CASE NO.: 2013-SOX-00017

IN THE MATTER OF

KELLY KILPATRICK,
Complainant

v.

CITIGROUP, INC., and
CITIMORTGAGE, INC.

Respondents

APPEARANCES:

BRANDON HORNSBY, ESQ.
GRAHAM SCOFIELD, ESQ.
HORNSBY LAW GROUP
For Complainant

EARL M. JONES, ESQ.
MICHELLE B. BROOKSHIRE, ESQ.
LITTLER MENDELSON
For Respondent

BEFORE:

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE
A. Background

This case arises under the Sarbanes-Oxley Act of 2002 (“SOX” or “the Act”), technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 U.S.C. §1514A et seq., and the employee protective provisions promulgated hereunder at 29 C.F.R. Part 1980. Under SOX, the Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees of publicly traded companies who are allegedly discharged or otherwise discriminated against, with regard to their terms and conditions of employment, for providing information about fraud against company shareholders to supervisors, federal agencies, or members of Congress.

On November 6, 2012 Complainant filed a complaint with the Secretary alleging that Respondent discharged her in retaliation for providing information to Respondent’s auditor and a Securities & Exchange Commission (SEC) investigator during a March 2012 audit. The Secretary investigated and on February 4, 2013 dismissed Complainant’s allegations of SOX violations by Respondents finding no evidence of protected activity by contacting the SEC, until after her discharge on July 5, 2012, which Respondent did for “unabated” performance problems.

Complainant timely appealed the dismissal to the Office of Administrative Law Judges claiming that Respondents had discriminated against her for engaging in different protected activities involving disclosures relating to fraudulent accounting practices, lack of compliance with U.S. generally accepted accounting principles (GAAP) and lack of effective internal controls at Respondent’s Irving, Texas office.

A hearing was held before the undersigned on June 13, 14, 2013 in Dallas, Texas during which Complainant testified, called witness and co-worker/mentor, Dick Irby, and introduced 8 exhibits. Respondent / Employer, Citi Mortgage, Inc. called Complainant’s supervisors, Dennis Steib and Jennifer Arnold and human resources generalist, Stephanie King and introduced 67 exhibits.

After reviewing the entire record including witness testimony and exhibits, I find no evidence of protected activity by Complainant, and no evidence to link what Complainant states or rather hyperbolizes to be protected activity prior to her discharge. Rather I find, as argued by Respondent, clear and convincing evidence that Complainant’s termination was caused solely by her poor performance and not for complaining about alleged data processing errors. Contrary to

1 Complainant’s admitted documents include CX-2 (documents summarizing Complainant’ post-termination employment search); CX-3 (correspondence between Complainant and a prospective employer ); CX-5(an e-mail showing that Complainant was not given Metadat access until April 19, 2012 although she returned to duty on December 28, 2011); CX-6 (performance goals that Complainant e-mailed to her supervisor on August 8, 2011); CX-8 to11 (Share Point notifications showing program errors on Risk Data Mart ).
Complainant’s assertions, I find no credible evidence that Data Mart Data (DMD) was used for financial reporting purposes or reported externally to credit agencies like Equifax2.

B. Complainant’s Employment with CMI

Citimortgage, Inc. (CMI), is a subsidiary of Citigroup Inc.,(CITI) a public company registered under Section 12 of the Securities and Exchange Act of 1934 (Act) required to file reports under Section 15 (d) of said Act. CMI is a foreign for-profit corporation doing business in the State of Texas where it engages in the banking and lending business including the origination, purchase and sale of residential mortgage loans on the secondary mortgage market. In the course of its business operations CMI sold tens of thousands of its loans to government and government related and/or backed entities including GNMA, FNMA, Freddie Mac as well as private investors.

CMI hired Complainant as a SAS programmer analyst or credit risk analyst on January 3, 2011. Complainant worked as a team member in its Risk Data Mart Department using the SAS program, an analytic software program that can perform large, complex calculations to build up and analyze its data base of business information which was aggregated from a variety of internal and external and sources. (Tr.196-199). At the end of each month a series of about 400 programs pulled this data from its sources and amassed the data in the Risk Data Mart. The external data that was fed into the Risk Data Mart did not feed back to the original source. A series of program codes or jobs ran in order to extract, transform, and load the data. (Tr. 175-182, 200-203).

If a job did not run to a successful completion, the data was not published or provided to the user. Each job was assigned to a primary owner/monitor whose job it is to ensure a successful completion by investigating and resolving any error that may occur. The Risk Data Mart was not designed or used to detect fraud, did not generate Citi’s public financial statements and was not included in Citi’s internal control systems. Rather the data was used for business intelligence, i.e, to determine what loans are/ were profitable. (Tr. 203-213).

From her hire date in January 20, 2011 to her termination on July 5, 2012 Complainant reported to supervisor Jennifer Arnold, Vice President of Risk Data Mart who reported to Dennis Seib, Director of Information Services for Risk Management Department. (Tr. 197, 214). Although Complainant would have the undersigned believe she had no significant problems in successfully performing her job assignments during her employment, the record contains credible and in many cases uncontested testimony of Arnold and Seib that Complainant did not timely or successfully complete her job assignments

For example one month after being employed Arnold assigned Complainant a basic task of writing a program using the SAS programming tool. Complainant was unable to complete this task and in the process deleted a co-worker’s work requiring it to be reproduced with Arnold having to write the program for her. (Tr. 215, 216; RX-53).

2. Contrary to Complainant’s assertion, I do not find Respondent to have refused to present Scott Sager in a timely fashion. Complainant could have but did not subpoena Scott Sager, senior vice president or question any witness to confirm her suspicions that data mart data was used for external financial reporting purposes..
Complainant did not focus on assigned tasks in a timely manner as can be seen in her submission of personal goals at the end of October, 2011 rather than March 2011 when requested. (RX 8,14, 38; Tr.222). Complainant had difficulty communicating or working with co-workers using unprofessional terms while without basis accusing them of stealing her keys and cellphone, intentionally knocking her into a pillar, laughing and talking about her, (Tr. 218-222, 270-274, RX-6).

Arnold, Seib, and Human Resources person, King in August 2011 recommended to Complainant that she voluntarily seek voluntary counseling from Respondent’s Employee Assistance Program (EAP) to deal with her performance problems and conduct which they considered to be disruptive and unprofessional (Tr. 265, 277). On November 4, 2011 Complainant’s supervisors made the referral to EAP mandatory when she refused to take accountability for her performance problems, denying her behavior was a problem. (Tr, 266). Complainant was placed on administrative leave on November 4, 2011, met with a psychiatrist on November 15, 2011, cleared for a return to duty that day, but not allowed to return to work until December 27, 2011 when a forensic audit of Complainant computer was completed. (Tr. 53-55, 204-06).

On January 5, 2012 Arnold placed Complainant on a Performance Improvement Plan (PIP) (RX-12). On January 25, 2012 Complainant filed her reply to the PIP. (RX-11). Arnold rated Complainant as “not effective” on her 2011 year end assessment which was in line with her PIP (EX-10).

In early February 2012 Complainant went on FMLA leave and returned in early April 2012. After returning Complainant showed no progress in doing those things assigned her and on June 14, 2012 was continued for another 90 days on her PIP. (Tr.246, 247). From this point on to her termination Complainant did no work and refused to respond to Arnold’s request for updates. (Tr. 248,249; RX-44).

B. Alleged Protected Activities

Complainant alleged before the Secretary two instances of protected activity involving allegedly the SEC monitoring her e-mails at work and her indirect communication with an unnamed Citi “internal risk guy” who had access to her computer screen. Complainant dropped these allegations before the undersigned and in pleadings before the undersigned alleged four instances of protected conduct on October 4, 2011, October 26, 2011, March 1, 2012 and June 5, 2012. In her brief, Complainant reduced the protected activity to October 26, 2011 and March 1, 2012.

On the first occasion of October 4, 2011, she informed Arnold that 69 loan receivers were bypassing fraud detection and unresolved errors were repeatedly occurring in the system.(RX-3)

---

3 In October, 2011, Complainant supervisors also became concerned that Complainant had distributed or was on the verge of distributing customer social security numbers to outside 3rd parties and directed a forensic audit of Complainant’s computer. (Tr. 193, 194).
The second occasion occurred on October 26, 2011 when she e-mailed Steib and Arnold telling them errors in the month end processing ledger were serious and impacted the integrity of CMI financial reporting system and violated CMI’s internal control guidelines. (Tr. 61).

Complainant admitted in her e-mails of October 4 and 26, 2011, that she did not reference GAAP, raise the topic of internal controls or indicate any concern that SOX had been violated. (Tr.120). In fact neither Arnold or Seib interpreted Complainant’s emails of October 4, 2011 or October 26, 2011 to indicate any possible SOX violations because the errors Complainant reported in the data mart data were responded to and corrected by internal controls within the data mart system.(Tr. 128, 129, 182, 183).

Complainant asserts that the third occasion of protected activity occurred in a March 1, 2012 meeting she had with CMI’s attorney while on FMLA leave. In this meeting Complainant made general allegations that there were errors in the month end processing which Respondent refused to correct and that she had allegedly found a fake code in the Risk Data Mart and suspected that certain loan recipients such as Dallas Cowboy’s former Coach, Jimmy Johnson were receiving preferential treatment. The basis of her suspicions was her EAP social worker. Respondent replied that the errors which Complainant reported were nothing more than a naturally occurring event akin to an Alaskan complaining about snow. (Tr. 130,183, RX-27,28,)

Finally Complainant alleges protected activity on a 4th occasion on June 5, 2012 when one of her former attorneys (Sam Boyd) allegedly met with the Department of Justice. However Complainant had no evidence to show Respondent was aware of this meeting and both Seib and Arnold denied knowledge of such. (Tr. 133,134,187, 188, 251,252).

Respondent replied that all allegations were bogus and amount to nothing more than a red herring because while it does have “internal controls” in Data Mart, this term in Data Mart refers to efficient business practices dealing with the accurate and complete collection of data within the data mart system and not SOX required internal control reviews. According to Seib the data mart data was an after the fact repository of those entries that have already been made, was not the producer of financial compliance reports,(Tr. 202). Risk Management’s role was to set parameters and policies for loan originations determining for example property values and income levels to qualify for mortgages by extracting data from a data warehouse that come from several external sources, were transformed and loaded by 400 programs into a staging area where it, if validated were then published. It was not used to detect fraud or generate public financial statements. (Tr.174-82).

Arnold explained to Complainant that 69 represented 69 duplicate accounts that were removed from a data base which Complainant should have been able to tell from merely reading the log in question.Tr 232-33).

On October 4, 2011 Complainant asserts she told Arnold that 69 loan receivers were bypassing the fraud detection system and that unresolved errors were repeatedly occurring in the system (RX-68, Complainant’s First Amended Responses to Respondent’s First Interrogatories).
C. Burden of Proof under SOX

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

(a) 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, 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) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

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

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a); see also Hendrix v. American Airlines, Inc., 2004-AIR-00010, 2004-SOX-00023 (A.L.J. Dec. 9, 2004) (unpublished). The information or assistance must be provided to, or the investigation must be conducted by, a federal regulatory or law enforcement agency, any member of Congress, any committee of Congress, or 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. §1514A(a)(1); See also, 29 C.F.R. §1980.102(a)(1). Any employer 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 under the Act’s protection.  Id.
The legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b), govern SOX whistleblower actions. 18 U.S.C. § 1514A(b)(2)(C). To prevail, an employee must prove by a preponderance of the evidence that (1) he or she engaged in protected activity; (2) the employer knew that he or she had engaged in the protected activity; (3) he or she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor to the unfavorable action. 49 U.S.C. § 42121(b)(2)(B)(iii); Hemphill v. Celanese Corp., 430 Fed. Appx. 341, 344 (5th Cir. 2011); Allen v. Admin Rev. Bd., 514 F.3d 468, 475-76 (5th Cir. 2008); see also 29 C.F.R. § 1980.104(b)(1)(i)-(iv); Getman v. Southwest Sec., Inc., ARB No. 04-059, ALJ No. 2003-SOX-8, (ARB July 29, 2005). A contributing factor need not be significant, motivating, substantial, or predominant; and can be any factor which alone, or in connection with other factors, tends to affect in any way the outcome of the decision. Collins v. Beazer Homes U.S.A., Inc., 334 F. Supp. 2d 1365 (N.D. Ga. 2004). Ordinarily, temporal proximity between the protected activity and unfavorable personnel action will satisfy the burden of making a prima facie showing of employer knowledge and that the protected activity was a contributing factor. Id.

If the employee establishes these four elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of that [protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv); Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-00008, (ARB January 31, 2006); Allen, 514 F.3d at 476.

D. Protected Activity

SOX prohibits a publicly-traded company from retaliating against an employee who reports information to a supervisor “regarding any conduct which the employee reasonably believes constitutes a violation” of one of the six enumerated categories. 18 U.S.C. § 1514A(a)(1); Marshall v. Northrup Gruman Synoptics, 2005-SOX-00008 (A.L.J. June 22, 2005). SOX does not apply to generic allegations of accounting violations, violations of GAAP, or general allegations of fraud. Marshall, 2005-SOX-00008 at 5 (stating that, “The fact that the concerns involved accounting and finances in some way does not automatically mean or imply that fraud or any other illegal conduct took place.”).

The employee’s reasonable belief of a violation must be scrutinized under both subjective and objective standards. Welch v. Cardinal Bankshares Corp., ARB Case No. 05-064, 2007 WL 1578493 (ARB May 31, 2007). see also Melendez v. Exxon Chemicals Americas, ARB No. 96-051, 93-ERA-00006 (July 14, 2000). The employee does not need to show that the employer’s conduct actually caused a violation of the law, but must show that he/she reasonably believed the employer violated one of the laws or regulations enumerated under SOX, any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders. Id.; see also Halloum v. Intel Corp., ARB No. 04-068, 2006 WL 3246900 (ARB Jan. 31, 2006). The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee. Allen, 514 F.3d at 477; see also Welch, 2007 WL 1578493 at *7. The subjective reasonableness requires that the employee actually believe the conduct being complained of constitutes a violation of pertinent law. Day v. Staples, 555 F.3d
Protected activity under SOX is thus essentially comprised of three elements: (1) report or action that involves a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders; (2) complainant’s belief concerning the activity must be subjectively and objectively reasonable; and (3) complainant must communicate his concern to either his employer, the federal government or a member of Congress who has the requisite reviewing ability. See Harvey v. Safeway, Inc., 2004-SOX-00021 at 29 (ALJ Feb. 11, 2005).

In this case, the undersigned finds that Complainant did not engage in a protected activity with respect to any of his actions within this instant matter. During his various actions in this matter, Complainant did not reasonably believe that the conduct he was reporting violated one of the six enumerated categories under 1514A. In order to satisfy this reasonable belief burden under SOX, evidence must show that Complainant had both a subjective and an objective reasonable belief of violations at the time his complaints were made. A subjective reasonable belief requires Complainant to actually believe that the conduct he/she was complaining of constituted a violation of pertinent law; i.e., one of the six enumerated categories under 1514A. An objective reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant. Here, the evidence shows that Complainant did not have either a subjective or objective reasonable belief that Respondent was violating one of the enumerated categories under 1514A at the time of his complaints.

With regards to the objective belief standard, the undersigned must look at the totality of the circumstances, taken in context with Complainant’s experience, to determine if a reasonable person would believe Respondent was violating one of the six enumerated categories under section 1514. Claimant had 30 years of computer programming experience with graduate level courses in CSECS, computer science education and cognitive systems with 12 hours in accounting courses with practical experience in fraud detection at Fannie Mae.(Tr.30-33,35). With that background and experience both Seib and Arnold testified that Complainant should have known that the errors she reported were not significant, were remedied at the end of each month and were not related to Respondent’s internal controls but rather in house usage to evaluate and establish criteria for mortgages. Complainant’s contention that she held a reasonable belief to the contrary is belied by the fact that she arrived at that conclusion only after she had a conversation with an EAP counselor.

Complainant did not even have a subjective good faith belief that her error reporting was related to Respondent’s misconduct or a possible SOX violation with which she had some personal experience at Fannie Mae as evidenced by her failure to merely refer to and not complain about such when reporting recurrent errors to Arnold and Seib. Complainant moreover had no evidence to support her allegations that (DMD) was reported to Equifax and was being used in internal compliance reports as she asserted in her March 1, 2012 meeting with company attorneys.(Tr. 60-62).
D. Contributing Factor to Unfavorable Personnel Action

Under the evidentiary framework of a SOX whistleblower cause of action, a complainant must establish that there are circumstances which suggest that the protected activity was a contributing factor to the unfavorable action. 49 U.S.C. § 42121(b)(2)(B)(iii); A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." Allen v. Stewart Enterprises, Inc., ARB No. 06-081, ALJ Nos. 2004-SOX-00060 to 62 (ARB July 27, 2006). The contributing factor standard was "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." Id. To prevail, the whistleblower must show this contributing factor by a preponderance of the evidence. Id.

Normally the burden of establishing a contributing factor “is satisfied...if the complainant shows that the adverse personnel action took place shortly after the [reported] activity, giving rise to an inference that it was a factor in the adverse action.” 29 C.F.R. §1980.104(b)(2); See also, Kendrick v. Penske Transportation Services, Inc., 220 F. 3d 1220, 1234 (10th Cir. 2000). However, temporal proximity alone does not establish retaliatory intent, but may establish the causal connection component of the prima facie case. Taylor v. Wells Fargo Bank, NA, ARB No. 05-062, ALJ No. 2004-SOX-00043 (ARB June 28, 2007). The ARB has held that "the probative value of temporal proximity decreases as the time gap lengthens, particularly when other precipitating events have occurred closer to the time of the unfavorable personnel action." Henrich v. Ecolab, Inc., ARB No. 05-030, ALJ No. 2004-SOX-00051 (ARB June 29, 2006), slip op. at 18.

A complainant does not have the burden to establish that a respondent's articulated reason for the adverse action was pretext. Klopfenstein v. PCC Flow Technologies Holdings, Inc., ARB No. 04-149, ALJ No. 2004-SOX-00011 (ARB May 31, 2006). Further, the contributing factor does not have to be the primary motivating factor to establish causation. Halloum v. Intel Corp., ARB No. 04-068, 2003-SOX-00007 (ARB Jan. 31, 2006)

As clarified above, a complainant must show by a preponderance of evidence that the plaintiff's protected activity was a contributing factor in the unfavorable action. If the employee does so, the burden shifts to the employer to show by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected behavior. 49 U.S.C. § 42121(b)(2)(B)(iv); Allen, 514 F.3d at 476.

In this case, the undersigned finds no evidence to suggest any protected activity let alone that such activity was a contributing factor in Complainant’s discharge. Rather the undersigned finds the overwhelming weight of credible evidence shows Complainant was terminated for poor work performance from the date of hire to her termination on July 5, 2012 Indeed I find no credible evidence to link her discharge with protected activity. Moreover even after her discharge Respondent produced further evidence that Complainant misrepresented facts on her employment application pertaining to her discharge at Fannie Mae and Brierley, and secretly recorded conversations with supervisors and employees, all in violation of Respondent’s
employment policies which would have led to her discharge notwithstanding her poor performance record. (Tr. 86-89; 130,131, 286-87, 292-93; RX-32,42.).

E. Conclusion

Based on the foregoing law and discussion, the undersigned finds no credible evidence of protected activity, no evidence of any protected activity contributing to any adverse action against Complainant. Rather the credible evidence shows Complainant being discharged for poor performance with after acquired evidence of further misconduct by Complainant in misrepresenting facts on her employment application related to her prior employment and secretly recording conversations with employees and supervisors in violation of company policies.

F. Order

For the reasons set forth above, I find no merit in Complainant complaint and accordingly dismiss it.
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).