

**U.S. Department of Labor**

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**Issue Date: 31 May 2011**

CASE No.: 2007-SOX-00076  
2011-SOX-00010

In the Matter of:

**BORIS GALINSKY**  
Complainant,

v.

**BANK OF AMERICA CORPORATION**  
Respondent

Appearances:

Boris Galinsky, *Pro Se*  
For Complainant

Valecia McDowell, Esquire  
Mark Nebrig, Esquire  
Frank Schall, Esquire  
For Respondent

Before: Ralph A. Romano  
Administrative Law Judge

**RECOMMENDED**  
**DECISION AND ORDER**

This is a proceeding brought by Boris Galinsky (hereinafter referred to interchangeably as "Complainant" or "Galinsky") under the employee protection provisions of the Sarbanes-Oxley Act (hereinafter "the Act"), 18 U.S.C. 1514A.

Complainant filed his first complaint with the Occupational Safety and Health Administration (hereinafter "OSHA") on January 26, 2007; OSHA dismissed the complaint on July 2, 2007. Subsequently, Complainant appealed to the Office of Administrative Law Judges; on October 12, 2007, Judge Bullard granted Respondent's Motion for Summary Judgment. Complainant filed a second complaint with OSHA on February 28, 2008. After being fired, Complainant filed a third complaint with OSHA on July 16, 2008; the third complaint was subsequently amended on July 17, 2009 and February 10, 2010. The Administrative Review Board remanded Judge Bullard's decision regarding the first complaint on January 13, 2010. On July 6, 2010, Judge Bullard recused herself and I was assigned the matter on July 15, 2010. On November 12, 2010, OSHA dismissed Complainant's second and third complaints. On November 30, 2010, I consolidated all three of Complainant's complaints.

The matter was tried in Philadelphia, Pennsylvania from January 11, 2011 through January 14, 2011.<sup>1</sup> Including Complainant, eight witnesses were called. Complainant's exhibits are labeled CX-1 through CX-212.<sup>2</sup> Respondent's exhibits are labeled RX-3 through RX-50. Thirty-six Administrative Law Judge exhibits were introduced at the hearing.<sup>3</sup> Complainant's final brief was received on March 18, 2011; Respondent's final brief was received on March 22, 2011.<sup>4</sup>

## I. GOVERNING STANDARDS OF LAW

### A. Burden of Proof

Complaints filed under the Act are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121. 18 U.S.C.A. § 1514A(b)(2)(C). In order to prevail, a Complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity or conduct; (2) respondent knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Bechtel v. Competitive Technologies, Inc.*, ARB Case No. 06-010 *slip op.* at 4-5 (March 26, 2008).

If a complainant establishes the above four elements, the respondent 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." 49 U.S.C.A. § 42121(b)(2)(B)(iv). In other words, only if the complainant proves his prima facie case must the ALJ then apply a mixed motive analysis and determine whether his employment would have been terminated anyway. *Heinrich v. Ecolab, Inc.*, ARB No. 05-030 *slip op.* at 16-17 (June 29, 2006)(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). If the respondent is successful, the burden shifts back to the complainant who must then provide some evidence, direct or circumstantial, to rebut the proffered reasons as a pretext for discrimination.<sup>5</sup>

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<sup>1</sup> The transcript consists of 1025 pages and will be cited as "Tr. at --." My office received a letter from Complainant on March 7, 2011 indicating that line 5 of page 937 of the transcript should reflect that Yashkov was talking, not Galinsky. Despite Galinsky's claim, I find that the official transcript is accurate with regards to line 5 of page 937 and decline to order it changed.

<sup>2</sup> Complainant sent a letter dated March 7, 2011 requesting to admit a privilege log found on page 4 of Respondent's March 26, 2010 response to production of documents. This log represents the redacted portion on page 1 of CX-14. Over Respondent's objection, this log is entered into evidence at the relevant part of CX-14 for the sake of a complete record.

<sup>3</sup> Pursuant to Complainant's letter of March 11, 2011 and Respondent's response on March 15, 2011, Complainant's February 22, 2010 "Response to Respondent's Response to Show Cause" is hereby admitted as a pleading and will be labeled ALJ-37.

<sup>4</sup> Complainant's final brief will be cited as "CB at --." Respondent's final brief will be cited as "RB at --."

<sup>5</sup> Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a *prima facie* case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

## **B. Protected Activity and Knowledge**

In order to engage in protected activity, a complainant's communications must definitely and specifically relate to one of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1). *Platone v. FLYi, Inc.*, ARB No. 04-154, *slip op.* at 17 (Sept. 29, 2006). However, "[a] whistleblower need not cite the specific law or regulations that he believes is being violated in allegedly protected activity." *Menz v. Lannett Co., Inc.*, ALJ No. 2007-SOX-00072 at 12 (May 27, 2008). Despite this, a complainant must have a reasonable belief that the employer violated one of the enumerated statutes, such as mail, wire, or securities fraud. 18 U.S.C.A. § 1514A(a)(1). This belief must be both objectively and subjectively reasonable. *Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009); *Day v. Staples, Inc.*, 555 F3d 42 (1st Cir. 2009).

A respondent must be aware of the protected activity described above. With regards to knowledge, the Administrative Review Board (hereinafter the "Board") has stated that the relevant inquiry is not what was alleged in an OSHA complaint, but rather what was communicated to the respondent prior to the alleged adverse action. *See Platone*, ARB No. 04-154 at 17.

## **C. Adverse Employment Action**

The Board has stated that the standard for adverse employment action under the Act is laid out in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 US 53 (2006). *Melton v. Yellow Transp. Inc.*, ARB Case No. 06-052 (ARB Sept. 30, 2008). The standard in *Burlington Northern* requires the complainant to show that a "reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." 548 US at 68. The Court emphasized that "reasonable employee" is an objective standard that is judicially administrable. *Id.* Applying the *Burlington Northern* standard, the Board requires employees to show "tangible employment action" resulting in "a significant change in employment status." *Hirst v. Southeast Airlines, Inc.*, ARB Case No. 04-116, *slip op.* at 9 (ARB Jan. 31, 2007). Some examples of tangible employment action include firing, failure to promote, or a significant change in benefits. *Id.*

## **D. Contributing Factor**

Complainant must show that his protected activity was a contributing factor in the alleged adverse action. The Board defines a contributing factor as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, *slip op.* at 17 (July 27, 2006). In other words, the standard does not require complainants to prove that the protected conduct was a significant, motivating, substantial, or predominant factor in the alleged adverse action. *See id.* It should be noted that the Board has stated that while temporal proximity does not establish retaliatory intent, it may establish the causal connection component of the prima facie case. However, the ultimate burden of persuasion that the respondent intentionally discriminated because of complainant's protected activity remains at all times with the complainant. *Taylor v. Wells*

*Fargo Bank, NA*, ARB No. 05-062 at n. 12 (June 28, 2007). 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 (2001) (internal quotations omitted).

## II. SUMMARY OF DISPOSITION

I will find that Complainant has demonstrated that he engaged in protected activity and that Respondent had knowledge of such activity. In addition, I will find that Complainant suffered adverse employment actions and that his protected activity was a contributing factor in the adverse employment actions.

However, I will also find that Respondent has demonstrated by clear and convincing evidence that it would have taken the same adverse employment actions against Complainant in the absence of any protected activity. Accordingly, Complainant’s complaint will be dismissed.

## III. COMPLAINANT’S CASE

Complainant alleges multiple instances of engaging in protected activity and several adverse employment actions that resulted because of those activities.

Complainant began working for Respondent in 2003 as a Vice President. In 2005, he was promoted to Senior Vice President. In April of 2006, he volunteered to work on the technical support team for Respondent’s Anti-Money Laundering Project (hereinafter “AML Project”) based out of Charlotte. The AML Project was a method whereby Respondent could identify suspicious activity that needed to be reported to the IRS. An expert with computers, Complainant had built a number of compliance technology applications. Complainant’s immediate supervisors in Charlotte were Chris Chapman and Marty Walsh. These individuals reported to Bucky Feagans, the managing director and manager of the Risk Technology Group. Additionally, Complainant’s immediate supervisor in New York was Miriam Delman. (Tr. at 54-64, 113-14).<sup>6</sup>

While working on the AML project, Complainant became extremely concerned that Respondent was not going to be creating a truly functional software system. On June 14, 2006, Complainant wrote Feagans an email stating that he could “give him an earful” of what was wrong with the AML Project’s application development process. (CX-111). Subsequently, Complainant also expressed his concerns in person to Feagans. On July 24, 2006, Complainant emailed Feagans indicating that the AML Project was “destined for failure.” (CX-111). Subsequently, on July 26, Complainant stated that he wanted off the AML Project because he

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<sup>6</sup> For clarity purposes, I include a brief summary of the hierarchy at Bank of America in the relevant time period. In 2006, Complainant immediately reported to Delman, who in turn reported to Diana Donato-Katz. Donato-Katz reported to Feagans. When on the AML Project, Complainant also reported to Chapman and Walsh, both of whom also reported to Feagans. Feagans reported to Steven Venezia. (Tr. at 611-13). When Complainant was transferred in 2007, he immediately reported to Alexei Yashkov, who in turn reported to Noel Ikoku. (Tr. at 340). Prior to Complainant’s termination, Ikoku left production support and was replaced by Faed Hindi. (Tr. at 854, 923-24).

was dissatisfied with how the leaders on the project were making one wrong decision after another. (CX-51; Tr. at 63-108).

Once off the AML Project, Complainant had a quick performance review on July 30, 2006 with Delman. Delman stated that everything was marked as “meets expectations.” (CX-58). On September 14, 2006, Diana Donato-Katz informed him that Feagans thought his July email was inappropriate. In a 360 degrees associate feedback survey, comments indicated that Complainant should stop leading with the negative and find ways to express more constructive criticisms. Subsequently, on November 7, 2006, Delman gave Complainant his end of the year performance review. Complainant did not meet expectations in the areas of “communicating clearly” and “continuously learns and adapts.” (CX-60). Thus, overall, he received a “does not meet” rating in the “how” category. Delman indicated that she did not agree with the communication ranking and that Mr. Feagans had done that portion. Complainant was not eligible for his bonus because of that performance review. Complainant points out that Feagans actually assigned Complainant’s ratings on October 12. (CX-113; Tr. at 112-24, 139).<sup>7</sup>

Complainant emailed Venezia, Feagan’s supervisor, on December 5 and 8, 2006. (CX-61). In his December 5 email, Complainant gave a detailed description of the serious issues that had been wrong with the AML Project. (*Id.*) In the December 8 email, Complainant stated that the problems he brought up earlier could be construed as fraud. (*Id.*) Subsequently, in January of 2007, Complainant was put on associate counseling. Complainant argues that his negative performance rating prevented him from being put into another position at Bank of America; he was denied any more performance reviews until at least July or August. (Tr. at 126-162).

In February of 2007, Complainant was transferred to the production support team. His immediate supervisor was Alexei Yashkov; Yashkov reported to Noel Ikoku. (Tr. at 340). Complainant testified his new job was to focus on fixing things, not to develop things. In addition, Complainant started researching a Green Belt Project in order to help save Respondent 250,000 dollars. However, Complainant argues that he was being set up to fail at his Green Belt Project because he was always being sidelined with other tasks. Subsequently, on June 1, 2007, Respondent determined that Complainant’s job band and code were impermissibly higher than his actual job duties; therefore, Complainant was realigned from a band 4 to a band 5, Senior Consultant to Consultant.<sup>8</sup> Complainant classified a Senior Vice President having a job band of a Consultant is like a “judge [being] asked to be a janitor.” Moreover, Complainant presented his own summary of the corporate directory outlining how he was the only Senior Vice President with the title of Consultant. (CX-8; Tr. at 163-173).

Complainant secretly recorded a performance review he had in August of 2007 with Yashkov and Ikoku. Complainant testified that Ikoku could not give him specific examples of bad behavior when he pressed him about it. Additionally, Yashkov did note some improvements in Complainant’s behavior. (CX-26, pg. 6). Also, Complainant points out an email exchange

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<sup>7</sup> Complainant’s first complaint alleges this negative performance review and subsequent denial of a bonus was an adverse employment action. (ALJ-1).

<sup>8</sup> At Bank of America, one’s corporate title is different from their band and code level. In other words, while Galinsky’s band and code level was now a level 5 Consultant, his corporate title was still Senior Vice President. (Tr. at 171).

between Delman and Ikoku on August 10, 2007 to demonstrate that Ikoku did not want to hear about how Complainant helped resolve issues. (ALJ-19, 2nd Complaint, pg. 14). In the emails, Ikoku asked Delman in response to her praising Complainant's work "[w]hy it was necessary to preface your comments here with a statement about your role and Boris's." (Tr. at 182-90).

Throughout this time, Complainant attempted to gather information on a potential Green Belt Project. He contacted Diana Donato-Katz seeking certain financial information; however, he did not get all the information he needed. (CX-17). Subsequently, Complainant emailed Mike Radest, Director of Compliance for Bank of America Securities, on November 14, 2007 seeking answers to his financial questions and bringing up Respondent's recently failed internal audit.<sup>9</sup> Immediately following this, he had a meeting with Ikoku and Yashkov and was informed that this was an improper escalation of issues to higher management. (See CX-36). During this meeting, Complainant told Ikoku that he was engaging in fraud by hiding from the audit the true status of the production department. On November 30, 2007, Ikoku, Gardner, and Yashkov issued Complainant a written warning in which his email to upper management was described as circumventing appropriate channels and that his attitude towards other employees was disrespectful. (CX-20).<sup>10</sup> Complainant was placed on administrative leave while Respondent investigated his allegations. Following the meeting, Complainant emailed Ikoku, Yashkov, and Gardner on December 3, 2007 describing how Ikoku committed fraud by failing to disclose problems with the production environment to internal audit. (RX-47; Tr. at 389-90). Complainant returned from leave on January 29, 2008 and had a meeting with McDowell, Respondent's attorney, amongst others. McDowell informed Complainant that his previous warning had been changed, now there was no mention of him not treating employees with due respect. (CX-23; Tr. at 192-217).<sup>11</sup>

Complainant maintains that he always had positive relations with his coworkers. In support of this, he points to a Spirit Card written by Terry Park on April 9, 2008. Park wrote that Complainant was always helpful in assisting the Control Room with technology inquiries. (CX-40). Respondent terminated Complainant on April 28, 2008. Complainant points out that there was conflicting testimony at the hearing regarding the people involved in his termination. (CB at 6-8).<sup>12</sup> Yashkov did not provide Complainant a reason for the termination when he informed him; rather, Galinsky later learned that he was fired for loss of trust and confidence arising out of his use of Respondent's corporate directory system exported for non-BAC purposes and for

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<sup>9</sup> Stacey Goodman, Senior Technology Executive for the Global Risk Investment and Treasury Technology organization, Julia Garder, and Jan Rossman were also copied on the email.

<sup>10</sup> Complainant's brief implies that he had no performance review at the end of 2007. (CB at 12). He argues that the fact that he entered comments on November 30, 2007 in RX-44 demonstrates it did not happen prior to this date because the log is closed after an evaluation. Also, Complainant further argues that there was no final 2007 review when he came back from administrative leave. (CB at 12).

<sup>11</sup> Complainant's second complaint alleges that his job band and code realignment and his August performance review were adverse employment actions in retaliation for filing his first complaint. Additionally, the complaint states that Complainant's email to Radest was a new protected activity and his subsequent written warning was an adverse employment action resulting from that activity. (ALJ-19).

<sup>12</sup> Holden testified that the termination was a joint decision between Yashkov, Ikoku, Terry Gardner-Turner and Mary Olmer Jones. (Tr. at 791-95). However, Gardner-Turner's affidavit of October 22, 2008 states that she was not part of the team that decided to terminate Complainant. (CX-106). Moreover, Ikoku testified that while he was notified of the decision to terminate Complainant, he did not take part in the process to reach that outcome. (Tr. at 923-26).

recording conversations with OSHA. Complainant points out that he did not record conversations with OSHA, rather the OSHA investigator did. (Tr. at 222-233).<sup>13</sup>

In summary, Complainant argues that he first engaged in protected activity in June and July of 2006 when he contacted Feagans about his concerns with the AML Project. Complainant suffered his first adverse employment action with his negative performance review in November of 2006. He engaged in protected activity again by contacting Venezia on December 5 and 8, 2006. In retaliation for filing his first complaint with OSHA, Complainant further argues that his job band and code realignment on June 1, 2007 and his negative August 7, 2007 performance review were adverse employment actions. Moreover, Complainant states that he engaged in new protected activity with his emails to Radest and Ikoku on November 14, 2007 and December 3, 2007, respectively. Moreover, his conversation with Ikoku on November 14 was another form of protected activity. The adverse employment action arising from these activities was his written warning that was issued on November 30, 2007 and affirmed on January 29, 2008. Complainant also argues that he suffered an adverse employment action when he was fired. In addition, Complainant argues that he suffered adverse employment actions after he was fired by having his reputation tarnished and by Respondent's attorney advertising her involvement in this case on her firm's website. (CB at 24-25).

#### **IV. RESPONDENT'S CASE**

Respondent argues that Complainant's communications prior to his November 2006 performance review did not put it on notice of any alleged fraud; rather, the communications were expressions of an employee angered by perceived incompetence around him. Furthermore, Respondent points out that there were ample reasons to give Complainant a negative performance review in November 2006 and August 2007. Moreover, Respondent states that Complainant's job band change in 2007 was a department wide measure that in no way singled him out. Also, Complainant's repeated instances of inappropriate behavior were the reasons for his written warning in November 2007. Finally, Respondent argues that it fired Complainant because of a loss of trust and confidence, having nothing to do with any alleged whistle-blowing.

Peter Richards managed Respondent's financial intelligence unit in 2006. Richards testified that Respondent had multiple ways of monitoring suspected money laundering at the time; the AML Project that Complainant worked on was specifically designed as a prototype that operated on a single computer while also making it available to multiple users at the same time. Feagans testified that Galinsky was causing a rift once he started working on the AML Project. Feagans believed that Galinsky needed coaching and mentoring after he received the June 14, 2006 email stating that Complainant could give him an earful of what was wrong with the AML Project. Complainant's behavior did not improve between June 14 and July 24, 2006. In response to Complainant's emails of July 24 and 26, 2006 stating that the project was destined for failure and that he was reporting to individuals that wanted him to develop "crap" (CX-111; RX-5), Feagans found it surprising that Galinsky thought he, Galinsky, was the individual making decisions about the project. Additionally, Feagans emailed Donato-Katz stating that they needed to transition Complainant off the AML Project. (CX-111). Respondent also points out

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<sup>13</sup> Complainant's third complaint alleges that he suffered an adverse employment action when he was fired. (CX-149).

that while they considered Complainant's suggestions regarding the project, they decided not to adopt them. (Tr. at 413-23, 485-86, 963-76).

Despite coaching and the fact that Complainant was eventually off the AML Project, Respondent points out that Galinsky still exhibited unprofessional conduct throughout the fall of 2006. Donato-Katz was based out of New York and was not involved in the AML Project; rather, she oversaw Complainant when he was not working on the AML Project. Despite this, Complainant still voiced his displeasure to Donato-Katz regarding the way things were being run. Additionally, Feagans forwarded her some of Complainant's emails and asked her to coach him regarding his behavior and communication skills. On September 14, 2006, Complainant exchanged several emails with Jay Slavin, an associate, displaying rude behavior. (RX-9). Feagans forwarded the emails to Donato-Katz and she agreed that coaching Complainant did not appear to be working. Moreover, on October 26, 2006, in response to Donato-Katz's email discussing charity contributions, Complainant sent out a mass email questioning the integrity of United Way and its financial statements. (RX-15). Donato-Katz immediately met with Complainant and explained how this was undermining the charity project and inappropriate behavior. (Tr. at 610-36).

Respondent argues that the Complainant even recognized some of his inappropriate behavior at the time, as evident in his 360-degree survey of 2006. The survey allows managers and peers the opportunity to evaluate an associate's performance. The survey indicated that feedback from various parties referenced Complainant's combative nature and that he should provide more constructive feedback in a positive manner. (CX-59, pg. 18). Complainant acknowledged in the survey that he should "[b]e less critical and take it easy." (CX-59, pg. 17; Tr. at 620-23).

Mary Rankin is the HR manager for Respondent and has counseled managers regarding performance issues in the past. (Tr. at 721-23). Rankin, Feagans, Delman, Donato-Katz, and Venezia all participated in Complainant's 2006 Performance Review. (Tr. at 433-35, 638, 722). Overall, Complainant received a "does not meet" rating in the categories of "continuously learn & adapt" and "communicates clearly." These ratings led Complainant to receive a "does not meet" rating in the "how" category.<sup>14</sup> (CX-60). According to the modification log of performance ratings, Delman marked Complainant as "meets" in the "what" and the "how" categories on August 16, 2006. (CX-113, pg. 131, line 148). On October 12, 2006, Venezia marked Complainant as "meets" in the "what" but as a "does not meet" in the "how." (CX-113, pg. 115, line 120, pg. 119, line 120). On November 14, 2006, Delman entered a final overall rating for Complainant as "meets" on the "what" and "does not meet" on the "how." (CX-113, pg 91, line 84, pg. 95, line 84). Both Feagans and Donato-Katz testified that there was never a problem with what the Complainant was raising issues about, it was how he went about doing it that caused problems. (Tr. at 533-34, 638-40).

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<sup>14</sup> At Bank of America, associate performance ratings are broken down into the "what" and the "how. The "what" reflects a person's performance while the "how" is the way one communicates and provides leadership to fellow employees. (Tr. at 723-24).

Donato-Katz continued coaching Complainant on his behavioral issues and eventually developed, along with other managers, a performance plan for Galinsky on January 3, 2007. (RX-21). A performance plan is installed when coaching doesn't work and the company wants to put into writing the specific issues to be addressed by the associate. In conjunction with the performance plan, Complainant and Donato-Katz drafted an improvement plan in order to resolve those specific issues that had been raised. (RX-23; RX-25). On January 25, 2007, Galinsky signed his performance plan. Even when Complainant went to another team, this performance plan went with him. (Tr. at 640-45).

Complainant was transferred to the production support team within technology compliance in February of 2007. While there, he reported to Yashkov, who in turn reported to Ikoku. Donato-Katz testified that Complainant's transfer to production support was not a demotion or negative move. In fact, she had started her own career in production support and eventually moved back there in 2008. Furthermore, Ikoku testified his production support team was very small and they were in need of more people in 2007. Ikoku discussed with Donato-Katz how Complainant was an ideal candidate for the position because he had a lot of insight into the new applications and would be helpful in fixing any issues. Subsequently, in late May of 2007,<sup>15</sup> Respondent's technology department aligned job bands to ensure that an associate's description matched the type of work he was actually doing. Respondent determined that Complainant's job band was higher than his job code; thus, Complainant's job band was moved from a band 4 to a band 5 and he was now considered a Consultant as opposed to a Senior Consultant. Complainant's salary and corporate title of Senior Vice President remained the same. Respondent points out that it realigned job and band codes for numerous associates at that time and that Complainant's "does not meet" rating had nothing to do with his change; rather, the realignment was purely based on Complainant's actual job in the department. (Tr. at 644-45, 737-38, 768-69, 805; RX-30).

Respondent argues that Complainant's behavioral issues continued throughout the summer and fall of 2007. In June of 2007, Complainant secretly recorded a conversation that he had with Feagans in which Galinsky referred to management as incompetent. Subsequently, on July 26, 2007, Complainant emailed an internal client in another department suggesting that "we should not install unsupported products on bank computers . . . [h]owever, I can be easily overruled by my managers." (RX-33). Upon hearing of this, Ikoku emailed Complainant and asked him to refrain from flippant comments that tend to undermine production support management. (*Id.*). Ikoku and Yashkov conducted Complainant's mid-year review on August 9, 2007 in which they communicated to Galinsky that there had been no improvement on his "does not meet" rating for the "how" category. (*See* RX-35). During the evaluation, Complainant referred to Ikoku's opinion as erroneous. (Tr. at 342-44; 822-29).

As described above, Complainant emailed Michael Radest and others on November 14, 2007 seeking information for his Green Belt Project and also referring to the release process in compliance technology as "completely broken." (RX-40). Ikoku immediately spoke with the Complainant and explained how this was another example of him taking inappropriate actions; Complainant accused Ikoku of fraud during this meeting. Complainant laughed when Ikoku communicated the written warning to him on November 30, 2007. In fact, Rankin testified that

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<sup>15</sup> Ikoku informed Complainant of the decision on June 1, 2007. (RX-30).

Complainant could have been terminated because of the November 14, 2007 email because he was already on a performance plan. Ikoku and Yashkov issued Complainant's end of the year review in 2007, assigning him a "does not meet" rating for his "how" category. (See RX-44). Ikoku testified that the Complainant refused to acknowledge that he had behavioral issues and that he refuted the rating point by point.<sup>16</sup> (Tr. at 780-81, 830-32, 844-47, 880-81).

Respondent maintains that Complainant's termination on April 28, 2008 had nothing to do with any alleged protected activities. (RB at 13). In 2007 and 2008, Christy Holden was a human resources manager working directly with the technology organization within Bank of America. Holden testified that in the spring of 2008 she learned that Complainant had been taping co-workers.<sup>17</sup> Additionally, it was confirmed that Complainant had also been downloading and exporting data from Respondent's computer systems. Respondent's employee handbook states that unauthorized recording and use of corporate information for personal use are potential grounds for termination. (RX-50). Holden further testified that, regardless of any previous performance, a lack of trust and confidence is grounds for immediate termination. Holden testified that the decision to terminate Complainant was a combined decision made by Terry Gardner Turner, Yashkov, Ikoku, Mary Olmer Jones, and herself. Yashkov testified that he was on the phone call with HR when there was a recommendation to terminate Complainant. The reasons cited were his taping of co-workers and uploading bank information, both contributing to an official loss of trust and confidence.<sup>18</sup> Yashkov did not disagree with the decision to fire Complainant. Subsequently, Yashkov informed Complainant that he was being terminated for a loss of trust and confidence. (Tr. at 761, 791-92, 923-25).

## V. ANALYSIS

### A. Prima Facie Case

#### 1. Protected Activity and Knowledge

Complainant argues that his communications to management regarding the AML Project rise to the level of protected activity under the Act. (CB at 18; Tr. at 65-88). On the other hand, Respondent claims that Complainant's emails pertaining to the AML Project did not put it on notice of any unlawful activity, but rather just demonstrated Galinsky's capacity for inappropriate comments. (RB at 2-4). I find that Complainant's June 14, 2006 email to Feagans does not constitute protected activity. Saying that he could give Feagans "an earful" on what was wrong with the AML Project does not rise to the level of putting him on notification of some type of illegal activity. Rather, Complainant is simply attempting to convey some concerns he had with the project. (See CX-111). Unlike his emails in July of 2006, this email does not convey a sense of urgency that could rise to the level of shareholder fraud.

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<sup>16</sup> Complainant denies that this meeting ever took place. (CB at 11-12). Accordingly, he has not argued that he suffered any adverse employment action as a result of this alleged meeting.

<sup>17</sup> For example, Respondent taped conversations he had with Prakash Totala and Alexei Yashkov, both taking place on March 12, 2008. (CX-32; CX-32(1); CX-33; CX-33(1)).

<sup>18</sup> Initially, Gardner-Turner told Complainant on July 1, 2008 that he been terminated, in part, due to taping of his conversations with OSHA. However, she stated in her affidavit that she misinterpreted a conversation with Holden and that Complainant had actually been terminated because of his recordings of conversations with peers and supervisors. (CX-106).

I find that Complainant's communications on July 24 and 26, 2006 regarding the AML Project constitute protected activity under the Act. Complainant stated that the AML Project was "destined for failure" and that Chapman was asking him to develop "crap." While these communications do not specifically mention fraud, I find that they do reasonably relate to shareholder fraud. Complainant's belief was objectively reasonable because the AML Project was designed to implement software across a variety of systems in order to monitor high risk accounts with Bank of America. Since Chapman, in Galinsky's view, was asking Complainant to develop non-functional software for the AML Project, an objectively reasonable developer could believe that this is a fraud against shareholders by deliberately establishing a system that would not correctly monitor money-laundering activities. This type of negative activity would cause Respondent's shares to have an inflated value, thus constituting a fraud against shareholders. Moreover, I find that Complainant's belief that this constituted a fraud was subjectively reasonable. Complainant's emails demonstrated a belief that there was a scheme in place to develop a non-functional product that was destined for failure.

Complainant further argues that his email to Radest on November 14, 2007 and Ikoku on December 3, 2007 constitute new forms of protected activity. (ALJ-19, 2nd Complaint, pg. 20). I find that the November 14, 2007 email does not constitute protected activity under the Act. While the November 14 email refers to the build-release process as "completely broken," it does so in the context of asking for information related to Complainant's six sigma (green belt) project. (See RX-40). I do not interpret this email as notifying Respondent about fraud; rather, the email sets forth a problem within the build-release process and seeks specific answers to questions regarding the costs of failed internal and external audits.<sup>19</sup> In other words, I interpret this email as *seeking* information for Complainant's green belt rather than *providing* information about a fraud.

I find that the substance of the November 14, 2007 meeting with Ikoku and Complainant's December 3, 2007 email to Ikoku both constitute protected activity under the Act for the same reasons. Complainant testified that during the November 14 meeting he told Ikoku he was committing fraud by hiding items from auditors. (Tr. at 203-04). Ikoku testified that Complainant accused him of fraud during this meeting. (Tr. at 880). Similarly, the December 3 email stated that Ikoku knew of problems not discovered by the internal audit and was unwilling to fix them. An objectively reasonable person would believe that Ikoku was committing bank fraud by withholding information from the internal audit since he gloated after the results were released that not all of the deficiencies had been found. Furthermore, I find that Complainant had a subjectively reasonable belief that bank fraud was committed. The evidence demonstrates that Complainant was acting in good faith by bringing up issues to management that he personally encountered and believed were detrimental to Respondent.

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<sup>19</sup> Respondent argues that the November 14, 2007 email fails as a form of protected activity for the same reasons Complainant's prior communications regarding the AML Project fail to constitute protected activity. (RB at 6). I disagree. The November 14, 2007 email is asking specific questions for Complainant's green belt project in an area that he believed could be improved upon. On the other hand, the AML Project communications were not bringing up issues in the context of a green belt project; rather, the AML Projects were Complainant's pleas to management over the functionality of the system.

I find that Complainant's emails to Venezia on December 5 and 8 of 2006 constitute protected activity under the Act. The reasoning behind this is the same as with his communications to Feagans regarding the AML Project as constituting protected activity. The Complainant had a legitimate concern that the AML Project was developing a non-functional system that would be detrimental to the shareholders of Bank of America.

Finally, I find that Complainant's filing of his first and second Sox complaints constitute protected activity under the Act.

In summary, I find that Complainant's emails of July 24 and 26, 2006 relating to the AML Project both constitute protected activity. Complainant's email to Ikoku on December 3, 2006 also constitutes protected activity. Complainant's meeting with Ikoku on November 14, 2006 qualifies as protected activity. Additionally, Complainant's emails to Venezia on December 5 and 8, 2006 qualify as protected activity under the Act. Finally, Complainant's filing of his first and second Sox complaints also qualify as protected activity under the Act.

## 2. Adverse Employment Actions

Complainant alleges multiple adverse actions arising out of his time working for Bank of America. Furthermore, Complainant also argues that he has suffered adverse actions since being terminated by Respondent. I will address each alleged adverse employment action in chronological order.

Complainant argues that his negative performance review on November 6, 2006 is an adverse employment action. (ALJ-1). Pursuant to the standard in *Burlington Northern*, I find that a reasonable employee would consider this negative performance review materially adverse. The specific tangible employment action was Complainant receiving a "does not meet" rating on his "how" performance evaluation. This action had a direct effect on Complainant's compensation because he was ineligible for his bonus because of the negative rating. Accordingly, I find that Complainant's negative performance review in November of 2006 is an adverse employment action.

Galinsky also alleges that his job code and band change on June 1, 2007 qualifies as an adverse employment action. (ALJ-19, 2nd complaint). Despite the fact that Complainant's salary and corporate title stayed the same, he considers being labeled a Consultant in band 5, as opposed to his previous title of Senior Consultant in band 4, a demotion. Respondent argues that this action was not a demotion; instead, it was a division-wide realignment to ensure that people's job codes and bands properly matched their duties. (RB at 12). Pursuant to the standard in *Burlington Northern*, I find that Complainant's job band and code realignment is an adverse employment action. In doing so, I recognize that Complainant's salary, benefits, and corporate title of Senior Vice President remained the same after this event. However, I find that being downgraded from a Senior Consultant in band 4 to a Consultant in band 5 is a tangible action that significantly changes one's employee status. Galinsky testified that a Senior Vice President being labeled as a Consultant was akin to "a judge [being] asked to be a janitor." (Tr. at 171). Simply put, Complainant's internal job code and band went from a higher position to a lower position. A reasonable worker might be dissuaded from bringing a charge of

discrimination while he is maintaining the corporate title of Senior Vice President while simultaneously being realigned in another area. Therefore, I find that Complainant's job band and code change on June 1, 2007 qualifies as an adverse employment action.<sup>20</sup>

Under the heading of "Retaliation for filing Sox Complaint" in his second complaint, Complainant describes the July 26, 2007 email exchange between himself and Ikoku regarding the "flippant" comments. (ALJ-19, 2nd Complaint, pg. 13). While the exact alleged adverse activity is somewhat unclear, it appears that Complainant is arguing that Ikoku was discriminating against him by being directed to find something "flippant" in his communications with other co-workers. I find that this does not qualify as an adverse employment action. Ikoku's email to Galinsky, his subordinate, regarding the appropriateness of emails to other co-workers is not a tangible employment action changing the nature of his job status. Rather, it is simply an email from one of Complainant's managers describing how to not engage in inappropriate behavior.

Complainant's mid-year performance review in August of 2007 indicated that he had no improvement in his "does not meet" rating in the "how" category. Complainant alleges in his second complaint that this review is an adverse employment action. (ALJ-19, 2nd Complaint, pgs. 13-14). I agree and find that his August 2007 mid-year performance review qualifies as an adverse employment action. The reasoning for this finding is the same as my decision to find Complainant's November 2006 performance review to be an adverse employment action.

Complainant argues that his written warning from November 30, 2007, which was later affirmed by Respondent on January 29, 2008, qualifies as another adverse employment action.<sup>21</sup> (ALJ-19, 2nd Complaint, pgs. 17-19). I find that the warning is an adverse employment action. This is a tangible employment action that affected Complainant's status because it put him on official notice that he could be further disciplined or terminated if he did not improve his behavioral conduct. (*See* CX-23). After this warning, a reasonable worker could potentially be afraid to bring a charge of discrimination for fear of further discipline or termination. Accordingly, I find that the written warning is an adverse employment action.

Complainant alleged in his final brief that Feagans had created a negative employment environment by sharing his emails with co-workers. (CB at 21). I classify Complainant's argument as alleging that Feagans created a hostile work environment for him. In a whistleblower case, the ALJ must weigh the following five factors to evaluate whether a hostile work environment claim has been established: (1) the [complainant] suffered intentional discrimination because of his or her membership in the protected class; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the [complainant]; (4)

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<sup>20</sup> For clarity purposes, I point out that Complainant did not allege in his second complaint that his job transfer in February of 2007 was an adverse employment action. (*See* ALJ-19, 2nd Complaint, pgs. 6, 12). Rather, Galinsky complained to OSHA about his alleged demotion. (*Id.*). In his closing brief, Complainant classified his job transfer in February of 2007 as the "set-up" to his demotion in June of 2007. (CB at 9, 21). Thus, I will not analyze whether Complainant's job transfer in February is an adverse employment action. Rather, it is simply part of the factual circumstances leading up to his alleged demotion in June of 2007.

<sup>21</sup> Notwithstanding the written warning, Complainant and Respondent differ on whether there was an end of the year evaluation for 2007. (Tr. at 830-32; CB at 11-12). Since Complainant argues that there was no end of the year evaluation for 2007, it cannot be considered in any adverse actions analysis.

the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and (5) the existence of respondent superior liability. *See Varnadore v. Oak Ridge National Laboratory*, Case Nos. 1992-CAA-2 and 5, 1993-CAA-2 and 3, 1995-ERA-1 (ARB June 14, 1996). I find that Complainant has not established a hostile work environment. The fact that Feagans shared the substance of Complainant's emails does not rise to the level of intentional discrimination; rather he seemed to be exploring with Donato-Katz and others how they could counsel Complainant. If Complainant was truly concerned with Respondent's alleged fraudulent activity, one would think that he *would want* Feagans to share the substance of the emails in an effort to investigate what Galinsky was "blowing the whistle" on. Thus, even if Feagans' actions detrimentally affected Galinsky and are considered intentional discrimination because of his class as a whistleblower, I find it dispositive that an objective reasonable employee in Complainant's situation would most likely not care if his emails relating to fraud were distributed to some people. Accordingly, I find that this is not a hostile work environment.

Complainant also alleges in his brief that the Internal Audit and Human Resources tarnished his reputation by informing managers of his complaint with OSHA and that he may secretly be recording conversations. (CB at 21). I find that these activities do not qualify as adverse employment actions. These are not tangible employment actions affecting his employee status. Moreover, a reasonable person in Complainant's position would not consider these actions materially adverse. An individual filing a retaliation claim against his employer would have to anticipate that members of his employer's organization would find out about that claim. Also, the fact that Complainant was secretly recording his co-workers was eventually no secret at all; Complainant informed the Administrative Review Board of this and also included a discussion of it in his second complaint. (Tr. at 203; ALJ-19, 2nd Complaint). Thus, a reasonable person would probably expect his employer to tell his co-workers about the possibility of secret recordings. Accordingly, I find that the two above-mentioned activities are not adverse employment actions.

Clearly, Complainant's termination from Bank of American on April 28, 2008 is an adverse employment action under the *Burlington Northern* standard. Furthermore, Complainant alleges that he suffered adverse employment actions after he was terminated from Bank of America, such as loss of reputation and blacklisting. (CB at 24-25). I find that any alleged improper activities conducted by Respondent after Complainant's terminations do not qualify as adverse employment actions under the Act. Simply put, Complainant was no longer an employee of Respondent at that time; therefore, there was no employment status that could be significantly changed by any alleged improper activities of Respondent.

In summary, Complainant has established the following adverse employment actions: November 2006 performance review; job band and code change in June 2007; August 2007 performance review; written warning of November 2007/January 2008; and termination on April 28, 2008.

### 3. Contributing Factors

As outlined above, Complainant must show that his protected activity was a contributing factor in his adverse actions. *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, *slip op.* at 17 (July 27, 2006). I will address each adverse action in turn.

I find that Complainant has demonstrated that his protected activity with regards to the AML Project was a contributing factor in his November 2006 performance review. In September of 2006, Donato-Katz informed Complainant that his July email to Feagans, which I have found constitutes protected activity, was inappropriate. Furthermore, Delman told Complainant that she did not agree with Complainant's communication ranking and that it was Feagans directing that portion of the review. Thus, I find that it is a logical conclusion that Feagans' unhappiness with the previous emails did in some way contribute to Complainant's negative review. While Complainant's communications to Feagans do not appear to be the driving force in the negative review, the evidence suggests that they did influence it.

Complainant points to his summary of Respondent's corporate directory to argue that the filing of his first complaint contributed to his job band and code change in June of 2007. (Tr. at 167-170). Complainant's summary of Respondent's directory indicates that there are 1,842 Senior Vice Presidents within Barbara DeSoer's hierarchy; Complainant is the only Senior Vice President with the internal job tile of Consultant. (CX-8). This disparity in numbers suggests that Complainant may have been classified as a Consultant out of retaliation for his complaint. However, it should be noted that Complainant is not alone in having a senior management position as a Consultant. For example, there are also 4 Vice Presidents (VP) and 4 Associate Vice Presidents that are also Trust Officers (AVP & Trust OFF) and have an internal job code of Consultant. (CX-8). Despite this, given the disparity in the numbers regarding how many Senior Vice Presidents are labeled as Consultants, I find that Complainant's protected activity in some way contributed to his job band and code realignment.

I find that Complainant's filing of his first complaint contributed to his negative performance review in August of 2007. I recognize that Complainant filed his first complaint in January of 2007. However, Complainant's mid-year August 2007 review was his first performance evaluation since his complaint. Ikoku, one of the managers giving his evaluation, was aware of his complaint. While several months separated the two events, it still was his first review since his complaint against Respondent. Therefore, I find that temporal proximity supports a finding that Complainant's protected activity contributed to his negative performance review in August of 2007.

I find that Complainant's protected activity of emailing Ikoku on December 3, 2007 was not a motivating factor in him receiving a warning on November 30, 2007. The protected activity could not have been a factor in the initial version of the warning because it took place after November 30th. However, the warning that was issued on November 30, 2007 was re-issued in an amended form on January 29, 2008. (Tr. at 214). The final version of the warning discusses how Complainant's behavior on November 14, 2007 was inappropriate and how his mid-year review in August of 2007 continued to find problems in his behavior. (CX-23). The December 3, 2007 email is not mentioned at all. Rather, the amended warning reflects that a

portion of the original warning concerning Complainant's behavior with other employees was redacted. (See CX-23; Tr. at 214-16). Nothing indicates that the December 3, 2007 email was a driving force in the issuance of the original warning or its amendment. Accordingly, I find that Complainant's December 3, 2007 email was not a motivating factor in this adverse employment action.

Based on the conflicting evidence regarding the identity of the decision makers in Complainant's termination, I find that his protected activity was a contributing factor in the adverse action. For example, Holden testified that Complainant's termination was a joint decision between Yashkov, Ikoku, Terry Gardner-Turner and Mary Olmer Jones. (Tr. at 791-95). However, Gardner-Turner's affidavit of October 22, 2008 states that she was not part of the team that decided to terminate Complainant. (CX-106). Moreover, Ikoku testified that while he was notified of the decision to terminate Complainant, he did not take part in the process to reach that outcome. (Tr. at 923-26). This type of circumstantial evidence leads me to conclude that Complainant's protected activity was in some way part of Respondent's decision to terminate him. In other words, the fact that the evidence is conflicting regarding the decision makers brings the decision itself into question.

In summary, Complainant has proven his *prima facie* case by establishing that his protected activities were at least contributing factors in his November 2006 and August 2007 performance reviews, job band and code realignment, and his termination.

### **B. Respondent's Rebuttal**

As described above, Complainant has proven his *prima facie* case. However, as will be shown below, Respondent has proven by clear and convincing evidence that it would have taken the same actions regardless of Complainant's protected activities.

There is clear and convincing evidence that Respondent would have given Complainant a "does not meet" in the "how" rating for his November of 2006 performance review irrespective of any protected activities. As described above, the "how" rating reflects communication and leadership skills. By the fall of 2006, Respondent was attempting to coach Complainant regarding his behavior. Despite this coaching effort, Complainant still displayed inappropriate behavior with colleagues. Complainant acknowledged in his 360-degree survey from September 2006 that he should "[b]e less critical and take it easy." (CX-59). Subsequently, Complainant exchanged rude emails with Slavin on September 14, 2006 that caused Feagans to state that coaching didn't appear to be working. Furthermore, I am simply astounded that Complainant sent out a mass email on October 26, 2006 blasting the United Way Campaign after Donato-Katz had sent out an email seeking charitable contributions. Regardless of the substance of Complainant's message, this undermining effort of one's manager alone would justify a negative performance review. As Donato-Katz and Feagans both testified, it was never "what" Complainant brought up that was an issue, it was "how" he brought it up that caused problems. (Tr. at 633-34, 533). I noticed Complainant's propensity for rude comments during the trial. (Tr. at 452; 950-51). The fact that Complainant continued to display rude behavior in the face of proper coaching demonstrates that Respondent would have given him a negative performance review despite any protected activities.

I find that Respondent would have realigned Complainant's job and band code in 2007 even in the absence of Complainant's protected activity. Respondent conducted a division-wide job code and band realignment in the spring of 2007. Including Galinsky, numerous other employees were affected by this realignment. Holden testified that the purpose of the realignment was specifically to align the code to the work that the associate was currently performing. (Tr. at 769). Therefore, even had Galinsky never engaged in protected activity, Respondent still would have examined his work duties in order to see if they reflected his job band and code. Thus, his job band and code would have been changed regardless of any protected activity.

Irrespective of any protected activity, I find that Respondent would have also given Complainant a negative mid-year performance evaluation in August of 2007. I find dispositive that Ikoku testified that Complainant's behavior had not improved with regards to him receiving a "does not meets" on the "how" rating. Ikoku testified that there were a number of occasions where Complainant had been over enthusiastic in his treatment of folks on his team. (Tr. at 824). For example, Complainant emailed Lavin, an internal client, on July 26, 2007 stating that he didn't think the bank should install unsupported products; however, Complainant qualified the statement by stating that he can be easily overruled by his managers. (RX-33). Ikoku immediately told Galinsky how this type of communication with a client undermines management. (*Id.*). Therefore, Complainant still displayed a propensity for rude behavior despite his performance plan and prior negative performance review. Accordingly, I find that Respondent has established by clear and convincing evidence that it would have given Complainant a negative performance review notwithstanding any protected activity.

I find that Respondent has established by clear and convincing evidence that it would have terminated the Complainant regardless of any protected activity. Respondent became aware that the Complainant was violating company policy by secretly recording conversations with co-workers. Additionally, Respondent conducted an investigation after it became aware that the Complainant was violating bank policy by improperly downloading company information for personal use. It is entirely reasonable that Respondent would have a loss of trust and confidence regarding the Complainant after discovering these activities. Bank of America's handbook states that these activities are prohibited and could result in termination. In fact, Galinsky admitted at trial that he was aware he was violating company policy when he taped his co-workers. While it is not binding here, the facts in this case are similar to *Halloum v. Intel Corp.*, 2003-SOX-00007, at \*18-21 (ALJ Mar. 4, 2004). In *Halloum*, under the dual motive analysis, the ALJ held that an employee's constructive discharge for knowingly violating company policy by taping co-workers was clear and convincing evidence that the company would have taken the same action regardless of any protected activity. *Id.* I find that the evidence is clear in establishing that Respondent would have terminated Complainant for a loss of trust and confidence regardless of any protected activity.

### C. Pretext

Complainant has not established that any of Respondent's non-retaliatory reasons for their employment actions were pretextual. Complainant points to his January 4, 2007 Associate

Counseling document to establish that any adverse action taken against him with regards to the AML Project are just pretext. (CB at 21-22). However, Complainant did state that “[t]he other charges, with possible the exception of United Way reference, are just pretext . . .” (CB at 22). Therefore, even Complainant recognizes the possibility that the United Way incident was not pretextual in nature. I find that there is nothing pretextual about Respondent’s non-retaliatory reasons for giving Complainant a negative performance review in November of 2006. His final ratings in the performance log were not issued until November 14, 2006. Complainant’s rude emails with Slavin and his United Way mass email are completely legitimate reasons for giving him a negative performance review.

I find that there is nothing pretextual about Complainant’s job band and code realignment in 2007. Respondent presented completely legitimate reasons that the changes were done to match Complainant’s job duties. Moreover, this realignment was done on a division wide basis, affecting numerous other employees.

I find that there is nothing pretextual about Complainant’s negative mid-year August 2007 performance review. Complainant was already on a performance plan and continued to display bad behavior, as evidenced by his email with Lavin. Therefore, Respondent’s reasons for giving him a negative performance review are legitimate.

Complainant has not established that the reasons given for his termination were pretextual. In his brief, Complainant argues that Respondent “knew about claimed ‘violations’ some five month[s] before the termination and did not take any action.” (CB at 22). Complainant is implying that the reasons given for his termination are pretextual because Respondent knew about these alleged violations five months before and did not take any action. I am not persuaded by Complainant’s arguments. Complainant testified that he informed the Administrative Review Board in October of 2007 that he had previously recorded co-workers. (Tr. at 203). While Complainant informed the Administrative Review Board of these tapings in October of 2007, Holden was not notified until the spring of 2008 of Complainant’s taping and downloading of corporate directory. (Tr. at 791-94). Holden testified that Mary Olmer Jones told her of Complainant’s actions as a result of one of his filings. (*Id.*). This is consistent with the fact that Complainant’s second complaint, filed on February 28, 2008, contained a description of his secret recordings and use of the corporate directory. (ALJ-19, 2nd Complaint, pgs. 3-4, 7). Thus, while some employees at Bank of America may have become aware in October 2007 of Complainant’s taping and downloading, even more employees became aware of the activities after Complainant reiterated them in his second complaint. Subsequently, Respondent conducted an investigation and chose to terminate the Respondent. I find nothing illegitimate in the timeline surrounding Respondent’s decision to terminate the Complainant.

## VI. CONCLUSION

Complainant did establish that some of his protected activities were contributing factors in his adverse employment actions. However, I have found that Respondent established by clear and convincing evidence that it would have taken the same actions regardless of any protected activity.

## VII. RECOMMENDED ORDER

The complaint of Boris Galinsky is DISMISSED.

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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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points

and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If 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).