had engaged in fraudulent conduct and that the conduct complained of dealt with mere poor customer service and unfairness of employees getting incentive pay they did not earn and objectively from the standpoint of a reasonable banker with similar training or experience such a banker would not rely upon inherently

unreasonable sources which were disgruntled former employees. Further federal criminal wire or mail fraud involves 4 elements which Complainant never showed, i.e. a scheme to defraud, use of the mails or wires to execute the scheme, material falsehood, and specific intent.

Respondent contends that Complainant fail to show that suspension and discharge were a result of any protected activity because they were separated by an intervening event, i.e., employee's misconduct. However, even if Complainant were to establish a prima facie case of retaliation Respondent asserts it showed by clear and convincing evidence that it would have terminated him in any event. Indeed, Mr. Yu terminated for the same misconduct and did not engage in any protected conduct. Further, if Respondent is held liable for a discriminatory discharge, Respondent argues that it does not owe Complainant, aside from the traditional remedies of back pay, reinstatement litigation costs, expert witness fees and reasonable attorney fees, more than nominal damages for emotional and other non-pecuniary injuries in the absence of medical or other expert testimony.

The ARB reasoned that "requiring a complainant to prove or approximate the specific elements" of a violation contradicts SOX's requirement that the complainant have a reasonable belief of an enumerated violation. *Parexel*, 2011 WL 2165854 at \*18. A complainant can have a reasonable objective belief of a violation under Section 806 even where he fails to allege, prove, or approximate specific elements of fraud. *Id.*

Complainant defined mail fraud, or wire fraud as the use of the mail or wire services to obtain money or property by means of fraudulent pretenses, representation, or promises and bank fraud as the defrauding of a financial institution of monies, funds, credits, assets, securities or other property by means of false or fraudulent pretenses, representations or promises. Thereafter he believed both subjectively and objectively that Respondent's supervisor defrauded U.S. Bank by utilizing both the mails and wire services to engage in credit card and DDA account slamming, obtain mortgage loans that were issued not within the required loan to value ratios and unlawfully doubly NSF charges. Said conduct also in Complainant's mind constituted fraud on shareholders and he communicated such to top officials including Davis and Carey. Such conduct was based upon Parker and Heman's training as confirmed by conversations with Palumbo and Purcell, actions and words of Thompson who told him to stop turning over stones, and Adams slamming of Respondent products and conversations with other employees of Respondent including Hawkins about falsifying documents in obtaining loans. In opening credit cards and DDA accounts and processing mortgages the computer, Internet and mail services were used.

The only supervisor to be disciplined for complaining about these practices was Complainant, branch manager Yu was discharged for complaining of discrimination in Respondent's promotion practices. Almost as soon as Complainant voiced his concerns to Davis he was placed on leave and never allowed to return to work. When questioned about why he was not allowed to return Lawler and Carey gave evasive answers. When questioned about the reason for Complainant's termination Lawler and Carey gave answers that proved false, i.e. the opening of the child accounts with no explanation when in fact the decision had already been made to fire Complainant irrespective of what he said; poor management when Complainant had acted promptly to discharge Adams when he had learned of his misconduct after returning from a Pinnacle meeting; and the alleged but totally unproven forcing of employees to open accounts without any need to do so. Indeed, there were other employees who opened suspect accounts that were never disciplined but rather given amnesty for such conduct.

While I have found that the ARB's decision in *Parexel* is controlling precedent in this case, I am compelled to note that the record evidence supports a finding that, following *Van Asdale* and *Platone*, Complainant's communications to Respondent "definitively and specifically" related to enumerated violations under § 1514A. Complainant "need not cite a code section he believes was violated." *Van Asdale*, 577 F.3d at 997 quoting *Welch*, *supra*, 536 F.3d at 276. Significant to the instant case is the

context and content of the communications the complainant in *Platone* had with the respondent. Those communications regarded internal emails centered around billing issues to which the ARB found that the respondent failed to “provide specific information regarding fraud.” *Platone, supra*, at 19. In contrast, Complainant in the instant case specifically mentions or specifically relates to instances of potential fraud. (CX-3, CX-5, CX-8, CX-10, CX-16, CX-19). Conduct which he believed to be violations of the enumerated statutes listed *supra*.

## VI. REMEDIES

Pursuant to 18 U.S.C. § 1514A(c)(1) (2002), a prevailing employee is, “entitled to all relief necessary to make the employee whole.” 18 U.S.C. § 1514A(c)(2) requires that relief for any action shall include:

- (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
- (B) the amount of back pay, with interest; and
- (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees and reasonable attorney fees.

Complainant seeks reinstatement, special damages, and general damages. Complainant seeks lost wages in the amount of \$40,126.50 (9 mos. x \$4,458.50/mo.); lost quarterly incentive pay in the amount of \$16,000.00 (4 quarters x \$4,000.00); lost health care benefits (insurance) in the amount of \$13,200.00 (11 mos. x \$1,200.00/mo.); and prejudgment interest in the amount of \$36,049.78 (12% x (52 mos. x \$69,326.50)). Complainant also seeks compensation for litigation costs, expert witness fees, and reasonable attorney fees. Finally, Complainant claims entitlement to \$1,500,000.00 in general damages for harm to reputation, embarrassment, stress and anxiety.

Respondent argues that Complainant’s requested award is unsupported by the facts and law. Respondent contends that if Complainant prevails, he is entitled only to receive his lost wages and prejudgment interest as specified in 28 U.S.C. § 1961. Respondent asserts that Complainant’s claim to incentive pay is speculative and his entitlement to damages for health care benefits are not supported by evidence demonstrating Complainant suffered a loss. Further, Respondent contends that Complainant’s request for prejudgment interest in the amount of 12% is overstated and not supported by evidence or precedent.

Reinstatement is the preferred remedy for unlawful employment discrimination, and front pay is the disfavored alternative, available only when reinstatement is impracticable or impossible. *Ford Motor Co. v. EEOC*, 458 U.S. 219, (1982); *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001); *Martin v. The Department of the Army*, 93-SDW-1 (Sec’y July 13, 1995); *Kucia v. Southeast Ark. Cmty. Action Corp.*, 284 F.3d 944, 948-49 (8th Cir.2002) (Title VII case).

Respondent argues that Complainant has waived reinstatement through numerous statements made in both status conferences and pre-hearing statements. Respondent argues that it reasonably relied on Complainant’s representations and that allowing Complainant to move for reinstatement following the hearing would unfairly prejudice Respondent. Due to Respondent’s reliance on Complainant’s supposed waiver, Respondent did not present any evidence at hearing as to the appropriateness of reinstatement. Additionally, Respondent argues that reinstatement would provide a remedy for a time period, not at issue in this case but at issue in two cases pending in federal court between Complainant and Respondent.

Ultimately, I do not find Respondent’s arguments to preclude Complainant from seeking reinstatement compelling. It is well settled that reinstatement in whistleblower cases under SOX is the

preferred remedy for unlawful retaliation. While Respondent may prefer not to reinstate Complainant, it has not shown that reinstatement is impractical or impossible.

Prejudgment interest on back wages recovered in litigation before the Department of Labor is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified by the Internal Revenue Code, 26 U.S.C. § 6621. The employer is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of the complaint. *See Palmer v. Western Truck Manpower, Inc.*, 85-STA-16 (Sec'y Jan. 26, 1990) (where employer has the use of money during the period of litigation, employer is not unfairly prejudiced).

Complainant seeks prejudgment interest on his award for damages in the amount of 12% yet offers no justification as to why such a figure is appropriate. Nonetheless, Complainant is entitled to prejudgment interest from the date the payments were due as wages until the actual date of payment as specified above.

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action. Compensatory damages are designed to compensate not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 93-SDW-1, slip op. at 17 (ARB July 30, 1999), *citing Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305-307 (1986); *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996) (compensatory damages based solely upon the testimony of the complainant concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts); *Crow v. Noble Roman's, Inc.*, No. 95-CAA-08, slip op. at 4 (Sec'y Feb. 26, 1996) (complainant's testimony sufficient to establish entitlement to compensatory damages); *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998) (injury to complainant's credit rating, the loss of his job, loss of medical coverage, and the embarrassment of having his car and Truck repossessed deemed sufficient bases for awarding the compensatory damages).

The testimony of medical or psychiatric experts is not necessary, but it can strengthen a complainant's case for entitlement to compensatory damages. *Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993); *Busche v. Burkee*, 649 F.2d 509, 519 n.12 (7th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *See also United States v. Balistrieri*, 981 F.2d 916, 931-32 (7th Cir.1992) (a party's own statements can support a mental suffering award if they are more than simply conclusory), *cert. denied*, 510 U.S. 812, 114 S.Ct. 58, 126 L.Ed.2d 28 (1993).

Complainant supports an award of \$1,500,000.00 with his own testimony and that of his wife. He did not present any medical or psychiatric evidence or testimony to further substantiate his claim. Accordingly, while Complainant's testimony is sufficient to support an award of general damages based upon the distress, anxiety, humiliation, and damage to reputation resulting from Respondent's retaliation, the amount sought is more than is reasonable to compensate. Based upon the testimony presented by Complainant, I find that an award of general damages in the amount of \$10,000.00 is appropriate.

## VII. ORDER

**IT IS HEREBY ORDERED** that the Respondent, U.S. Bancorp/U.S. Bank National Association:

1. Immediately reinstate Complainant, Derrick Johnson, with the same seniority that he would have, but for the discrimination.
2. Pay to Complainant back pay in the amount of \$40,126.50, with interest at a rate specified by the Internal Revenue Code, 26 U.S.C. § 6621.
3. Pay to Complainant compensatory damages in the amount of ten thousand dollars (\$10,000) in compensation for distress suffered as a result of the anxiety, humiliation and retaliation endured.
4. Pay to Claimant, all costs and expenses, including reasonable attorney fees incurred by him in connection with this proceeding. Counsel for the Complainant will have thirty (30) days from the date of this Order in which to submit an application for attorney fees and expenses reasonably incurred in connection with this proceeding. A service sheet showing that proper service has been made upon the Respondents and the Complainant must accompany the application. Respondent will have twenty (20) days following receipt of the application to file and objections thereto.

**SO ORDERED** this 29<sup>th</sup> day of October, 2012, at Covington, Louisiana.

**CLEMENT J. KENNINGTON  
ADMINISTRATIVE LAW JUDGE**

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. See 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. 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.

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).

**The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board.** 29 C.F.R. § 1980.109(c). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board, unless the Board grants a motion to stay the order. 29 C.F.R. § 1980.110(b).