**U.S. Department of Labor**

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

**Issue Date: 16 June 2008**

Case No.: 2008-SOX-00034

In the Matter of

GUOGUANG SU,

Complainant,

v.

ALLIANT ENERGY CORPORATION

and

RMT, INC.,

Respondents.

## RECOMMENDED DECISION AND ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION

This cases arises out of a complaint of discrimination filed pursuant to 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 USC § 1514A ("Sarbanes-Oxley" or "the Act") enacted on July 30, 2002. Sarbanes-Oxley affords protection from employment discrimination to employees of companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 USC § 781) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 USC § 780[d]). The law protects "whistleblower" employees from retaliatory or discriminatory actions by the employer based on the employee having provided information to the employer, a Federal agency, or Congress relating to alleged violations of 18 USC §§ 1341 (mail fraud or swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of federal law related to fraud against shareholders.

## BACKGROUND

The Complainant, Dr. Su Guoguang, filed a complaint of retaliation in violation of the Act with the Department of Labor on August 31, 2007. He alleged that he had been employed by RMT, Inc. ("RMT"), a wholly-owned subsidiary of Alliant Energy ("Alliant"). He contended that he was an employee of Alliant for purposes of Sarbanes-Oxley, and that he had been terminated in retaliation for whistleblowing activity protected under the Act. Alliant is a publicly traded company registered with the Securities and Exchange Commission. RMT is not.

The Occupational Safety and Health Administration (OSHA) conducted an initial investigation of the complaint. The report of that investigation, dated February 19, 2008, dismissed the complaint. The investigation found that the two respondent corporations "do not constitute an integrated employer" and that therefore Dr. Su was not an employee covered under Sarbanes-Oxley.

Dr. Su filed an appeal with the Office of Administrative Law Judges on March 24, 2008. On April 30, 2008 the respondents filed a motion for summary decision. Dr. Su responded to this motion on May 21, 2008, with a supplemental filing on May 23, 2008.

The respondents filed a reply to this supplemental filing on June 6, 2008. The only portion of this last filing that needs to be addressed at this time is in a footnote on page 3. In that footnote, counsel for the respondents raised the possibility that Dr. Su, who is representing himself and lacks experience with the American legal system, may have filed documents with this office without serving them on the respondents. I have reviewed the filings received from both parties. All of the documents submitted by Dr. Su are attachments to filings that have been commented on in the briefs and other submissions of the respondents. Based on this review I am satisfied that Dr. Su has not submitted any documents to me *ex parte*.

## STATUTORY PROVISIONS

In defining what constitutes a violation and the types of entities that may commit one, the Act states that:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--
>
> > (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or

> 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. §1514A(a)

There is no evidence that there was ever a "proceeding" within the meaning of Section 1514A(a)(2), so the case falls within the language of Section 1514(A)(a)(1) requiring that a complainant "provide information, cause information to be provided, or otherwise assist in an investigation."

## STANDARD OF REVIEW ON MOTIONS FOR SUMMARY DECISION

In ruling on a motion for summary decision, an administrative law judge may grant the motion 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." 29 C.F.R. § 18.40(d); *see also* Rule 56 of the Federal Rules of Civil Procedure. A fact is material and precludes granting summary decision if proof of the fact "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "'genuine' … if the evidence is such that a reasonable [finder of fact] could return a verdict for the non-moving party." *Id.*

Initially, the party moving for summary decision has the burden of showing that there are no genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This burden may be discharged by demonstrating that the nonmovant cannot make a showing sufficient to establish an essential element of the case. *Id.* 325. Thereafter, the burden shifts to the nonmovant who must "set forth specific facts showing that there is a genuine issue of fact for the hearing." *See* 29 C.F.R. § 18.40(c). The opposing party may not rest upon mere allegations or denials. *Id.* In determining whether there is a genuine issue of fact for the hearing, the judge shall view "all the evidence and factual inferences in the light most favorable" to the nonmovant.

*See Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999) (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1969)). If there are no genuine issues of material fact, then the moving party is entitled to summary decision as a matter of law. *See Dawkins v. Shell Chemical, LP*, 2005-Sox-41, slip op at 2 (ALJ May 16, 2005).

## GROUNDS ASSERTED FOR SUMMARY DECISION

The first ground asserted for summary decision by the respondent corporations is timeliness of the appeal. The second is that RMT, the company that employed Dr. Su, is not subject to the Act and that he was thus not a covered employee. This is the basis on which OSHA made the determination that is under appeal. The third ground is that Dr. Su's actions alleged in the complaint do not constitute protected activity under the Act. The fourth ground is that even if Dr. Su had engaged in protected activity, that activity was not the reason for his termination.

## TIMELINESS

Under 29 C.F.R. §1980.105(c) the findings and preliminary order from an initial investigation by OSHA become effective unless an objection and request for hearing is filed within 30 days. The report of the investigation was mailed on Tuesday, February 19, 2008. Dr. Su signed the return receipt on Monday, February 25, 2008 and mailed his appeal on Monday, March 24, 2008, within the 30-day time limit. His appeal is therefore accepted as timely.

## STATUS OF RMT AS AN EMPLOYER UNDER SARBANES-OXLEY

### CORPORATE STRUCTURE OF THE RESPONDENT CORPORATIONS

Alliant Energy is a publicly traded holding company that owns two regulated public utility companies and a variety of other subsidiaries. The corporate structure of the Respondents is detailed in their motion for summary decision. RMT is a wholly owned subsidiary of Alliant Energy Integrated Services Company, which is a wholly owned subsidiary of Alliant Energy Resources, Incorporated, which is in turn a wholly owned subsidiary of Alliant, the publicly traded company named as a respondent in this case. [Affidavit of William Dickrell, Exhibit 1 of the motion for summary decision].

This structural description is not denied by the Complainant and is generally consistent with Exhibit 4 of his response to the motion, a hand-drawn table of organization that was provided to him during his job interview. That table is primarily concerned with the internal structure of RMT, and it omits Alliant Energy Integrated Services Company. However, it shows clearly the subsidiary relationship running from Alliant through Alliant Energy Resources to RMT.

## COMPLAINANT'S ALLEGATIONS CONCERNING HIS EMPLOYMENT STATUS

In support of his contention that RMT was an agent of Alliant for purposes of the Act Dr. Su offered several documents:

1. A form letter from the President and CEO of Alliant that offers the opportunity to participate in Alliant's employee stock purchase plan. [Appendix 1, March 24, 2008 Appeal]

2. Pages from a document labeled Alliant Energy Ethical and Legal Compliance Code. It includes a cover letter from the President and CEO that states: "Ethical behavior is a core value of Alliant Energy and its subsidiary companies." This sentence is circled by hand on the copy attached to the appeal. The next page contains the paragraph: "One of the highest priorities of Alliant Energy and its subsidiary companies is to comply with all applicable laws, rules and regulations. It's the way we do business both within the company and with outside affiliates, customers, clients, regulatory agencies, foreign entities and competitors." [Appendix 2, March 24, 2008 Appeal]

3. A copy of a security badge issued to Dr. Su. The top of the badge contains the name and logo of Alliant Energy. The bottom portion, below Dr. Su's photograph, has the words "RMT, Inc. Guoguang Su." [Appendix 2, March 24, 2008 Appeal]

4. The hand drawn table of organization mentioned above. [Exhibit 4, May 23, 2008 Supplemental Brief]

In addition, he makes claims for the relationship between the two companies for which he does not offer supporting documentary evidence. For example, at page 21 of his appeal he states that page 2 of Alliant's Form 10K for 2006 "stated that Alliant employees includes RMT employees." At page 22 of the appeal he states that Mr. Stephen D. Johannsen, the President of RMT, is an employee of Alliant and that the Human Resources Department of RMT "represented" Mr. Johannsen in carrying out the decision to terminate Dr. Su.

## ALLIANT'S FORM 10-K AND PRESS RELEASES

Page 2 of Alliant's 200610-K filed with the Securities and Exchange Commission does not mention RMT at all. It refers to Alliant Energy Resources, the parent company of RMT, which it abbreviates as "Resources." It lists the number of total employees for "Resources," and the number of those employees who are covered by collective bargaining agreements. It does not say anything about the numbers or status of the employees of RMT or of any other subsidiary of "Resources."

The only reference to RMT on any of the pages of the 10-K that Dr. Su cited is on page 15, which states:

> Resources [*i.e*. Alliant Energy Resources, Inc.] manages a relatively small portfolio of wholly-owned subsidiaries and additional investments through two distinct platforms: Non-regulated Generation and other non-regulated investments.
>
> . . . . . .
>
> Other non-regulated investments – includes investments in environmental engineering and site remediation, transportation, construction management services for wind farms and several other modest investments . . . Environmental engineering and site remediation includes RMT, Inc., an environmental and engineering consulting company that serves clients nationwide in a variety of industrial market segments and specializes in consulting on solid and hazardous waste management, site remediation, ground water quality monitoring and detection, and air quality control.

The 10-K also reports earnings from RMT, as well as those from Alliant's other subsidiary companies. In addition Dr. Su has provided in his May 20, 2008 response to the motion copies of press releases concerning RMT's activities. These refer to RMT's status as a subsidiary of Alliant Energy Integrated Services and "a member of the Alliant Energy family of companies." Neither these press releases nor the sparse reference in the 10-K filings prove any degree of operational integration or principal-agent relationship between Alliant and RMT. They prove merely what has never been in dispute--that RMT is a wholly-owned subsidiary of Alliant.

**STATUS OF THE PRESIDENT OF RMT**

The complaint alleges that Mr. Johannsen is an employee of Alliant and that he was involved in the decision to terminate Dr. Su. These two allegations might, if they were proven to be true and if other conditions were met, bring the complaint within the statutory prohibition of adverse action by an "officer, employee, contractor, subcontractor, or agent" of a covered employer. However, no evidence has been offered in support of either one. Mr. Johannsen's affidavit [Exhibit 12 of the motion for summary decision] states that he has been President of RMT since November 13, 1997 and that he is not and never has been an employee, officer, or director of Alliant. He further states that he was not involved in the decision to terminate Dr. Su. This is both plausible on its face in light of ordinary business practices and consistent with Dr. Su's description of the circumstances of his termination. He describes dealings with supervisory engineering personnel and with the Human Resources Department, but not with Mr. Johannsen.

**DIRECT STOCK PURCHASE PLAN OFFER**

A direct stock purchase plan is a form of employer-sponsored benefit that permits employees to invest in their company's stock without the transaction costs associated with buying shares on the stock market in a conventional brokerage account. By definition a corporation like RMT, non-publicly traded and wholly owned by another company, cannot offer

such a benefit. If the employees of a non-publicly traded subsidiary are to receive the benefit at all, it is the shares of the publicly traded parent corporation that must be made available for purchase. This is the offer expressed in Appendix 1 of the appeal.

That letter begins "Dear New Employee" and opens by saying "As an employee of Alliant Energy Corporation, you are eligible to participate in the Alliant Energy Corporation (the "Company") Shareowner Direct Plan (the "Plan")." It goes on to describe the operation of the plan, which permits employees to make direct purchases of Alliant stock. The second paragraph, headed "Eligibility Requirements" says:

> There are no minimum age restrictions nor is a specific length of company service required before an employee is eligible to participate in the Plan. Employees of the Company and its subsidiaries are exempt from the initial investment of $250.

This is the only portion of the letter that refers to subsidiaries, and it does so only to put employees of subsidiaries on an equal footing with employees of Alliant itself for purposes of eligibility to make initial purchases.

## ALLIANT'S ETHICAL AND LEGAL COMPLIANCE CODE

The quoted portions of the Alliant Energy Ethical and Legal Compliance Code add nothing meaningful to an analysis of the employment status of the employees of any of Alliant's subsidiaries. The Code states that to "comply with all applicable laws, rules and regulations" is among the highest priorities of both Alliant and its subsidiary companies. Alliant and its subsidiaries would be under an obligation to comply with laws, rules, and regulations whether or not it ever issued an internal code of ethics. Having decided to issue such a code, Alliant could scarcely say that obeying the law is a high priority for the parent company but is merely an option for its subsidiary companies to consider.

If the mere acknowledgement by a publicly traded corporation of the binding effect of the law on subsidiary companies had the effect that is being claimed, then all employees of all subsidiaries would be employees of the parent corporation for purposes of the whistleblower protection provisions of the Act. Both the text of the statute and the case law make it clear that this is not the case.

## SECURITY BADGE FOR ACCESS TO ALLIANT FACILITIES

Marie S. Hammond was the RMT employee who obtained the Alliant security badge for Dr. Su. Her affidavit is Exhibit 16 of the Respondent's motion for summary decision. The application for the badge [Exhibit A of her affidavit] is a form with Alliant's name and corporate logo headed "Non-Employee (Contractor)." The Job Code checked on the form is "Non-Employee General." The form approving the issuance of the badge [Exhibit B] is headed "Security Identification Badge and Access Request *for Non-Alliant Energy Personnel*." [Italics

in original] It lists Dr. Su's employment status as "Contractor." In short, the circumstances under which he received the badge were those for an outside contractor of Alliant rather than an employee.

**DISCUSSION**

A corporation, as an artificial person, acts through other entities, including other corporate entities and, ultimately, through individual human beings. Section 1514A(a) acknowledges this commonplace reality by prohibiting actions of an "officer, employee, contractor, subcontractor, or agent" of a publicly traded company. It does not refer to non-publicly traded subsidiaries of such a company, but under certain circumstances a subsidiary could be an "agent" within the meaning of the statute.

In his appeal from the initial OSHA determination Dr. Su cites other sections of Sarbanes-Oxley that expressly regulate both publicly traded companies and their subsidiaries. He argues from this that the whistleblower protection provision also applies to subsidiaries. However, these portions of the statute support the opposite conclusion. Reference to subsidiaries in other sections of the Act make it clear that Congress contemplated the difference between publicly-traded companies and their subsidiaries as it was drafting Sarbanes-Oxley. Congress could have included subsidiaries within the whistleblower protection section but did not.

The statutory language "simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer." *Minkina v. Affiliated Physicians Group*, ALJ No. 2005-SOX-19, at 6 (ALJ Feb 22, 2005). It does not convert every entity that acts as an agent of a publicly-traded company for any purpose into an agent within the meaning of Section 1514A(a). "Nothing in the Act suggests that it is intended to provide general whistleblower protection to the employees of any employer whose business involves acting in the interest of public companies." *Brady v. Calyon Securities*, 406 F. Supp. 2d 307 (S.D.N.Y. 2005).

Even though subsidiaries like RMT are not expressly included within the scope of 18 USC § 1514A, they may, depending on the facts of an individual case, be accountable as agents of their parent companies. A subsidiary of a publicly traded company may act on behalf of its parent company in employment matters just as an outside contractor might. However, the fact that one company acts as an agent of another for some purposes does not bring all of the acts of the agent within the scope of the whistleblower protection of Sarbanes-Oxley. The Act does not define the term "agent." Therefore common law agency principles apply in determining whether a subsidiary or other entity was acting as an agent of the publicly traded company in employment actions relating to an alleged whistleblower. *Rao v. Daimler Chrysler Corporation*, 2007 WL 1424220 (ED. Mich, 2007).

RMT acts on behalf of Alliant in the most obvious and general way. By engaging in a specialized business (and one that is distinct from Alliant's core business), RMT is intended to make money for Alliant and its shareholders. That is ordinarily why large companies own smaller ones in the first place. However, more than that is required for one company to be the

agent of another for purposes of Section 1514A(a). "[L]iability will only be extended in an area where the parent has exerted its influence or control. *United States v. Bestfoods, et al.*, 524 U.S. 51, 59 (1998). Therefore, in an employment discrimination case, the parent company will only be held liable where it controlled or influenced the work environment of, or termination decision about, an employee of its subsidiary company." *Hughart v. Raymond James and Assoc*., 2004-SOX-9 (ALJ Dec. 17, 2004). *See also Bothwell v. American Income Life*, 2005-SOX-57 (ALJ Sept. 19, 2005).

The appeal cites *Carnero v. Boston Scientific Corp*. 433 F.3d 1 (1st Cir. 2006) for the proposition that Sarbanes-Oxley whistleblower protection extends to non-public subsidiaries of publicly-traded companies. This reliance is misplaced. *Carnero* concerned the issue of extra-territorial application of Section 1514A(a). The Court of Appeals expressly declined to rule on the question of liability of a subsidiary. In order to reach the extra-territoriality issue it assumed, without deciding, that the complainant in that case was a covered employee.

Whether a complainant's employer is an outside contractor as in *Minkina* and *Brady*, or a subsidiary of the publicly traded parent as in *Hughart* and *Bothwell*, whistleblower protection under the Act requires that the non-public company acted as an agent of the public company with respect to employment practices. There is no evidence of that here.

The only evidence from which any inference of employer-employee relationship between Alliant and Dr. Su could be drawn is the salutation and opening sentence of the form letter that offered him participation in the stock purchase plan. Even that is ambiguous because it indicates that the program is offered under identical terms to employees of both the parent corporation and its subsidiaries.

Placed against this single item is the entire history of Dr. Su's employment by RMT, both as recounted by him and supported by the evidence submitted by the respondents. He was hired, supervised, and eventually terminated by RMT employees. His pay and other personnel matters were administered by RMT's Human Resources Department. When his professional duties required him to visit Alliant's facilities he did so under the procedures that apply to non-employees of Alliant.

The materials submitted by the parties do not raise genuine issues of material fact concerning Dr. Su's status as an employee of RMT rather than Alliant, RMT's status as a non-publicly traded company, or Alliant's lack of involvement in employment activities, including the alleged retaliation. There is no evidence supporting the contention that RMT acted as an agent of Alliant in employment activities and therefore no genuine issue of material fact on that allegation.

## PROTECTED ACTIVITY

### STATUTORY BURDEN OF PROOF

Under 18 U.S.C. § 514A(b)(2)(C), whistleblower actions under Sarbanes-Oxley are governed by the legal burden of proof set forth in 49 U.S.C. §42121(b), the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, (AIR 21). That standard requires an employee to prove by a preponderance of the evidence that: (1) he or she engaged in protected activity or conduct; (2) the respondent employer knew of the protected activity; (3) he or she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.

### COMPLAINANT'S ALLEGATIONS OF PROTECTED ACTIVITY

Dr. Su worked as an engineer on several projects designed to reduce environmental pollution in coal-burning power plants. In his original complaint to OSHA on August 31, 2007 Dr. Su summarized the complaints during his employment that he asserts to have constituted protected activity as follows:

> 9. . . .Su complained orally in May and June 2006 regarding the defect in the Kapp Feasibility study to Ma Zhanhua and Pisi Lu. In July 13, 2006, Su complained via email and orally about the defect in the Deep Staging Project that may increase the pollution and the risk of damage and decrease safety to Pisi Lu, Yang Ge, and Zhanhua Ma. In October and November of 2006 Su again complained orally to Ma, Ge, and Pisi about the Sherco project about the NOX and carbon monoxide releases and economically degrade the company. During the same period Su complained orally to Ma Zhanhua about the Edgewater 5 NOX and carbon monoxide releases that would result in economic degradation of Alliant. In December 2006, Su complained orally about the false information in the Kapp Project and defects in the Deep Staging Project to Ma Zhanhua. In March 13, Su complained by email to Zhanhua about false information in the Kapp project.
>
> . . . . . .
>
> 13. On May or June of 2006, Su warned about the defect in the Kapp Feasibility study. The Kapp study was a GO/NO GO study. The project went ahead despite the false information. This would potentially result in economic degradation of the company even though no damaging effects occurred.
>
> 14. On July 13, 2006 Su complained to management that there were flaws in the Deep Staging Project for Alliant. The Deep Staging Project was important and the mistake had to be corrected because, to the best of knowledge and belief, it could have affected Alliant's physical and legal ability to continue operating its powerplants.

> 15. From October to November 2006, Su warned of defects in the Sherco Project for Xcel Energy. The defect went uncured. The uncured defect would result in commercial degradation of Alliant and RMT even though the project was made for a third company.
>
> 16. In the same period, Su complained to Ma Zhanhua about the Edgewater 5 Project for Alliant because calculations were incorrect and would potentially result in higher noxious emissions (pollution) and commercially degrade the company. Ma Zhanhua then altered the data by using another method of calculation and refused to show Su the details of the method of calculation.

Original complaint, pp 3-5

In his various submissions to OSHA and to me Dr. Su has not offered, by affidavit or otherwise, any account of the oral complaints that he alleges. In his May 9, 2008 motion to strike affidavits he has attached three emails to document what he asserts to be complaints that constituted protected activity. They are marked Documents 7, 8, and 20 attached to the May 9 motion.

The first of these is an email dated June 28, 2006 to other engineering personnel concerning the Deep Staging Project. It opens by saying:

> I've reviewed the previous simulation result for quarter furnace. There are several items that I would like to bring up, confirm with you, and ask for your opinions.

After describing the result, Dr. Su goes on say:

> We know that FLUENT offer [sic] two options for periodic boundary condition: Translational Type and Rotational Type. I think, for our simulation, Rotational Type would be more reasonable.
>
> ….
>
> . . . I would suggest that we use rotational type periodic boundary condition and rebuild the geometry to "repeat" the physics. If you have any thoughts or different approaches, please let me know.

Document 7, May 9, 2008 motion

Document 8 is a longer email dated July 13, 2008 with the subject listed as "Update and New thinking for deep-staging." After discussing the results of earlier simulations it says:

> Several days ago, I had a long discussion with Yang. At that time, a new thought was broached. Since this is a R&D project, with a better solution, we would have more confidence in R&D conclusion for deep staging. I would like to spend some more time to express my thought.

Document 8, May 9, 2008 motion

He then proposes a new simulation method and lists several advantages that he believes would result from that method compared with the current simulation. The email closes by saying "Please let me know whether my thoughts sound reasonable. I look forward to your good suggestions for next steps."

The third of these emails was sent to Dr. Ma on March 13, 2007. It referred to a performance review meeting between the two of them. The email said:

> In my performance review meeting on Mar. 1st, you mentioned that you asked me to do group 2 for KAPP modeling project but I did group 1 instead. You also mentioned that you had e-mail about this. My memory did not match this. I checked my e-mails and could not find your e-mail either. Instead, the attached e-mail was found, in which, I documented your request and sent you to ensure that my understanding is correct. From that e-mail, you can see that actually you asked to do KAPP project in both group 1 and group 2. I guess that you might not remember this correctly, as you are busy with other important stuffs [sic] as well.

Document 20, May 9, 2008 motion.

In the motion, Dr. Su argues that this proves the falsity of a reference to the KAPP project in his performance review.

**DISCUSSION**

The theory of the case that has been consistently asserted since the original complaint to OSHA is that defects in the projects on which Dr. Su worked could result in environmental pollution, which would harm the financial interests of RMT and of Alliant (which not only owns RMT but was the customer of RMT for some of those projects), which would in turn harm the shareholders of Alliant. In a motion for summary decision all factual inferences are drawn in the light most favorable to the non-moving party. Therefore I accept, for purposes of this motion, that the simulations and other procedures in the projects to which Dr. Su was assigned were flawed in the ways that he alleges.

However, in order for there to be protected activity there must be more than corporate activities with potential harmful effects on shareholders. There must be some action by the employee "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 one of the statutes or regulations listed in Section 1514A(a)(1).

None of the materials submitted allege any such action. The first two emails quoted above propose different approaches to engineering problems and solicit additional ideas from the email recipients. Exchanging such ideas and proposals is at the heart of what engineers do, especially in research and development projects that by their nature tend to involve a certain

amount of trial and error. The most forceful statement in either of those emails is that one approach "may be more reasonable" than another.

The third email cited expresses disagreement with Dr. Ma concerning which aspects of a project Dr. Su was assigned to work on. Once again, I assume for purposes of the motion that Dr. Su's recollection of the nature of his work assignment is correct.

All of these emails express opinions within the scope of the give and take of ideas that are routinely discussed among professionals collaborating on experimental projects. None of them comes close to suggesting what Dr. Su now alleges: that data were altered, test results were faked, and defective technologies were being prepared for delivery to customers. In short, they do not "provide information, cause information to be provided, or otherwise assist in an investigation" within the scope of Sarbanes-Oxley.

No official of RMT, reading the emails that Dr. Su has submitted as his evidence of protected activity, could possibly have understood him to be alleging an engineering fraud, much less a financial one. Even if RMT's management was planning to defraud Alliant's shareholders, and even if it was willing and eager to retaliate against any employee who threatened to blow the whistle on the fraud, it would, based on the evidence presented, never occur to any manager to regard Dr. Su as a potential whistleblower.

The first two elements of a violation of the Act noted above are that the employee engaged in protected activity and that the employer knew of the protected activity. The material submitted has failed to raise a genuine issue of material fact as to either of those elements.

## REASONS FOR TERMINATION

The final ground on which the respondents moved for summary decision is that, even if Dr. Su was covered by the Act and engaged in protected activity, that activity was not the reason for his termination. In support of that motion the respondents included affidavits of Pisi Lu, Yang Ge, and Zhanhua Ma. On May 9, 2008, Dr. Su filed the motion discussed above to strike those affidavits.

In view of my findings on the issues of protected activity and employment status, it is not necessary to reach this last basis for the motion for summary decision. Because I do not reach the issues addressed in the affidavits, the complainant's motion to strike those affidavits is moot.

## ORDER

The Respondents' Motion for Summary decision is **GRANTED**.

**SO ORDERED.**

A

KENNETH A. KRANTZ
Administrative Law Judge

KAK/jcb
Newport News, Virginia

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