U.S. Department of Labor

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Issue Date: 12 October 2007

CASE NO.: 2007-SOX-00076

In the Matter of

BORIS GALINSKY,
Complainant,

v.

BANK OF AMERICA CORPORATION,
Respondent.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT; DISMISSING THE COMPLAINT AND DECLINING TO ISSUE SANCTIONS

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("the Act" or "SOX") enacted on July 30, 2002.

I. PROCEDURAL HISTORY

On January 26, 2007, Boris Galinsky ("Complainant") filed a complaint before the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA"), alleging that his employer, Bank of America ("Respondent")[1], retaliated against him in violation of the Act. Specifically, Complainant alleged that he became concerned that managers were making poor decisions during Complainant's involvement with a project designed to identify and thwart illegal activity. Compl. at 2.[2] Complainant felt the project "ultimately would deliver a non-functioning product," and thus would reflect "poorly on all project members" and potentially create "very costly consequences to the Bank for non-compliance with federal regulations." Id. Complainant states that he "believed that the company could be found guilty of negligence and willful blindness – a deliberate effort to avoid and ignore information that could lead to the discovery of unlawful activity." Id.

[1] In Respondent's brief ("RB") it is noted that Bank of America, N.A. is Complainant's current employer and the proper party to this action. RB at 2.

[2] Although Mr. Galinsky's original Complaint was submitted without page numbers, I take official notice that the Complaint is comprised of four pages, and reference thereto shall cite to each page as if it were sequentially paginated by Complainant, as "Compl. at page #_".

Complainant alleged that he voiced these concerns "up the management ladder" via e-mails between July 24, 2006, and July 26, 2006. Compl. at 3. Complainant avers that as a result, he received a negative performance review on November 6, 2006, for failure to meet expectations for behavior. Id. This review prevented Complainant from eligibility for a bonus and was "pretty much a nod toward the door." Id.

On July 2, 2007, OSHA determined that the concerns Complainant raised to management are not protected under the Act. OSHA found that Complainant was unable to demonstrate that he reported any information to Respondent that Complainant reasonably believed constituted a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. Complainant objected to OSHA's findings and requested a hearing before an Administrative Law Judge on August 2, 2007. Subsequently, the case was assigned to me.

On August 13, 2007, I issued an Order giving the parties ten days to show cause whether jurisdiction stands under the Act. Complainant timely filed a response on August 27, 2007.[3] Having not received any response from Respondent, I issued an Order on September 4, 2007, directing Respondent to show why sanctions should not be imposed. Respondent filed responses on September 14, 2007, to the Order to Show Cause and the September 4, 2007, Order.[4] On September 19, 2007, Complainant filed his proposed discovery plan. On September 20, Respondent filed its proposed discovery plan.

In its Response to Order to Show Cause, Respondent argues that Complainant's claims fail as a matter of law. Furthermore, Respondent refers to and includes evidence beyond the pleadings and, as such, I am treating the response as a motion for summary decision.

II. ISSUES

1. Whether sanctions should be imposed for Respondent's failure to respond to the Order to Show Cause; and

2. Whether Complainant engaged in protected activity under the Act.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Failure to Respond

Respondent failed to timely respond to my August 13, 2007, Order. The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges allow me, *inter alia*, to limit evidence and impose sanctions when a party fails to comply with an order. 29 C.F.R. §§ 18.6(d) and 29.

[3] Complainant's response is referred to herein as "Compl. Resp. at page #_."

[4] On September 17, 2007, Respondent filed a duplicate of its response. Respondent's response to Order to Show Cause is referred to herein as "Resp't Resp. 1 at page #_". Exhibits attached to Respondent's response are referred to herein by "EX #_", using the same number as designated by Respondent. Respondent's response to the Court's September 4, 2007, Order is referred to herein as "Resp't Resp. 2 at page #_."

In its Response to my Order of September 4, 2007, Respondent argued that the untimely response was inadvertent. Specifically, Respondent stated that a copying error resulted in the transfer of an incomplete version of the Order. As a result of the deficient copy, attorney Valecia M. McDowell "erroneously concluded that the August Order was directed solely to the Complainant." Resp't Resp. 2 at 2; Aff. of Valecia M. McDowell.

I find Respondent's explanation plausible and reasonable. My August Order was three pages long and the third page contained only my signature line and one sentence. The sentence read, "Respondent is directed to also address the issues raised in this Order by written submission or a dispositive motion, due contemporaneously with that of the Complainant." If the third page was mistakenly not forwarded to counsel because of a copying error, it would appear that the Order was not directed to the Respondent.

I find that Respondent's failure to comply with my Order directing Respondent to address jurisdictional issues was inadvertent. Accordingly, I find it unnecessary and inappropriate to impose sanctions on or otherwise prohibit Respondent from introducing evidence for its failure to comply with my Order of August 13, 2007.

B. Protected Activity

Standard of Review

The standard for granting summary decision is essentially the same as that set forth in Fed. R. Civ. P. Rule 56, the rule governing summary judgment in the federal courts. Reddy v. Medquist, Inc., ARB No. 04-123 (ARB Sept. 30, 2005). Thus, pursuant to 29 C.F.R. § 18.40(d), the Administrative Law Judge ("ALJ") may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." A "material fact" is one whose existence affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A "genuine issue" exists when the nonmoving party produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. Reddy, ARB No. 04-123. Sufficient evidence is any significant probative evidence. Id.

The moving party bears the initial burden of demonstrating that there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Hall v. Newport News Shipbuilding and Dry Dock Co., 24 BRBS 1,4 (1990). Upon such a showing, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact. 29 C.F.R. § 18.40(c); Celotex, 477 U.S. at 322; Hall, 24 BRBS at 4. All evidence must be viewed in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 261 (1986); Hall, 24 BRBS at 4. Where a genuine issue of material fact does exist, an evidentiary hearing must be held. 29 C.F.R. § 18.41(b).

Factual Background

Complainant's pleadings constitute his evidence for purposes of determining whether Complainant engaged in protected activity. I have relied upon Complainant's complaint to OSHA, and his Response to my Order of August 13, 2007 for his factual averments. Respondent has submitted documentary exhibits to its response to my Order, and I refer to those as well.

Complainant works for Respondent in its Compliance Technology department in the area of computer programming and software development. Compl. at 1. He specializes in Java, the computer language commonly used in the financial industry. Id. He has "over 30 years experience as a Computer Programmer/Software Developer, 22 of which were spent working the financial industry." Id. Complainant works in New York; however, in the spring of 2006, he requested participation in an anti-money laundering project ("AML") being developed in Charlotte, North Carolina. Id. at 2; Compl. Resp. at 1. Respondent agreed and Complainant began working on AML in April, 2006. Comp. Resp. at 1.

Shortly after Complainant began working on the AML project he started communicating concerns about it with his superiors. Compl. at 3; Compl. Resp. at 1. On June 14, 2006, Complainant e-mailed an indirect supervisor named Bucky Feagans. Compl. at 3; EX. 2. Complainant wrote "[n]ext time you are in NY we'll need to talk. I think I can give you an earful of what I believe is wrong with Charlotte application development process." EX. 2.

After receiving an e-mail informing Complainant that the AML group decided not to use a framework Complainant suggested, Complainant replied on July 25, 2006, stating "[t]he fact that I was excluded from this discussion also speaks volumes about my ability to contribute to this project." EX. 3; Compl. Resp. 1-2. Complainant continued, "[t]he decision … is yet another push to lower the standards on this project. This framework is used extensively … [s]o much for 'high standards.'" Id. Complainant then sent an e-mail directly to Mr. Feagans expressing displeasure about being excluded. Id. In response to Mr. Feagans' suggestion that Complainant that he work it out with others involved, Complainant stated that the others are the problem. Id. Complainant wrote that he was asked "to develop crap" because the group was developing "'simple' inflexible applications that will be re-written in a couple of years." Id. He went on to say "[t]here are so many things wrong with how this project is being developed, and people are so set in their ways that without authority I cannot make an effective contribution." Id. In the end, Complainant told Mr. Feagans that the group is "building something they don't know what and they make one wrong decision after another … [s]o, I really want out of this." Id. Complainant's request was granted and he was immediately taken off the AML project. Compl. at 3.

Complainant received a performance review dated November 6, 2006. Compl. at 3; EX. 11. In the section titled "Behaviors" Complainant received multiple ratings of "Does Not Meet Expectations." Id. Specifically, he received suboptimal ratings for "Communicating Clearly" and "Continuously learn and adapt," and, consequently, Complainant received an overall rating of below expectations for Behaviors. EX. 11. As a result of Complainant's failure to meet the expectations, he was not eligible for an incentive bonus for his work in 2006. Compl. at 3.

After the November, 2006, review Complainant continued to voice concerns about the AML project. On December 5, 2006, Complainant sent Mr. Feagans' direct supervisor, Stephen Venezia, an e-mail regarding these concerns. EX. 14. Complainant wrote:

> I would like to ask for your intervention in a somewhat delicate matter …
>
> Soon after I started to working with Charlotte's team, I was surprised to discover that none of its members played with the prototype … This was totally different from what we do in New York … AML Surveillance BRD had many gaps, which nobody wanted to address because this would have jeopardized the schedule …
>
> There were also major differences in the approach to design. I favored … a flexible component-based approach …
>
> Team Charlotte wanted to develop "simple" and "tight" application … In my experience, this eventually leads to a very large, unstable and complex application … that no one fully understands, and which has to be eventually redone. [A manager] stated that in his experience applications are re-written every two years, so there is no point to "over-design."
>
> I was not invited to participate in design reviews … The entire development process was totally contrary to my experience … I felt that the project was doomed … I emailed [Mr. Feagans] a request to be taken off the project.
>
> At a later point I learned that [Mr. Feagans] shared the email … with other people … It was used as an example of my "bad behavior." It was also the basis for giving me "Does Not Meet Expectations" rating …
>
> I still believe that AML Surveillance project is a failure … I don't see how this or any company would benefit from this type of development …

EX. 14. Complainant sent Mr. Venezia a follow-up e-mail on December 8, 2006. EX. 15. Complainant wrote, in pertinent part:

> … I would like to step back and look at a larger picture that I painted in my email to you.
>
> … I had sent a message to my manager alerting him to what at the time I thought was a case of gross incompetence. … Instead of

> talking to me, discussing the issue, taking appropriate actions, my manager decided to stack up the deck against me which would either nudge me out of the company or help him eventually fire me.
>
> Some may argue that what I was pointing out is not as innocent as incompetence, but is a fraud. It is fraud because the company is getting lousy non-working product/service, but management claims great success and is rewarded. … this is going on continuously …
>
> … The bank is dealing with billions and billions of dollars. The potential for loss is huge. Also, in compliance department we develop applications that are mandated by the US government. These applications are supposed to find criminal activity, and they are not …

EX. 15. In January, 2007, Complainant submitted a written response to his performance review and counseling sessions for his communication. EX. 17. He states, in relevant part:

> When I started to work with AML team in Charlotte I was surprised to learn that their understanding of the scope of the project was much narrower than the prototype – they insisted that the code has to conform to … Business Requirement Document … but did not, and, despite the document's many flaws and omissions, adamantly refused to change it. I became concerned that the group will ultimately deliver a non-functioning product and that this will have very costly consequences. According to mandatory AML course available from the Bank's learning portal, I believed that the company could be found guilty of negligence and willful blindness – a deliberate effort to avoid and ignore information that could lead to the discovery of unlawful activity.

EX. 17. Complainant re-explained why he suggested a flexible software approach for the AML project and why he felt the group mistakenly decided otherwise. Id. Specifically, Complainant felt that "without [interactivity between statistical model results and actual data] the future product would have even less functionality than the prototype." Id. Complainant continued:

> So, I felt that I had more than enough reason to believe that the Bank may be found guilty of violating federal laws and regulations, would face fines, loss of company reputation and , ultimately, loss of shareholders value. With intimate knowledge of the prototype, being a senior member of the development team building compliance applications for over 3 years, having 20+ years of software development in financial industry I clearly have

> enough background to form a reasonable belief in such a conclusion.
>
> … I escalated the issue up … I told [Mr. Feagans] of my concerns of the project being a failure and … about the inefficiency in software development where the rule is to redo the job every couple of years. This inefficiency may also be looked as a drain on company resources and shareholder assets, preventing the Bank from coming out with new products and services, thus not being able to compete efficiently. This too can have an effect on company reputation and consequently its stock share price.
>
> I feel that I am being penalized and retaliated against for following Bank's own policies, procedures and guidelines, as well as observing the requirements of federal law.

Id. Complainant concluded that because he "had a reasonably successful career at Bank of America" prior to the June 2006, "incident," the only explanation for his bad review was retaliation. Id.; Compl. Resp. at 2.

Applicable Law

The employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("the Act" or "SOX" herein) provide the right to bring a "civil action to protect against retaliation in fraud cases." The procedural regulations governing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 4212 (b), codified at 18 U.S.C. § 1514A(b)(2)(B), apply to whistleblowing actions under the Act. Section 4212(b) of AIR 21 establishes the procedure for filing complaints of discrimination with the U.S. Department of Labor [OSHA].

On August 24, 2004, OSHA published final regulations prescribing the procedures for handling complaints of discrimination under the Act. 69 Fed. Reg. 52104. The regulations are found at 29 C.F.R. Part 1980, and mirror those applicable to AIR21 discrimination complaints.

The Act specifically provides protection against retaliation to employees who:

> 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 [certain provisions of the Act], 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 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)…

18 U.S.C. § 1514A(a)(1).

The Act extends such protection to employees of companies "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))." § 1514A(a).

To receive protection under the Act, a complainant must establish by a preponderance of the evidence that he engaged in activity protected under the Act; that his employer was aware of the protected activity; that he suffered an adverse employment action; and that circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. §§ 1980.104(b), 1980.109(a). Macktal v. U.S. Dept. of Labor, 171 F.3d 323, 327 (5th Cir. 1999). If the complainant proves all four of these elements, then he is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity. 29 C.F.R. § 1980.109. If that burden is met, then the inference of discrimination is rebutted, and to prevail, the complainant would need to show that the employer's rationale for the adverse action was pretextual. Overall v. Tennessee Valley Auth., ARB No. 98-111 (ARB April 30, 2001).

Whether Complainant engaged in protected activity is an essential, material fact which Complainant must show to survive summary disposition. The Act protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of the federal mail, wire/radio/TV, bank, and securities fraud statutes (18 U.S.C. §§ 1341, 1343, 1344, and 1348), or any rule or regulation of Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a).

Protected activity is defined under the Act as reporting an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against the shareholders. While the employee is not required to show the reported conduct actually caused a violation of the law, Complainant must show that he actually believed that Respondent violated one of the laws or regulations enumerated in the Act, and that his belief was reasonable. See, e.g., Deremer v. Gulfmark Offshore Inc., 2006 SOX-00002 (ALJ June 29, 2007). Therefore, Complainant's belief "must be scrutinized under both subjective and objective

standards." Marshall v. Northrup Gruman Synoptics, 2005-SOX-8 (ALJ June 22, 2005) (quoting Melendez v. Exxon Chemicals Americas, ARB No. 96-051 (July 14, 2000)).

The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision. See e.g., S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002)(explaining that the pertinent section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company"). In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." Ames Department Stores Inc., v. Stock Litigation, 991 F.2d 953, 967 (2d Cir. 1993)(addressing SEC antifraud regulations). While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit.

Complaints regarding internal company policies and decisions are not protected activities under the Act. In Marshall, an employee reported concerns to management about "improper financial accounting methods and ethical lapses." Marshall, supra., 2005-SOX-8 at 4. Specifically, the employee related matters involving fraudulent accounting activity, including "willful misclassification of labor hours, depreciation and capital expenses." Id. The ALJ found "no basis to argue that [the respondent's] internal accounting implicated fraud against shareholders" because "[c]omplainant's allegation that certain expenses should have been charged to a different department, even if true, … merely demonstrates a grievance with internal company policy as opposed to actual violations of federal law." Id.

Similarly, in Reddy, the Administrative Review Board ("ARB") held that an employee failed to allege a protected activity where the employee reported that her "line counts are being 'zapped' and that the 'zapping' is an 'Enron-type' accounting practice." Reddy, ARB No. 04-123 at 8. The ARB found that the complainant "did not show that her emails … provided information about conduct she reasonably believed constituted a violation of the federal fraud statutes, or an SEC rule or regulation, or any federal law relating to shareholder fraud." Id. at 8-9. See also Tuttle v. Johnson Controls, 2004-SOX-76 (ALJ Jan. 03, 2005)(finding no protected activity where complaint involved a report that a significant number of batteries were defective); Lerbs v. Buca di Beppo, Inc., 2004-SOX-8 (ALJ June 15, 2004)(no protected activity where the complainant reported concerns about (1) reclassifying outstanding cash balances to accounts payable; (2) hiring former employees of the respondent's auditor; and (3) purchasing employee meals from the respondent's restaurant at allegedly inflated rates).

In Platone v. FLYi, Inc., ARB No. 04-154, 17 (ARB Sept. 29, 2006), the ARB reversed an ALJ's finding of protective activity where the employee's communications did not "'definitively and specifically' relate to any of the listed categories of fraud or securities violations" under § 1514A(a)(1) of the Act. The ARB noted that the relevant inquiry is not what the complainant alleges in the complaint, but what the complainant actually communicated to the employer prior to the adverse action. Id. In Platone, the ARB found that the complainant's communications raised a possible violation of internal union policy but not fraud against shareholders. Id. at 18.

Discussion

Complainant Did Not Adduce Sufficient Evidence That He Engaged in SOX-Protected Activity.

In both Complainant's Complaint and Response, he argues that Respondent launched a retaliatory scheme against him starting in November, 2006, based on his June and July, 2006, communications regarding the AML project. Compl. Resp. at 2. The alleged adverse employment actions include a negative performance review in November, 2006, counseling on communication in January, 2007, and a demotion and lowering of pay in June, 2007. Id. at 4. Complainant's negative performance review resulted in the loss of a bonus for the 2006, work year. Id.

Respondent argues that Complainant has failed to establish any protected activity under the Act because Complainant did not identify any of the enumerated provisions of the Act that denote protected activity in any of his communications made prior to the alleged adverse employment action. Resp't Resp. 1 at 19. Respondent further contends that Complainant's communications did not reference fraud until after his November, 2006, performance review and, even then, Complainant merely alluded to fraud. Id. at 20. Respondent avers that Complainant's reports "demonstrate a grievance with internal management decision and bank policy." Id. I agree.

Complainant identifies his e-mails starting in June, 2006, as the catalyst for Respondent's alleged retaliatory scheme. In June, Complainant voiced concerns about AML team's application development process. EX 2. In July, Complainant's e-mails reflect concern about the AML team's choice of framework. See, EX 3. He voiced frustration about being excluded from the decision making process and displeasure with the AML team's decisions in general. Id. Complainant also expressed his distress over apparent inefficiencies and the potential need to redesign the work in the future. Id. Complainant asked to be removed from the project altogether on July 26, 2006. EX 3 ("So, I really want out of this"). Complainant did not even hint at fraud in these e-mails. At that time, Complainant's concerns solely related to internal management decisions and corporate efficiency.

Following Complainant's negative performance review in November, 2006, Complainant continued to express complaints about internal management. On December 5, 2006, Complainant again voiced concern with the AML team's choice of an inflexible framework and the possibility of re-work. EX-14. Like its predecessors, this e-mail was void of any mention of fraud; Complainant merely added that he believed his negative performance review was the result of his previously expressed concerns.

Complainant first referenced fraud in his December 8, 2006, e-mail. EX 15. However, the reference is both general and obtuse. Complainant stated that "[s]ome may argue … what I was pointing out … was fraud." Complainant defined this fraud in terms of the company creating a "lousy product/service" in the context of the value of the product to the company rather than fraud against shareholders. Although Complainant used the word "fraud", his e-mail evidences more concern that the AML team's decisions would produce an inferior product.

Complainant did not agree with the application the AML team was creating and he voiced his frustrations. The evidence demonstrates that Complainant's concerns do not involve fraud against shareholders. As in Marshall, Complainant's communications from June through December, 2006, involve concern with internal management decision making and product development. See also Reddy, Tuttle, and Lurbs (involving communications about internal management and/or policy).

In response to both counseling on his communication style and his November, 2006, negative employment review, Complainant submitted a written rebuttal in January, 2007. EX 17. It is here that Complainant stated for the first time that he "believed that the company could be found guilty of negligence and willful blindness – a deliberate effort to avoid and ignore information that could lead to the discovery of unlawful activity." Id. Complainant further claimed that he "had more than enough reason to believe that the Bank may be found guilty of violating federal laws and regulations." EX 17. Complainant's communication is general and lacks any specificity as to how the AML team's decisions constituted fraud against shareholders. I find that Complainant's communications are similar to the communications discussed in Platone because they do not definitively and specifically relate to any of the categories enumerated in § 1514A(a)(1) of the Act.

The fact that Complainant mentioned "federal laws and regulations" in his January, 2007, communications does not transform his concern with internal policy into concern about stockholder fraud. Complainant did not specify anything involving intentional deceit. He did not address his concerns to any individual responsible for company finances, who would logically recognize fraudulent conduct within the context of the Act. I find that Complainant's communications do not constitute a protected activity because they involved matters of internal company policy. I further find that Complainant did not identify particular concerns about Respondent's conduct that he may have actually and reasonably believed to be illegal.

Even if I find that Complainant's December, 2006, e-mails and January, 2007, report amount to protected activity, both communications occurred after the November, 2006, performance review. In addition, Complainant's January, 2007, report was submitted after his counseling on communication. Complainant likely could not establish that the protected activity was a contributing factor to the unfavorable employment action because the primary unfavorable employment action, the November, 2006, performance review, occurred prior to Complainant's first reference to fraudulent conduct.

IV. CONCLUSION

Based on the foregoing discussion, construing all facts in the light most favorable to Complainant, it is clear that Complainant did not engage in activities protected under the Act. Respondent's motion for summary decision as a matter of law is hereby GRANTED.

ORDER

It is hereby ORDERED that Complainant's Complaint be DISMISSED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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).