

U.S. Department of Labor

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Issue Date: 27 January 2010

CASE No.: 2009-SOX-00041

In the Matter of:

JOHN O. JOHNSON
Complainant,

v.

ACE LIMITED, ACE INA holdings, Inc.
ACE Group, ACE USA Holdings, Inc.
ACE UK, ACE American Insurance Company
And Doney Largey
Respondents

Appearances:

Michael Kohn, Esquire
Richard R. Renner
For Complainant

Edward T. Ellis, Esquire
for Respondent

Before: Ralph A. Romano
Administrative Law Judge

RECOMMENDED
DECISION AND ORDER

This is a proceeding brought under the employee protection provisions of the Sarbanes-Oxley Act (hereinafter "the Act"), 18 U.S.C. 1514A.

This matter was tried in Philadelphia, Pennsylvania from August 31, 2009 through September 4, 2009. Including Complainant, fourteen witnesses were called. Complainant introduced 70 exhibits (marked CX 1 - CX 70), and Respondents offered 136 exhibits (marked RX 1 – RX 136). Final briefs were filed on November 23, 2009.

THE LAW
BURDEN OF PROOF

In Allen v. Administrative Review Bd., USDOL, 514 F.3d 468 (5th Cir. Jan 22, 2008) (case below ARB No. ARB No. 06-081, ALJ Nos. 2004—SOX 60 to 62), the Fifth Circuit Court of Appeals provided an overview for the legal burden of proof applicable to Sarbanes-Oxley Act

whistleblower complaints, following in part the interpretive case law developed by the Administrative Review Board (ABR):

The legal burden of proof set forth in [AIR21], 49 U.S.C. §42121(b), govern SOX whistleblower actions. 18 U.S.C. §1514A(b)(2)(C). To prevail, an employee must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew that she engaged in protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. ...

If an employee establishes these four elements, the employer may avoid liability, if it can prove “by clear and convincing evidence” that it “would have taken the same unfavorable personnel action in the absence of that [protected] behavior.” 59 U.S.C. § 42121(b)(2)(B)(iv). This “independent burden-shifting framework” is distinct from the McDonnell Douglas burden-shifting frame applicable to Title VII claims. ...

Slip op. at 9-10 (citations and footnotes omitted). The Court noted that an employee is entitled to relief only if the employee demonstrates that the protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint, 49 U.S.C. § 42121(b)(2)(B)(iii), and held that the term “demonstrates” means to prove by a preponderance of the evidence. Slip op at n.1.

Merely presenting a prima facie case does not entitle a complainant to prevail, but merely forces a respondent to articulate its reason or reasons for an unfavorable personnel action. Once a respondent has done so, and a full hearing has been held, the prima facie case analysis is no longer relevant. Moreover, “whether or not the respondent has articulated a reason, the complainant in order to obtain relief must prove each element of his case by a preponderance of evidence. ... Only if the complaint so proves must the ALJ apply a mixed motive analysis and determine whether the complainant’s employment would have been terminated anyway. Heinrich v. Ecolab, Inc., ARB No. 05-030, ALJ No. 2004-SOX 51 (ARB June 29,2006), slip op. at 16 (ALJ did not err in declining to engage in a mixed motive analysis where the complainant failed to prove that protected activity was a contributing factor in his termination).

PROTECTED ACITIVITY

In Van Asdale v. International Game Technology, (577 F.3d 989) Aug. 13, 2009), the Plaintiffs-Appellants were in-house intellectual property attorneys who allegedly had raised the issue of shareholder fraud in relation to the failure to disclose, prior to a merger, possible problems with an important patent holding.

The Ninth Circuit concluded that the plain language of the SOX whistleblower provision, as well as the statute’s legislative history and case law interpreting it, suggest that to trigger the protections of the Act, an employee must have (1) a subjective belief that the conduct being reported violated a listed law, and (2) this belief must be objectively reasonable. The court stated it agreed with the First Circuit that “[t]o have an objectively reasonable belief there has been shareholder fraud, the complaining employee’s theory of such fraud must at least approximate

the basic elements of a claim of securities fraud.” Slip op. at 11083, quoting Day v. Staples, Inc., 555 F3d 42, 55 (1st Cir. 2009).

The Court found that the Plaintiff’s theory of fraud was sufficient (for the purposes of determining a summary judgment motion) to approximate a securities fraud – at least that it was objectively reasonable for the Plaintiffs’ to suspect that the non-disclosure prior to the merger was deliberate (the patent being the “crown jewel” of the defendant’s intellectual portfolio). The court made a point of stating that it was not finding that the nondisclosure actually constituted wrongdoing, but that under the SOX whistleblower provision – to encourage disclosures - - a plaintiffs’ reasonable, but mistaken belief of a Sox violation is protected.

CONTRIBUTING FACTOR

In Pardy v. Gray, (07 Civ. 6324-LAP), S.D.N.Y. July 15, 2008, it was held that:

The question becomes whether Plaintiff can demonstrate that her allegations of fraud were a contributing factor in her termination. The words “a contributing factor” means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. Marano v. Dep’t of Justice, 2 F.3d 1137, 1140 (Fed.Cir.1993). One consideration in proving causation is the temporal proximity between the protected activity and the unfavorable personnel decision. See Mahony 2007 WL 805813; Collins, 334 F.Supp.2d at 1379; 29 C.F.R. § 1980,194(b). mere temporal proximity, however, does not compel a finding of retaliatory intent. See McClendon v. Hewlett Packard, Inc., 2006-SOX 29 (ALJ Oct. 5, 2006). In a Title VII case, the Supreme Court stated that even cases that accept mere temporal proximity to establish causation “uniformly hold that the temporal proximity must be close.” Clark County School Dist. V. Breeden, 532 U.S. 268, 273 92001) (internal quotations omitted); see also Moser v. Indiana Dept. of Corrections, 406 F.3d 895, 905 (7th Cir. 2005) (in the Title VII context, “suspicious timing alone rarely is sufficient to create a triable issue”).

SUMMARY OF DISPOSITION

I will find that Complainant has demonstrated: that he engaged in protected activity; that Respondents knew that he engaged in protected activity; that he suffered adverse employment action; and, that the protected activity was a contributing factor in the adverse employment action.

However, I will also find that Respondents have demonstrated by overwhelming clear and convincing evidence that they would have taken the same adverse employment action against Complainant in the absence of any protected activity.

COMPLAINANT’S CASE

On the morning of December 17, 2007, Complainant telephoned Respondents’ “...integrity hotline...”, and reported what he believed to be violations of the Security and

Exchange Commission (SEC) rules and regulations (Tr. 270-273; R-13). Doney Largey (Complainant's superior) and Mary Ann Fazio (Respondents' Human Resource representative) were informed of that telephone call shortly after it was made, and before Complainant's December 19, 2007 termination (Tr. 276-77; C25; Tr. 281-2). Complainant testified that his charge of SEC violations was based upon his belief that Respondents' reporting to the SEC was: "...obviously fraud ...obviously accounting irregularity, that [Respondents] have not revealed, not reported the true condition of [their] internal controls ..., [that] it isn't about what [Respondents] knew its [sic] what they did not report," and "[i]f you look at the SEC 302, those are regulatory requirements that you report material deficiencies in your internal controls, especially those that are impacting your financials... it was clear that [Respondents] were affecting ACE's financials and that [Respondents] needed to report[ed] them and [Respondents] weren't doing so." (Tr. 284; CX 24; CX 27). Complainant had conducted workshops with several of Respondents' underwriters in April, 2007 (which resulted in his creation of his report critical of the underwriting process, C-4), and had come away with a distinct impression that "...underwriting is in very serious trouble...[y]our balance sheet potentially is being affected by the way [the underwriters] are underwriting risks...[y]ou're completely exposed...[t]omorrow morning you could have a real call of claims which exhaust your reserves and you end up...in a hole somewhere" (Tr. 152). Without question, Complainant believed that Respondents' underwriters were incorrectly assessing risks, and thus incorrectly setting premiums (Tr. 96-97). Thus, reasoned Complainant, the statements in Respondents' filing with the SEC that Respondents' have put in place "...clearly defined underwriting authorities, standards, and guidelines..." as well as employing a business review structure that helps ensure control of risk quality and conservative use of policy limits and terms and conditions (R 17 @ 11), were incorrect, false and misleading (Tr. 11, 115). I find Complainant's belief both objectively and subjectively reasonable.

Complainant's conviction, although based in ignorance, see *infra*, that Respondents' underwriting function was in serious disarray contaminating risk assessment and ultimate premium pricing¹, when viewed against the foregoing statements in Respondents' SEC 10-K filing (at R 17, at 9, 11)², is found to be objectively reasonable.

Respondents' insistence that Complainant's business educational background (masters degree in business, etc.) and previous business experience (with, among others, a public accounting firm), precludes a reasonable subjective belief that SEC violations were occurring, misses the point. Such a background suggest more that Complainant would be less likely to conclude that Respondents' underwriting function was flawed, rather than discredit his connection between what he though he observed of that function (misplaced as it was , *infra*) and Respondents' 10-K assurances to the SEC. Subjectively, Complainant's very ignorance of the underwriting function, places him within the reasonable range of belief that the 10-K statements were not in accord with the reality at Respondents' underwriting world.

¹ Respondents' assertion (Br. at 26, 38, 40; 47) that among Complainant's motives in making the hot-line call was his attempt to save his job, has no affect on whether Complainant engaged in protected activity. So too, Complainant's "...sprinkling magic powder" (Br. 38, 39) or smoke and mirror alleged behavior, does not render an otherwise valid protected activity, unprotected.

² I.e., "Our priority is to ensure adherence to criteria for risk selection by maintaining high levels of experience and expertise in an underwriting staff." "...we have established a business review structure that ensures control of risk quality..." (R 19, at 9).

Both Largey and Fazio acknowledge that they were aware of Complainant's hot-line call before Complainant was fired (supra).

The hot-line call was placed on December 17, 2007, and Complainant was terminated on December 19, 2007 (supra). And, as noted, the proximity in time between the protected conduct and the adverse action may itself be sufficient to establish causation for purposes of a prima facie case. Toland v. Werner Enterprises, 93-STA-22 (Sec'y D&O Nov. 16, 1993, slip op at 3); *see also* Stiles v. J.B. Hunt Transportation, 92 -STA-34; Moravec v. HC & M Transportation, Inc., 90-STA-44; Ertel v. Giroux Brothers Transportation, Inc., 88-STA-24. Complainant was discharged within two days of his hot-line call. Thus, based on temporal proximity, I find that Complainant raised the inference of causation; and has sustained his initial burden of proof.

RESPONDENTS' CASE

Respondents tell us that Complainant was fired because he was not competent, was conducting an outside business using their resources, and was insubordinate to his boss; and that any protected activity engaged in by him, played no role in his termination (Tr. 668; 761-2). The record abundantly supports this assertion.

Complainant was initially hired by Largey to help move an operations office which had recently been relocated from England to Scotland; to help establish a more efficient relationship between the underwriters³ and the operations staff⁴; and to assure compliance with a newly enacted United Kingdom timing requirement for the issuance of policies called "contract certainty" (Tr. 708-9). These "process" functions assigned to Complainant had nothing to do with financial reporting (Tr. 709) or financial controls (Tr. 720). Complainant's first report of his observations of and solutions to these "processing" problems (R 19) was viewed by Largey as "...highly academic...overly complicated...and [not] detailed enough to be able to articulate the actual process" (Tr. at 711-12). Largey discussed the shortcomings of these observations with Complainant (Tr. 712-13). At no point had Complainant discussed with Largey any "breakdowns" in technical underwriting, "peer reviews"⁵, or underwriting deficiencies affecting Respondents' (10K-SEC) financial reporting as fraudulent (Tr. 713-14)⁶. After this discussion, while Complainant identified the problems to be solved (R 88), he never produced a plan to remedy these problems (Tr. 715-17). Later, at a meeting with Respondents' CEO⁷, Complainant's presentation failed to adequately answer certain of the CEO's inquiries resulting in the CEO's questioning of Complainant's competence (Tr. 721-728), and loss of confidence on

³ Who evaluate risks; and set policy premiums-substantive "technical underwriting" vs. process functions (Tr. 713).

⁴ Which issue and service the policies based upon the information contained in Underwriting Risk Evaluations (URE's), which are prepared by the underwriters to enable the issuance of policies (process vs. substantive functions Tr. 710). See also Tr. 717-8, describing the "underwriting portal" data re-entering issues faced by underwriters.

⁵ Described as a "...peer to peer review of each other's work to make sure that [underwriters] are within the guidelines" (Tr. 843).

⁶ Complainant's hiring in the "operations part of the company" never envisioned his involvement in financial reporting responsibilities or functions (Tr. 679) or technical underwriting (Tr. 721).

⁷ Before which, Complainant's planned slideshow to be shown at this meeting (R 49) was criticized by Largey (R 50), and later corrected (R 52) (Tr. 722-725).

the part of Largey (Tr. 728-9). In June and July, Largey e-mailed to Complainant critiques of Complainant's work product (R 54), centered mainly upon Complainant getting involved with topics he was never asked to focus upon, and also omitting important parts of his assignment he should have been addressing (Tr. 730-5). Further problems with Complainant's work performance developed concerning the amount of time he spent at the newly staffed Scotland situs, his expense reports, Blackberry usage, and distribution of his reports of operations (Tr. 734-6). In early September, Largey discussed Complainant's work performance with the high-level officials of Respondents' overseas operations, and learned that Complainant was not "...adding value" to those operations (R 63; Tr. 737-739). On September 17, Largey noted that Complainant's work was neither practical nor useful (R 71), and discovered, upon Complainant's admission, that his interview-stated skills (implementation/fixing of problems) were different from what Complainant thought he was good at (analysis of problems) (Tr. 739-42).

On December 7, Complainant volunteered to Largey that his private, outside company had been awarded a (2 to 3 million dollar) contract with the Mortgage Banker's Association, dumbfounding Largey and leading him to suspect that this ill-performing employee may be "...spending all his time on [an outside business]" (Tr. 745-7). Largey then contacted Respondents' human resources department (Mary Ann Fazio) for approval to view Complainant's emails, as well as his websites possibly promoting his outside business, and, on December 17, asked Complainant to produce his company computer and blackberry (Tr. 747-8). At that point, Complainant "...exploded...point[ed] in [Largey's] face, and [told Largey he was] incompetent...", and that Largey has "...trouble working with minorities" (Tr. 748-9). Complainant also informed Largey that he had called the hotline (id, see also R 74). The following day, Largey received from Fazio a document authored by Complainant "...putting forth as it related to risk management" (Tr. 750-1; R 16). Largey concluded that Complainant's assertion of risk "...miscalculations..." was of no merit and "...not valid" (Tr. 751-2).⁸ Largey otherwise found that Complainant's allegations of underwriting deficiencies and other matters, i.e. reserve balances, etc. were "...not worth considering further" (Tr. 754-61). Finally, Largey asserts that Complainant's hot line call was not considered in making his decision to terminate Complainant (Tr. 761-2).

Ron Rintala is the executive to whom Largey reports (Tr. 793). He participated in Complainant's initial job interview and agreed with Largey's decision to hire him (Tr. 796-7). Like Largey, he was never advised by Complainant of any peer review problems (Tr. 799), underwriting breakdowns, or SEC fraudulent reporting (Tr. 800). He, too, along with Largey, was critical ("...just not to the point") of Complainant's planned slideshow presentation to Respondents' CEO in June, 2007, (Tr. 805-6). He too, like Largey, was disappointed with Complainant's presentation at that meeting since Complainant "...wasn't close enough with the details" (Tr. 807). Finally, he noted that he agreed with Largey's decision to fire Complainant due to incompetence, side business and insubordination (Tr. 808-10), and that Complainant's "...raising his hand around SOX issues..." (Tr. 812) didn't have "...anything to do with [Complainant] getting fired" (Tr. 814).

⁸ Included among his reasons for so concluding is that the U.S. based data warehouse is not used to calculate risks, and time problems involved in retrieving information also have no bearing thereon. (Tr. 752-3).

Pat Drinan, is a director of corporate risks in London, England, and has been in charge of Respondents' underwriting department in the U. K. and Ireland since 2004 (Tr. 953-4). Underwriters rely on brokers who act on behalf of customers (insureds) and provide details as to the risks insured (Tr. 957-8). Premiums are determined by underwriters who analyze the risks involved (Tr. 959). There exists no one "correct...or true..." premium, and experienced underwriters may well disagree as to what premiums should be charged (Tr. 96-10). Underwriters are judged as doing a "good job" through an internal audit process as well as re-insurance (laid-off risks) audits (Tr. 962-3). Premiums are not arrived at through computer systems, but the underwriters place critical factors (arrived at by experience) in the computer systems, which then merely calculate the sum of the premium (Tr. 966-7). A "URE" is a worksheet on which underwriters record features of a risk, that then generates a premium quote (Tr. 966-8; 971). In January 2007, Respondents' U.K. computers were not communicating with each other, causing frustration and extra work for the underwriters. Also, an administrative move from England to Scotland caused the hiring of new employees who needed training (Tr. 971-2). These problems, however, did not affect "technical underwriting decisions", i.e., determination of risks and premium pricing. There existed, throughout this period of time in 2007, and notwithstanding these computer and training glitches, no "...hint that [Respondents' were] experiencing in London a serious breakdown of technical underwriting" (Tr. 973-974). Respondents' rank "really well" in loss ratios⁹, compared to competitors (Tr. 975). Drinan was asked by his boss, Richard Pryce, upon Complainant's hire in March, 2007, to help Complainant meet the people he was to work with and to get his job done (Tr. 976). Contract certainty regulations¹⁰ and these computer and training glitches (supra), already having been worked upon, were to be dealt with by Complainant, as an "additional resource" (Tr. 972-9). Drinan set up a workshop for Complainant to get feedback from underwriters, and otherwise helped Complainant familiarize himself with the problems to be addressed, and the process the underwriters had to go through (Tr. 979-81). Had Complainant ever mentioned that peer reviews were not being done, "[T]hat would be absolutely unacceptable" (Tr. 982). Complainant never advised Drinan that computer system inefficiencies disabled underwriters from correctly assessing risks, and, at any rate, these computer problems did not affect technical underwriting (Tr. 983). Drinan remembered being called into a meeting with the CEO in June to answer certain questions (Tr. 985-6). In the summer of 2007, Drinan advised Largey that Complainant's "...contribution to [Drinan's] part of the business was very little", and was not "...fixing the problem" faced by the operations center in Glasgow (Tr. 986-8). Any promise of confidentiality would not be necessary in a workshop conducted by Complainant with underwriters (Tr. 1013-14).

Andrew Kendrick is CEO of ACE's European Group with extensive underwriting experience (Tr. 1023-6). Loss ratio is a measure of the quality of underwriting, and Respondents "...outperform the industry generally" (Tr. 1028). Kendrick corroborates Drinan as to Complainant's role at Respondent, as well as peer review and technical underwriting integrity (Tr. 1032-4). Kendrick noted the departure of Isabel Lima¹¹, and Complainant's interim replacement of her "...[to] mirror [Lima's role in] the Glasgow operation," "...without responsibility for technical underwriting (Tr. 1034-8). While Complainant was interim head of

⁹ Ratios of premiums collected to losses paid out on claims (Tr. 975).

¹⁰ Time constraints relating to issuance of policies.

¹¹ Formerly, in charge of ACE European Group operations (Tr. 1034).

operations between May and September, 2007, "...he [Complainant] needed to be more engaged and actually spend more time [in Glasgow]" and "[Complainant] would [conference call] in late...forget people's names..." and was not respected by others on the conference calls (Tr. 1039-41). Lorraine Morrow, infra, who ran operations and reported to Complainant, told Kendrick there was no need for Complainant in Glasgow (Tr. 1041). Upon Largey's questioning, Kendrick advised that "...we didn't really require [Complainant] anymore in Europe" (Tr. 1042-3).

Denise Carson is V.P. of Employee Relations, and, in part, responsible for approving company-initiated employee terminations (Tr. 1063). She explained Respondents' code of conduct, policy on electronic communications and data (R 102-103), personal conduct on the job (R102, 103, 104), and how employees come to know of these items (Tr. 1064-5). Complainant's hotline call notification transmission came to her, and she explained how internal audit was responsible for any investigation of same since SEC violations were alleged (Tr. 1066-7). Prior to her receipt of this transmittal, Mary Ann Fazio had contacted her about Complainant with concerns about Complainant "...running a business...using ACE's systems..." (Tr. 1068). She checked Complainant's e-mails and discovered a request to a university for interns to help with his personal business, and his personal business websites (Tr. 1068-70). She participated in the December 18, 2007 meeting with Largey and Fazio about Complainant's illicit use of company property and his performance (Tr. 1070). She also viewed documents from Complainant's computer including a proposal for his personal business (Tr. 1072). She examined Complainant's cell phone records, and found phone numbers of Complainant's personal businesses, and unusually high cell phone bills (Tr. 1073-75). She was also present at the December 19, 2007 meeting with Largey and Fazio (Rintala by phone) which involved Complainant's prior conduct/behavior (toward) Largey, and the decision to terminate Complainant (Tr. 1075-7). She noted two other employees who had been fired for misuse of company property and conducting outside businesses (Tr. 1082-5).

Richard Pryce is the President of ACE U.K., who reports to Kendrick, and to whom Drinan reports, and is responsible for all U.K. and Ireland underwriting (Tr. 1145-7). He explained how risks are properly evaluated by underwriters (Tr. 1147-51). He met Complainant in the Spring of 2007, and understood Complainant's job function as involving the "...efficiency of the policy servicing unit...", and the amount of excess time underwriters were spending on administrative tasks (Tr. 1151-2). Complainant's R 19 was presented to him, and he acknowledged some value therein relative to the noted inefficiencies of underwriters' support of the policy servicing unit, but "...other conclusions and comments in there...[he] didn't...take...seriously because [he didn't] think that there was any credibility to them and ...beyond the scope of what...we were asking [Complainant] to do". (Tr. 1152-3). For example, "...comments about...the quality of the underwriting [were]...over and beyond exactly what we were looking at", since "...there's nothing in there that would question our technical underwriting" (Tr. 1153-4). He notes that Complainant never told him that underwriters were signing off on peer reviews without actually having done the peer reviews, nor that underwriters were underwriting risks without knowing the basis for the quoted premiums, nor that the technical underwriting was defective, since "[Complainant] was [not] there to look at the technical underwriting..." (Tr. 1155-7). He also testified that in his opinion Complainant "...wasn't knowledgeable...about the underwriting process...the technical review of risks and

how one would assess a risk and price it. And, really his role ... was counting the efficiency of the process rather than having the knowledge and the ability to look at the technical approach of underwriting” (Tr. 1157). Complainant never mentioned to him any suggestion of violations of FSA¹², or SEC rules, nor that underwriters were accepting bad risks, nor any fraud against stockholders (Tr. 1157-8). In June of 2007, he participated in a meeting with Respondents’ CEO (see supra), and corroborates that Drinan had to be called into the meeting to answer technical questions Complainant could not answer (Tr. 1160). Finally, he corroborated that he could not agree that “...the URE can be the area of greatest technical error [for underwriters] because actually that’s not the underwriting process. That’s [the URE] after the underwriting process”, and “...the URE is not part of the technical underwriting process.” (Tr. 1173-1175). “The URE is a mechanism where the information [of risk evaluation and pricing of risk] is passed from underwriting...to issue the policy” (TR 1173, 1175).

Lorraine Morrow is the head of operations in ACE Europe Group, based in Glasgow, Scotland, and principally has responsibility for policy issuance and credit control (Tr. 1184-5). She first met Complainant in April 2007, and was then reporting to him (Tr. 1193-4). Complainant had created a “model” to help debt collection, but this was never used because “...it’s a sort of theory...a strange model...quite hard to understand...we haven’t...done anything with it” (TR 1195-6). Complainant offered no other suggestions or instructions to help credit control (Tr. 1197), and he “...call[ed] people by the wrong names...[A]nd...he can be a bit wacky and be a bit eccentric...it happened all the time it wasn’t just...once or twice” (Tr. 1198). Telephone conference calls were “awkward...because he didn’t seem...to acknowledge or know who was on the calls...and it was...a bit embarrassing...” (Tr. 1198-9). She eventually told Kendrick that Complainant “...wasn’t technically adding anything...was creating more work for [herself] and the team...”, and that she did not believe that Complainant understood the credit control problem or ACE commercial insurance, and didn’t get the “...impression [that Complainant’s] background was in insurance” (TR 1200).

Mary Ann Fazio is Assistant Vice President of ACE Human Resources in Philadelphia (Tr. 510). She was first approached by Largey on or about December 6, 2007, who told her that he had some concerns about Complainant’s performance, that Complainant had recently told Largey that he had a financial consulting business which had been awarded a million dollar plus contract, and that he wanted to know his options relative to viewing Complainant’s e-mails and possible use of ACE equipment to conduct his business on company time (Tr. 541-2) She later requested and received access to Complainant’s e-mails (Tr. 543), and also viewed websites (R 1, 2) from a computer hard drive which indicated a Complainant-advertized company named Decision-Optima (Tr. 543-5). A letter from a university regarding Complainant’s e-mail request for resources for his financial business was also found (Tr. 546). She testified that she had received from Largey several e-mails noting Largey’s criticism of Complainant’s performance (R 43, 44, 45, 46, 54, 55, 57, 59, 60, 63, 65, 66, 67 and 68), and read them on December 18, 2007 (Tr. 548-52). She noted that she had, on December 17, offered Complainant the opportunity to explain his outside business activities. On that date, she, Largey and Complainant met, and Largey began by explaining his concerns with Complainant’s performance and outside business interests (Tr. 553). Complainant’s laptop computer was secured, and “...at that point [Complainant stood up, pointed at [Largey]...looked at [her]...and [paraphrasing] said ‘This man

¹² U. K. statutory/regulatory insurance authority. (Tr. 1025).

is incompetent, he has problems with minorities. I [Complainant] have called the ethics hotline'...”, (Tr. 553-4). At a later meeting, it was decided that Complainant was to be terminated based upon poor performance, outside business interests, and disrespect shown to Largey (Tr. 555-57). She was unaware of Complainant’s hotline call prior to the meeting of December 17, 2007 (Tr. 564-5).

DISCUSSION

The two most compelling features of this case in so far as offering support for Respondents’ assertion that Complainant was fired for legitimate non-discriminatory reasons are:

- 1) Largey moved dramatically against Complainant toward dismissal prior to Complainant’s hotline call and Respondents’ awareness of the call, and
- 2) Any and all other alleged protected activities posed no threat to Respondents such that would warrant dismissal for that/those reasons.

I.

Nearly everybody agrees that Complainant was performing poorly (Largey, Rintala, Drinan, Kendrick, Pryce, Morrow). Everybody, except Complainant, who himself prepared a chart (C 15) in which his performance is listed as stellar. Among all these critical ACE folk who came in contract with Complainant, Lorraine Morrow¹³ singularly appears nearly unable to control herself in her frankness in her evaluation of Complainant’s lack of contribution to her part in ACE’s business operation. She had been tasked to help Complainant help her with credit control, and reported directly to him. While Complainant appeared only three times over the three to four month period he was involved, and stayed for only two or three hours at a time, the “model” he constructed (RX 89), was of no help to her – it was “strange...quite hard to understand” and was never used – no one had ever “...done anything with it”. She describes her team as viewing him as “...a bit wacky and...a bit eccentric...”. When Complainant chaired conference calls, the calls were “...awkward”, because he didn’t know who was on the calls (which included senior management) and, so it was “...a bit embarrassing”. She finally told Kendrick that Complainant was “...creating more work for [her] and the team”, because, even though he was being updated “...all the time...[they were]...not really getting anything back”. She concluded that Complainant “...didn’t...actually under[stand]...ACE,...ACE commercial insurance”. (Tr. 1195, et seq.)

The first of Complainant’s work product faced by Largey (R 19-CX 4)¹⁴ is described by Largey as “complicated...far too detailed...academic.. [not presentable] to executive management”, and “draws [no] conclusions”. As to a part of this product (at pg. A047862)

¹³ Complainant, early on, in April 2007 was placed at Morrow’s shop in Glasgow. She had been, and continued after Complainant left, running operations there (processing claims, credit control, and policy issuance). Some 250 people were involved in this operation.

¹⁴ Complainant readily admits that he was over, rather than under, communicative. Most every document authored by Complainant appearing in this record and read by me, to say the least, verges on the obscure. While not substituting this judgment for evidence, and recognizing that certain “management-speak” may indeed appear unintelligible and esoteric, my sympathies are with those tasked to comprehend some of these writings. Excusable excessiveness in communication presumes some level of comprehensible communication!

Largey would have asked Complainant “What did all of this stuff mean?” He viewed this work product as “...not get[ing] to the point of exactly what we needed to do [except to the extent that it described that underwriters were spending too much time on administrative duties, which Largey already knew].” These shortcomings were discussed with Complainant. (Tr. 712-13).

The next performance-based situation faced by Largey was the near disaster of Complainant’s presentation to ACE’s CEO (*supra*). The financial model Largey asked Complainant to build on the ESIS (claims processing third party) project was, like the credit control model presented to Morrow, “...extremely complicated and difficult to follow”, and without problem solving value (Tr. 743-4). Later, Complainant’s proposals relative to expense reductions, next assigned by Largey, were found wanting (Tr. 1122-1127). Complainant’s next work assignment with Clara Neves involving the management balance sheet, came to nothing (Tr. 763-66; 787-8). Finally, Complainant set up a workshop to complete a Largey assignment relative to the Legacy System Replacement project¹⁵, which resulted in contention among the people involved, and an unfinished work project (Tr. 726-9).

And, after all of this failure, and after Largey obtained a near consensus of high-level management that Complainant was under-performing, on December 7, 2007,¹⁶ Complainant notified Largey of his outside company winning a substantial contract award of several million dollars. At this point, Largey set in motion procedures intended to separate Complainant. Can one image a more sensible thing to do? I find Largey’s movement in the direction of dismissal altogether reasonable, and not motivated in any way by the hotline call.

It is to be noted that, except for Largey, all of Respondents’ witnesses had been separated from the courtroom during each others’ testimony. I found these witnesses consistent and corroborative of each other, and entirely credible. And, more specifically, I credit the Largey and Fazio (who was, after all, an eyewitness) recall of the insubordinate details at the December 17, 2007 meeting over Complainant’s version. Moreover, Complainant’s professed ignorance of ACE’s company-equipment usage restrictions and/or its policy relative to outside business, fails to substantively weaken or negate the reflexive insult to the company culture of integrity underlying the decision to terminate Complainant.

II.

That Complainant demonstrated a severe lack of understanding of what underwriters do, public financial reporting responsibilities¹⁷, and various of accounting realities, may be said to dovetail with his poor performance. Apart from Largey’s articulated awareness of these deficiencies, Ms. Schaekel’s expression of this ignorance is also helpful.

Ms. Schaekel is Respondents’ Chief Auditor, and is responsible for reviewing adherence to the company’s policies and procedures, including financial reporting and review of the company’s 10K-SEC filings (Tr. 840-1). She participated in a 2007 audit of the company’s peer

¹⁵ Designed to capture all previous differing computer systems inherited by Respondents.

¹⁶ Well before Largey or any of the Respondents became aware of the hotline call (December 17, 2007).

¹⁷ Complainant notes throughout his brief that the important point is not what Respondents knew about their reporting responsibilities, but what they failed to report.

review process, which resulted in a “satisfactory” rating – generally conforming to the company’s policies and procedures and operating standards – despite a “...minor documentation issue”, which was not considered significant in terms of the ultimate “satisfactory” rating reached, and “...that doesn’t, not at all” mean that anything is wrong with the underwriting decisions involved (Tr. 847-9). Technical underwriting decision-making had also been audited with an overall rating of “excellent” (Tr. 852). An operational process control audit resulted in a “needs improvement rating”, but this had nothing to do with financial reporting or for SOX purposes (Tr. 862-4). Ms. Schaeckel read Complainant’s report (R-16) as demonstrating that the “...author was really unfamiliar with ACE’s risk management process” (Tr. 867-8). She continues that this report assumes “...precision around [premium] pricing which is...not realistic...” given the products sold by ACE (Tr. 869-70). She concluded that this report is “...very, very general...”, “theoretical [and] broad” (Tr. 870-1), and suggests no violations of FSA or SEC laws (Tr. 871). She notes that the report’s assertions that “[R]isk of miscalculations [lead] to premiums that are too low”, or that “...premiums...had little to no integrity...”, show either a lack of understanding of ACE’s risk management process or are “...factually inaccurate...” (Tr. 871-2). Reserve calculations suggested as being incorrect in this report “presumes a level of specificity that just isn’t done in actuarial roles” (Tr. 878-9). Finally, her review of this entire document led her to the conclusion that it was “...an attempt to raise issues in an inflammatory manner that, ...actually the wording makes it really clear to me that the author doesn’t understand our processes, understands little about our products, and understands very little about how pricing is actually done for our business” (Tr. 883-4), and, that Complainant’s “...understanding of what an SEC or FSA violation was [is] flawed” (Tr. 883-4; 925).

Also, the testimony of three experienced underwriters (as well as that of underwriters Kendrick, Pryce and Drinan) suggests the same thing. Paul Cranford has been a maritime cargo underwriter for the last fifteen years (Tr. 1214). He explained how he does “technical underwriting” i.e., how a risk is presented, how premiums are determined (Tr. 1215). He uses a computer system to electronically file records like policy documents and correspondence, etc. He also uses a “rating model” called First Rate which stores data to help him determine a premium for the risk (Tr. 1215-16). He uses UREs, which he describes as a “...request for an underwriter to the processing unit (PSU) in Glasgow to carry out certain action...premium processing” (Tr. 1217-18). The underwriter creates the premium, not the URE (Tr. 1218). On the URE, the box entitled “Produce Quote” asks the PSU to produce a written document to be given to a broker (who represents a customer) citing the premium quote (established by the underwriter, supra) (Tr. 1219). Ninety percent of the time¹⁸, peer review is done to review risks, where underwriter colleagues get together, discuss the risk being proposed, and agree or disagree with the decision made relative to risks (Tr. 1219-1). He explained the frustration with the administrative processes faced by underwriters in the Spring of 2007, i.e., repetition of entry data (Tr. 1220-21). He met Complainant in April 2007 at a meeting with other underwriters, where everyone was “...quite open about the frustrations we had with our IT systems”, and that there would have been no need for anonymity (Tr. 1221-22). At this meeting “...business process and...[entry of] data...” was discussed, not technical underwriting, nor how risks are assessed (Tr. 1222). Complainant introduced himself as “...a business efficiency expert or process efficiency expert”, not as an underwriting expert (Tr. 1222-23). If he were told at that meeting

¹⁸ Certain risks are exempted from peer review (Tr. 1219).

that peer reviews were not being performed, he would have been concerned because underwriters “spen[d] so long discussing the peer review process” (Tr. 1223). No one at the meeting told Complainant or the group as a whole that peer review was so inefficient as to render risk assessment improper by underwriters. The “...frustration was inefficient process not the inability to perform our jobs” (Tr. 1223). No discussions about unacceptable risks reflected onto balance sheets were had, nor violations of FSA or SEC regulations (Tr. 1224).

Adam Mason is a 7 ½ year Casualty Manager, who is involved with selling excess loss policies, i.e., shared risks of loss among insurance companies (Tr. 1231). He has underwriting authority, and relies on risk exposure information supplied by brokers (Tr. 1232-33). There is nothing “wrong” with such reliance in technical underwriting (Tr. 1234). He explained how he arrives at a premium, and how prior year premiums are a factor in renewal business (Tr. 1234-5). He negotiates premium pricing with brokers, and engages in peer review for “[e]very risk...” (Tr. 1235-36). Peer review is documented on paper, and UREs were used as an “...information gathering tool from the point of view of processing rather than underwriting...” and the information on the URE is put into a computer system (Tr. 1237). The URE does not calculate a premium (id). He corroborates Cranford relative to the meeting concerning processing frustrations faced by underwriters in 2007, the fact that these frustrations had no effect upon technical underwriting or the ability to assess a risk, (Tr. 1238-39) and that no discussion of technical underwriting, peer review slippage, computer systems being so bad as to effect proper assessment of risk, balance sheet reporting of unacceptable risks, or FSA violations, was had (Tr. 1240). Complainant was not at the meeting to help the underwriters figure out an efficient way to underwrite risks, but how to “...process the business that we write” (Tr. 1242). His understanding was that Complainant “...was not talking about the underwriting process... [but] the process of logging the business ...not actually underwriting the risk but physically processing the risk” (Tr. 1243). He saw no reason why confidentiality would be offered at the meeting (Tr. 1243-44). The purpose of the meeting was that “...ACE wished to see if they could see if they could come up with a more efficient way of processing the business not underwriting their business” (Tr. 1245).

Charlotte Williams is the Casualty Underwriting manager for the U. K. and Ireland. She has 16 years of underwriting experience (Tr. 1249). She testified that she operates under an underwriting manual. Since 2007, the administrative process has significantly improved, but underwriting is the same (Tr. 1250-51). She explained the underwriting process as getting risk data from brokers; securing all facts and exposures surrounding the risk; reviewing claims experience; ensuring compliance with the underwriting manual; and putting a rate to that risk (Tr. 1252). The computer generated figure for premiums is used as a “...double check” on the number ascertained by the underwriter using his/her experience (Tr. 1253). Peer review is done and the data sent off to PSC, in the past by the URE, now by the Portal System (Tr. 1254). Nearly all business is peer reviewed (Tr. 1254). Premium amount history is reviewed for renewals (Tr. 125405). She confirmed the circumstances surrounding, and fact of, the underwriters’ meeting in the Spring of 2007. She does not recall an offer of confidentiality, and the meeting was to “improve the administration that the underwriters had to carry out” (Tr. 125506). No discussions of technical underwriting, failed peer reviews; repetitive quotes; improper assessments from bad computers; balance sheet-reported unacceptable risk; or violations of FSA or SEC, were had (Tr. 1257-8). The URE is a “...collection of data after the

underwriting thought process has taken place” (Tr. 1263). The computer system does not determine premiums (Tr. 1264).

Complainant perceived a substantive “breakdown” of the underwriting ability at ACE devolving into misrepresentations to government authorities including the SEC. He insists that his efforts to thwart this result was suppressed by Respondents so that the lack of quality of underwriting, contaminated by his perceived variance from the SEC-reported implementation of underwriting standards and guidelines, would remain hidden from the government and stockholders (Complainant’s Br. @ 25-27). Moreover, he was concerned that the “unbalanced” consolidated balance sheet containing discrepancies in “unapplied cash”¹⁹, further eroded the validity of the disclosure to government (id., @ 32-33).

None of these concerns of Complainant, however, raised any serious issues for Respondents. Largey and all the executives who were privy to these concerns, knew that no threat was presented in terms of real underwriting weakness, or public reporting shortfalls.

Complainant did not know:

- that the URE does not evaluate risks or set premiums, but is essentially a depository of the data surrounding same (Tr. 1237-8).
- that the “unbalanced” balance sheet was a management tool not designed to be balanced, and does not bear upon the 10 K-SEC report (Tr. 764-6).
- that “unapplied cash” problems do not bear upon risk evaluation in that there is no evidence in this record which suggests that a premium payment history impacts on risk evaluation or premium setting (See footnote 21, Complainant’s Br. @ 32).
- that the underwriters with whom he met in April 2007 never addressed (and Complainant there learned nothing about) technical underwriting problems, or peer review shortfalls, as such problems did not exist as perceived by him; and that ACE’s loss ratios established the success and high quality of underwriting at ACE (Tr. 1222; 1240; 1257; 975).
- that none of the systems Complainant considered weak enough to affect reserve calculations were involved with any such calculations (Tr. 878-9).
- that minor documentation peer-review issues are not significant, and do not in any way distort 10K-SEC financial reporting (Tr. 847-9).
- that problems surrounding data management (data warehouse) as detailed on CX-10 did not represent a breakdown of ACE’s financial control (TR. 630), nor threat to the integrity of ACE’s financial reporting (Tr. 606)

¹⁹ This item involves premium amounts received but not yet applied to policies to which they belong.

- that the delayed retrieval of some source data (common in the insurance industry), upon request of state regulatory agencies, does not distort ACE's financial reporting, but takes unnecessary extra time, effort and expense (Tr. 607-12)
- that there exist extensive manual checks by people at ACE who are very familiar with reporting requirements of external agencies before financial reporting is made, people who do the scrutiny of data, as well as senior managers who have exposure to this reporting (Tr. 606; 610-11)

And, this record as a whole indicates that Complainant did not know that he did not know.

In summary, Complainant, hired to fix processes, became involved in substantive underwriting functions about which he had little or no knowledge, which resulted in ill-conceived and uninformed reporting to his superiors, which in turn resulted in his termination. Indeed, Respondents very nearly argue from this scenario, that rather than only having employed Complainant, they endured or survived him during his stay.

DISPARATE TREATMENT

Complainant very directly suggests²⁰ that Isabel Lima, his predecessor in Glasgow who was fired by Respondents, was aware of the underwriting problems he had identified and had threatened to bring legal proceedings against the company when she learned of her impending termination. She too, he notes, like Complainant had "...compromised the firm...", and was apparently prepared to blow the whistle with respect to the underwriting deficiencies (Tr. 124-130).

Complainant also protests, however, Respondents' disparate special treatment of Lima by "...do[ing] its utmost for her to leave with dignity [with]...her reputation intact", a treat he was never granted (Tr. 131; Complainant's Br. @62-3). But this argument does Complainant little good because it shows, if anything, Respondents' sensitivity to prospective whistle-blowers and their threatened legal proceedings, thereby implying non-recognition of Complainant by Respondents as a whistle-blower since he was treated unlike Lima. The argument proves too much!

The Gomez termination (for sexually explicit computer usage), included no evidence of prior poor performance, nor of insubordination (Tr. 510-12). The same situation was present with Zimmer who was fired for outside business activities (Tr. 1084-93). Watson, who was fired for both outside (and conflicting) activities was also said to be a poor performer, but he, like Complainant, was given no warning or counseling before termination (Tr. 1083-4).

This evidence is not sufficient to find disparate treatment such as would establish, or seriously tend to establish, that Complainant was treated so differently as to show retaliatory termination.

²⁰ There is no other evidence in this record supporting this suggestion.

RECOMMENDED ORDER

The complaint of John O. Johnson is DISMISSED.

A

Ralph A. Romano
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, 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).