



**In the Matter of:**

**JOHN O. JOHNSON,**

**ARB CASE NO. 10-052**

**COMPLAINANT,**

**ALJ CASE NO. 2009-SOX-041**

**v.**

**DATE: January 30, 2012**

**ACE LIMITED, ACE INA HOLDINGS, INC.,  
ACE GROUP, ACE USA HOLDINGS, INC.,  
ACE UK, ACE AMERICAN INSURANCE COMPANY,  
and DONEY LARGEY,**

**RESPONDENTS.<sup>1</sup>**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Michael Kohn, Esq., Richard R. Renner, Esq., Kohn, Kohn, and Colapinto, LLP,  
Washington, District of Columbia**

*For the Respondents:*

**Edward T. Ellis, Esq., Sarah E. McCarthy, Esq., Montgomery, McCracken, Walker  
& Rhoads, LLP, Cherry Hill, New Jersey**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative  
Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge**

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<sup>1</sup> The Respondents informed the Board that “ACE Group,” “ACE USA Holdings,” and “ACE UK” are trade names and not legal entities. ACE Brief (Br.) at 2 n.2. We will subsequently refer to the Respondents as “ACE.”

## FINAL DECISION AND ORDER

This case arises under Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (West Supp. 2009).<sup>2</sup> John O. Johnson was an employee of ACE American Insurance Companies (ACE). ACE terminated Johnson's employment on December 19, 2007, for violating company policies, poor performance, and insubordination. Johnson filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his termination violated Section 806 and its implementing regulations at 29 C.F.R. Part 1980 (2009). OSHA found no violation and dismissed the case. Johnson objected to OSHA's findings. The Administrative Law Judge (ALJ) assigned to the case found that Johnson engaged in protected activity and that protected activity contributed to his termination, but he found that ACE proved by clear and convincing evidence that it would have terminated Johnson's employment even if he had not engaged in protected activity. We affirm.

### DISCUSSION

ACE American Insurance Company hired Johnson on or about March 3, 2007. Doney Largey, who in 2007 was the Senior Vice President of Finance and Re-Engineering, supervised Johnson. Transcript (Tr.) at 645.

Throughout 2007, the relationship between Johnson and ACE deteriorated. Johnson complained about ACE's processes and wrote a report addressing several problems with ACE's underwriting and claims department. Respondent's Exhibits (RX)-19. Johnson voiced his concern that underwriting issues could create problems with ACE's balance sheet. Tr. at 65-66, 96-97, 152. On December 17, 2007, Johnson called the ACE hotline and complained of SEC violations, accounting irregularities, and internal controls problems. Recommended Decision and Order (R. D. & O.) at 3; Tr. at 270-73, 284; *see also* Complainant's Exhibits (CX)-24, 27; RX-13.

According to ACE, Johnson failed to handle his responsibilities adequately. Many supervisors and managers felt Johnson's work was substandard. Colleagues and subordinates criticized Johnson's work with underwriting staff and felt his written contributions were too academic and off focus from his assignments. In September 2007, in what Largey characterized as a negative performance review, he removed Johnson from his supervisory duties in Scotland.

During the fall of 2007, Johnson started a private consulting company. On or about December 6, 2007, Johnson commented to Largey that his consulting company had received a

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<sup>2</sup> The Act and its implementing regulations (29 C.F.R. Part 1980) have been amended since Johnson filed his complaints. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010); 76 Fed. Reg. 68084-97 (Nov. 3, 2011). Neither the SOX, nor the regulations' amendments would affect the outcome of this case.

multi-million dollar contract. Thereafter, on or about December 7, Largey asked human resources to examine Johnson's e-mails to determine whether Johnson had used company resources in operating his outside business. An investigation revealed company e-mail usage for his personal business. Tr. at 1068-69.

On December 17, Largey and a human resources representative met with Johnson concerning his use of company resources and his outside business.<sup>3</sup> During the meeting, Largey asked Johnson for his laptop and Black Jack cell phone so that ACE could examine the equipment for inappropriate use. At this point, Johnson became agitated and called Largey incompetent and accused him of having problems with minorities. R. D. & O. at 6; Tr. at 747-49. Johnson turned in his laptop and was escorted off the premises. After receiving Johnson's laptop and phone, ACE discovered that Johnson's work cell phone had personal business contacts and had been used for personal business calls. Tr. at 911-12, 1069-75. On December 19, Largey and several ACE executives attended a meeting at which time they decided to terminate Johnson's employment. Tr. at 555-56, 668, 1075. According to ACE, Johnson's side business, insubordination, and performance problems were the three reasons for his termination. R. D. & O. at 5-6; Tr. at 668, 808-10, 836.

In response to his December termination, on March 14, 2008, Johnson filed a complaint with OSHA, which ruled against his claim on February 18, 2009. ALJ Exhibits (ALJX)-1, 2. Johnson filed an objection, and the ALJ assigned to the case held a hearing from August 31-September 4, 2009. Following post-hearing briefing, the ALJ issued his Recommended Decision and Order denying Johnson's complaint on January 27, 2010. The ALJ found that Johnson engaged in protected activity and that protected activity contributed to his termination. Nonetheless, the ALJ found that ACE demonstrated by clear and convincing evidence that it terminated Johnson's employment because he was performing poorly, was conducting an outside business using company resources, and was insubordinate. The ALJ further found that ACE would have terminated him even if he had not engaged in protected activity. R. D. & O. at 5. In so finding, the ALJ credited the testimony of Johnson's subordinates that he traveled to Glasgow, Scotland too infrequently and, when he did, stayed only for a few hours each trip. *Id.* at 10. Johnson's subordinates and colleagues ultimately concluded that Johnson was not contributing to European operations. *Id.* at 9. According to a colleague, Johnson's models were of no help and were difficult to understand. *Id.* at 10. Others voiced concerns that Johnson's contributions were too academic. *Id.* at 10-11. The ALJ also credited several colleagues' criticisms of Johnson's

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<sup>3</sup> R. D. & O. at 6. On December 17, Johnson made a hotline call concerning SEC violations, accounting irregularities, and internal controls problems. ACE argues that neither Largey nor Fazio had any knowledge of the hotline call when they scheduled and conducted the December 17 meeting. The record suggests that the hotline report was initiated at 9:51 a.m. and the third-party service notified ACE of the hotline call at 11:39 a.m., after Largey's mid-morning meeting with Fazio and Johnson. RX-13, 73; Tr. at 404-05, 522. The ALJ found temporal proximity between the hotline call and Johnson's termination. Because we find substantial evidence supports the ALJ's conclusion that ACE proved by clear and convincing evidence that it would have terminated Johnson's employment absent his protected activity, we do not address the causal connection between the hotline call and Johnson's termination.

presentation to the CEO and testimony of Johnson's insubordination at the December 17 meeting. *Id.* at 11. The ALJ found that dovetailing Johnson's poor performance was a severe lack of understanding of the underwriting business. *Id.* at 11-15.

Johnson appealed the ALJ's R. D. & O. to the Administrative Review Board (ARB or Board).<sup>4</sup> Johnson argues, among other legal and evidentiary claims, that the clear-and-convincing-evidence standard is high and that the ALJ erred in finding that ACE would have terminated Johnson in the absence of his protected activity. Johnson Br. at 22-27.

Having reviewed the record and the briefs, we conclude there is substantial evidence to support the ALJ's finding that ACE demonstrated by clear and convincing evidence that it would have terminated Johnson's employment even if he had not engaged in protected activity.

One of ACE's stated reason for terminating Johnson was his inappropriate use of company resources for his outside business. ACE has a code of conduct concerning electronic communications and data security.<sup>5</sup> The company's policies regulate use of company resources and prohibit creating conflicts of interest with ACE. RX-105; Tr. at 1078-81. In violation of these policies, ACE found unusual cell phone and e-mail usage and discovered presentations and legal documents for his personal company on his company laptop. RX-8, 97, 99, 131; Tr. at 1068-85.

Johnson argues that others who violated company policies by using company resources were not fired or at the least were warned before subsequent action was taken. Johnson Br. at 39-42. ACE counters that it considered Johnson's poor performance and insubordination in addition to his outside business when reaching the conclusion to terminate his employment. Tr. at 668, 1070-71, 1076. In support, ACE provided several examples of Johnson's poor performance during the eight months he was employed at ACE. Colleagues and subordinates criticized Johnson's work with underwriting staff and felt his written contributions were too academic and off focus from his assignments.<sup>6</sup> ACE notes that Johnson admitted that he did not perform well at a skill for which he was hired and that he misrepresented this proficiency during his job interview. Tr. at 739-42; ACE Br. at 4. According to ACE, Johnson performed poorly in a key meeting with the CEO. Tr. at 721-29, 1160; R. D. & O. at 6. Both Largey and Ronald

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<sup>4</sup> The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the ARB. 29 C.F.R. § 1980.110(a). *See* Secretary's Order 1-2010 (Delegation of Authority and Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board reviews the ALJ's findings of fact under the substantial evidence standard, 29 C.F.R. § 1980.110(b), and reviews an ALJ's conclusions of law de novo. 5 U.S.C.A. § 557(b) (West 1996). *See Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008).

<sup>5</sup> RX-103, 104, 135; Tr. at 1079-81, 1117-1120.

<sup>6</sup> Tr. at 668-69, 711-17, 727-35, 739-42, 987-88, 1041-43, 1132; RX-54, 71; R. D. & O. at 5-7, 10.

Rintala, ACE's Global Operations Officer, were critical of Johnson's competence. Tr. at 721-29, 805-10, 1160; R. D. & O. at 6. According to ACE, Johnson did not contribute to operations. Tr. at 734-36, 1039-43; RX-57. Largey informed Johnson of his performance problems during a September 17 performance evaluation in which he removed Johnson from his European leadership responsibilities.<sup>7</sup> Several ACE employees corroborated Johnson's poor performance.<sup>8</sup>

### CONCLUSION

For the above reasons, we **AFFIRM** the ALJ's Recommended Decision and Order and **DENY** the complaint. Because we find that substantial evidence supports the ALJ's decision that ACE proved, by clear and convincing evidence, it would have terminated Johnson's employment even if he had not engaged in protected activity, Johnson's other legal and evidentiary arguments are moot.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

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<sup>7</sup> Tr. at 654-55, 739-42, 987-88, 1041-43; RX-63, 71, 72; CX-20; R. D. & O. at 6.

<sup>8</sup> Tr. at 807-10, 833, 1039-43, R. D. & O. at 6-8.