



Issue Date: 29 April 2019

Case No.: 2016-SOX-00001

In the Matter of:

PATRICIA LEVIEGE (Deceased),
Complainant,

v.

VODAFONE US, INC.,
Respondent.

Monique Miles, Esq.,
Alexandria, VA

For the Complainant

Bronwyn H. Pepple, Esq.,
Devin C. Daines, Esq.
Denver, CO.

For the Respondent

Before: William S. Colwell
Associate Chief Administrative Law Judge

DECISION AND ORDER DIMISSING COMPLAINT

This is a case arising under § 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, as amended, 18 U.S.C. §1514A (hereinafter "SOX"), and the implementing regulations at 29 C.F.R. Part 1980. Complainant filed her SOX complaint on

January 23, 2015. DX 26.¹ It was dismissed by the Occupational Safety and Health Administration on September 21, 2015. RX 57. Complainant requested a *de novo* hearing before this Office, and the case was assigned to me for hearing and decision. Respondent's motion for summary decision was denied on February 1, 2017.

The case initially was scheduled for hearing for three days, from May 31 to June 2, 2017, in Washington, DC. However, it turned out that scheduling the hearing for only three days was highly optimistic, and the hearing was to reconvene on August 8th. Complainant was testifying on direct examination at the time the hearing was adjourned on June 2nd, and her direct had not been completed. Sadly, during the break between hearing dates, Complainant was diagnosed with stomach cancer, and due to her illness the August 8th hearing did not take place. She passed away on September 19th at the age of 48. Complainant's family elected to proceed with the case.² By motion dated November 1, 2017, Respondent moved to strike Complainant's testimony since it did not have the opportunity to cross-examine her. ALJX 9. I denied that motion on the record on December 18th. TR 724. The hearing reconvened on December 18, 2017 and was completed on December 22nd. Both parties made closing arguments and filed post-hearing briefs.

Complainant contends she was terminated by Respondent because she reported allegations that Respondent was engaging in fraudulent activities in violation of SOX. Respondent claims that Complainant was terminated because her position was relocated to the United Kingdom and she refused to move there or to other locations where she was offered employment in the United States. Based on my review of this lengthy record, I conclude that Complainant failed to meet her burden of proof. Therefore, the case is dismissed.

¹ Citations to the record of this proceeding will be abbreviated as follows: CX – Complainant's Exhibit; RX – Respondent's Exhibit; SX – Stipulated Exhibit; DX – Exhibit attached to SX 16, the transcript of Respondent's discovery deposition of Complainant; ALJX – Administrative Law Judge Exhibit. The following exhibits were admitted into evidence: CX 1-21, 23, 25-28, 30, 31, 32 (pp. 567-68 only), 34, 35, 38-40, 43-48, 51, 54-58, 59 (pp. 1131-33 only), 60-65; RX 6, 12, 211-24, 26, 28, 29, 31-38, 40, 41, 42 (pp. 5, 9-13 only), 44, 45, 47 (pp. 1-2 only), 48, 50-52, 56, 57, 60, 63, 66, 67, 69, 71, 72, 74-77; SX 1-16 (SX 16 includes 27 exhibits); and ALJX 1-11.

² Complainant's estranged husband predeceased her. Subsequent to her death, her son Malcolm, who was 19 or 20 years of age in December 2017, stood in for her at hearing.

Prior to addressing the merits of the claim, there are preliminary issues that must be addressed. First, Respondent conducted a 275-page discovery deposition of the Complainant (with an additional 27 deposition exhibits) on May 9, 2016. SX 16. Complainant filed a ten-page errata sheet regarding the deposition transcript proposing over 160 changes. CX 63. Respondent objected generally to the proposed changes to the transcript, contending Complainant was attempting to change her correctly reported testimony rather than alleging transcription errors. But Respondent did not directly address any of the specific changes proposed by Complainant.

The proposed changes were broken down by Complainant into four categories: "typos" (typographical errors), "clarify", "correction" and "typed response is nonsensical". Addressing the changes identified as typos, I make the following rulings:

Page 6, Line 11 – Change "20134" to "20136".

Page 41, line 9 – Change "Jariya" to "Jorrit".

Page 106, line 10 – Change "Cooper" to "Hooper".

Page 106, line 21 – Change "for" to "from".

Page 115, line 1 – Change "Cooper" to "Hooper".

Page 115, line 17 – Proposed change is not a typo. It seeks to clarify the correctly reported text.

Page 117, line 11 – Proposed change is not a typo. It seeks to change the text.

Page 117, line 18 – Proposed change is rejected. The text seems correct.

Page 131, lines 21-22 – Change "CW80680" to "CWAO-80682". The rest of the proposed change is not a typo. It seeks to change the text.

Page 133, line 14 – Proposed change is not a typo. It seeks to change the text.

Pages 154-56 – Proposed changes are not typos. They seek to clarify the text.

Page 179, line 4 – Change "instore numbers" to "NSER numbers".

Page 237, line 12 – Change “Cooper” to “Hooper”.

In regard to the other three categories of alleged errata, Complainant does not contend that the transcript errs in reporting her testimony. Rather than proposing changes to correct transcription errors, Complainant is attempting to explain the reported testimony. This is not an appropriate use of an errata sheet. These assertions belong in Complainant’s brief. Other than the changes listed as “typos” which I have accepted, the errata sheet is rejected.

In addition, Respondent’s counsel was permitted to make an offer of proof regarding the testimony she allegedly would have adduced had she been able to cross-examine Complainant, during which she proffered numerous exhibits which were admitted into evidence. TR 727-790, 883-930. The offer of proof is not part of the record; it is for possible consideration by an appellate body. But the exhibits admitted into evidence during the offer of proof are part of the record and were considered in reaching this decision.

FINDINGS OF FACT and CONCLUSIONS OF LAW

Background

Respondent is a multi-national communications company with offices all over the globe and revenue of about \$60 billion a year. TR 386; SX 2. It acquired Cable & Wireless American Operations Inc. (“C&W”) a few months prior to Complainant’s employment with the combined entity, as shown by reference to both companies in the July 25, 2013 letter to Complainant offering her a position as Commercial Specialist beginning on August 1st. SX 3.³ C&W entered into a Master Professional Services Agreement with Bank of America, N.A. (“BOA”) which was effective as of May 31, 2013 and was to run for three years. CX 1. The contract contained ten milestones. CX 12. Most relevant to this case is Milestone 4 (“M-4”), which required C&W to complete a physical inventory of certain electronics equipment in BOA’s offices worldwide. *E.g.*, TR 303. C&W was to be paid \$735,000 for this task. *E.g.*, CX 12. M-4 was primarily the responsibility of Respondent’s Ashburn, Virginia office, which previously had been a C&W office.

³ Since the integration of C&W into Vodafone is an important factor in this case, the record is unclear regarding when Vodafone acquired C&W. The integration of C&W’s operations into Vodafone was an ongoing process during Complainant’s employment with Respondent.

Complainant is a native of Lake Charles, Louisiana. She moved to Northern Virginia when she was 19 years old. She was a resident of Bristow, Virginia at all times relevant to this case. She was married, although estranged from her husband, and had two teenage sons. Her husband passed away early in December 2013. TR 685-86. Complainant listed a B.S. Degree majoring in accounting and management information systems from George Mason University and an MBA in 2003 from Strayer University on her application for employment to C&W/Vodafone. (RX 6).⁴ She testified at the hearing that she had recently received a Masters Degree in accounting from Keller Graduate School. TR 560. Complainant testified that basically her whole career was in accounting. TR 561. Prior to working for Vodafone she held several different accounting positions where she utilized many software systems including Excel and SAP. TR 561-68.

Complainant began working for Respondent on August 1, 2013, at a salary of \$50,000 a year. SX 3. Her job title was Commercial Specialist. According to the job description (SX 2), the Commercial Specialist is "responsible for working with the business to ensure the invoicing for a high profile (NYSE) account is accurate," and is accountable "for all billing/invoices generated for the Customer." The essential job duties included producing monthly reports, "[l]iasing] with the Customer to ensure there is agreement with the invoices being produced prior to the invoice being forwarded for payment," and being the "Single Point of Contact" ("SPOC") for all billing related queries for the Customer." SX 16, at 21. Complainant testified that the position was "something outside" of her accounting background. The employment relationship could be ended by either party with or without cause. *Id.* Complainant worked in the Ashburn, Virginia office. Her residence in Bristow and the office in Ashburn are located in neighboring counties in the Virginia suburbs of Washington, DC.

Respondent's contract with BOA (CX 1) called for Respondent to manage devices located in BOA offices around the world. Respondent previously had contracted with another company to perform these services. In order to manage these devices, Respondent had to know exactly where they were located. Milestone 4 of the contract required Respondent to complete an inventory of the devices, which in turn required it to physically locate each device it was supposed to manage. *E.g.*, SX 1. Initially, BOA

⁴ Except where it is necessary to distinguish between C&W and Vodafone, C&W will be included when referring to Vodafone.

provided Respondent with a list of these devices. TR 303-04. But the list was inaccurate, and Respondent subcontracted with a company called Black Box to locate each device. *E.g.*, TR 48, 162, 305. On the 15th of each month, Complainant would make an inventory list which was constructed on an Excel file. BOA would go over the list and either agree with it or indicate discrepancies which Respondent would correct if necessary. Paul Martinez was Respondent's employee responsible for working with BOA to get a complete and accurate inventory. TR 48.

Complainant worked primarily on the BOA contract. She began working on Milestone 4 of the contract in November, 2013. TR 579. Complainant's day-to-day supervisor when she began working for Respondent was Kevin Jarvis, whose title at the time was U.S. Commercial Manager. TR 302. Her overall (line) supervisor was Richard Mullock, who at the relevant time was the financial controller for U.S. operations. TR 368; 579. Jariya McCormick, who since 2008 has been a Senior Commercial Manager,⁵ took over Jarvis's responsibilities in February, 2014, when Jarvis moved on to another project for Respondent. TR 196-97, 201. At all times relevant to this case, Jarvis, Mullock and Ms. McCormick worked in the Ashburn office. Ms. McCormick testified that Complainant was the single SPOC with BOA, but only for billing. TR 209. Ms. McCormick described Complainant's work as the SPOC as follows:

She would communicate to the bank . . . on the . . . inventory auditing, and work with the bank to make sure that the information in the inventory is accurate and the bank approved every single device that can be billed before she can produce or send the accurate information to billing to produce the invoice.

TR 210; *see also* TR 580. Mullock testified that Complainant's "primary role was to make sure that we got all the invoices out in a timely manner and that they were accurate the first time they went out." TR 425. He noted that Complainant's job description did have additional higher roles, but he believes Complainant did not perform them. TR 425. Complainant testified that she "was responsible for providing external reports to Bank of America for their internal use." TR 580.

⁵ Ms. McCormick testified that after Respondent took over from C&W, the title of her position changed to Principal Commercial Manager, but her duties remained the same. TR 197.

Effective April 1, 2014, Complainant was officially transitioned from C&W to Vodafone. See SX 9. Her job title changed to Commercial In Life Specialist, but her job duties remained basically the same. TR 1336; DX 4.

Jarvis testified that Complainant did the work she was assigned to do but nothing extra. TR 338. When he hired her he expected her to be better. TR 346. Mullock testified that Complainant was a poor performer because she was capable of doing more than she was delivering. TR 394. Nevertheless, she asked for higher skilled duties to perform, but due to her performance in her current duties he did not believe she could perform them. But he did not place her on a performance improvement plan, which is the step prior to termination. TR 396-97. Moreover, there is no contention by Respondent that Complainant was terminated due to poor performance.

Legal Standards

The whistleblower protection provisions of the Sarbanes-Oxley Act protect employees who are discriminated against by their employers for reporting activity in violation of SOX's provisions. The regulations at 29 C.F.R. §1980.102 state in relevant part as follows:

- (a) No covered person may discharge, demote, suspend, threaten, harass or in any other manner retaliate against, including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section.

(b) An employee is protected against retaliation (as described in paragraph (a) of this section) by a covered person for 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 18 U.S.C. 1341 [frauds and swindles], 1343 [wire 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—

(i) A Federal regulatory or law enforcement agency;

(ii) Any Member of Congress or any committee of Congress; or

(iii) 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)

The Sarbanes-Oxley Act incorporates the burdens of proof set out in the Wendell H. Ford Aviation Investment Act for the 21st Century, at 49 U.S.C. 42121(b). The Administrative Review Board recently stated the Complainant's burden under this provision is to "prove, by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action." *Palmer v. Canadian National Railway*, ARB Case No. 16-035 (Sept. 30, 2016) (en banc). In order to prevail on a claim under SOX, a Complainant must prove that she engaged in protected activity; that the employer knew she engaged in this protected activity; and that the protected activity contributed to the adverse action taken by the employer.

For the sake of brevity, this decision will address only the first two factors, which are interrelated and are clearly dispositive of the case.

Protected Activity

The evidence fails to prove that Complainant engaged in protected activity in that she has not proven that she reported allegations which would constitute violations under §1980.102(b)(1) to any of the entities listed in that section of the regulations. Complainant has not contended that she reported any concerns which would be protected under SOX to a federal regulatory or law enforcement agency or to Congress, and in any event there is no evidence whatsoever that she did so.⁶ Thus, whether she engaged in protected activity hinges on whether she reported allegations constituting violations of §1980.102(b)(1) to supervisory employees prior to her termination by Respondent.

⁶ Complainant did file a Complainant alleging discrimination to the Equal Employment Opportunity Commission, but that complaint was limited to discrimination based on race (Complainant is African-American) and age. See DX 25.

Complainant testified that she reported her concerns regarding billing fraud to Jarvis, de Vries (DT 203; TR 609, 647, 652), Vodafone in-house counsel Emma Nasif, and Amy Ricciardi, who during the relevant period was Vodafone's head of human resources for the Americas⁷ (TR 675). These concerns centered on billing for services that had not been completed and billing based on inventories with incorrect data. In regard to the former, under Section 12.1, subsection (c) of the contract between Respondent and BOA, "[a]mounts shall be invoiced promptly after the Services [are] performed or Work Product delivered." CX 1, at 49. Complainant testified that this was her understanding of proper billing. TR 587. She further testified that toward the end of 2013 Jarvis instructed her to bill for the device inventory despite that the inventory had not been completed. TR 588. But the evidence shows that James McCormack, a Senior Vice-President of BOA (TR 525), requested Respondent to bill it for all the work on Milestone-4 despite that M-4 was incomplete because BOA had budgeted to pay for M-4 entirely in 2013. Complainant was aware of this, because she had received emails laying this out. See RX 12, CX 17; TR 311-14, 1057. Nevertheless, she looked at the pre-billing as a nefarious plot involving "insider dealings" between Respondent and Mr. McCormack, and testified that it was "fraudulent accounting". DT 90, 102; see also DT 163.

However, other than Complainant's testimony, there is no evidence that Complainant ever complained to anyone while she was still employed by Respondent that the pre-billing was illegal, fraudulent, or a violation of SOX, even if she had a reasonable belief that it was⁸. See, e.g., TR 91 (Martinez); 275-76 (McCormick); 316, 347 (Jarvis); 386, 407 (Mullock); 491 (Newberry); 830 (Wiles); 1068 (Meyers); 1094-95 (Girault); 1168 (Ricciardi); 1331 (de Vries); 1503 (Nasif). In an email dated June 11, 2014, she complained to Ricciardi that Mullock and de Vries were discriminating against her. CX 54. She did not list a reason for the discrimination, but coming the day after she received the "poor" performance appraisal, it seems reasonable to assume that was the precipitating incident for the complaint. In the September 15, 2014 email which led to Nasif and Ricciardi's investigation, she mentioned filing an EEOC complaint "for discrimination on many levels." She also noted individuals were creating a

⁷ Ms. Ricciardi left Vodafone at the beginning of 2016. TR 1166

⁸ Whether Complainant had a reasonable belief that fraud was occurring will not be addressed in this decision. Even if her belief was reasonable, it would not change the outcome of this case.

hostile work environment, and listed violation of the Equal Pay Act. Consistent with this, in their investigative report, Nasif and Ricciardi listed her complaints as the creation of a hostile work environment by de Vries and Mullock due to her completion of Vodafone's People Survey in November, 2013; de Vries's accusation that she committed fraud regarding a leave issue; and an equal pay violation. RX 44. Finally, in her November 11, 2014 complaint to the EEOC, she complained of race, age and sex discrimination, but nothing related to SOX (although it should be pointed out the EEOC does not have jurisdiction over complaints regarding securities fraud). See DX 25. She did not even tell her friend Nychele Mitchum-Ware, who worked through a contractor as a temporary human resources assistant at Vodafone for about a year in 2013 and 2014, that Respondent was engaging in fraud. All Complainant told her was that she "wasn't comfortable" and was "a little concerned" about some billing discrepancies and an issue regarding paychecks. TR 1242, 1247; cf. TR 603.⁹ Regardless, a complaint to a non-supervisory employee is not a protected activity under SOX.

Complainant also alleged that in November, 2013 Jarvis tried to get her to forge host names on the device inventory used to invoice BOA, but citing SOX and Enron she refused. DT 123, 167-68; TR 592-93. She alleged this several times in her testimony. Nevertheless, Complainant downplayed the significance of Jarvis's request, stating that it was simply a conversation between her and Jarvis and she did not expect anything to result from it. DT 168. Jarvis denies that Complainant ever complained about any fraudulent billing or accounting practices or that she ever mentioned Enron or violations of the Sarbanes-Oxley Act. TR 347-48. In any event, Complainant testified she never told anyone that Jarvis tried to get her to forge data (DT 168), so no protected activity could have resulted from it even if her version of the events was accurate.

Further, since the only evidence to support Complainant's contention that she reported billing fraud committed by Respondent's employees to managerial employees is her unsupported testimony, her credibility is at the center of this case. The inescapable conclusion is that she was not a credible witness.

⁹ Although in response to a leading question from Complainant's counsel Mitchum-Ware testified that she "perceived" Complainant believed fraud was being committed (TR 1255), she did not testify that Complainant indicated to her that fraud or any other illegal or unethical activity was taking place.

For one thing, despite alleging that Jarvis instructed her to report fraudulent data in late 2013 (*e.g.*, TR 592), an allegation which is a major point in her case (*see infra*), on March 11, 2014 she wrote an email relating to Jarvis's annual review praising him to the sky. See DX 16 (also RX 23). It strains credibility that she would have praised him as she did if she believed he had engaged in fraud and tried to get her to do the same. Further, since Jarvis was no longer her supervisor on March 11, 2014, having moved to another position at Vodafone sometime in February (TR 200, 343), she had no reason to curry his favor by praising him.

Second, she clearly was a disenchanting employee. She believed she was overqualified for her position, was paid less than other similarly situated employees, and was not getting a promotion and the additional responsibilities she believed she deserved. *E.g.*, TR 396, 1321; DX 5; RX 31; DT 42-52, 58-59. She complained to her supervisors about these issues repeatedly. However, she accepted the position knowing what her job duties and salary were, and it was clearly unrealistic for her to expect to be given different job duties and a raise in pay shortly after starting her employment with Vodafone.

Third, she was infuriated by the "Poor" performance rating she received from de Vries. At a meeting on June 10, 2014, where de Vries discussed the performance rating with her, she stormed out of his office and soon returned to turn in her laptop and work materials (*see* TR 1349-51; RX 36), and never returned to work at Vodafone. She was on various forms of leave until her actual termination at the end of October, 2014.

Fourth, Complainant jumped to conclusions with no evidence to back them up or even with the knowledge of credible contradictory evidence. She allegedly believed that all the billing and invoicing she disagreed with was fraudulent even though she did not have access to relevant underlying data since that data was not pertinent to her job duties. Further, she was convinced that the pre-billing for M-4 was a duplicitous arrangement between Mr. McCormack of BOA and Respondent, and that mutually agreed upon deviations from the terms of the contract were somehow illegal and/or fraudulent. Basically, her attitude, observable throughout her testimony, was that she had degrees in accounting and therefore knew things better than anyone else. Of course, she was not the only person working on the BOA

contract who had relevant degrees,¹⁰ and they were privy to more information than was Complainant.

It is also significant that none of the present or former Vodafone or BOA employees who testified at the hearing exhibited any bias or animosity toward Complainant. Many were no longer employed by Respondent or BOA, including key witnesses Jarvis, de Vries and Ricciardi, and would suffer no adverse consequences by telling the truth. There is also no reason to believe that Respondent had it in for her or was otherwise punishing her or discriminating against her for any reason. If that was Respondent's intent, it could have fired her at any time due to her supervisors' dissatisfaction with her work, or reasonably determined that she resigned when she walked out of de Vries's office on June 10, 2014. Instead, they often tried to help her improve her work (*see, e.g.*, CX 39; RX 32; TR 1318-19), and acted compassionately by working with her to maintain her income from the time she left the office on June 10th until her position was moved to the United Kingdom and she was terminated when she rejected moves to other Vodafone locations. *E.g.*, TR 1584-85.

Complainant also alleged that Respondent engaged in an "accounting irregularity" (DT 265) by paying its employees who came to Vodafone through the C&W acquisition twice for the same pay period. *See* DX 26, Complainant's complaint letter to OSHA. She alleged that this was a "theft" of millions of dollars engineered by Mullock to pay himself "extra money," and that Vodafone was unwilling to take corrective action. *Id.*

Complainant's contention regarding this double payment issue is further evidence of her lack of credibility. Mullock testified that Respondent's payroll provider, not Vodafone, made this error in paying former C&W employees twice for the pay period February 15-28, 2014. As soon as he realized what had happened, he sent an email to all the affected employees, which would have included Complainant, notifying them that the payroll provider made this error and the duplicate payments would be recouped from the accounts to which their paychecks were sent. TR 389-90; RX 22. Both Mullock and Ms. McCormick testified that their accounts were

¹⁰ For example, Ms. McCormick has an MBA from American University (TR 189); Jarvis has an accounting degree from University in the UK and has additional accounting qualifications (TR 300); and Mullock is a qualified chartered accountant, which is the English equivalent of a CPA (TR 367). Also, de Vries, who is from the Netherlands, obtained a law degree there. TR 1309.

immediately debited for the duplicate payment. TR 272, 390. Complainant's pay statements for the applicable pay period, which she offered into evidence, show that she received duplicate payments for this pay period and that her account was debited to correct this error. See CX 26. But Complainant contends that her bank statements from the relevant period (CX 27) show that her account was not debited for the duplicate payment. TR 635. Since those bank statements in evidence have the account balances redacted, it is unclear whether her duplicate payment was recouped.¹¹ But if, as Complainant testified, her bank statements show that the duplicate payment was not recouped, there is no indication anywhere in the record that Complainant mentioned this to anyone. Mullock testified that Complainant did not complain to him about this double salary payment. TR 390. Nor is there evidence that she returned the mistaken payment or made any attempt to do so.

Finally in regard to her attitude and credibility, Complainant complained that she was the only person on an office trip to Respondent's Sandy Hook, Connecticut office for a company-wide meeting who was not served lunch on the bus. TR 714-15. Mullock testified that lunch was not ordered for her, because she advised him that she was not going to take the bus to Sandy Hook, she had arranged alternate transportation. TR 397-98. She denied emailing or telling anyone that she was not going to ride the bus (TR 714), but on March 3, 2014, she sent an email to Mullock asking if he knew if anyone was driving up to Sandy Hook. She "wanted to see if I could ride with them or book a rental today." RX 71. Mullock testified that he checked with everyone going on the trip, and Complainant confirmed she was not taking the bus to the meeting (TR 398). A roster for the trip listed Complainant as taking the bus only on the return trip. RX 72.

This incident shows two things. First, that Complainant should raise this obviously trivial point in this litigation, presumably as evidence of being discriminated against, is, to use an appropriate legal term, silly. That Respondent would discriminate against her by not providing her with lunch on the bus trip is far-fetched. Moreover, Complainant's failure to acknowledge her email to Mullock, which indicates that if she could not find anyone else to drive up with she was going to rent a car, supports Mullock's version of the incident.

¹¹ Respondent's expert witness stated in his report that the bank statements show that the duplicate payment was not recouped. It is possible he saw unredacted bank statements.

Based on the forgoing discussion, I give no weight to Complainant's testimony when it is contradicted by other evidence.

Complainant's Expert Witness

In support of her case, Complainant offered the report and testimony of Howard Scheck, an extremely well qualified forensic accountant. CX 64, at 1. The substantive part of Scheck's direct examination is contained in less than eight pages of transcript, from the very bottom of page 963 to the very top of page 971, and does little to expand upon his report.¹² It is Scheck's opinion that "it is reasonable that Ms. Leviege believed that Vodafone's conduct *could have constituted* violations of the federal securities laws and therefore were protected activities as described in Section 806 of Sarbanes-Oxley Act." *Id.* at 8 (emphasis added); *see also* TR 963 ("Ms. Leviege had a reasonable belief . . . that Vodafone *may have* been engaged in accounting fraud." (Emphasis added)). It is questionable whether a Complainant's reasonable belief that a violation *could have* or *may have* occurred satisfies the regulatory standard that a Complainant must "reasonably believe [the employer's conduct] *constitutes* a violation" (Emphasis added).¹³ There is a significant difference between believing that a violation may have occurred as opposed to believing that it did occur. But there is no need to delve into this arcane issue. For despite Scheck's outstanding credentials, his opinion has no probative value regarding the overriding issues in this case.

For one thing, it makes no difference if Complainant had a reasonable basis to believe Respondent was violating SOX since I have found she did not report these alleged violations to anyone. Second, Scheck reviewed the limited evidence made available to him and essentially made findings of fact and conclusions of law on the ultimate factual and legal issues in this case. That is not the role of an expert witness. An expert witness should provide the court with information and opinions regarding his area of expertise to assist the court in evaluating the evidence and reaching a decision.¹⁴

¹² The rest of his direct examination concerned his qualifications and the evidence he reviewed in arriving at his opinion.

¹³ At page 3 of his report, Scheck states Complainant's burden as having a reasonable belief that a violation of law "has occurred or [is] likely to occur." This is not the same standard he applies in concluding that Complainant engaged in protected activity.

¹⁴ *See* Rule 702 of the Federal Rules of Evidence, and 29 C.F.R. §18.702. *See also* TR 974, where I held that Scheck could testify "as an expert witness for his experience in the auditing and all his experiences related to Sarbanes-Oxley cases . . . and any information that will assist the judge in making a decision."

Whether Complainant had a reasonable belief that Respondent was engaging in fraudulent conduct is not what an expert witness in this case should have focused on. He should have limited his opinion to explaining proper accounting practices and whether they were followed here, as well as whether the conduct Complainant allegedly believed Respondent engaged in would amount to a violation of any of the statutes or laws listed in §1980.102(b)(1). In going far beyond this, his ultimate conclusion that Complainant engaged in protected activity is not appropriate expert opinion evidence and will not be considered.

Third, even if the full extent of Scheck's opinion is relevant, it is based on the "facts" as reported to him by Complainant, which he assumed to be accurate, and his review of some of the documentary evidence, including unspecified emails. CX 64, at 3-4; TR 963, 984-85. Since both Complainant and Scheck were in the Washington, DC area, it is inexplicable that he did not meet personally with her; instead, he interviewed her over the phone. His report does not mention any conversations with Complainant or when they took place, nor is there any evidence of when he interviewed her. He did not read the transcript of her deposition, which was taken almost a year before his report is dated, or her hearing testimony (TR 963, 974-76).¹⁵ He is not sure whether he spoke to Complainant more than once, but if it was more than once any other calls would have been brief follow-ups. TR 975. He did not speak to anyone at BOA or Vodafone at any time or review any of the other testimony in this case prior to testifying despite having the six month break in the hearing to do so. *Id.* These shortcomings are crucial since his opinion is so dependent on Complainant's voracity.

In accepting whatever he was told by Complainant as true, he mistakenly believes, among other things, that: Jarvis told her to forge data; she complained about it to Jarvis; she complained about it to other supervisory personnel; and she reported to Nasif and Ricciardi that Jarvis and Mullock "were fraudulently billing BOA for services not performed, and recording revenues that Vodafone had not earned" (CX 64, at 2). *E.g.*, TR 964-65. All of these beliefs are contradicted by more credible evidence in the record, most of which was available to him prior to his testimony. An opinion based on such selective and frequently false information has no probative value.

¹⁵ Scheck testified that he did see excerpts of Complainant's deposition testimony attached to some pleadings.

Fourth, Scheck believes Respondent overbilled BOA for at least 60%, and possibly 100%, of the M-4 cost by submitting invoices to BOA for services that had not yet been performed. CX 64, at 5; TR 965-67. Although he acknowledges that there was an initial agreement between Respondent and BOA to bill for at least 40% of the budgeted amount for M-4 in 2013, it appears that he was not provided with a copy of RX 12.3, a November 14, 2013 email from Margaret Meyers, Respondent's Global Service Manager based in New York, to which Complainant was copied, stating that "Jim [McCormack] . . . would prefer we bill all charges in November to ensure we get paid this year[;]" or RX 42 at 11-12, which states that invoicing BOA for the entire device inventory amount in 2013 and completing the work next year was already discussed with Mr. McCormack. He also did not review Mullock's testimony, where he explains why the bank wanted to be invoiced for the device inventory in 2013 even though the inventory would not be completed until the following year. TR 377. Significantly, Scheck does not opine either in his report or during his testimony that submitting the invoices before the work was completed was illegal or fraudulent, or would constitute a violation of any of the statutes or regulations listed in 29 C.F.R. §1980.102(b)(1). Moreover, there is nothing inherently fraudulent or illegal about paying for services in advance or modifying the terms of a contract to provide for paying for services in advance (assuming the contract prohibits prepaying). Further, he assumes that Respondent reported the unpaid income from the invoices as revenue, which would result in an overstatement of Respondent's revenue. CX 64, at 5. But Mullock, who at the time was responsible for booking Respondent's revenue, as well as Jarvis, testified that Respondent books revenue only after the services have been delivered (TR 329, 369), and their testimony is uncontradicted.

Finally, there is no indication that Scheck was aware of the device inventory process and the significant give-and-take between Respondent and BOA necessitated by the incomplete and incorrect data in BOA's initial inventory. *See, e.g.*, TR 306-08.

Due to all of these shortcomings, I give no weight to Scheck's testimony or report.

Conclusion

I therefore conclude that Complainant did not engage in protected activity; accordingly, Respondent could not have been aware that she

engaged in protected activity. Therefore, Complainant has not met her burden of proof, and her claim must be denied.

ORDER

IT IS ORDERED that the claim of discrimination filed by Patricia Leviege under the Sarbanes-Oxley Act against Vodafone US Inc. is **DENIED**.

WILLIM S. COLWELL
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been

filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents issued by the Board through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs, can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1978.110(a).

When 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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1978.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may

include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1978.110(b).