



Issue Date: 27 February 2018

CASE NO.: 2017-CFP-00003

In the Matter of:

BRYAN HORN,
Complainant,

v.

**UNIVERSITY FIRST FEDERAL
CREDIT UNION,**
Respondent.

DECISION AND ORDER

This is a claim under the whistleblower protection provision of Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567 (“Dodd-Frank”), and associated regulations at 29 C.F.R. § 1985. On November 3, 2016, the Occupational Safety and Health Administration issued its findings and concluded no reasonable cause existed to believe respondent University First Federal Credit Union (“UFFCU”) violated 12 U.S.C. § 5567. Complainant Bryan Horn appealed. UFFCU filed a Motion for Summary Disposition on July 6, 2017, and Mr. Horn submitted his Opposition on July 31, 2017. I denied the Motion on August 2, 2017. On August 10, 2017, I received both parties’ Pre-Hearing Statements. Hearing in this matter occurred in Salt Lake City, Utah, on November 1-2, 2017. I admitted Complainant’s Exhibits (“CX”) 1-20 and Respondents’ Exhibits (“RX”) 1-16 to the record without objection. I received UFFCU’s Post-Hearing Brief on February 9, 2018, and Mr. Horn’s Post-Hearing Memorandum on February 12, 2018.

I. STIPULATIONS

1. Mr. Horn began employment with UFFCU on August 31, 2015. He worked at the Sandy, Utah, branch.

2. Mr. Horn was a Financial Service Representative (“FSR”). He sold UFFCU’s products and services, including real estate, auto, and personal loans. He initiated, processed, and closed the loans.
3. Mr. Horn’s employment with UFFCU ended on February 18, 2016.

II. ISSUES IN DISPUTE

1. Did Mr. Horn engage in protected activity under 12 U.S.C. § 5567?
2. If so, did UFFCU take adverse action against Mr. Horn?
3. If so, was Mr. Horn’s protected activity a contributing factor to UFFCU’s adverse action against him?
4. If so, would UFFCU have taken the same adverse action in the absence of the protected activity?
5. If not, what amount in damages is Mr. Horn entitled to?

III. STATEMENT OF FACTS

UFFCU employed Mr. Horn as an FSR from August 31, 2015, to February 18, 2016. He performed his sales job well, and no credit union members complained about him. (TR, pp. 178, 182, 217.) But UFFCU’s internal policies often frustrated Mr. Horn. He found them lacking compared to his previous employer, US Bank. (TR, 169, 195, 269.) Mr. Horn was critical of the policies’ lack of clarity. (TR, pp. 193, 210.) He believed UFFCU should not criticize him for making procedural errors when UFFCU’s manual lacked adequate explanations. (TR, pp. 146-47; CX 19.) He complained about these errors several times a week to his co-worker, Christy Watson. (TR, pp. 146-47; CX 19.)

Mr. Horn’s frustration with UFFCU’s policies sometimes gave way to anger. In November, Human Resource Manager Scott Mann verbally warned Mr. Horn after Mr. Horn spoke to Branch Manager Ericka Marshall in an unprofessional way on the phone in front of members. (TR, pp. 12, 28, 250, 267.) Between January 11 and February 18, Mr. Horn spoke angrily twice to Bret Carter, who had replaced Ms. Marshall as branch manager in early January, because Mr. Horn could not proceed with two loans as planned. (TR, pp. 152, 166-70.) Mr. Carter spoke to Mr. Horn about his temper, but he did not formally discipline Mr. Horn for these two incidents. (TR, pp. 172, 209.)

An auditor for UFFCU, Susan Toole, visited the Sandy branch in early December, and Mr. Horn used this visit as an opportunity to discuss his ideas for improving UFFCU’s procedures. (TR, pp. 219-20, 31-32, 228.) Mr. Horn and Ms. Toole spoke face-to-face for approximately 40 minutes. (TR, p. 32.) He discussed how to open accounts, expressed concern about UFFCU’s alarm system, suggested branch improvements, and offered to help build an online procedural manual. (TR, pp. 222, 226, 32.)

At Ms. Toole's request, Mr. Horn sent her an email on December 8 recapping his ideas to "improve operational errors and clarify procedure." (TR, p. 32; CX 4.) Mr. Horn described how US Bank sent managers to branches to ensure the branches were following protocol, including providing required disclosures, posting required disclosures within each branch, and following other legal requirements. (CX 4.) Mr. Horn suggested UFFCU implement similar visits to "go over books, train on errors and review procedure." (CX 4.) He also suggested distributing weekly questionnaires to test employees' knowledge of company policy. (CX 4.) One question he suggested was: "What are the required disclosures you must give at the time of account opening? [Answer:] Deposit Account Agreement, Reg E election, FDIC notice, Privacy Policy, CRA disclosure, Rates and Fees, Terms and Conditions." (CX 4.) Ms. Toole did not respond to Mr. Horn's email. (TR, p. 33.) UFFCU took no adverse action against Mr. Horn for discussing these ideas with Ms. Toole. (TR, p. 92.)

As an FSR, UFFCU required Mr. Horn to follow the Truth in Savings Act ("TISA"). His job description includes this requirement. (CX 2; TR, p. 89.) UFFCU had him complete an online TISA training in September. (CX 3; TR, pp. 233-34.) UFFCU also instructed Mr. Horn on what documents he needed to disclose to members under TISA and how to print them. (TR, pp. 236-37.) UFFCU's computer system did not automatically print the TISA disclosures when opening an account, so Mr. Horn and other FSRs had to go into the system, check boxes, and manually print each disclosure. (TR, pp. 74-75, 236-37.)

No one at UFFCU told Mr. Horn following TISA was not part of his job responsibilities. (TR, p. 89.) And no one directly told Mr. Horn UFFCU would take an employment action against him if he provided the TISA disclosures. (TR, p. 84.) When supervisors reviewed Mr. Horn's work, they did not criticize him for providing the disclosures. (TR, p. 88.) Mr. Horn did not raise concerns about the disclosures to Susan Toole when they spoke in person. (TR, p. 222.) He did not raise concerns about compliance with disclosure requirements with Training Specialist Parker Pratt. (TR, pp. 231, 238-40.) The only discussion Mr. Horn had with Mr. Carter regarding account opening documents concerned a glitch in the credit union's computer program. (TR, pp. 154-55.) Mr. Mann also never heard Mr. Horn complain about non-compliance with disclosure requirements. (TR, p. 255.)

On February 2, credit union member Anitra Lilly contacted Mr. Horn to apply for an auto loan. (CX 9.) Mr. Horn worked on this loan periodically from February 2 to February 12. (TR, p. 40; CX 9.) On Friday, February 12, Ms. Lilly told Mr. Horn she would pick out a car by Tuesday, so Mr. Horn could close the loan. (TR, pp. 40-41.) On Saturday, February 13, Ms. Lilly acquired a car, went into UFFCU's Brickyard branch, and closed her loan with Acting Manager Michelle Russo. (TR, p. 42.) Ms. Russo changed the name of the loan's processor, so she and the Brickyard branch would get credit for the loan. (TR, p. 43.)

Ms. Russo's actions upset Mr. Horn's "personal code of ethics and morality." (TR, p. 42.) He spoke with Mr. Carter on February 17 and told Mr. Carter he felt it was not "legally and ethically right for someone to steal someone's work." (TR, p. 46.) He was also upset because he believed employees at the Brickyard branch invaded his privacy by spreading information about him related to the Lilly loan. (TR, pp. 158-59, 161.) Mr. Horn expressed his frustration over the company's lack of clear policy, an accusation of unethical behavior by a branch manager, previous interactions with Ms. Marshall, and feeling held back by past issues. (CX 11.) Mr. Horn discussed the possibility of resigning and asked Mr. Carter if he would receive unemployment benefits if he did resign. (TR, p. 47.) But they made no final decision regarding resignation or termination. (TR, p. 176.) Mr. Horn asked Mr. Carter for 24 hours to think it over, and the two men agreed to talk the following day. (TR, pp. 161, 48.) They did not discuss UFFCU's compliance with disclosure laws. (TR, p. 255.)

The next morning, February 18, Mr. Horn sent an email to Mr. Mann, Mr. Carter, and regional manager Verl Tidwell at 8:52 a.m. expressing his desire to stay with UFFCU. (RX 12; TR, pp. 189-90.) At 9:33 a.m., Mr. Mann emailed Mr. Carter and Mr. Tidwell, stating Mr. Horn was "not a positive presence" but "a negative one" who did not "respect the institution." (RX 12.) "His emotions always seem to run so high that they effect [sic] his professionalism and the moral [sic] of those that have to deal with him," wrote Mr. Mann. (RX 12.) Mr. Horn had left his coworkers "feeling that he [is] too emotional and not on our side." (RX 12.) Mr. Mann believed Mr. Horn's email that morning was "too waffling for someone we needed in a key position." (TR, p. 258.) Mr. Tidwell also believed keeping Mr. Horn as a promoter of the credit union was unwise. (TR, p. 215.) Later in the day, Mr. Carter told Mr. Horn that Ms. Russo and her branch would get the loan value credit but Mr. Horn would receive the incentive credit for the Lilly loan. (TR, p. 50.) Mr. Horn's employment status did not come up during that discussion. (TR, p. 50.)

Around 4:45 p.m., Mr. Mann and Mr. Carter met with Mr. Horn and handed him a letter prepared by Mr. Mann. (TR, p. 49; CX 15.) The letter stated UFFCU did "not feel that having an employee in a sensitive member service position, who does not have the desire to be with us, is in the best interest of all parties." (CX 15.) The letter informed Mr. Horn he must resign or UFFCU would terminate him. (CX 15.) The letter also stated UFFCU would not challenge Mr. Horn's unemployment benefits and would only disclose Mr. Horn's employment dates and position titles to inquiring employers. (CX 15.) Mr. Mann then told Mr. Horn to hand over his keys, gather his personal belongings, and leave the premises. (TR, p. 51.) Mr. Horn agreed to resign, and he did not claim complaints about Dodd-Frank violations contributed to his resignation. (TR, pp. 164-65.)

Before leaving, Mr. Horn went to his computer and typed a letter under Mr. Mann's supervision. (TR, p. 52; CX 16.) The letter, titled "Resignation effective im-

mediately,” criticized UFFCU’s poorly-defined policies and described how the Lilly loan was “callously stolen” from Mr. Horn. (CX 16.) He recounted his meeting with Ms. Toole regarding procedural improvements and wrote he “could indicate many other factors as to why I feel that this organization . . . has violated ethics and banking laws.” (CX 16.) Mr. Horn asked UFFCU to “do whatever is necessary to process my resignation.” (CX 16.) As promised, Mr. Horn received an extra \$50 in his final paycheck as compensation for the Lilly loan. (TR, p. 265.)

IV. DISCUSSION

A. Legal Standard

Section 1057 of Dodd-Frank protects whistleblowers who perform tasks related to offering or providing consumer financial products or services. These protections, codified at 12 U.S.C. § 5567(a), state in part:

- (a) No covered person or service provider shall terminate or in any other way discriminate against, or cause to be terminated or discriminated against, any covered employee . . . by reason of the fact that such employee . . . has—
 - (1) provided, caused to be provided, or is about to provide or cause to be provided, information to the employer . . . relating to any violation of, or any act or omission that the employee reasonably believes to be a violation of, any provision of this title or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;
 - . . .
 - (4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard, or prohibition, subject to the jurisdiction of, or enforceable by, the Bureau.

A “covered employee” is any individual “performing tasks related to the offering or provision of a consumer financial product or service.” 12 U.S.C. § 5567(b.) A “consumer financial product or service” includes extending credit and servicing loans. 12 U.S.C. § 5481(15)(A)(i.) A complainant has the burden of showing the complainant’s protected activity was a contributing factor in the adverse action. If the complainant demonstrates this, the respondent can still avoid liability by showing with clear and convincing evidence the respondent would have taken the same adverse action in the absence of the complainant’s protected activity. *See* 12 U.S.C. § 5567(c)(3).

B. Protected Activity

Mr. Horn has failed to show he engaged in the protected activity of informing UFFCU of Dodd-Frank violations. *See* 12 U.S.C. § 5567(a)(1). In the “Protected Activity” subsection of his Post-Hearing Memorandum, Mr. Horn forgoes legal analysis for conclusory statements. He does not refer to one specific incident of speaking to his supervisors about Dodd-Frank violations. I am simply to believe “[w]hile [Mr. Horn] did complain about a number of things, one of those things was compliance with *Dodd Frank*.” (Complainant’s Post-Hearing Memorandum, p. 4.) This is unper-
suasive.

I am also unpersuaded by Mr. Horn’s testimony. At hearing, Mr. Horn claimed he raised concerns about Dodd-Frank violations with Ms. Marshall (TR, p. 28), the head of the training department (TR, p. 27), management in underwriting (TR, p. 27), Mr. Carter (TR, p. 30), and Ms. Toole. (TR, p. 32.) But no other witnesses or evidence support this. No one from underwriting management or Ms. Marshall testified. Both Mr. Carter and Ms. Toole testified to the opposite. (TR, pp. 154-55, 222.) The “head of the training department” may refer to Mr. Pratt or to someone else. If Mr. Horn is referring to Mr. Pratt, he testified Mr. Horn did not discuss TISA compliance with him. (TR, pp. 231, 238-40.) If Mr. Horn is referring to someone else, that person did not testify.

Mr. Horn also testified Ms. Marshall, Enrique Reyes, Jill Simper, the manager of another branch, and Jessica Abbanati “actively encouraged” him not to print out required disclosures. (TR, pp. 74-78, 83.) But he provides no evidence other than his own testimony, which I find exaggerated and unconvincing. For example, Mr. Horn stated the manager of another branch told him in mid-January, “[i]f you want to do [the disclosures], that’s great,” but “[n]o one is really going to read those anyway,” so “if they just want it, they’ll either ask us and we’ll, you know, we’ll get it to them.” (TR, p. 82.) This manager may have been flippant about the disclosures, but I do not find this “active encouragement” to not hand them out. Mr. Horn alleges Ms. Abbanati told him, “[y]ou know, fake it until you make it. If consumers want disclosures, we’ll get it to them.” (TR, p. 83.) But I also do not find this statement “active encouragement.” The ambiguity of Mr. Horn’s examples and the absence of corroborating evidence lead me to find his testimony about UFFCU discouraging the disclosures not credible.

According to Mr. Horn, Ms. Marshall “indirectly” suggested management might take employment action against him if he complied with TISA or approached his job as a “bank banker” and not a “credit union banker.” (TR, pp. 84-86.) Ms. Marshall allegedly said, “they don’t like that and to be careful.” (TR, p. 86.) But when pressed on his answer, Mr. Horn backed away from specifically suggesting Ms. Marshall warned him about complying with TISA to make the more ambiguous

claim that UFFCU was unwelcoming of commercial banks' practices. (TR, pp. 84-86.) I find his testimony too ambiguous to support the proposition Ms. Marshall "indirectly" told Mr. Horn UFFCU would take employment action against him if he provided required disclosures. I also find this testimony unconvincing because nothing else in the record suggests UFFCU's managers "don't like" TISA compliance. To the contrary, UFFCU listed TISA compliance as a requirement in Mr. Horn's job description (CX 2; TR, p. 89), trained Mr. Horn on TISA (CX 3; TR, pp. 233-34), instructed Mr. Horn on what TISA documents he needed to disclose and how to print them (TR, pp. 236-37), and never criticized him for providing the disclosures. (TR, p. 88.)

Aside from his own testimony, which I find unpersuasive, the only evidence showing Mr. Horn speaking to a UFFCU employee about TISA disclosures is his December 8 email to Ms. Toole. (CX 4.) But this communication does not show or suggest Mr. Horn engaged in protected activity. When Mr. Horn spoke to Ms. Toole in person, he made suggestions for improving the branch but did not raise concerns about compliance with disclosure laws. (TR, p. 222.) Similarly, Mr. Horn framed his follow-up email to Ms. Toole as an effort to "improve operational errors and clarify procedure." (TR, p. 32, CX 4.) Mr. Horn intended to improve UFFCU's frustrating internal policies and procedures, not alert a supervisor of legal violations.

Mr. Horn mentions required disclosures twice in his December 8 email, but he does not state UFFCU was failing to provide the disclosures or otherwise violating Dodd-Frank. The first mention of disclosures simply describes how managers at US Bank would visit different branches to ensure the branches were handing out required disclosures and taking other legally-required steps. (CX 4.) This statement does not suggest UFFCU was, in contrast to US Bank, failing to hand out disclosures. Mr. Horn mentions disclosures a second time when he suggests periodically quizzing employees and including a question about disclosures. (CX 4.) This statement also does not suggest UFFCU was failing to hand out disclosures and violating Dodd-Frank. Mr. Horn's suggestion only shows he believed quizzing employees on legal requirements would be an effective way to improve the branch.

Mr. Horn's resignation letter supports the position Mr. Horn only complained about internal policies, not violations of Dodd-Frank. In his letter, Mr. Horn's first and longest complaint is UFFCU's "complete lack of policy as to matters of procedure." (CX 16.) He then criticizes UFFCU's loan closing procedures, an accusation by a branch manager that Mr. Horn engaged in unethical conduct, and UFFCU's actions regarding the Lilly loan. (CX 16.) Nowhere in this letter does Mr. Horn recall previously complaining about required disclosures, nor does he make the complaint in his letter. Mr. Horn writes he could explain further how UFFCU "violated ethics and banking laws," but he provides no details, and I find no reason to assume he is referring to disclosure requirements. (CX 16.)

The record shows UFFCU's internal policies were lacking, and Mr. Horn wanted to standardize procedure and implement best practices. But Mr. Horn has only shown his complaints constitute critiques of UFFCU's internal procedures, not complaints UFFCU was violating Dodd-Frank. And although the dispute over the Lilly loan angered Mr. Horn, it does not implicate Dodd-Frank. (TR, p. 117.) Mr. Horn has not met his burden of showing he engaged in protected activity. Therefore, whether Mr. Horn resigned or UFFCU terminated him is irrelevant. I need not decide whether adverse action occurred or determine the reason behind it. I also do not need to consider UFFCU's possible defense or the issue of damages.

V. CONCLUSION

Having reviewed the hearing testimony and exhibits, I find:

- (1) Mr. Horn did not carry his burden of showing he engaged in the alleged protected activity of informing UFFCU of Truth in Savings Act violations.
- (2) Rather, Mr. Horn engaged in repeated criticism of internal policy and procedure.
- (3) Because Mr. Horn failed to show he engaged in protected activity, his departure from UFFCU on February 18, 2016, does not implicate Dodd-Frank and its whistleblower protections.

VI. ORDER

Mr. Horn's complaint is DENIED.

SO ORDERED.

CHRISTOPHER LARSEN
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. § 1985.110(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. § 1985.110(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. 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. § 1985.110(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. §§ 1985.109(e) and 1985.110(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. § 1985.110(b)