

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 18 January 2017

CASE NO.: 2015-SOX-00034

In the Matter of:

THOMAS RIMINI,
Complainant,

v.

J.P. MORGAN CHASE & COMPANY,
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION**

This proceeding arises from a complaint of discrimination filed on July 31, 2015 under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A and the procedural regulations found at 29 C.F.R. Part 1980 (“SOX” or the “Act”). On August 19, 2015, the Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), acting as agent for the Secretary of Labor (“Secretary”), issued a letter dismissing Complainant’s claim. On September 9, 2015, Complainant Thomas Rimini (“Rimini” or “Complainant”) objected to the Secretary’s findings and requested a hearing pursuant to 29 C.F.R. § 1980.106.

On September 9, 2016, J.P. Morgan Chase & Company (“JPMC” or “Respondent”) filed a Motion for Summary Decision with accompanying memorandum and exhibits in support thereof. Respondent’s exhibits are hereinafter designated as “EX”. In my Order Granting Respondent’s Motion for Extension of Time in Part, issued on September 12, 2016, I gave Complainant additional time to respond to Respondent’s Motion due to an outstanding discovery issue. On October 3, 2016, Complainant filed his Opposition to Respondent’s Motion for Summary Decision with accompanying exhibits. Complainant’s exhibits are hereinafter designated as “CX”.

After reviewing the evidence and arguments presented by the parties, I find the Respondent has established that there is no genuine issue of material fact as to an essential element of Complainant’s claim—whether he suffered an adverse action. Accordingly, this Order grants Respondent’s Motion for the reasons set forth below.

I. RELEVANT PROCEDURAL HISTORY

Following a preliminary conference call with the parties, I issued the Notice of Hearing and Pre-Hearing Order on October 20, 2015; setting the hearing for February 16, 2016. On November 17, 2015, Respondent filed a Motion to Dismiss or, in the Alternative, for Summary Decision. On December 2, 2015, I received Complainant's Points and Authorities in Opposition to Respondent's Motion to Dismiss or, in the Alternative, for Summary Decision. Shortly thereafter, Respondent and Complainant each filed a reply-brief on December 10, 2015.

On December 23, 2015, Respondent filed Agreed Motion to Extend Discovery Deadline. Therein, Respondent requested I extend discovery and the hearing date due to a convoluted litigation calendar and paternity leave. On December 30, 2015, I issued Order Cancelling Hearing and Continuing Matter Generally; cancelling the hearing, extending the discovery deadline to April 1, 2016, and instructing the parties to agree upon a new hearing date. After the parties jointly proffered potential dates, I issued Order Scheduling Hearing setting this matter for hearing on May 10, 2016.

On February 19, 2016, Respondent submitted a letter requesting the discovery deadlines be held in abeyance until this Court issued a decision on the outstanding Motion to Dismiss or, in the Alternative, for Summary Decision. Complainant filed his response in opposition to Respondent's request on February 22, 2016. For good cause shown, I granted Respondent's request in Order Staying Discovery Deadlines issued on February 29, 2016.

On March 8, 2016, I issued Order Permitting Amendment of Claim. In this Order, I dismissed Complainant's claim to the extent his alleged protected activity was premised upon his sexual orientation and disability. I also gave Complainant an opportunity to amend his claim, however, because of the lenient policy adopted by the Administrative Review Board ("ARB" or the "Board") in *Evans v. United States Environmental Protection Agency*, ARB No. 08-059, ALJ No. 2008-CAA-00003 (July 31, 2012). Lastly, I acknowledged that Complainant was—and continues to be—unrepresented in this matter and the ARB has a practice of granting latitude to inexperienced pro se litigants. Complainant however is not the typical pro se litigant-- he is an attorney. Accordingly, I informed the parties I would hold Complainant close to, but not quite at, the same standard I set for seasoned litigants.

In compliance with my Order Permitting Amendment of Claim, Complainant filed an amended Complaint on March 15, 2016 and Respondent filed Motion to Dismiss Complainant's Amended Complaint or, in the Alternative, for Summary Decision. On April 20, 2016, I issued Order Granting Respondent's Motion to Dismiss in Part and Denying in Part. Therein, I dismissed Complainant's allegations of adverse action that transpired outside of the 180 day statute of limitations, permitted the remaining allegations to remain, cancelled the May 10, 2016 hearing, and scheduled a conference call with the parties to take place on May 11, 2016, to discuss a new hearing date.

Following the May 11, 2016 conference call, I issued Order Setting Discovery Deadlines and Hearing Date on May 19, 2016. Within this Order, I set the hearing for November 2, 2016, and ordered discovery to close on August 15, 2016, motions for summary decision must be filed

no later than September 9, 2016, and responses to motion for summary decision must be received by September 23, 2016.

During the course of discovery, a number of disputes arose between the parties. Respondent filed a Motion for Protective Order to Prevent or, in the Alternative, to Limit the Deposition of Stacey Friedman, with accompanying memorandum of law in support thereof, and a Motion to Compel Responses to its Interrogatories and Document Requests on July 6 and 20, 2016, respectively. Complainant filed Response to Respondent's Motion for Protective Order and Response to Respondent's Motion to Compel on July 11 and 27, 2016, respectively. On July 29, 2016, I held a conference call and provided each party an opportunity to present arguments.

In responding to Respondent's motion for protective order, Complainant failed to adequately demonstrate why he needed to conduct a deposition of Ms. Friedman¹ especially in light of her declaration indicating she had no knowledge of the 2011 interview Complainant alleged constitutes protected activity. Since Ms. Friedman did interview Complainant and would be the only other potential person with knowledge about his alleged statements I permitted him to submit twenty-five interrogatories for her to respond to. I denied his request to depose Friedman.

Similarly, Complainant was unable to adequately explain his often times perplexing objections to Respondent's discovery requests. Accordingly, on August 2, 2016, I Issued Order Denying Respondent's Motion for Protective Order in Part and Granting in Part and Order Granting Respondent's Motion to Compel Discovery.

Complainant filed a Motion to Compel on July 27, 2016. Respondent filed its Response to that motion on August 9, 2016. On August 17, 2016, a conference call was held to discuss the issue, and the parties presented their arguments. Except for a few limited instances in which I instructed Respondent to provide greater detail to its responses and objections, I denied Complainant's Motion to Compel due to his overly broad, vague requests.

As provided for in my May 19, 2016 Order, discovery closed on August 15, 2016. On September 9, 2016, JPMC filed the motion at issue, Respondent's Motion for Summary Decision ("Motion") with accompanying memorandum and exhibits, and a Motion for Extension of Time to Respond and Object to Complainant's Interrogatories to Stacey Friedman. In the Order Granting Respondent's Motion for Extension of Time in Part, issued on September 12, 2016, I granted Complainant additional time to respond to Respondent's Motion due to Respondent's failure to timely produce Friedman's responses to his interrogatories. On October 3, 2016, Complainant filed his Opposition to Respondent's Motion for Summary Decision ("Opposition") with accompanying exhibits.

On October 6, 2016, Respondent filed Motion to Vacate the Hearing Date and Deadlines Relating to the Submission of the Pre-trial Stipulation and Exhibits, requesting that the remaining pre-hearing deadlines and hearing be held in abeyance until I decide the Motion. On October 14, 2016, I issued Order Vacating Prehearing Order Deadlines, Cancelling Hearing and Continuing

¹ Respondent's current General Counsel and Executive Vice President.

Hearing Generally which cancelled the hearing and continued the matter generally so that I could fully analyze the merits of Respondent's dispositive motion.

II. STANDARD OF REVIEW – SUMMARY DECISION

“A party may move for summary decision, identifying each claim or defense—or the part of each claim or defense—on which summary decision is sought.” 29 C.F.R. Part 18.72(a). The Administrative Law Judge may “grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” *Id.* A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In determining whether there is a genuine issue for trial, the court must view all the evidence and factual inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the non-moving party produces enough evidence to create a genuine issue of material fact, it defeats the motion for summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Board summarized the non-moving party's burden:

The nonmoving party may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. If the nonmoving party fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Reddy v. Medquist, Inc., ARB No. 04-123, ALJ No. 2004-SOX-35, at 4-5 (September 30, 2005).

III. FINDINGS OF FACT

A. Background

Complainant graduated from the George Washington University Law School and was admitted to the State Bar of California in 2001. CX-B at 1; EX-B at 9. Complainant worked for JPMC—a global financial services firm—from 2003 to 2006. CX-B at 1; EX-A at 1; EX-B at 83. During his first two years of employment, Complainant was an assistant vice president within Respondent's Legal and Compliance Group. EX-B at 88. His duties focused on “evaluat[ing] the ten-firm settlement, separating investment banking from research, and looking at how communications worked within the bank to refine an employee surveillance system.” *Id.* at 89. Complainant reported to Peter Sivere and Andy Cadel during this period. *Id.* at 90.

Complainant testified that sometime in “mid-2005 or maybe earlier,” while Sivere was out on paternity leave, Complainant had a “very quick telephone conversation” with a

government regulator regarding Sivere's whistleblower claim against Respondent.² EX-B at 126-27. During Complainant's deposition, Respondent's attorney asked him if he supported Sivere's claim during this conversation with the government regulator. *Id.* at 127. Complainant testified, "The government—she wasn't really looking for support. She just asked for details and I just told her what I knew." *Id.* When asked if he told Sivere or anyone else at Respondent that he briefly spoke with a government regulator, Complainant answered, "Prob—no. I don't see why I would have." *Id.* at 129. Furthermore, Complainant testified to the best of his knowledge, no one at Respondent knew that he spoke with the government regulator. *Id.* at 129-33.

In 2005, Complainant transitioned to an associate position within Respondent's Investment Banking Group. EX-B at 88-89. One of Complainant's primary duties was conducting due diligence on loans before they were added to a larger pool of loans. *See Id.* at 94-100. When asked who supervised him in this position, Complainant testified: "The reporting structure in the investment bank is a lot different than in the corporate side. There were three, four people" that managed Complainant, including Tom Roh, Dave Duzyk, and Paul White. *Id.* at 79, 90-91.

Complainant testified that in late 2005 or early 2006 he was told "it was in [his] best interest to leave the investment banking group." EX-B at 91-92. Complainant explained he was "taken off projects" and was subjected to "retaliatory comments" because of his "refusal to put loans in a due diligence pool." *Id.* at 93-94. At his deposition Complainant testified about one instance in which he was asked to enter a group of loans into a larger pool of loans without completing the due diligence process with a rating agency signoff.³ *Id.* at 99-100. Complainant refused to group the additional loans with the larger pool of loans without conducting what he believed was requisite due diligence.⁴ *Id.* He testified that Roh, one of his supervisors, was "pissed" at his refusal and instructed him to enter the loans into the pool because "[t]he client want[ed] this to market by a certain time."⁵ *Id.* at 101, 105. Sometime during this dispute another manager, White, walked in and Roh "backed down and said, 'Do what you want.'" *Id.* at 105. Ultimately, Complainant "didn't put them in," and did not know if anyone else did so. *Id.* at 106-07.

In early 2006, Complainant's employment with JPMC was terminated. EX-B at 117. After JPMC, Complainant worked briefly at two other investment banks. *Id.* at 83. In 2006, he worked at Bear Sterns until he voluntarily quit. *Id.* He then worked for Lehman Brothers for approximately eight months—from April 2007 through January 2008—until he was laid off. *Id.*; *see* CX-B. Complainant has remained unemployed since 2008 when his employment with Lehman Brothers ended.. EX-B at 87.

² Complainant considers this his first act of protected activity under SOX. EX-B at 126, 232.

³ After recounting this dispute Complainant clarified that this was the only circumstance in which he raised an issue about loan due diligence with Roh or anyone else at Respondent. EX-B at 110.

⁴ Complainant believes his refusal to add the loans to the pool constituted a second instance of protected activity. *See* EX-B at 37, 140-44, 232.

⁵ Complainant testified that during the argument, Roh walked away and spoke with Duzyk. EX-B at 111-12. He admitted that while he overheard Roh mention his name, he could not hear anything else Roh and Duzyk discussed. *Id.* at 112.

Sometime after his termination, Complainant filed suit against JPMC. EX-B at 64. However, on August 5, 2008, Complainant entered into a settlement agreement and a release with Respondent for any and all legal claims in exchange for \$75,000. *Id.* at 63-64, 205, 227-30; EX-E. The settlement agreement specified that Complainant’s employment with JPMC was “permanently and irrevocably severed.” EX-E at 3. In fact, Complainant agreed to never seek reemployment with Respondent and, “in the event he knowingly or unknowingly applies for a position with [Respondent], any pending offer may be withdrawn and he shall immediately terminate such position, employment, reemployment, work or assignment.” *Id.* Respondent could, however, rescind this employment bar and permit Complainant to rejoin JPMC or one of its subsidiaries if a duly authorized representative of JPMC waived the ban in writing. *Id.*; EX-B at 229.

Three years later, in November 2011, Complainant was interviewed for a position at JPMC. EX-A at 2; EX-B at 146-47. Stacey Friedman—who is now an Executive Vice President and General Counsel of JPMC—conducted the interview when she was a “secondee from a law firm . . . working at JPMC.” EX-A at 1-2. Although Friedman does not recall what was discussed during the interview, Complainant testified he discussed with her the due diligence practices he observed when he worked for Respondent in 2006.⁶ *Id.* at 2; EX-B at 144-45. Complainant recalled telling Friedman there weren’t any written signoffs on due diligence because they “always were to do it by phone” and that there wasn’t adequate due diligence conducted on certain loans. EX-B at 145-46.

Complainant confirmed during his deposition that he has no knowledge whether Friedman discussed his statements about his due diligence observations at JPMC with Dave Duzyk or anyone else at Respondent. EX-B at 147-48, 234-35. In Respondent’s Declaration of Stacey Friedman, dated June 30, 2016, and Respondent’s Objections and Stacey Friedman’s Answers to Complainant’s Interrogatory Questions for Deposition of Stacey Friedman, dated September 19, 2016, Friedman indicated she could not recall discussing Complainant, or anything that he may have said during the 2011 interview, with anyone. EX-A at 2; CX-A at 8.

On February 24, 2015, Complainant submitted an email to James Dimon requesting that he waive the “no-hire” provision of the 2008 settlement agreement and allow Complainant to return to JPMC because of the challenges he faced in attempting to find employment. EX-B at 241-42; EX-F at 2; *see supra* pp. 5-6. On March 3, 2015, Michelle Velasquez responded to Complainant on behalf of Dimon and informed Complainant that his request was referred to “Corporate Employee Relations for reviewing and handling.” EX-F at 2. On Monday, March 30, 2015, Velasquez advised Complainant “that [JPMC] will not be waiving the ‘no reapplication’ provision.” *Id.* at 1. Complainant maintains this February 2015 inquiry played a role in a series of adverse actions that JPMC took against him. EX-B at 241.

B. Alleged Adverse Actions

Complainant alleged that he suffered various adverse actions within 180 days of the complaint filed with OSHA on July 31, 2015. EX-B at 121-24. During his deposition,

⁶ Complainant considers his comments to Friedman about poor due diligence practices at Respondent to constitute his third and final instance of protected activity. *Id.* at 138, 232.

Complainant alleged that Respondent engaged in the following instances of adverse action: negative employment reference provided to Getting Hired; causing Complainant to lose a job opportunity at Bank of America; JPMC's insufficient investigation into his retaliation claims; unsolicited telephone calls; and, allegations of Complainant being a poor performer. *See id.* at 121-24, 150, 152-55, 171-84, 185-86, 214-20, 221-25.

i. Getting Hired

Getting Hired is an organization that helps secure employment for disabled people “who are struggling to find [jobs].” EX-B at 166. To the best of Complainant's knowledge, Getting Hired is not a recruiter; rather, it is an interface that connects disabled people with opportunities. *Id.* at 197. Complainant tried to find employment with the help of Getting Hired for about three years and he continues to use the service through present day. *Id.* at 169. At the time of the deposition, however, Complainant stated he had not been in contact with anyone who works for Getting Hired for about a year, but he continues to use their website to search for jobs. *Id.* at 169, 197. He recalled working with two or three individuals at Getting Hired, but could not recall any of their names during the deposition. *Id.* He stated that part of the reason he could not recall anyone's name from Getting Hired is because “a large element of it is an online recruiting thing, so you're connected to various companies, and you speak with recruiters through that module.” *Id.* at 171.

Complainant alleged that someone from JPMC contacted Getting Hired and made a negative comment about him. *See* EX-B at 171-84. The basis of his belief stems from a notice he said he saw on his LinkedIn feed that said “disparaging” or “derogatory” information was provided by JPMC to Getting Hired. *Id.* at 172, 174. Despite an exhaustive search, Complainant testified he could not locate the notice he saw on LinkedIn. *Id.* at 172-73.

Upon further questioning, Complainant admitted he does not know: what derogatory information was allegedly received by Getting Hired; who at Respondent allegedly contacted Getting Hired and provided derogatory information; who at Getting Hired allegedly received the derogatory information; and, if Getting Hired passed the derogatory information onto any potential employers. EX-B at 178, 180-82.

ii. Bank of America

During the summer of 2015, Complainant was working with a head hunter to acquire a position at Bank of America. EX-B at 185, 189. During his deposition, Complainant explained that the head hunter had exclusive rights to that vacancy and had assured Complainant he was the only candidate being submitted for consideration to Bank of America. *Id.* at 189-90. Although he had an interview scheduled, the head hunter informed him that it was cancelled, four new candidates were being considered, and Complainant was no longer being considered. *Id.* Complainant testified he asked the headhunter about what happened to the job opportunity, but “never heard anything again about it.” *Id.* at 191. He did not, however, inquire directly to Bank of America about what had happened. *Id.*

Complainant testified the promising Bank of America job opportunity disappeared because of something JPMC said about him. EX-B at 185, 188. He testified that he believed someone at JPMC must have conveyed information to Bank of America—“either by Getting Hired or, . . . a reference check with [JPMC].” *Id.* at 185. Similar to Complainant’s allegations about Getting Hired, Respondent’s attorney asked Complainant a series of questions to discover why he believed JPMC played a role in losing the opportunity:

Q: So you don’t know whether anybody at [JPMC] contacted Bank of America. Correct?

A: I don’t know.

Q: You don’t know when any purported communication was made from anyone at [JPMC] to Bank of America. Correct?

A: That’s correct.

Q: You don’t know who at Bank of America received any statement about you from anyone at [JPMC]. Correct.

A: Yup.

Q: And you don’t know whether or when or from whom any contact was made between Getting Hired and Bank of America with respect to you that involved comments about you from [JPMC]. Correct?

A: That’s correct.

Id. at 185-86.

iii. Phone Calls

Complainant alleged he received a significant amount of phone calls “from [JPMC] telephone numbers” in which the caller would abruptly hang up when Complainant answered the call. EX-B at 150. When asked about the number of calls received, Complainant testified: “I cannot even—I couldn’t even venture a guess at a number. It’s happened so frequently. There have been days where it’s been ten calls, one after another.” *Id.* at 153. He testified that “probably about five of these calls,” the caller would request that Complainant come in for a job interview. *Id.* at 153. Complainant could not identify the names of the individuals offering him job interviews and he never responded; he “just hung up.” *Id.* at 153, 155.

Respondent’s attorney asked Complainant why he believed this constituted unlawful activity. Complainant testified: “To call somebody repeatedly and hang up is probably pretty unlawful, repeatedly.” *Id.* at 150-51. Upon further questioning, Complainant admitted he did not know “[w]hich applicable harassment laws” could possibly apply to these circumstances. *Id.* at 151. Respondent also asked Complainant how he knew the calls were from someone at JPMC. Complainant testified, “Because the phone numbers were largely from [JPMC] telephone numbers. The—I believe that only [JPMC] has the 270 exchange in New York.” *Id.* Complainant did not think it was possible that other people in New York may have the same exchange number; however, he did not take any steps to verify that the calls originated from JPMC. *Id.* at 152.

As of the date of his deposition, Complainant stated he continues to receive a mix of phone calls that result in either an immediate hang up or an offer for an interview. EX-B at 163-64. Beyond telling the caller to stop calling and then hanging up, Complainant has not had any communication with the caller. *Id.* at 164-65.

iv. Poor Performer Allegations

During Complainant's deposition, Respondent's attorney asked him about his response to interrogatory number thirteen in which he alleged "Respondent's careless assertions that I was a poorly performing [sic] employee continue to be an ongoing adverse action against me, particularly as stated by Dave Duzyk, Tom Roh, and Melissa Gold. EX-C at 9; EX-B at 213. Respondent's attorney asked for more details about this alleged adverse action and, in particular, if it occurred within the 180 day period before Complainant filed his SOX complaint. EX-B at 213-20. Complainant admitted he did not know when these statements were made. *Id.* at 213-14. He testified he believed they were made within the 180 day period because of an experience he had after he met a friend in New York City. *Id.* at 214-16. After incorrectly recounting the event, Complainant testified:

I was down there meeting Randall [Rothchild]—and Randall is a good friend of mine. After I met with him, I went and got coffee and then was getting a Metro to go home. When I stopped in the coffee shop near [Respondent], that Starbucks, there were a bunch of people there that I used to work with, and I had loose conversation with them. And I just mentioned my ongoing difficulties finding a job. And they said, well, I mean, like with these—there, like, poor performance things that's probably why you're not working.

Id. at 216. When asked who made this statement, Complainant stated, "I don't remember who it was." *Id.* at 218. He attempted to explain why he could not remember specifics:

A: I can't and let me explain why. I worked with hundreds of people at that bank. I was—in the banker role that I had, I engaged many different parties, so I knew a lot of people. I don't necessarily know who everybody's name is, off the top of my head. I worked with traders, salespeople, you know—

Id. at 219. Respondent sought further detail:

Q: As we sit here today, you can't identify anyone?
A: No. I can't identify anyone with specificity, but I wouldn't—
Q: And you can't tell me specifically what was said?
A: No. It's all poor performance stuff. It's all that—
Q: What, specifically, was said?
A: That I was a poor performer. That once you have that poor performer, there's no way around it.
Q: What were the words that were used?
A: "Poor performer."

- Q: But you don't know whose mouth this came out of?
A: No.
Q: How is it possible that you remember that you were called a poor performer, but you don't remember who said it?
A: Because it was such a distinct language, and it's come up so many different times that—
Q: You can't tell me on any of the other occasions who said that?
A: No, I can't.

Id. at 219-20.

v. Insufficient Investigation

In response to an interrogatory, Complainant proffered the following adverse action: “The neglect by Respondent in protecting me from retaliation, particularly where I made specific and verifiable complaints, is in direct conflict with JPMC’s own internal policies and applicable regulations and is in and of itself an ongoing adverse action.” EX-C at 8. During his deposition, Respondent’s attorney asked Complainant to expound about how this alleged lack of investigation constitutes adverse action:

- A: I just—I guess what I’m getting at here I believe that, according to its own policies, that respondent should have done more to protect me from further retaliation as I had already identified it, and I don’t feel like there was any effort to really investigate my claims to prevent further damage.
Q: How is that a failure to investigate a violation of the law?
A: Well it’s—I would have to go through and look at all the different laws. But presumably, JPMC’s anti-retaliation policy is based upon some element of some regulatory requirement.
Q: But you don’t know. You’re just speculating?
A: It’s just common sense to me that there’s some requirement.
Q: Where is there a requirement that JPMC has to do an investigation?
A: I just know that it is. I don’t know why I know it. I just know that they have to.

EX-B at 221-22. Respondent’s attorney asked Complainant to put aside his legal conclusions and explain why a lack of investigation constitutes an adverse employment action. *Id.* at 223. Complainant admitted, “It would be speculation on my part. I just don’t—I just don’t know.” *Id.* at 224. Complainant also did not definitively know that Respondent did not conduct an investigation. *Id.* at 225.

IV. CONCLUSIONS OF LAW

Section 806 of SOX, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees, and former employees, of publicly-traded companies who are retaliated against for engaging in certain protected activity. Section 1514A(a) states, in relevant part:

(a) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a). An action brought under SOX’s whistleblower protection provisions is governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), at 49 U.S.C.A. § 42121(b). 18 U.S.C. § 1514A(b)(2)(C).

At the summary decision stage in a SOX claim, the complainant need only demonstrate “that a rational factfinder could determine that the [complainant] has made his prima facie case.” *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432 (S.D.N.Y. May 1, 2013). To establish a prima facie case, a complainant must allege the existence of facts and evidence establishing: (1) the employee engaged in a protected activity; (2) the respondent knew or suspected that the employee engaged in the protected activity; (3) the employee suffered an adverse action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1980.104(e)(2). Complainant’s failure to demonstrate any of the four elements “render[s] all other facts immaterial” because a claim cannot succeed without satisfying the four requisite elements. *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).

Respondent’s Motion proffered several theories to demonstrate why Complainant cannot establish a prima facie case and why this matter should be dismissed. Motion, 15-24. Respondent’s primary and most persuasive argument establishes that Complainant cannot demonstrate he suffered an adverse action. *Id.* at 16-21. Complainant’s Opposition did not confront Respondent’s arguments; instead, Complainant focused on attempting to broaden the

relevant time period to include other incidents of alleged adverse action outside of the statutorily mandated 180 day period.⁷ His efforts to include other, untimely events are unpersuasive because the plain language of the statute bars untimely adverse actions from being considered. *See* Opposition, 1-9.

A. Adverse Actions

Each of Complainant's alleged incidents of adverse action concerns various types of blacklisting. The ARB defines blacklisting as:

[W]hen an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. . . . In addition, blacklisting requires an objective action there must be evidence that a specific act of blacklisting occurred. Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place.”

Messer v. John Elway Dodge, 2006-SOX-00094 at 29 (quoting *Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18, at 8-9 (ARB Nov. 28, 2003). Even a showing that a complainant applied for subsequent positions and was not hired is insufficient where there is no evidence to link any of the applications or subsequent refusals to hire with any protected activity. *McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 2003-SOX-23 (ALJ Jan. 16, 2004). “Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place”; rather, there must be evidence that an objective, specific act of blacklisting occurred. *Pickett*, ARB Nos. 02-056 and 02-059 at 9; *see Bausemer v. Texas Utilities Electric*, Case No. 91-ERA-20, slip op. at 8 (Sec'y Oct. 31, 1995); *Howard v. Tennessee Valley Authority*, Case No. 90-ERA-24 (Sec'y July 3, 1991).

Based upon the evidence presented, Complainant alleged five incidents of blacklisting that occurred within 180 days of his filing his complaint with OSHA.⁸ He believes: Respondent made derogatory remarks to Getting Hired; Respondent communicated derogatory information to Getting Hired or directly to Bank of America which caused him to lose a job opportunity at Bank of America; Respondent conducted an insufficient investigation into his retaliation claims; he

⁷ Complainant's Opposition included a citation to 12 CFR 1081.212(g) and a request that “oral arguments be allowed before the Court, as it is a potentially dispositive motion.” Opposition, 1. This regulation concerns rules of practice for adjudication proceedings before the Bureau of Consumer Financial Protection, a wholly different federal agency. These regulations have no relevance to proceedings before the Office of Administrative Law Judges; therefore, Complainant's request is denied.

⁸ In addition to the adverse actions summarized above, Complainant's allegations included several adverse actions that fell outside of the statutorily mandated 180 day statute of limitations. These untimely allegations included: JPMC's alleged refusal to verify his employment and unsolicited emails regarding job opportunities at JPMC. EX-B at 156-57, 206-12; EX-D. These alleged incidents fell outside of the 180 day statute of limitations. Therefore, while they could be used for the purpose of background evidence of continuing retaliation, they are barred from constituting adverse actions in the claim before me; thus, there is no need to analyze them. *See McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29 (ALJ Oct. 5, 2006).

received unsolicited telephone calls from Respondent; and, Respondent disseminated information that Complainant was a poor performer. *See supra* pp. 7-10.

I find that Complainant has failed to establish by a preponderance of the evidence that Respondent blacklisted him. All five of Complainant's allegations are beset by an obvious dearth of direct and circumstantial evidence. Not only did Complainant fail to produce any documents to substantiate his allegations, but he repeatedly testified during his deposition that he could not identify the persons at Respondent who made disparaging comments, who received them, what was said, and when were those comments made. *See supra* pp. 7-10. As such, with nothing more than unsubstantiated allegations and speculation upon which to build his case against Respondent—despite having the opportunity to conduct full discovery—I find that Complainant's case fails and must be dismissed.

ORDER

When viewing all the evidence and factual inferences in the light most favorable to Complainant, the non-moving party, I find Respondent has established that there is no genuine issue of material fact as to an essential element of Complainant's claim—whether he suffered an adverse action.

Accordingly, it is hereby **ORDERED** that Respondent's Motion for Summary Decision is **GRANTED**, and Complainant's claim is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When 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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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(e) and 1980.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).